

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TODD DAGNALL,

Petitioner,

OPINION AND ORDER

v.

06-C-433-C

PHIL KINGSTON, Warden,
Waupun Correctional Institution,

Respondent.

Todd Dagnall, an inmate at the Waupun Correctional Institution, petitions the court for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is serving a life sentence after having been convicted in the Circuit Court for Dane County for party to the crime of first degree intentional homicide while using a dangerous weapon. In his habeas petition, petitioner contends that his custody is in violation of the laws or Constitution of the United States because his trial lawyer provided constitutionally ineffective assistance. Specifically, petitioner contends that his lawyer gave petitioner bad advice when he told him not to testify at trial; failed to interview state witnesses Kendra Shulfer and Helen Pullen; and failed to find, interview and subpoena certain potential defense witnesses. He contends that these errors, either individually or in combination, deprived him of a fair trial.

Before the court is respondent's motion to dismiss the petition in its entirety on the ground that it is untimely or that the claims presented are procedurally defaulted. In his response to the motion, petitioner has not disputed respondent's contentions regarding untimeliness or procedural default, but contends that this court should hear his claims nonetheless because he is actually innocent.

Because the undisputed facts show that the petition is untimely and petitioner has not accompanied his claim of actual innocence with any newly-discovered evidence, I will grant respondent's motion and dismiss the petition.

From the documents attached to respondent's motion, I find the following facts for the purpose of deciding the instant motion.

FACTS

On October 14, 1997, the state filed a criminal complaint in the Circuit Court for Dane County charging petitioner with one count of first-degree intentional homicide while using a dangerous weapon, as party to a crime, and one count of armed burglary. Petitioner and another individual named Christopher Murray were accused of entering the residence of Norman Gross and beating Gross to death with baseball bats. After the trial court denied petitioner's motion to suppress statements he made to police officers, petitioner entered a plea of no contest to the homicide charge. He was sentenced to life in prison. However, his

conviction was reversed on appeal on the ground that the trial court had improperly denied his suppression motion. State v. Dagnall, 2000 WI 82, 236 Wis. 2d 339, 612 N.W. 2d 680.

Petitioner was then tried by a jury. On February 9, 2001, after a five-day trial, the jury found petitioner guilty of first-degree intentional homicide while using a dangerous weapon, as party to a crime. On July 13, 2001, the court sentenced petitioner to life in prison with a parole eligibility date of October 13, 2036.

Petitioner filed a direct appeal. In an opinion issued February 6, 2003, the Wisconsin Court of Appeals affirmed the conviction. On April 22, 2003, the Wisconsin Supreme Court denied petitioner's petition for review.

On September 29, 2004, petitioner filed a *pro se* motion for postconviction relief pursuant to Wis. Stat. § 974.06, Wisconsin's collateral attack statute. The circuit court denied the motion and petitioner appealed. The state court of appeals affirmed the denial of the motion. On August 7, 2006, the Wisconsin Supreme Court denied petitioner's petition for review.

Petitioner filed the instant habeas petition on August 10, 2006.

OPINION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a one-year statute of limitations period for all habeas proceedings. 28 U.S.C. § 2244. The one-year limitation begins to run from the latest of: 1) the date on which judgment in the

state case became final by the conclusion of direct review or the expiration of the time for seeking such review; 2) the date on which any state impediment to filing the petition was removed; 3) the date on which the constitutional right asserted was first recognized by the Supreme Court, if that right was also made retroactively applicable to cases on collateral review; or 4) the date on which the factual predicate of the claims could have been discovered through the exercise of due diligence. § 2244(d)(1)(A)-(D). Pursuant to 28 U.S.C. § 2244(d)(2), time is tolled during the pendency of any properly filed application to the state for post-conviction relief.

Petitioner's conviction became final on July 21, 2003, the last date on which he could have filed a petition for a writ of certiorari in the United States Supreme Court. Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002) (time for seeking direct review under § 2244(d)(1)(A) includes 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court). Thus, petitioner had until July 21, 2004, in which to file his federal habeas petition. He did not file his petition until more than two years later.

Petitioner filed a § 974.06 motion for postconviction relief in the state trial court on September 29, 2004. But by then, his one-year period for filing a federal habeas petition had expired. A state court motion for collateral relief submitted after the AEDPA deadline does not toll the limitations period. Fisher v. Gibson, 262 F.3d 1135, 1142-43 (10th Cir. 2001); Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir. 2001) (state court petition filed

following expiration of federal limitations period “cannot toll that period because there is no period remaining to be tolled”) (citation omitted).

Thus, the petition is untimely unless petitioner can show that this court should apply one of the alternate starting dates set out in § 2244(d)(1)(B)-(D) or that some extraordinary circumstance prevented him from filing his petition on time. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) (explaining what petitioner must show to be entitled to equitable tolling of limitations period). Petitioner has not attempted to make either showing. Instead, he argues that this court must accept his untimely petition because he is actually innocent of murdering Gross.

Although a showing of “actual innocence” can be a gateway that allows a federal court to consider the merits of an otherwise procedurally defaulted claim, Schlup v. Delo, 513 U.S. 298, 327-29 (1995), that showing alone is insufficient to overcome a petitioner’s failure to file his federal petition within the AEDPA deadline. Escamilla v. Jungwirth, 426 F.3d 868, 871-72 (7th Cir. 2005). In Escamilla, the court explained that a petitioner can bring an otherwise untimely claim only if he shows actual innocence *and* the discovery of a factual predicate for his claims that could not have been discovered earlier. Id. at 872. See also Gildon v. Bowen, 384 F.3d 883, 887 (7th Cir. 2004) (holding same). Actual innocence without a newly discovered claim “does nothing at all.” Escamilla, 426 F.3d at 872.

Petitioner’s claim of actual innocence rests on evidence that he says shows that Sheila Trentin, who was simultaneously Gross’s live-in girlfriend and petitioner’s girlfriend for

approximately two weeks before the murder, had solicited Murray to murder Gross. However, this evidence consists of various police reports that have been available since the time of the murder investigation. Such reports provide no basis for finding that petitioner could not have filed either a state or federal petition for collateral relief before the federal limitations period expired.

In sum, even if this court was to accept petitioner's claim that he is "actually innocent," it could not consider his petition because petitioner has failed to show that his claim of innocence rests on facts that could not have been discovered earlier. The petition is untimely under § 2244(d)(1)(A) because petitioner has failed to show that he qualifies for either statutory or equitable tolling, and it must be dismissed. This disposition of the petition makes it unnecessary to consider respondent's alternate contention that petitioner procedurally defaulted his claims by failing to present them to the state courts.

ORDER

IT IS ORDERED that the petition of Todd Dagnall for a writ of habeas corpus is DISMISSED WITH PREJUDICE for petitioner's failure to file it within the limitations period prescribed by 28 U.S.C. § 2244(d)(1)(A).

Entered this 9th day of January, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge