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

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RICHARD A. FORD,

Petitioner,

OPINION AND ORDER

v.

06-C-757-C

TIMOTHY LUNDQUIST, Warden,
New Lisbon Correctional Institution,

Respondent.

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Richard Ford, an inmate at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, has petitioned the court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the court is respondent's motion to dismiss the petition on the ground that it is untimely under 28 U.S.C. § 2244(d)(1)(A). Because it is undisputed that petitioner did not file his federal petition within one year of his state conviction's becoming final and because petitioner has not shown that he is entitled to either statutory or equitable tolling, I will grant the state's motion and dismiss the petition.

From the documents attached to the petition and respondent's motion to dismiss, I find the following facts.

## FACTS

On August 6, 1998, petitioner entered a plea of no contest in the Circuit Court for Richland County for one count of second-degree assault to a child. The court sentenced petitioner to a 20-year term of confinement.

Petitioner filed a notice of his intent to pursue post-conviction relief. Assistant State Public Defender James Fullin was appointed to represent petitioner in post-conviction proceedings. In an order entered February 19, 1999, the court of appeals extended petitioner's deadline for filing a notice of appeal or post-conviction motion to April 1, 1999. Petitioner did not file either a notice of appeal or post-conviction motion within the specified time period.

More than three years later, on July 10, 2002, petitioner filed a petition for a writ of habeas corpus in the state appellate court pursuant to State v. Knight, 168 Wis. 2d 509, 484 N.W. 2d 540 (1992). In the motion, petitioner asked the court to reinstate his direct appeal on the ground that Fullin had been ineffective for failing to file a direct appeal on petitioner's behalf. In response to the court's inquiry, Fullin indicated that he had closed petitioner's file after petitioner waived his right to have Fullin file an appeal. The court of appeals appointed James Troupis to argue in support of petitioner's Knight petition and allowed the state public defender's office to file an amicus brief opposing the petition. In an opinion and order issued January 29, 2004, the court rejected the suggestion by Ford and the state that appointed appellate counsel should always be required to obtain court

permission to withdraw from representation before counsel may "close the file" on his client's appeal and agreed with the state public defender that "off the record" termination was acceptable. State ex rel. Ford v. Holm, 2004 WI App 22, ¶¶ 23-26, 269 Wis. 2d 810, 676 N.W. 2d 500. However, the court referred the case to the trial court for an evidentiary hearing to ascertain whether petitioner knowingly and voluntarily waived his right to pursue a direct appeal of his conviction. Id., at ¶¶ 32-37.

After an evidentiary hearing, the circuit court found that Fullin had identified a potential plea withdrawal motion that Fullin thought had arguable merit but petitioner decided that he did not want to pursue any issues that would result in the withdrawal of his plea and the possible reinstatement of another second-degree sexual assault charge. The court also found that Fullin and petitioner had discussed a possible motion for sentence modification that petitioner wanted to pursue, but Fullin was of the opinion that that issue had no merit. The circuit court found that Fullin did not file a "no merit" report on this latter issue because petitioner did not want to pursue the potentially meritorious issue pertaining to plea withdrawal that Fullin had identified. State ex rel. Ford v. Holm, 2005 WL 3070947 (Ct. App. Nov. 17, 2005) (opinion withdrawn), attached to Pet.'s Reply Br., dkt. #12, exh. B. (Although the court of appeals had also directed the trial court to make findings regarding why petitioner waited more than three years to file his petition, it is not clear whether the trial court made such findings. I infer that the state abandoned any claim that petitioner's writ was barred by the doctrine of laches.)

On the basis of the circuit court's findings, the court of appeals found in an opinion and order issued November 17, 2005, that petitioner had knowingly and voluntarily waived his right to have Fullin pursue on appeal a challenge to the plea, and therefore, Fullin was not ineffective for failing to pursue this issue. Id., at ¶ 3. However, it found that Fullin was ineffective for failing to offer petitioner the option of a "partial" no merit report on the sentencing issue. Id., at ¶ 4. In reaching this conclusion, the court found that it routinely accepted such reports even though they were not expressly authorized by statute. Id., at n.1. Accordingly, the court granted the writ in part and denied it in part.

Following the release of the appellate court's opinion, the Office of the State Public Defender asked the court to reconsider and for permission to intervene. The court granted the request and withdrew the November 17 opinion. On August 10, 2006, it issued a new opinion in which it reversed its position on the sentence modification issue and denied petitioner's writ application *in toto*. State ex rel. Ford v. Holm, 2006 WI App 176, 722 N.W. 2d 609. The court indicated that its prior decision had been flawed insofar as it did not address whether petitioner was constitutionally or statutorily entitled to a "partial no-merit" report. Id., at ¶ 7. Reviewing Supreme Court precedents, the court determined that petitioner's constitutional right to effective representation for the purpose of exercising his right to directly appeal his 1998 conviction did not require his post-conviction lawyer to offer him the option of a "partial no-merit" report on any potential issues remaining after

petitioner declined for strategic reasons to pursue an issue having arguable merit. Id., at ¶¶ 9-12. Accordingly, the court declined to reinstate petitioner's direct appeal.

The state supreme court denied petitioner's petition for review on November 6, 2006.

## OPINION

The Antiterrorism and Effective Death Penalty Act of 1996 "AEDPA" established a one-year statute of limitations period for all habeas proceedings running from certain specified dates. 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 April 1, 1999, which was the last date on which he could have filed either a notice of appeal or post-conviction motion. Petitioner does not deny that he filed his Knight petition more than one year after that date and he

does not contend that he filed any other motions in state court that might have tolled the limitations period.

Petitioner suggests that his petition is timely because the state appellate court ruled on the merits of his Knight petition without finding that petitioner had waived or otherwise procedurally defaulted his ineffective assistance of counsel claim. However, the state appellate court's willingness to entertain petitioner's Knight petition on the merits is irrelevant to the timeliness of petitioner's federal habeas petition. In deciding whether petitioner's habeas petition is timely, this court applies federal law, not state law. Federal law differs significantly from Wisconsin law insofar as Wisconsin prescribes no time limit for the bringing of post-conviction motions or habeas corpus petitions. The timeliness of petitioner's claims in state court does not make them timely in federal court.

Petitioner argues that, as in Betts v. Litscher, 241 F.3d 594 (7th Cir. 2001), this court should hear the merits of his claims because his appellate lawyer abandoned him. However, the facts of Betts differ significantly from the facts of this case. In Betts the issue was not whether Betts's federal habeas petition was timely, but rather whether the federal court should defer to the state court's determination that Betts's claims were procedurally barred as a result of his failure to raise the claims on direct appeal. The federal court of appeals found that it was not bound by the state court's finding of procedural default because the record was inadequate to show that Betts had validly waived his constitutional right to counsel on direct appeal. Betts, 241 F.3d at 596-97. However, unlike Betts, who had a

constitutional right to the assistance of counsel on direct appeal, petitioner has no constitutional right to the assistance of counsel in filing a federal habeas petition. Coleman v. Thompson, 501 U.S. 722, 756-757 (1991). Thus, even if petitioner's appellate lawyer did abandon him, as he claims, that would not excuse petitioner's failure to file his federal habeas petition on time.

Finally, petitioner argues that this court should consider his untimely petition because he did not understand until long after his direct appeal had expired that his lawyer's failure to file a no merit report might amount to the denial of petitioner's right to the effective assistance of counsel on direct appeal. I construe petitioner's argument as an appeal to the doctrine of equitable tolling. Although the Supreme Court has never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations, it has stated that a petitioner seeking equitable tolling must establish two elements: (1) he has been pursuing his rights diligently; and (2) some extraordinary circumstance stood in his way. Lawrence v. Florida, 127 S. Ct. 1079, 1085 (2007) (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). Petitioner has not established either of these elements. The only explanation petitioner offers for his delay is his lack of legal training and ignorance of the law. Ignorance of the law is not a sufficiently extraordinary circumstance to justify equitable tolling. Montenegro v. United States, 248 F.3d 585, 594 (7th Cir. 2001); Fiero v. Cockrell, 294 F.3d 674, 682 (5th Cir. 2007).

In sum, petitioner has filed to show that he is entitled to either statutory or equitable tolling of AEDPA's one-year limitations period. Accordingly, the petition must be dismissed as untimely.

ORDER

IT IS ORDERED that the state's motion to dismiss the petition of Richard Ford is GRANTED. The petition is DISMISSED WITH PREJUDICE for petitioner's failure to file it within the limitations period prescribed by § 2244(d).

Entered this 2nd day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge