

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

STANLEY E. MARTIN,

Petitioner,

v.

STEVE WATERS, Director,
Sand Ridge Secure Treatment Center,

Respondent.

ORDER

08-cv-518-bbc

Petitioner, a patient committed to the Sand Ridge Secure Treatment Center in Mauston, Wisconsin, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the \$5 filing fee. The petition is before the court for preliminary review pursuant to 28 U.S.C. § 2254.

Petitioner is serving an indefinite term of confinement pursuant to a December 3, 1996 judgment by the Circuit Court for Milwaukee County, adjudicating him to be a sexually violent person under Wisconsin's sexual predator law, Chapter 980. In 2005, petitioner asked the circuit court to dismiss, vacate and discharge the commitment order. The trial court denied the motion and petitioner's subsequent motion for reconsideration. He appealed. On January 15, 2008, the Wisconsin Court of Appeals affirmed petitioner's commitment on the merits. The Wisconsin Supreme Court denied his petition for review on August 18, 2008.

Petitioner alleges that he is in custody in violation of the laws and constitution of the United States because his commitment is based in part on 1) 1976 and 1979 charges that were dismissed pursuant to a plea agreement and 2) opinions from medical experts who considered petitioner's alleged conduct that was the subject of the dismissed charges. Construing petitioner's claims liberally, he appears to be contending that he was denied his fundamental right to due process. However, even if the petition states a cognizable constitutional claim, it appears untimely.

The Antiterrorism and Effective Death Penalty Act of 1996 established a one year statute of limitations for all habeas proceedings running from certain specified dates. 28 U.S.C. § 2244. The one year limitation period 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. *See* § 2244(d)(1)(A)-(D).

Petitioner does not appear to be seeking habeas relief on the basis of any newly-recognized constitutional right or newly-discovered facts, or contending that the state impeded him from filing his habeas petition sooner. Assuming none of the circumstances set forth under

§ 2244(d)(1)(B)-(D) apply here, the petition appears to be untimely unless there is time that can be excluded by virtue of statutory or equitable tolling.

Pursuant to 28 U.S.C. § 2244(d)(2), time is tolled, that is, it does not count against the one-year statutory period, while a properly filed application for post-conviction relief is pending in state court. Accordingly, the relevant starting date for statute of limitations purposes is the date on which the circuit court's judgment became "final," as described in § 2244(d)(1)(A). Although petitioner fails to allege it in his petition, a search of Wisconsin's Circuit Court Access Program (CCAP) reveals that he appealed the 1996 judgment. The court of appeals denied his appeal on April 7, 1998, and the supreme court denied his petition for review on June 12, 1998. On June 24, 1999, one year and 12 days later, petitioner filed a petition for a writ of habeas corpus in state court, leaving 78 days remaining on his federal habeas clock. *See* Consolidated Court Automation Programs (CCAP), WI Supreme Court and Court of Appeals Cases Access for no. 1999 AP 1671 at <http://wcca.wicourts.gov> (visited Sept. 23, 2008); *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). Petitioner appealed and the supreme court denied his petition for review on August 29, 2000. Twenty-three days later, on September 21, 2000, petitioner filed another state petition for a writ of habeas corpus. The 2000 petition was denied 5 days later and petitioner apparently did not appeal the denial. CCAP, WI Circuit Court Access for

Milwaukee Cty. Case No. 2000 CV 7898. At this point, 55 days remained on petitioner's federal habeas clock. Court records available electronically indicate that petitioner did not file another application for relief until December 6, 2001, or 65 days later. *Id.* for case nos. 2001 CV 11574.

If the above information is accurate and petitioner's filings were proper applications for post-conviction relief, then he cannot benefit from tolling under § 2244(d)(2) because his one-year period for filing a federal habeas petition had expired before he filed his state petition for habeas corpus in 2001. *Fernandez v. Sternes*, 277 F.3d 977, 979 (7th Cir. 2000) (tolling under § 2244(d)(2) unavailable when federal limitations period already expired).

Before dismissing the petition, however, I will allow petitioner the opportunity to present any additional facts that might show that the petition is timely. Even if petitioner cannot show that his petition is timely under the statute, the possibility remains that his failure to file his petition on time may be excused for equitable reasons. *See United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000). However, equitable tolling is granted sparingly and only when “[e]xtraordinary circumstances far beyond the litigant’s control . . . prevented timely filing.” *Id.* *See, e.g., U.S. ex rel. Ford v. Page*, 132 F. Supp. 2d 1112, 1115 (N.D. Ill. 2001) (run-of-the-mill claim of ignorance of law not sufficient to warrant equitable tolling); *Posada v. Schomig*, 64 F. Supp. 2d 790, 796 (C.D. Ill. 1999) (fact that prison was sometimes on lock-down, preventing access to prison law library, did not establish “extraordinary circumstances” justifying equitable

tolling). Petitioner's response should include any facts that might allow this court to apply the doctrine of equitable tolling.

ORDER

IT IS ORDERED that petitioner has until October 23, 2008 within which to show cause why his petition is not untimely. If petitioner fails to make such a showing, or if he fails to file a response within this deadline, the court will find that his petition is untimely and will enter an order dismissing the petition with prejudice.

Entered this 24th day of September, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge