

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

PATRICK P. SHARP,

Petitioner,

OPINION AND ORDER

v.

09-cv-109-bbc

GREGORY GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

Patrick P. Sharp, an inmate at the Columbia Correctional Institution in Portage, Wisconsin, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner alleges that he is in custody in violation of various rights he possesses under the United States Constitution, including the Sixth Amendment right to the effective assistance of counsel. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Because petitioner concedes that he did not file his petition within the one-year deadline prescribed by the Antiterrorism and Effective Death Penalty Act and has alleged no facts sufficient to warrant either statutory or equitable tolling of the limitations period, the petition must be dismissed.

I find that the petition fairly alleges the following facts.

ALLEGATIONS OF THE PETITION

Petitioner was convicted on February 11, 2002 in the Circuit Court for Milwaukee County after pleading guilty to two counts of second degree sexual assault of a child. He was sentenced on each count to consecutive terms of 7 years' confinement followed by 10 years' extended supervision. Petitioner filed a direct appeal. The lawyer appointed to represent him filed a no-merit report pursuant to Anders v. California, 386 U.S. 738 (1967), identifying four potential issues for reversal and explaining why none had any merit. Petitioner filed a response to the no-merit report in which he identified several additional issues. On January 16, 2004, the court of appeals issued an order affirming the conviction.

Petitioner did not file a petition for review with the Wisconsin Supreme Court or take any other action to challenge his conviction until July 28, 2006, when, with the help of a jailhouse lawyer, he filed a motion for post-conviction relief under Wis. Stat. § 974.06 in the Circuit Court for Milwaukee County. That motion was denied and affirmed on appeal. The Wisconsin Supreme Court denied petitioner's request for review on May 14, 2008.

Petitioner filed the instant petition on February 26, 2009, accompanied by a motion "Requesting Permission to File a 28 U.S.C. § 2254 Habeas Corpus with Waiver of One Year Time Limit" and a supporting brief.

OPINION

The Antiterrorism and Effective Death Penalty Act of 1996 established a one-year limitations period for all habeas proceedings running from certain specified dates. 28 U.S.C. § 2244. The one-year period begins to run from the latest of: (A) 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; (B) the date on which any state impediment to filing the petition was removed; (C) 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 (D) 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). In addition, the one-year deadline may be tolled if "some impediment of a variety not covered in § 2244(d)(1) prevents the filing of a federal collateral attack." Owens v. Boyd, 235 F.3d 356, 360 (7th Cir. 2000). See also Lawrence v. Florida, 549 U.S. 327, 336 (2007) (assuming without deciding that equitable tolling is available under § 2244). Such an impediment must have been an "extraordinary circumstance" that prevented petitioner from filing a timely petition. Lawrence, 549 U.S. at 336.

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. Accordingly, the relevant starting date

for statute of limitations purposes is the date on which petitioner's conviction became "final," as described in § 2244(d)(1)(A).

The Wisconsin Court of Appeals issued its order affirming petitioner's conviction on January 16, 2004. Petitioner's direct appeal expired and his conviction became final 30 days later, on February 16, 2004, which was the last day on which he could have petitioned the Wisconsin Supreme Court for discretionary review. Wis. Stat. § 809.62 (party has 30 days to petition supreme court to review adverse decision of court of appeals). The one-year limitations period for filing a federal habeas petition began on that date and expired one year later, on February 16, 2005. Although 28 U.S.C. § 2244(d)(2) provides that time is tolled during the pendency of any properly filed application to the state for post-conviction relief, petitioner did not file his post-conviction motion until July 2006. A motion filed after the limitations period has run has no tolling effect. Fernandez v. Sternes, 227 F.3d 977, 979 (7th Cir. 2000). Accordingly his petition is untimely.

Petitioner urges the court nevertheless to accept his petition, asserting that he did not discover that he had a basis for challenging his guilty plea until he starting doing legal research in 2006, that he has a below-average IQ and that he has received bad advice from jailhouse lawyers. None of these reasons is sufficient to allow the petition, either under the statutory exception set out in § 2244(d)(1)(D) or under the doctrine of equitable tolling. Although it is possible that petitioner did not understand until 2006 that he had a legal basis not previously raised for challenging his plea, "[t]ime begins [under § 2244(d)(1)(D)] when

the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance.” Owens, 235 F.3d at 359. Neither petitioner’s ignorance of the law nor his alleged mental limitations an extraordinary circumstance sufficient to warrant equitable tolling. As the Court of Appeals for the Seventh Circuit explained in Owens, 235 F.3d at 359:

Owens is young, has a limited education, and knows little about the law. If these considerations delay the period of limitations until the prisoner has spent a few years in the institution's law library, however, then § 2244(d)(1) might as well not exist; few prisoners are lawyers.

In sum, because petitioner has failed to show that any circumstance exists that would justify application of one of the statutorily enumerated grounds for tolling or the doctrine of equitable tolling, his petition must be dismissed as untimely. Because petitioner has addressed the timeliness issue in his submissions, it is appropriate to enter an order and judgment to this effect without soliciting a response from petitioner.

ORDER

IT IS ORDERED that Patrick P. Sharp's petition 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).

Entered this 3rd day of March, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge