IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHNSON CARTER,

Petitioner,

OPINION and ORDER

11-cv-221-bbc

v.

RANDALL H. HEPP, Warden,

Respondent.

- -

Petitioner Johnson Carter, a prisoner at the Jackson Correctional Institution in Black River Falls, Wisconsin, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. In a May 23, 2011 order, I noted that the one-year statute of limitations to file this petition appeared to have run out, but gave petitioner a chance to show that he is entitled to equitable tolling of the statute of limitations because his lawyers had allegedly mishandled his case. Now petitioner has submitted evidence detailing the history of his post conviction motions as well as his relationship with two lawyers he hired to represent him in the post conviction proceedings. Petitioner has filed also a motion for oral arguments. After considering these submissions, I conclude that equitable tolling should not apply and that the petition must be dismissed as untimely. Petitioner's motion for oral arguments will be denied as moot.

From petitioner's submissions and court records available electronically, I find the following facts.

FACTS

Petitioner Johnson Carter pleaded no contest to 13 different charges in a consolidated criminal case in the Circuit Court for Marathon County, Wisconsin, and the judgment of conviction was entered on March 15, 2004. Petitioner then filed several post conviction motions, which the circuit court denied. Petitioner appealed, and on December 28, 2005, the Wisconsin Court of Appeals affirmed both the judgment of conviction and the denial of his post conviction motions. Petitioner filed a petition for review in the Wisconsin Supreme Court; the petition was denied on February 27, 2006. Petitioner did not seek review in the United States Supreme Court.

Petitioner hired attorney Joseph Kaupie on February 14, 2006 to withdraw his no contest plea, but fired him in early June 2006 because Kaupie and petitioner could not agree on the scope of the motion.

In August 2006, petitioner requested a post conviction hearing, but that motion was denied by the state circuit court. Petitioner appealed this decision to the court of appeals, which dismissed the appeal on January 9, 2007.

Petitioner hired attorney Mark Ruppelt in January 2007. Ruppelt told petitioner

that he would "research and have something file[d]" within two months. After two months passed, petitioner contacted Ruppelt's office repeatedly to get an update. Ruppelt always told petitioner that he would file something within two weeks. Petitioner said that these delays went on for six months, at which point petitioner "confronted" Ruppelt about "leading [him] on." Four or five more months passed, at which point petitioner and Ruppelt "had it out again." Petitioner called the Office of Lawyer Regulation but did not file a formal complaint. After six more months passed (approximately June 2008), petitioner made a formal complaint against Ruppelt. Ruppelt finally filed a post conviction motion in July 2008, so petitioner withdrew his Office of Lawyer Regulation complaint. This motion was denied by the circuit court on September 3, 2008. Petitioner did not appeal the denial.

Petitioner filed another post conviction motion in October 2008 (he does not explain whether this was filed by Ruppelt). The circuit court denied this motion in December 2008. Petitioner appealed, and the electronic record shows that Ruppelt filed a number of documents in the appeal. Petitioner states that he "had to contact [the] Office of Lawyer Regulation again to get attorney Ruppelt to file [his] appellate brief . . . ." The court of appeals dismissed the appeal on August 10, 2010. Petitioner filed a petition for review in the Wisconsin Supreme Court. That petition was denied on March 11, 2011. Petitioner filed this pro se petition for a writ of habeas corpus on March 28, 2011.

OPINION

Under 28 U.S.C. § 2244(d)(1)(A), a state prisoner generally may bring a habeas petition within one year from the latest of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Petitioner's conviction became final on May 28, 2006, 90 days after the Wisconsin Supreme Court denied his petition for review. Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002) (one-year statute of limitations does not begin to run under §2244(d)(1)(A) until expiration of 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court).

The proper filing of a state court motion for collateral review tolls the one-year limitations period, 28 U.S.C. § 2244(d)(2). Court records submitted by petitioner show that he filed numerous post conviction motions after his conviction became final. However, as I stated in the May 23, 2011 order in this case, even if I assume that each of petitioner's motions for post conviction relief was properly filed, the one-year statute of limitations appears to have run out in the time periods between the adjudication of these motions. For instance, more than a year passed between the January 9, 2007 court of appeals' dismissal of one of petitioner's appeals and the July 2008 filing of his next post conviction motion.

To be entitled to equitable tolling, a petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his

way" and prevented timely filing. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000) (equitable tolling granted sparingly and only when "[e]xtraordinary circumstances far beyond the litigant's control . . . prevented timely filing").

Petitioner's argument for equitable tolling focuses on the conduct of two lawyers he hired to represent him in post conviction proceedings. He alleges that both of them ignored his requests to file post conviction motions until he persuaded them to do so by threatening to complain to the Office of Lawyer Regulation. He argues that these delays ate up the year's worth of time he had under the statute of limitations to file his habeas petition, warranting equitable tolling. In the August 24, 2011 order, I noted that petitioner's allegations were in some way similar to those in Holland v. Florida, 130 S. Ct. 2549, 2563-64 (2010):

> To be sure, [Attorney] Collins failed to file Holland's petition on time and appears to have been unaware of the date on which the limitations period expired—two facts that, alone, might suggest simple negligence. But, in these circumstances, the record facts we have elucidated suggest that the failure amounted to more: Here, Collins failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters.

Id. at 2564. The Supreme Court suggested that this behavior may have been egregious enough to warrant equitable tolling, although it remanded the case so that the determination could be made by the lower courts.

Now petitioner has submitted affidavits from himself and his wife that flesh out his litigation history and his lawyers' conduct. The conduct of the first lawyer discussed in petitioner's materials, Joseph Kaupie, cannot be a ground for equitable tolling because he served as petitioner's lawyer for at most only a week or two of petitioner's one-year limitations period, which began running on May 29, 2006. None of Kaupie's actions or inactions could have created an extraordinary circumstance impairing petitioner's ability to file a timely habeas petition, if petitioner had more than 11 months after firing Kaupie to file such a petition.

Turning to his second lawyer, Mark Ruppelt, petitioner rightfully describes Ruppelt's 18-month delay in filing a post conviction motion as "ineffective." But the facts of this case do not meet either of the requirements for equitable tolling. First, the facts do not show that petitioner was diligent in pursuing his habeas rights. In Holland, the petitioner repeatedly directed his lawyer to file a habeas petition as soon as possible following a ruling on his appeal by the Florida Supreme Court. Here, following denial of his petition for review in the Wisconsin Supreme Court, petitioner was not aware of the statue of limitations in a habeas action, and did not even hire Ruppelt specifically to file a habeas petition. Instead, Ruppelt

filed at least one post conviction motion and an appeal from the denial of another post conviction motion.

In a slightly different setting, the Court of Appeals for the Seventh Circuit has discussed diligence in relation to a prisoner's filings. Ryan v. United States, 657 F.3d 604, 607 (7th Cir. 2011) (delaying start of limitations period for § 2255 proceedings under § 2255((f)(4) for length of time "a duly diligent prisoner would take to discover that his lawyer had not filed a notice of appeal") The court concluded that "[t]he weight of this authority suggests that a reasonable prisoner may take at least two months . . . to suspect that counsel has dropped the ball, contact counsel or the court, wait for a response, and verify the suspicion." Id. at 607-08. Even assuming that this rule could be applied in the § 2254 setting once the one-year limitations period had begun to run, it cannot be said that petitioner exercised diligence with Ruppelt. Petitioner was well aware of Ruppelt's delays as early as two months after hiring him. He contacted him repeatedly, yet did not take any action to file a pro se submission of any type, despite the fact that roughly two months of petitioner's habeas deadline had already run by the time petitioner hired Ruppelt. Even if I gave petitioner *eight* months after hiring Ruppelt to discover his inactivity, the statute of limitations still would have run by the time Ruppelt filed the July 2008 post conviction motion. The facts presented by petitioner leave no doubt that he was aware that Ruppelt "dropped the ball" well within eight months of hiring him.

It cannot be said that any "extraordinary circumstance" stood in petitioner's way of filing his habeas petition. Part of what made the behavior in Holland egregious was that the lawyer failed to tell Holland that the Florida Supreme Court had denied his appeal. Holland's unawareness of the status of his appeal made it impossible for him to know whether he could file a habeas petition. In this case, however, petitioner was aware that the Wisconsin Supreme Court had denied his petition for review. He could have filed his own habeas action (or post conviction motions) despite Ruppelt's delays.

Petitioner's main line of argument is that Ruppelt "knew or should have known the one-year statute of limitations" and "should have informed [petitioner] about the statute of limitations." However, in Holland, the Court suggested that this lack of knowledge constituted "simple negligence" rather than the type of egregious behavior necessary for equitable tolling. Id. at 2564. The general rule is that "attorney negligence is not extraordinary and clients, even if incarcerated, must 'vigilantly oversee,' and ultimately bear responsibility for, their attorneys' actions or failures . . . . and, if necessary, take matters into their own hands." Modrowski v. Mote, 322 F.3d 965, 968 (7th Cir. 2003). The record shows that petitioner waited far too long to take matters into his own hands. Accordingly, I will dismiss the petition as untimely because the one-year statute of limitations has expired.

ORDER

IT IS ORDERED that

1. Petitioner Johnson Carter's petition for a writ of habeas corpus is DISMISSED.

2. Petitioner's motion for oral argument, dkt. #4, is DENIED as moot.

3. The clerk of court is directed to enter judgment closing this case.

Entered this 19th day of December, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge