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

ROGER DEAN BLACK,

Petitioner,

v.

WARDEN, WAUPUN CORRECTIONAL INSTITUTION,

Respondent.

ORDER

11-cv-588-wmc

Petitioner Roger Dean Black, also known as Dean Roger Black, is an inmate at the Waupun Correctional Institution. He has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge a state court conviction. He has paid the filing fee and he also has filed a motion for appointment of counsel, dkt. 6.

This case is currently before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. The pleadings show that petitioner challenges his conviction in Dane County Circuit Court Case No. 1983-CF-1293. A jury found petitioner guilty of first degree sexual assault (two counts) in that case. On December 19, 1984, petitioner received a sentence of 45 years' imprisonment, to be served "consecutive to sentences" imposed on petitioner in previous convictions.

Petitioner did not pursue a direct appeal from his sexual assault conviction in Case No. 1983-CF-1293. An exhibit supplied by the petitioner shows, however, that he filed an unsuccessful motion to modify his sentence in 1992. Liberally construed, petitioner now seeks relief under 28 U.S.C. § 2254 on the ground that he was denied effective assistance of counsel. Petitioner alleges that his defense attorney was deficient because (1) he "refused to dismiss himself when asked"; and (2) he failed to present unspecified evidence at trial.

The petition in this case is governed by the Antiterrorism and Effective Death Penalty Act (the "AEDPA"), which was enacted on April 24, 1996. Under the AEDPA, all habeas corpus petitions are subject to a one-year limitations period found in 28 U.S.C. § 2244(d)(1). The one-year limitations period is designed to "encourag[e] prompt filings in federal court in order to protect the

federal system from being forced to hear stale claims." *Carey v. Saffold*, 536 U.S. 214, 226 (2002). Because petitioner filed his petition with this court long after April 24, 1996, the one-year limitations period applies to him. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

This one year statute of limitations typically begins to run at "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Petitioner's conviction became final shortly after it was entered in 1984. *See State v. Lagundoye*, 2004 WI 4, ¶ 20, 268 Wis.2d 77, 94, 674 N.W.2d 526 ("A case is final if the prosecution is no longer pending, a judgment or conviction has been entered, the right to a state court appeal from a final judgment has been exhausted, and time for certiorari review in the United States Supreme Court has expired.") (citations omitted).

For prisoners whose conviction became final before the AEDPA was enacted 1996, Congress provided a one-year grace period in which to seek federal review. *See Newell v. Hanks*, 283 F.3d 827, 832 (7th Cir. 2002). This means that petitioner had until April 24, 1997 to file a federal habeas corpus petition. *See Balsewicz v. Kingston*, 425 F.3d 1029, 1032 (7th Cir. 2005). He missed this deadline by over 14 years late.

But before declaring the petition DOA, we need to determine whether any of statutory exceptions to the one-year limitation period apply to it. It will be up to petitioner to establish one of these things: (1) the State created an impediment to filing a petition; (2) the petition is based on a newly recognized constitutional right made retroactive by the Supreme Court; or (3) the claim is based on a new factual predicate, which new facts could not have been discovered with due diligence on an earlier date. *See* 28 U.S.C. § 2244(d)(1)(B)–(D). Likewise, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment" does not count toward the limitations period. 28 U.S.C. § 2244(d)(2).

Also, an untimely petition also might be saved by the doctrine of equitable tolling, which would require petitioner to establish that "extraordinary circumstances outside of the petitioner's

control prevent timely filing of the habeas petition." *Gildon v. Bowen*, 384 F.3d 883, 887 (7th Cir. 2004) (citation omitted); *see also Moore v. Battaglia*, 476 F.3d 504, 506 (7th Cir. 2007).

Now that petitioner has fair notice of these possible grounds for the court to deem his petition timely filed, I will give him an opportunity to demonstrate whether of them actually apply to him. *See, e.g., Day v. McDonough*, 547 U.S. 198, 211 (2006).

ORDER

IT IS ORDERED THAT:

1. Not later than July 27, 2012, petitioner must show cause why his petition should not be dismissed as barred by the one-year statute of limitations found in 28 U.S.C. § 2244(d)(1).

2. If petitioner does not respond to this order, then this case may be dismissed for lack of prosecution without further notice under Fed. R. Civ. P. 41(b).

3. Petitioner's pending motion for appointment of counsel, dkt. 6, is DENIED at this time, pending his response to the court's show cause order.

Entered this 27th day of June, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge