

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

ARTHUR FOSTER,

Petitioner,

v.

WILLIAM POLLARD,

Respondent.¹

ORDER

13-cv-569-wmc

Petitioner Arthur Foster, who is presently incarcerated by the Wisconsin Department of Corrections at the Waupun Correctional Institution, seeks a writ of habeas corpus to challenge a state court conviction pursuant to 28 U.S.C. § 2254. He has paid the filing fee and this case is now before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. After completing this review, the court concludes that the petition is untimely and subject to dismissal as barred by the one-year statute of limitations unless Foster can demonstrate that an exception applies.

OPINION

In 1994, Foster was charged with two counts of first-degree intentional homicide, among other things, in Pierce County Case No. 94CF114. In particular, Foster was accused of murdering an elderly couple while robbing their home. On June 8, 1995, Foster entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). On July 14, 1995, the circuit

¹ The petition lists Michael Thurmer as the respondent. Because the petitioner is in custody at the Waupun Correctional Institution, the court substitutes Warden William Pollard as the proper respondent pursuant to Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

court sentenced him to two consecutive terms of life imprisonment. He is eligible for parole in 2050.

On direct appeal, Foster challenged the denial of his pretrial motion to suppress incriminating statements that he made to a family friend while he was in custody. On September 4, 1996, the Wisconsin Court of Appeals rejected that argument and affirmed the conviction in an unpublished opinion. *See State v. Foster*, No. 95-3270. Foster did not file a petition for review with the Wisconsin Supreme Court.

On October 19, 2009, Foster filed a motion to withdraw his *Alford* plea, arguing that the prosecutor breached the plea agreement during his sentencing hearing and that his trial attorney failed to object. The circuit court denied that motion on December 18, 2009. On December 14, 2010, the Wisconsin Court of Appeals summarily affirmed that decision. *See State v. Foster*, No. 2010AP6.

In April 2012, the Wisconsin Court of Appeals denied Foster's request for an extension of time to file a post-conviction motion. Undeterred, Foster filed a petition for a writ of habeas corpus in December of 2012, alleging that the prosecutor breached the plea agreement in his case by making an impermissible sentence recommendation and that his attorneys failed to properly object or raise this issue on appeal. On January 11, 2013, the Wisconsin Court of Appeals summarily denied that petition after clarifying the record:

Arthur Foster has filed a petition for a writ of habeas corpus alleging ineffective assistance of his appellate counsel. He contends the district attorney violated the plea agreement by making an impermissible sentence recommendation. However, the transcript of the sentencing hearing shows that the district attorney complied with the plea agreement. He made the recommendation that was required under the plea agreement.

After the sentencing court disregarded the parties' sentence recommendations and imposed consecutive life sentences without the possibility of parole, the district attorney informed the court that he believed the sentence just imposed exceeded the statutory maximum. The district attorney merely informed the court of the maximum penalties the district attorney believed the law allowed. He did not attempt to undermine his earlier recommendation. Rather, to Foster's benefit, he argued for a reduction in the sentence just imposed by informing the court of the statutory maximum penalties.

Foster v. Pollard, No. 2012AP2756.

The Wisconsin Supreme Court denied Foster's petition for review on June 14, 2013.

On August 6, 2013, Foster executed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, and filed it with this court. Foster contends that he is entitled to relief from his conviction and sentence because he was denied effective assistance of counsel on appeal. In particular, he claims that his appellate attorney failed raise an ineffective-assistance claim based on his trial counsel's failure to object to the district attorney's breach of the plea agreement, which occurred during his sentencing proceeding in 1995.

Foster's petition is governed by the Antiterrorism and Effective Death Penalty Act (the "AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 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), which 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 the petition was filed well after the AEDPA effective date, the one-year statute of limitations clearly applies. See *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

From the petition, Foster evidently believed he had one year from the completion of his

most recent state collateral attack in which to seek federal habeas corpus review. *See Petition under 28 U.S.C. § 2254 For Writ of Habeas Corpus by a Person in State Custody*, dkt. 1, at 14-15, 18. Foster's sole ground for relief stems from his sentencing by the Pierce County Circuit Court, which occurred on July 14, 1995. To the extent that Foster challenges the validity of this state court judgment of conviction, the statute of limitations began 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). After the Wisconsin Court of Appeals affirmed the judgment of conviction on September 4, 1996, Foster had 30 days to pursue a petition for review of that adverse decision with the Wisconsin Supreme Court. *See Wis. Stat. § 808.10(1)*. Thus, Foster's conviction in Pierce County Case No. 94CF114 became final when his deadline to seek review by the Wisconsin Supreme Court expired in October 1996. The federal habeas corpus statute of limitations expired one year later in October 1997. 28 U.S.C. § 2244(d)(1)(A). Therefore, the petition executed by Foster on August 6, 2013, is barred from federal review as untimely filed unless Foster can establish that an equitable exception applies.

There are statutory exceptions to the one-year limitation period if any of the following circumstances are present: (1) the State has 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).

An untimely petition also may be saved if grounds exist to equitably toll the limitation period. Equitable tolling, however, is an extraordinary remedy that is rarely granted. *Tucker v. Kingston*, 538 F.3d 732, 734 (7th Cir. 2008). The Supreme Court has explained that “a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, — U.S. —, 130 S. Ct. 2549, 2562 (2010) (internal quotation marks omitted). The petitioner seeking equitable tolling bears the burden of establishing that it is warranted. *Williams v. Buss*, 538 F.3d 683, 685 (7th Cir. 2008). For this reason, the Supreme Court has cautioned that before raising the statute of limitations on its own initiative, a court must grant the petitioner fair notice and afford him an opportunity to present his position. *See Day v. McDonough*, 547 U.S. 198, 211 (2006).

So that Foster may have an opportunity to present any valid reason to toll the statute of limitations in his case, he will be allowed to supplement the pleadings and to show cause why his claims are not barred from federal review by the one-year statute of limitations found in 28 U.S.C. § 2244(d)(1).

ORDER

IT IS ORDERED that:

- (1) Petitioner Arthur Foster is directed to show cause, if any, by responding in writing not later than December 9, 2013 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) Foster’s motion for appointment of counsel (Dkt. 2) is DENIED as premature. He may re-file his motion after the court has finished its preliminary review under Rule 4.

- (3) No further action will be taken in this case until Foster files a response to this order. **Foster is advised that if he does not respond to this order as directed this case will be dismissed without further notice under Fed. R. Civ. P. 41(b).**

Entered this 7th day of November, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge