

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NATHANIEL BELLE	:	
Petitioner	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 99-5667
BEN VARNER et al.	:	
Respondents	:	

MEMORANDUM AND ORDER

YOHAN, J. March , 2000

In 1988, Petitioner Nathaniel Belle pleaded guilty to third degree murder and to possession of an unlicensed firearm. He was subsequently sentenced to a term of imprisonment of twelve and one-half years to twenty-five years by the Court of Common Pleas of Delaware County, Pennsylvania. Between the time of his guilty plea and the date of this memorandum and order, Belle filed two petitions for relief under the Pennsylvania Post-Conviction Relief Act [“PCRA”] and two petitions for a writ of habeas corpus under 28 U.S.C. § 2254, including the one currently pending before the court. Because it is unclear from the record before me whether or not Belle timely filed his most recent § 2254 petition, I will remand this case to the magistrate judge for a report and recommendation on this issue, as well as on such other issues as are appropriate.

I. Background

The factual background is set forth in Magistrate Judge Welsh’s report and recommendation. *See* Rep’t & Rec. (Doc. No. 7) at 1-3.

II. Legal Standard

Title 28 U.S.C. § 636(b)(1) allows the court to “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” *Id.*; see *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 91 (3d Cir. 1992). Further, § 636(b)(1) allows the court to “recommit the matter to the magistrate with instructions.” *Id.*

III. Discussion

Belle’s conviction became final before April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act [“AEDPA”]. Thus, § 2244(d)(1)’s one-year limitation period could not begin to run until that date. See 28 U.S.C. § 2244(d)(1); *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998) (stating that § 2244(d)(1)’s limitation period will begin to run on April 24, 1996, the effective date of AEDPA, for those convictions that were final before that date). Moreover, this one-year limitation period was tolled while Belle’s state post-conviction relief proceedings were “pending.” See 28 U.S.C. § 2244(d)(2); *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998) (recognizing that the limitation period will be tolled by pending state post-conviction relief proceedings). Because Belle’s first petition for relief under the PCRA was pending on April 24, 1996, his one-year limitation period did not begin to run until this PCRA proceeding had ended.

The Superior Court of Pennsylvania dismissed Belle’s appeal from the denial of his first PCRA petition on February 7, 1997. See Mem. of Law in Supp. of District Attorney’s Answer to § 2254 Pet. for Writ of Habeas Corpus (Doc. No. 6) [“Def.’s Mem.”] Ex. B at 4. A recent Third

Circuit case, decided after the report and recommendation of the magistrate judge, requires a conclusion that because Belle did not appeal this dismissal, his limitation period began to run on March 10, 1997. *See Swartz v. Meyers*, — F.3d —, No. 98-7282, 2000 WL 222581 at *6 (3d Cir. Feb. 25, 2000) (holding that Pennsylvania post-conviction relief proceedings remain “pending” and, thus, toll AEDPA’s limitation period “during the time a prisoner has to seek review of the Pennsylvania Superior Court’s decision whether or not review is actually sought”); Pa. R. App. P. 1113(a) (providing for a thirty-day period¹ after a decision of the Superior Court during which to file a petition for allowance of appeal to the Supreme Court of Pennsylvania). The one-year limitation period ran for 287 days until December 22, 1997, when Belle filed his second PCRA petition. *See* Def.’s Mem. Ex. B at 1. At that point, seventy-eight days of Belle’s one-year limitation period remained .

On August 13, 1999, the Supreme Court of Pennsylvania denied Belle’s petition for appeal of the Superior Court’s affirmation of the denial of his petition, thus ending his second unsuccessful attempt at obtaining relief under the PCRA. *See Commonwealth v. Belle*, 742 A.2d 167 (Pa. 1999) (table). At this point, Belle had ninety days in which to file a petition for a writ of certiorari from the U.S. Supreme Court. *See* Sup. Ct. R. 13(1). Although the Third Circuit has not stated its position on whether the one-year limitation period in § 2244(d)(1) is tolled during this ninety-day period, it recently acknowledged that both the Fifth and Tenth Circuits have held that this ninety-day period does not toll the limitation period. *See Swartz*, 2000 WL 222581 at *3 n.5 (citing *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999); *Rhine v. Boone*, 182 F.3d 1153,

¹Belle’s thirty days had passed on March 9, 1997, but March 9 was a Sunday. Thus, the thirty-day filing period had not run until March 10, 1997.

1155 (10th Cir. 1999)). As the Third Circuit explained, the reasoning behind the holdings of the Fifth and Tenth Circuits is that § 2244(d)(2) provides for tolling only during the pendency of the state post-conviction review process, and a certiorari petition is not part of the state process. *See Swartz*, 2000 WL 222581 at *3 n.5. I find this reasoning persuasive. Therefore, I conclude that Belle's one-year limitation period began running again on August 13, 1999. It ran for the next seventy-eight days, until October 30, 1999. Because October 30 was a Saturday, Belle's one-year limitation period did not actually expire until the following Monday, November 1. *See Fed. R. Civ. P. 6(a); Rhine*, 182 F.3d at 1155 n.3, n.4 (applying Fed. R. Civ. P. 6(a) to AEDPA's one-year limitation period); *Varsos v. Portuondo*, No. 98 Civ. 6709, 1999 WL 558147, at *3 (S.D.N.Y. July 9, 1999) (adopting a report and recommendation that extended AEDPA's one-year limitation period one day after its expiration on a Sunday). It is unclear, however, whether or not Belle's habeas petition was filed on or after November 1.

Belle's one-year limitation period required him to deliver his habeas petition to prison officials by November 1, 1999. *See Burns*, 134 F.3d at 113 (holding that a prisoner's habeas petition is "properly filed" for the purposes of AEDPA when it is delivered to prison officials). If he delivered the petition after November 1, then the petition was not timely filed and should be dismissed. Based on the documentary evidence before me, I cannot tell whether the petition was delivered on November 1,² November 3,³ or November 4.⁴ Thus, I cannot determine whether the

²The cover letter accompanying Belle's habeas petition is dated November 1, 1999.

³The date next to Belle's signature on the habeas petition is November 3, 1999. *See Pet.* (Doc. No. 1) at 10.

⁴The envelope containing Belle's cover letter and habeas petition bears the metered date November 4, 1999.

petition was timely filed. Given the possible delivery dates' close proximity to the end of Belle's one-year limitation period, knowing the exact date of delivery is essential to the proper consideration of Belle's petition.

Due to the uncertainty as to the date on which Belle's petition was "properly filed," I conclude that this matter should be remanded to Magistrate Judge Welsh for a report and recommendation addressing the actual date on which Belle's petition was delivered to prison officials, as well as whatever other issues need to be addressed in light of that actual delivery date. An appropriate order follows.

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ORDER

YOHN, J.

AND NOW, this day of March, 2000, upon consideration of the petitioner’s petition for a writ of habeas corpus (Doc. No. 1), the government’s response thereto (Doc. No. 6), and the magistrate judge’s report and recommendation (Doc. No. 7), IT IS HEREBY ORDERED that the case is REMANDED to the magistrate judge for a report and recommendation addressing the exact date on which the petition was “properly filed” with respect to 28 U.S.C. § 2244(d)(2), as well as whatever other issues need to be addressed in light of that date. IT IS FURTHER ORDERED that the petitioner’s petition to present state unexhausted claims (Doc. No. 10), filed after the report and recommendation, is referred to the magistrate judge for consideration.

William H. Yohn, Jr.