

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

CHRISTOPHER POLLER : CIVIL ACTION
: :
: :
v. : :
: :
KENNETH D. KYLER, et al. : NO. 02-CV-982
: :
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MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

August 26, 2003

Poller, currently incarcerated at the State Correctional Institution at Huntingdon, Pennsylvania, is serving a life sentence for second degree murder and concurrent terms of imprisonment of five to ten years and six to twelve months respectively on the charges of criminal conspiracy to commit armed robbery and possessing instruments of crime. Having exhausted his direct appeals and a petition under the Pennsylvania Post Conviction Relief Act, 42 Pa.C.S.A. § 9541, et seq. ("PCRA"), Poller filed this pro se petition for writ of habeas corpus under 28 U.S.C. § 2254. In his petition Poller claims ineffective assistance of counsel for his failure to argue that defendant was not the principal of the incident leading to the death of the victim but only an accomplice.

Magistrate Judge Linda K. Caracappa issued a Report and Recommendation ("R&R") in which she recommended that Poller's petition be denied as untimely.

28 U.S.C. § 2244(d)(1) provides in pertinent part:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral appeal; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Section 2244 further provides that, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

Poller was found guilty by a jury in the Court of Common Pleas of Philadelphia County after his sentence to life imprisonment on a murder charge and concurrent terms of imprisonment for 5-10 years and 6-12 months respectively on the charges of criminal conspiracy and possessing instruments of crime; post sentence motions were denied.

On May 8, 1996, the Superior Court of Pennsylvania affirmed the judgment of sentence and on December 20, 1996, the Supreme

Court of Pennsylvania denied plaintiff's petition for allowance of appeal. Plaintiff's conviction became final 90 days thereafter; on the last day, petitioner could have sought review by the United States Supreme Court: March 20, 1997. Poller had one year from that date to file a federal habeas petition but this deadline was tolled when he filed a pro se petition for relief under the Post Conviction Relief Act on December 15, 1997. The limitation period began to run again on March 30, 2001, when the Pennsylvania Supreme Court denied Poller's petition for allowance of appeal from the Superior Court's affirmance of the denial of his P.C.R.A. petition. From that date, Poller had three months remaining in which to file a federal habeas petition, i.e., until June 30, 2001. Poller filed this habeas petition on February 25, 2002, almost eight months after the expiration of the statute of limitations. Magistrate Judge Caracappa correctly concluded that Poller's habeas petition was untimely filed.

Poller objects to the R&R because he was not advised that the Pennsylvania Supreme Court had denied his petition for allocatur until he called his attorney to inquire about its status almost ten months after its denial. On this basis he seeks the application of equitable tolling to his habeas petition.

Equitable tolling may be appropriate if: (1) the respondent has actively misled the petitioner regarding the filing deadline; (2) the petitioner has in some extraordinary way been prevented from asserting his or her rights; or (3) the petitioner has timely

filed but in the wrong forum or in a defective way. See Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). The petitioner must demonstrate that he acted with reasonable diligence in bringing his claims.

Poller's allegations do not rise to the level of extraordinary circumstance necessary to trigger equitable tolling. See, Meiggs v. Pinkens, 2000 WL 101245 (N.D. Cal. 2000) citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) ("Failing to make sure the client learned of the denial of the petition for review may have been negligent, but the attorney's ordinary negligence does not merit equitable tolling of a limitations period."). See also, Johnson v. Hendricks, 314 F.3d 159, 163 (3d Cir. 2002) (attorney's erroneous written advice regarding date of the AEDPA deadline did not constitute extraordinary circumstances warranting equitable tolling, even though petitioner relied on counsel's advice).

In addition, even if Poller did not learn of the denial of his petition for allocatur on direct appeal until October 13, 1997, and the statute did not begin to run until 90 days thereafter, his petition would still not be timely. His PCRA petition, filed on December 15, 1997, two months thereafter, tolled the one year statutory period, but it left only ten months for Poller to file after he learned the Pennsylvania Supreme Court denied his request for allocatur with regard to that PCRA petition on March 30, 2001. The final date for filing a federal habeas petition would have been ten months later or the end of January, 2002. Poller did not file

his pro se petition until February 25, 2002. Poller has not shown that he exercised reasonable diligence in pursuing his claim. He waited eleven months to file his habeas petition after he had exhausted his direct appeal and PCRA remedies. This delay is unrelated to his counsel's failure to inform him of the denial of his original allocatur petition in 1997.

Judge Caracappa was correct in finding that Poller's petition was untimely and did not warrant the application of equitable tolling. The R&R will be approved and adopted and Poller's petition denied. An appropriate order follows.

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ORDER

AND NOW, this 26th day of August, 2003, upon consideration of the Report and Recommendation of the Magistrate Judge and de novo review of the objections thereto, and in accordance with the foregoing Memorandum, it is **ORDERED** that:

1. Judge Caracappa's Report and Recommendation is **APPROVED** and **ADOPTED**.

3. Poller's Petition for Writ of Habeas Corpus is **DENIED** and **DISMISSED**.

4. There is no basis for the issuance of a certificate of appealability.

Norma L. Shapiro, S.J.