

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KENNY R. GILES,)
)
Petitioner,)
)
v.) Civil No. 01-223-B-S
)
MARTIN MAGNUSSON,)
Commissioner Maine Department)
of Corrections,)
)
Defendant)

RECOMMENDED DECISION ON 28 U.S.C. § 2254 PETITION

Kenny R. Giles has filed a petition pursuant to 28 U.S.C. § 2254 seeking relief from his conviction by the State of Maine. (Docket No. 1.) The State has filed a motion to dismiss (Docket No. 8) and Giles has responded (Docket No. 10). Pursuant to the court’s order requiring a supplementation of the record, I now have before me the transcripts from Giles’s Rule 11 proceeding and sentencing. As explained below, I conclude that Giles’s petition is untimely under 28 U.S.C. § 2244(d)(1)(A) and, assuming equitable tolling is available, he has not demonstrated grounds to toll this statute of limitations. Accordingly, I recommend the court dismiss Giles’s § 2254 petition.

BACKGROUND

Giles is currently serving a sentence in the State of Maine for unlawful sexual contact. This conviction was obtained by virtue of Giles’s guilty plea. Giles was sentenced on November 12, 1999, to five years imprisonment with all but two years

suspended, and four years of probation.¹ Because this same conduct resulted in a revocation of his probation with respect to a prior arson conviction, Giles was also ordered to serve his remaining three years on that offense. The sentence on the new offense was imposed to run consecutively with the remaining sentence on the arson offense.²

Giles did not take a direct appeal of his unlawful sexual contact conviction and did not file an application for leave to appeal his sentence. Sometime before November 24, 2000, however, he contacted this court indicating he was having difficulty getting documentation on his case from the State that he needed to explain to “the court” that he was innocent. (28 U.S.C. § 2254 Pet. Ex. G.) He wanted to know who he needed to get to assist him or what paperwork he needed to help him “get this taken care of?” (Id.) The District Court’s clerk’s office forwarded this letter to the chief advocate for the Department of Corrections. (Id. Ex. F.)

On January 29, 2001, Giles filed a petition for state post conviction review, which the State court returned because it was not notarized. He then filed a notarized petition on February 12, 2001. This petition contained thirteen grounds, two of which are asserted in the present 28 U.S.C. § 2254 petition. On March 7, 2001, the Superior Court summarily dismissed the petition stating that it was not filed within the one-year limitation period of 15 M.R.S.A. § 2128(5) (West Supp. 2001).

¹ The December 8, 1999, docket entry for the November 12, 1999, sentencing indicates a one-year period of probation. The Judgment and Commitment and the sentencing transcript, however, indicate clearly that the judge ordered four years of probation.

² The December 8, 1999, docket entry also states that the two-year unsuspended portion is to be served concurrently with the remaining sentence on the arson offense. However, the Judgment and Commitment and the sentencing transcript clearly indicate that the sentences are to be served consecutively.

Giles initiated efforts to appeal the post-conviction order on March 16, 2001, which culminated in an October 18, 2001, decision by the Maine Supreme Judicial Court sitting as the Law Court denying Giles a Certificate of Probable Cause to proceed with an appeal of that dismissal.

Giles filed this § 2554 petition on November 5, 2001. After counsel was appointed to assist him, he filed an amended petition on March 5, 2002, asserting four grounds. The State has filed a motion to dismiss asserting that this petition is time-barred under 28 U.S.C. § 2244(d)(1)(A), and that the claims in this petition are procedurally defaulted.

The four grounds that Giles raises before this court are as follows. One, his attorney was ineffective in that he did not explain to Giles at the time of his Rule 11 proceeding that, in addition to admitting to a probation violation, Giles was pleading guilty to a new offense of unlawful sexual conduct. Giles is “mentally retarded,” functions verbally at the fifth grade level, and did not understand the difference between the admission to a probation violation and a guilty plea to a felony. He further faults his attorney for Giles’s failure to file a timely appeal, in that Giles did not understand that he had been convicted of a new offense and his attorney never properly explained this to him. Two, because of the same confusion explained in his first ground, Giles was denied his right to trial and appeal as his waiver of these rights was not knowing and intentional. Three, Giles’s conviction was the result of an admission made without an understanding of the nature of the charge and consequences of the admission. Again, this ground is premised on the same flaws identified in Grounds One and Two. Four, Giles’s conviction was the result of an admission that was unlawfully induced. Giles was housed

at the county jail in proximity with the father of Giles's alleged victim and he feared for his life. Fear and coercion induced Giles into admitting the conduct that resulted in his probation revocation and his unlawful sexual contact conviction in that Giles was hoping to be transferred to the Maine State Prison and out of danger from being assaulted by the father.

DISCUSSION

A. The 28 U.S.C. § 2244(d)(1) Statute of Limitation Concern

The State argues that this court ought not to address any part of Giles's petition because this petition was filed more than a year after his unappealed state court conviction became final.

The applicable statute of limitations for 28 U.S.C. § 2254 purposes is:

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 [s]tate 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[.]

28 U.S.C. § 2244(d)(1)(A).

This petition was filed on November 5, 2001. According to the State's calculations, Giles's unlawful sexual contact conviction became final for § 2244(d)(1)(A) purposes on December 27, 1999, allowing for the twenty days Giles had to file a notice of appeal following the entry of his judgment on the docket on December 8, 1999. With respect to the possibility that the filing of his unsuccessful state post-conviction tolled the § 2244(d)(1)(A) time limitation, see § 2244(d)(2), the State notes that Giles's first unnotarized state post-conviction petition was filed on January 29, 2001, more than a month after December 27, 2000, the date the § 2244(d)(1)(A) year had run.

I agree that the State's consideration of Giles's post-conviction petition in early 2001 could not restart what was already a run one-year limitation period under § 2244(d)(1)(A). See Delaney v. Matesanz, 264 F.3d 7, 11 (1st Cir. 2001). However, Giles's pleadings do raise a question as to whether he is entitled to equitable tolling of the § 2244(d)(1)(A) limitation period based on circumstances prior to running of the one-year on December 27, 2000.

The First Circuit has resolutely stopped short of deciding whether equitable tolling is available under the federal habeas statutes. Donovan v. Maine, 276 F.3d 87, 920-93 (1st Cir. 2002); Delaney, 264 F.3d at 13-16; Neverson v. Bissonnette, 261 F.3d 120, 127 (1st Cir. 2001). For instance, in Delaney the panel described the question as “interesting food for thought” but declared that “it need not resolve today whether courts ever can apply equitable tolling to ameliorate the [Antiterrorism and Effective Death Penalty Act's] one-year statute of limitations.” 264 F.3d at 14.³

The Neverson Court provided the following instruction when it remanded the 28 U.S.C. § 2254 petition for consideration of the petitioner's entitlement to equitable tolling:

If the court concludes that equitable tolling is unwarranted as a matter of fact, it should again dismiss the petition as time-barred. If, however, the court determines that the petitioner has made a sufficient showing to warrant equitable tolling, it must then resolve the unanswered legal question: Is equitable tolling available to extend the one-year limitation period specified in section 2244(d)(1)? We take no view on these, or any other, issues.

³ Other circuits have not been so reticent to countenance tolling. See Smith v. McGinnis, 208 F.3d 13, 17 (2nd Cir. 2000); Miller v. N.J. State Dep't Corr., 145 F.3d 616, 617-19 (3^d Cir. 1998); Harris v. Hutchinson, 209 F.3d 325, 328-30 (4th Cir. 2000); Davis v. Johnson, 158 F.3d 806, 810-11 (5th Cir. 1998); Dunlap v. United States, 250 F.3d 1001, 1004-07 (6th Cir. 2001); Taliani v. Chrans, 189 F.3d 597, 597-98 (7th Cir. 1999); Moore v. United States, 173 F.3d 1131, 1134 (8th Cir. 1999); Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998); Sanvik v. United States, 177 F.3d 1269, 1271-72 (11th Cir. 1999).

Neverson, 161 F.3d at 127. I follow this blue print.

1. Has Giles Demonstrated that Equitable Tolling Would be Factually Warranted?

In discussing equitable tolling in the context of 28 U.S.C. § 2244(d)(1)(A) the First Circuit has made it crystal clear that the burden is on the petitioner to demonstrate a compelling basis for tolling the limitation period. See Donovan, 276 F.3d at 93 (“The party who seeks to invoke equitable tolling bears the devoirs of persuasion and must, therefore, establish a compelling basis for awarding such relief.”); accord Delaney, 264 F.3d at 14. Giles’s court appointed attorney has not attempted to present factual support expressly relating to Giles’s entitlement to equitable tolling of the § 2244(d)(1)(A) limitation period. Faced with the statute of limitations argument made in the State’s motion to dismiss, Giles’s counsel simply suggested that the court should obtain the transcripts of the Rule 11 proceedings.

Though Giles has not made a factual proffer, there is sufficient material to undertake a “totality of the circumstances” analysis. Donovan, 276 F.3d at 93. On Giles’s side, there is some factual support for permitting equitable tolling vis-à-vis this petition. Unlike the petitioner in Delaney, Giles has not been dilatory in mounting a challenge to his conviction; though perhaps his efforts fall somewhat short of “assiduous.” Id. at 15. Furthermore, it could be argued that Giles’s letter to this court in November of 2000, prior to the expiration of his § 2244(d) one-year period, indicated that he was attempting to challenge his conviction in some forum -- it could be that he was attempting to meet the as yet un-run State statute of limitation or, perhaps, seeking to commence a § 2254 petition -- but was having trouble getting his paper work. Id. at 16. Also worth noting is that Giles’s petition to this court was accompanied by a copy of a

letter dated November 20, 2000, received by Giles from the justice who presided at the probation revocation, the Rule 11 proceeding, and the sentencing on the new charge. (28 U.S.C. § 2254 Pet. Ex. E). Arguably supportive of Giles's initial assertion that he did not plead guilty to a new criminal charge, the letter references only the admission to the probation violation. While Giles's pro se status at the time of filing does not in and of itself excuse his delay in filing, Donovan, 276 F.3d at 94, the fact that the courts might have played some part in the delay (in not providing him with materials he needs to pursue relief) could weigh in Giles's favor. Also factoring into this analysis is Giles's illiterate and mentally challenged self-characterization.

However, no small part of my equitable tolling analysis is an inquiry into whether the circumstances that caused Giles to miss the § 2244(d)(1)(A) deadline were or were not out of his hands. See Dunker v. Bissonnette, 154 F.Supp.2d 95, 107 (D. Mass. 2001). Giles adamantly contends that he miscomprehended the nature of his September 8, 1999, Rule 11 proceedings and that he was unaware that he was admitting to more than a violation of probation. He states that it was not until after one year in prison that he discovered that he had been convicted of unlawful sexual contact. (Pet'n Resp. Mot. Dismiss ¶ 4.)⁴ If, because of an inadequacy in the Rule 11 proceedings or his attorney's representation, this awareness came too late for Giles to abide by the § 2244(d)(1)(A) statute of limitation, this could be a factual basis for a determination that the circumstance that caused him to miss the deadline were out of his control.⁵

⁴ Giles's response actually states that it took him a year to discover that he stood convicted of "gross sexual assault." However, this seems to be a typographical error perhaps triggered by the fact that this was a count against Giles that the State dropped when Giles indicated his intent to plead to the unlawful sexual contact count.

⁵ It also might be the kind of situation that could arguably implicate 28 U.S.C. § 2244(d)(1)(D).

However, I have read both the transcript of Giles's Rule 11 proceeding and the November 12, 1999, sentencing hearing and they belie Giles's contention that there was any lack of clarity as to what Giles was admitting. Furthermore, I cannot credit his assertion that he emerged from either proceeding not understanding that he stood convicted of a new offense and subject to an additional sentence.

First, there is no merit to Giles's assertion that he was convicted "after a brief hearing in which he made some statement which a Justice of the Superior Court ... noted in the court record as a guilty plea." (Pet'r Resp. to Mot. Dismiss ¶ 3.) Giles's Rule 11 proceeding started with the court indicating that there were two matters to be addressed. (R. 11 Tr. at 1.) It then commenced a discussion of the probation revocation on his arson conviction as a consequence of Giles's admitted sexual contact with a child in violation of the conditions of his probation. (Id. at 3 -4.) The transcript then reflects the following interchange between the Court, Giles, and Giles's attorney, James Howaniec:

THE COURT: As far as the revocation is concerned, we will come back to that in a moment. On Docket No. 990489, Mr. Giles, you are charged in Count 1 with a Class A offense of gross sexual assault. In Count 2 you are charged with unlawful sexual contact. You have entered pleas of not guilty. My understanding is that you wish to change your plea with respect to Count 2, unlawful sexual contact; is that correct?

GILES: Yes, Sir.

THE COURT: Is that your understanding, Mr. Howaniec?

HOWANIEC: Yes, Your Honor.

THE COURT: Would the clerk please inquire?

THE CLERK: Kenny Giles, I have an indictment to which you have previously entered a plea of not guilty. The Court is informed that you wish to change your plea. What say you now to CR-99-489, Count 2, unlawful sexual contact, Class C, are you guilty or not guilty.

GILES: Guilty.

(Id. at 4-5.) The Court proceeded to inform Giles of his right not to plead guilty, to elect a trial, and his right to remain silent. (Id. at 5.) It inquired whether Giles was willing to waive these rights and answer questions, to which Giles responded, "Yes, sir." (Id.) The

Court stressed that if there was anything that Giles did not understand he must let the Court know and the Court would explain it or allow Giles time to speak with his attorney.

(Id.)

The Court then described Giles's entitlement to a bench or jury trial; the beyond a reasonable doubt standard and requirement that a jury's verdict be unanimous; his right to the assistance of counsel at trial, to confront witnesses, and challenge evidence against him; the State's burden of proof and the fact that Giles would have no burden to prove his innocence; Giles's right not to testify and his right to call and subpoena witnesses; and Giles's right to appeal a disagreeable verdict to the Law Court. (Id. at 5-9.) Next Giles unambiguously indicated that he was not coerced or pressured into pleading guilty, that he was doing so freely and voluntarily, and that he believed that pleading guilty was in his best interest. (Id. at 9.)

Inquiry was then made into a plea agreement. With respect to what his understanding of his sentence exposure was, Giles stated, "Five years, sir, Class C." (Id. at 10.) The following exchange then took place:

THE COURT: That's right, Class C, five years, and because this is alleged to have been committed while you were on probation, it could be consecutive to your other sentence, therefore, it could be five years on top of the three years. We are talking about actually eight years. Do you understand that?

GILES: Yes, sir.

THE COURT: Are you still willing to go forward?

GILES: Yes, sir.

THE COURT: Do you understand if I accept your plea you will be automatically found guilty, the case will be over and done with, the only thing left to do is impose some kind of sentence.

(Id. at 10.) The Court reminded Giles of the trial related rights he was giving up (id. at 10-11) and had Giles listen to the prosecutor's evidence proffer (id. at 11-12). The Court then accepted the plea, indicating that it was satisfied that Giles was aware of his rights,

aware of the consequences of waiving his rights, and that his waiver was knowing, voluntary, and intelligent. (Id. at 13.)

In the discussion of the sentence that followed to which Giles was privy it was clear that the sentence “on the new charge” was recommended by the prosecutor to be a “straight” “consecutive sentence” separate from and in addition to the revocation of probation and the sentence remaining to be served on the prior arson offense. (Id. at 14.) Giles’s attorney stated: “Your Honor, the agreement is a full revocation on the probation revocation of three years, and cap of a three year sentence on the Class C unlawful sexual contact charge.” (Id. at 14-15.) Giles’s attorney then argued for mitigation of the three years or a running of some of the three years concurrently with the sentence on the revoked probation. (Id. at 15-17.)

The Court next indicated that it was accepting the recommendation with respect to revoking the probation and required Giles to serve the three-year suspended portion of the sentence. (Id. at 17-18.) It then stated: “As for the sentence on 949 I am going to continue the matter for sentencing.” (Id. at 18.) It then indicated that while he was awaiting the sentencing on the new violation Giles would commence serving his revoked sentence on the probation violation. (Id. at 18-19.) To state the obvious, Giles left this proceeding knowing that he was to immediately start serving his revoked sentence and aware that he had not yet been sentenced for the unlawful sexual contact offense.

If this proceeding and the bifurcation of the sentencing on the two offenses was not enough to make it clear to Giles that his probation revocation and his new offense were discreet matters, the transcripts from the November 12, 1999, sentencing cannot but

have driven the point home. The Court commenced that proceeding with this clarification:

THE COURT: With respect to this matter, just to put things in perspective, the defendant also previously admitted to a violation of probation for which his probation was revoked and he was then sentenced to three years on the probation violation and that matter is, in fact, one he is now serving; is that correct?

HOWANIEC: Correct.

THE COURT: And the conduct that was the subject of the probation violation is the same that is the subject of this indictment?

HOWANIEC: That's correct.

(Sentencing Tr. at 1-2.) After hearing from the probation officer and Giles's attorney (id. at 2-7) the Court stated:

In this matter, the Court is mindful that the defendant is already serving a three-year sentence on the probation violation, having been placed on probation for arson, which is a Class A, very serious matter and that the probation violation, in fact, constituted the conduct that formed this violation. That sentence had already been imposed. The defendant is serving it and the – appropriately so.

(Id. at 7.) The Court went on to discuss the split sentence and conditions of probation to be imposed on the new offense. (Id. at 7-9.) The Court concluded:

As far as the sentence in this matter is concerned and your plea, even though you did plead, you have a limited right to appeal the judgment and jurisdiction of this Court; and the sentence exceeds one year. It was a matter in which the sentence was not agreed to. The – so if you feel that the sentence is unfair or unjust, you have a right to appeal that as well. In either event, you must file a notice in writing with the clerk's office within 20 days. Clerk will give you written notice of your right to appeal.

(Id. at 9-10.)

Based on these transcripts I cannot credit Giles's contention that he miscomprehended the nature of his September 8, 1999, Rule 11 proceedings and that he was unaware that he was admitting to more than a violation of probation. He was on clear notice at the time that his sentence was imposed that he stood convicted of a new offense and that the sentence on the new offense was in addition to and would run

consecutively with the remaining sentence on his arson conviction. He also had ample opportunity during these proceedings to indicate to the court if he did not understand what was happening and to confer with counsel. At no time did Giles indicate a lack of comprehension; to the contrary his responses seem to indicate that he was following along with understanding and participating cogently. The Court put him on full notice of his right of appeal and indicated the twenty day window he had to take this step.⁶ There was no inadequacy in the Rule 11 proceedings or his attorney's representation and there is simply no factual basis for a determination that the circumstances that caused him to miss the deadline were out of his control.

Thus, Giles has not demonstrated a factual predicate to support a finding that there was a sufficient impediment to his meeting the 28 U.S.C. § 2244(d)(1)(A) deadline and I conclude "that equitable tolling is unwarranted as a matter of fact," Niverson, 161 F.3d at 127, and his petition should be dismissed as time-barred, id.

Conclusion

For the foregoing reason I recommend that the Court **DISMISS** Giles's 28 U.S.C. § 2254 petition seeking relief from his state court conviction because it is untimely under 28 U.S.C. § 2244(d)(1)(A) having been filed more than a year after his conviction became final.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum,

⁶ Viewed in light of these transcripts, the November 20, 2000, letter from the presiding judge at most may have given Giles hope that he had an angle to pursue post-conviction relief. This letter has no legal bearing and does not alter the clear picture the transcripts provide of the nature of the Rule 11 and sentencing proceedings.

within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated June 14, 2002

ADMIN

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 01-CV-223

GILES v. SUPERINTENDENT, MCI, et al
11/05/01

Filed:

Assigned to: Judge GEORGE Z. SINGAL

Demand: \$0,000

Nature of Suit: 530

Lead Docket: None

Jurisdiction: Federal

Question

Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

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