

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MUSSE KASA,)
)
 Plaintiff)
)
 v.) Civil No. 04-79-B-W
)
 JEFFERY MERRILL,)
)
 Defendant)

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

Musse Kasa has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The State has filed a motion to dismiss arguing that the petition is untimely and that the grounds are procedurally defaulted. (Docket No. 5.) Because Kasa's petition is untimely under 28 U.S.C. § 2244(d), I recommend this court **GRANT** the motion and **DISMISS** the petition.

DISCUSSION

The portion of 28 U.S.C. § 2244 applicable to Kasa's petition provides:

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[.]

28 U.S.C. § 2244(d)(1). The statute also provides that: "The 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." Id § 2244(d)(2).

On March 19, 2001, as part of a plea agreement, Kasa, with the assistance of an Ethiopian speaking interpreter, pled guilty to murder. On September 7, 2001, Kasa was sentenced to a prison term of thirty-five years. The judgment was entered on the docket on September 12, 2001. Kasa did not file a direct appeal but on September 17, 2001, he did file a discretionary application for leave to appeal his thirty-five-year sentence. The Sentence Review Panel of the Maine Supreme Judicial Court denied Kasa leave to appeal his sentence on November 8, 2001. This order was received by the Clerk of the Supreme Judicial Court on November 9, 2001. Giving Kasa the benefit of the ninety-day period for seeking certiorari review of this determination from the United States Supreme Court,¹ Kasa's judgment of conviction became final for purposes of subsection (1)(A) of § 2244(d) on February 7, 2002.

Eighty-one days then elapsed until Kasa filed a petition for state post-conviction review on April 29, 2002. At this juncture subsection (2) of § 2244 kicked in for Kasa, tolling the running of his subsection (1) one-year. Kasa had 284 days left in his § 2244(d) year.

An order denying Kasa post-conviction relief was entered on the docket on June 17, 2003. Kasa did not seek discretionary review of this order from the Maine Law Court and the twenty-one day period in which to do so, see Me. R. App. P. 2, expired on July 8, 2003.

Therefore, on July 9, 2003, the 28 U.S.C. § 2244(d)(1) year began to run again. With 284 days left in his § 2244 year, Kasa had until April 19, 2004, (or April 20, 2004, if you give Kasa the benefit of leap-frogging April 19, 2004, because it was Patriot's Day,

¹ I am in no way suggesting that this would be appropriate in all similar cases. (See State Mot. Dismiss at 3 n.6.)

even though the Court was open for business on the 19th). Kasa signed his § 2254 petition on May 3, 2004, giving him full benefit of the prison mailbox rule. Therefore, his petition was at least thirteen days late, giving Kasa the benefit of all possible counting concessions. For purposes of a straight forward application of § 2244(d)(1), being thirteen days late has the same effect as being one year or one day late. See, e.g., Donovan v. Maine, 276 F.3d 87 (D. Me. 2002) (affirming District Court's conclusion that the § 2254 petition was time-barred by twelve days under § 2244(d) based on similar calculation variables).

The First Circuit Court of Appeals has held that the § 2244 statute of limitation is susceptible to equitable tolling, Neverson v. Farquharson, 366 F.3d 32, 41 (1st Cir. 2004) ("We hold that the one-year limitations period in § 2244(d)(1) is not jurisdictional and, accordingly, can be subject to equitable tolling in appropriate cases."), although it has not yet decided a § 2254 case in which it has concluded that equitable tolling was appropriate. In his opposition to the motion to dismiss Kasa recounts the state proceedings involving him, setting forth transcript excerpts from his March 19, 2001, plea hearing, his September 7, 2001, sentencing, and the June 16, 2003, state post-conviction evidentiary hearings. In the post-conviction hearing Kasa, through an interpreter, displayed confusion, frustration, and complained that his head was hurting as a consequence of the proceedings. The post-conviction hearing was terminated on Kasa's insistence that he did not want to continue to press his cause. In his statement of disputed factual issues attached to this objection, Kasa states, among other things, that there is a factual dispute as to whether he voluntarily and intelligently ended the state post-conviction hearing and whether his mental health issues are sufficiently serious to

warrant equitably tolling the § 2244 statute of limitation.² Other than quoting from the transcripts of his state hearings, Kasa has not explained or supported the bald assertion that he has mental health issues, let alone detailed how they prevented him from preparing his § 2254 petition in the 284-day period between July 9, 2003, and April 20, 2004. It must be noted that Kasa was able to complete a coherent petition by May 3, 2004, and to file a multi-page response to the State's motion to dismiss within ten days of that motion being filed. I must say I have seen much more confused and incoherent pleadings filed by § 2254 petitioners.

"The party who seeks to invoke equitable tolling bears the devoir of persuasion and must, therefore, establish a compelling basis for awarding such relief." Donovan, 276 F.3d at 93 (citing Delaney v. Matesanz, 264 F.3d 7, 14 (1st Cir.2001)). The First Circuit has "made it pellucid 'that equitable tolling, if available at all, is the exception rather than the rule; [and that] resort to its prophylaxis is deemed justified only in extraordinary circumstances.'" Id. (quoting Delaney, 264 F.3d at 14). Equitable tolling "is not available to rescue a litigant from his own lack of due diligence." Neverson, 366 F.3d at 42 (emphasis added).³

² Kasa also seems to want this court to determine whether he should be hospitalized rather than imprisoned and to decide whether his mental health issues are so severe that his continued imprisonment constitutes cruel and unusual punishment. Such review and relief is outside the bounds of a 28 U.S.C. § 2254(a) review of Kasa's murder conviction; habeas review under § 2254 asks only whether holding Kasa in custody on that conviction violates the Constitution or laws or treaties of the United States because of some infirmity in the process of conviction. Challenges to the conditions of confinement are outside the scope of § 2254 review and relief.

³ And this is not an instance in which this Court has played any role that might have influenced Kasa in any way that could have contributed to an untimely filing, such as can be the hazard when a § 2254 is filed on time but is a "mixed petition," one that contains both exhausted and unexhausted claims. See Pililer v. Ford, __ U.S. __, 124 S.Ct. 2441, 2448 (June 21, 2004) (O'Connor, J., concurring) (suggesting that on the Court's remand that the court should examine whether the petitioner was "affirmatively misled, either by the court or by the State," and consider whether "equitable tolling might well be appropriate."); Neverson, 366 F.3d at 43 & n. 12 (citing the Supreme Court's pending decision in Pililer vis-à-vis the dispute of whether equitable tolling may be appropriate when a petitioner who is in danger of running afoul

With nothing to back-up Kasa's bald assertion that his mental condition so interfered with his ability to prepare his petition in the 284 days he had at his disposal (305 if you add the time in which he could have, but did not, file for discretionary review by the Maine Law Court of the denial of his post-conviction petition). In my view, Kasa falls far short of making a sufficient showing of "extraordinary circumstances" so as to warrant equitable tolling.

Conclusion

Based upon the foregoing, I recommend the Court **GRANT** the Respondent's Motion to Dismiss (Docket No. 5) and **DENY** this 28 U.S.C. § 2254 petition because it is untimely.

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, 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.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated July 15, 2004.

of the § 2244(d) limitations period is not offered a stay of the § 2254 petition or warned of the hazards of dismissing a mixed petition in order to exhaust unexhausted claims).

KASA v. CORRECTIONS
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK
Demand: \$
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus
(State)

Date Filed: 05/10/04
Jury Demand: None
Nature of Suit: 530 Habeas Corpus
(General)
Jurisdiction: Federal Question

Plaintiff-----

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Defendant

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