

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TONY L. THOMAS,	§	
	§	
<i>Petitioner,</i>	§	
v.	§	CIVIL ACTION: H-04-4834
	§	
DOUGLAS DRETKE,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division	§	
	§	
<i>Respondent.</i>	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Tony L. Thomas's application for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 has been referred to this magistrate judge for a report and recommendation (Dkt. 3). Respondent has filed a motion for summary judgment (Dkt. 11). The court recommends that respondent's motion be granted and Thomas's application be denied.

BACKGROUND

Thomas was convicted on November 18, 1999 by a state court jury of three counts of aggravated robbery enhanced by two prior convictions, and was sentenced to 99 years on each count. The three counts were consolidated for trial, but were identified by the separate cause numbers 809398, 809399, and 827437. Notice of appeal was timely filed in each cause and the convictions were affirmed by the First Court of Appeals for Harris County on November 9, 2000. Thomas filed post-conviction applications for writ of habeas corpus on

January 16, 2003 as to cause numbers 827437 (01-00-00201 on appeal) and 809399 (01-00-00202 on appeal), but there is no record of a state court writ application in cause number 809398 (01-00-200 on appeal).

Upon review of these post-conviction applications, the Court of Criminal Appeals granted Thomas leave to file petitions for discretionary review out of time. The apparent basis for this ruling was an affidavit from Thomas's lawyer stating that she had no record of forwarding Thomas the November 9, 2000 decision affirming his convictions until January 22, 2002. The record reflects that Thomas filed a petition for discretionary review in cause number 827437 on May 26, 2004, which was refused by the Court of Criminal Appeals on August 31, 2004. The First Court of Appeals issued a mandate in all three cause numbers on October 14, 2004.

Thomas filed another state court application for writ of habeas corpus in cause number 827437 on September 17, 2004. On October 7, 2004, the trial court recommended dismissal of that application because Thomas's direct appeal in that case was still pending at the time he filed the application. Under Texas law, a direct appeal is final when the mandate from the court of appeals issues. *Ex Parte Johnson*, 12 S.W.3d 472, 473 (Tex. Crim. App. 2000). As noted above, the mandate did not issue until October 14, 2004.

Thomas filed this federal application for writ of habeas corpus on or about December 20, 2004,¹ challenging his conviction under all three state court cause numbers. Thomas

¹ The petition is file-stamped December 28, 2004. For purposes of the AEDPA, a federal petition is filed on the date it is placed in the prison mail system. *See Spotville v. Cain*, 149

raises two grounds for relief, which apply to all three convictions: (1) that he was denied effective assistance of counsel on direct appeal, and (2) that he was denied due process in his state habeas proceedings.² In connection with the first ground, Thomas contends that his attorney failed to present his direct appeal, failed to notify him when his direct appeal was decided, and failed to either file a petition for discretionary review or inform him of his right to do so. He further contends that counsel sent him a letter with the wrong case numbers on it in an effort to mislead him and/or the court.³ As to his second ground, Thomas contends that the state court dismissed his writ applications without proper notice to him.

ANALYSIS

Respondent challenges Thomas's ineffective assistance of counsel claims as barred by the statute of limitations, and the due process claim as not a proper subject for federal

F.3d 374, 378 (5th Cir. 1998). Thomas attests to placing the petition in the prison mail on December 20, 2004, which is supported by the envelope which bears a post-mark of December 21, 2004.

² Thomas makes no claim of ineffective assistance of counsel at trial.

³ Respondent identifies two additional claims: i) that counsel had a conflict of interest and ii) that counsel elicited false information in presenting the direct appeal. The court does not construe the petition as raising a conflict of interest claim. Although that phrase appears once in the petition, it appears only as a characterization of counsel's failure to notify him of the court of appeals decision. There is no other "conflict" identified in the petition. The court further construes the allegation of "eliciting false information" as relating to the incorrect case numbers on the January 22, 2002 letter, not as a separate claim. Thomas does not identify any other allegedly "false information." To the extent Thomas intended to raise such issues, his petition is conclusory and does not support federal habeas relief. *See Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983).

habeas review. Various other defenses are also raised,⁴ but need not be reached because these grounds are sufficient to dispose of the case.

A. Statute of Limitations

Section 2244 of the AEDPA provides as follows:

- (d)(1) A 1-year period of limitation shall apply to an application for 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 review; 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.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent

⁴ For example, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires exhaustion of state court remedies. 28 U.S.C. § 2254(b), (c). Thomas did not file an application for writ of habeas corpus in case number 809398, and thus it appears he has not exhausted his state court remedies as to his claims of ineffective assistance of counsel in that cause number. In addition, it does not appear that Thomas has raised his contentions regarding his counsel’s provision of incorrect case numbers before the state court.

judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Respondent argues that Thomas's claims for ineffective assistance of counsel are time-barred under subsection (d)(1)(D). Thomas became aware of the factual predicate for these claims at the latest upon receipt of the January 22, 2002 letter from counsel informing him that the Court of Criminal Appeals had affirmed his conviction and misidentifying state court cause numbers. Thus, his federal limitations period began running on that date, and absent tolling, would have expired on January 22, 2003.

Although the Court of Criminal Appeals effectively allowed Thomas to revive the direct appeal process by granting him leave to file an out of time petition for discretionary review, this relief did not alter the trigger date for the federal statute of limitations. The relief tolls the statute of limitations until the Court of Criminal Appeals denies further relief, but it does not restart the running of the limitations period. *Salinas v. Dretke*, 354 F.3d 425, 430 (5th Cir. 2004).

Thomas filed his state court applications for writs of habeas corpus on January 16, 2003, only five days before the limitations period would otherwise have expired. Although the Court of Criminal Appeals granted Thomas leave to file untimely petitions for discretionary review, it refused to grant discretionary review by order issued August 31, 2004. Based on these undisputed dates, Respondent contends the limitations period expired on September 5, 2004.

The court has some question as to whether the tolling period ended on August 31, 2004, when the Court of Criminal Appeals issued its decision refusing discretionary review, or on October 14, 2004, when the First Court of Appeals issued its mandate affirming the conviction. *Salinas* generally states that tolling ends “when the court decline[s] to exercise further review,” but does not squarely address the mandate issue. 354 F.3d at 430, n. 6. In any event, Thomas’s federal habeas petition was not filed until December 20, 2004 and was substantially late even using the October 14, 2004 tolling cut-off date. Thomas’s ineffective assistance of counsel claims should be denied as time-barred. Because the claims are time-barred, the court need not address the merits.

B. Denial of Due Process In State Court Writ Proceeding

Thomas’s argument that he was denied due process in his writ proceedings filed January 16, 2003 appears to be based on his misperception that government pleadings filed in February and December 2003 constituted rulings by the court. *See* Exhibit A to Petitioner’s Memorandum. His due process argument relating to his September 17, 2004 writ application appears to be based on the fact that the Court of Criminal Appeals decision refusing his petition for discretionary review was dated August 31, 2004, and thus his direct appeal was not still pending at the time he filed that application. Even assuming his arguments had merit, it is well-established that “infirmities in state court habeas proceedings do not constitute grounds for federal habeas relief.” *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003); *Duff-Smith v. Collins*, 973 F.2d 1175, 1182 (5th Cir. 1992) (on federal

habeas petition court looks only to trial and direct appeal). Therefore, Thomas's claims based on lack of due process in his state court habeas proceedings should be denied.

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court recommends that respondent's motion for summary judgment be granted and petitioner's application for writ of habeas corpus be denied.

The parties have ten days to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Signed at Houston, Texas on May 24, 2005.



Stephen Wm Smith
United States Magistrate Judge