

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

Lando Shepard,	§	
<i>Petitioner,</i>	§	
	§	
vs.	§	Civil Action H-06-2316
	§	
Nathaniel Quarterman, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
<i>Respondent.</i>	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Lando Shepard’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. 6). Respondent has filed a motion to dismiss. (Dkt. 11). The court recommends that Shepard’s application be dismissed as time barred.

BACKGROUND

Shepard is an inmate of the Texas Department of Criminal Justice serving an eight year sentence for possession of a controlled substance. Shepard was indicted on two counts of possession with intent to deliver four to two-hundred grams of cocaine. Pursuant to a plea bargain, Shepard pled guilty to a single count of possession of four to two-hundred grams of a controlled substance. On July 21, 2003, the 175th District Court of Bexar, County, Texas sentenced Shepard to ten years deferred adjudication and community supervision, which Shepard did not directly appeal. On August 18, 2003 the state filed a motion to adjudicate Shepard’s guilt stating that he violated the terms of community supervision by committing

a terroristic threat. Shepard pled not true to the allegations, but the trial court adjudicated guilt on September 26, 2003 sentencing Shepard to eight years confinement.

After Shepard's attorney filed an *Anders* brief stating there was no meritorious ground for appeal, Shepard filed an appeal *pro se* asserting that there was insufficient evidence to support the trial court's finding that he committed a terroristic threat, and that the trial court did not consider his background in sentencing him to eight years. On December 8, 2004, the Fourth Court of Appeals affirmed the trial court's judgment. Shepard did not file a petition for discretionary review.

On April 8, 2005, Shepard filed a state habeas petition with respect to his original deferred adjudication proceeding, asserting ineffective assistance of counsel, trial court abuse of discretion, conviction obtained in violation of self incrimination, and insufficient evidence to establish guilt for possession of a controlled substance. *Ex parte Shepard*, No. WR-61,854-01, at 9. The application was denied on July 13, 2005 without a written order or hearing. On July 6, 2006, Shepard filed this federal application for writ of habeas corpus asserting (1) ineffective assistance of counsel with regard to his original guilty plea, (2) ineffective assistance of counsel during adjudication of his guilt, (3) trial court abuse of discretion in revoking his deferred adjudication, (4) that his conviction was obtained in violation of self incrimination, (5) and no evidence or insufficient evidence to establish his guilt for possession of a controlled substance.¹

¹ Respondent argues that some of Shepard's claims are unexhausted because Shepard did not raise all claims to the state's highest court. However, even assuming Shepard properly

ANALYSIS

Shepard's federal application is governed by the amendments to the federal habeas corpus statutes contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2224. The AEDPA provides a one year limitation period for habeas petitions, running from the latest of several start dates, including "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).

Because Shepard did not file a petition for discretionary review, his sentence became final on January 7, 2005,² thirty days after his direct appeal was affirmed by the court of appeals. Tex. R. App. P. 68.2(a). Absent tolling, Shepard had until January 7, 2006 to file a timely federal habeas petition. Even assuming that the state habeas petition had tolled the limitations period, Shepard would have had until May 20, 2006 to file his federal petition. Nonetheless, this petition was filed on July 6, 2006 and is therefore time barred.

The petition does not present any grounds for equitable relief or statutory tolling of his limitations period. Equitable tolling of the statute of limitations is permitted only if rare

exhausted his remedies prior to seeking federal habeas relief, this petition is time-barred. *See Moore v. Caine* 298 F.3d 361, 365 (5th Cir. 2002) (assuming exhaustion where federal habeas petition was determined to be untimely).

² Shepard raises claims arising from both his original guilty plea resulting in deferred adjudication, and the subsequent adjudication of his guilt and judgment. Respondent asserts that the statute of limitations began to run at different times for each of these events. However, even assuming that the limitations period began running when the judgment affirming Shepard's guilt became final, this petition is still untimely.

and exceptional circumstances beyond a prisoner's control make it impossible to file a petition on time. *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). Mere ignorance of the law or lack of knowledge of filing rules or deadlines does not justify equitable tolling. *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999). Nor are there any grounds for statutory tolling. Shepard's claims do not present a constitutional right recognized by the Supreme Court within the last year, which could be retroactive on collateral review. 28 U.S.C. § 2244(d)(1)(C). Nor does Shepard assert (or the record support) any other ground of statutory tolling under AEDPA. *See* 28 U.S.C. § 2244(d)(1)(B) (state created impediment); 28 U.S.C. § 2244(d)(1)(D) (newly discovered facts). Therefore, the court recommends that this application be denied with prejudice.

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court recommends that petitioner's application for writ of habeas corpus be denied with prejudice.

The court further finds that Shepard has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules

Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on May 31, 2007.



Stephen Wm Smith
United States Magistrate Judge