

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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FRANK BANKS,

Petitioner,

97 CV 2244 (SJ)

- against -

MEMORANDUM AND
ORDER

JOHN P. KEANE, Superintendent
of Sing Sing Correctional Facility,

Respondent.

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A P P E A R A N C E S:

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JOHNSON, District Judge:

Frank Banks ("Petitioner" or "Banks") has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner believes his state court conviction should be reversed because (1) he was deprived of due process rights by the prosecutor's summation remarks and (2) his appellate counsel was ineffective for failure to raise the claim of ineffective assistance of trial counsel. Respondent moves

to dismiss the petition as time-barred. For the reasons stated below, the motion to dismiss is denied.¹

BACKGROUND

On November 23, 1985, at approximately 7:30 a.m., Petitioner accompanied by two others, attempted to rob the J & I Taxi garage located at 341 Bergen Street in Brooklyn. During the course of the robbery attempt, Petitioner shot James Garrahan. Mr. Garrahan died from his wounds. The next day, Petitioner was arrested and charged with the crime. Following a jury trial, Petitioner was convicted of Murder in the Second Degree (N.Y. Penal Law § 125.25[3]), Manslaughter in the First Degree (N.Y. Penal Law § 125.20[1]), Attempted Robbery in the First Degree (N.Y. Penal Law § 110.00/160.15[3]), and Criminal Possession of a Weapon in the Second Degree (N.Y. Penal Law § 265.03). On February 26, 1987, Petitioner was sentenced, as a second violent felony offender, to terms of imprisonment of twenty years to life on the murder conviction, twelve and one-half to twenty-five years on the manslaughter conviction, seven and one-half to fifteen years on the attempted robbery conviction, and seven and one-half to fifteen years on the criminal possession of a weapon. All the prison terms, except the term of imprisonment for the murder, were to run consecutively to each other. In addition, these prison terms were to run concurrently with the term for

¹ Rule 4 of the Rules Governing Section 2254 Cases for the United States District Courts permits a court to order summary dismissal of a habeas corpus petition if the petitioner is not entitled to relief in the district court.

murder.

Petitioner appealed from his judgment of conviction to the New York Supreme Court, Appellate Division, Second Department ("Appellate Division"). Petitioner raised the following claims: (1) Petitioner's conviction should be reversed because the line-up identifications were obtained as a direct fruit of Petitioner's arrest which had been made without probable cause; (2) Petitioner was denied his right to due process and a fair trial by the prosecutor's comments on summation; and (3) the court's imposition of consecutive sentences was illegal and thus, Petitioner's sentence should be reduced in the interest of justice. On October 17, 1994, the Appellate Division modified Petitioner's judgment of conviction by running all of his prison terms concurrently. The court unanimously affirmed the judgment of conviction as so modified. People v. Banks, 208 A.D.2d 759 (2d Dept. 1994). On March 1, 1995, the New York State Court of Appeals ("Court of Appeals") denied Petitioner's request for leave to appeal. People v. Banks, 85 N.Y.2d 905 (1995).

On October 1, 1996, Petitioner moved for a writ of error coram nobis raising the following claims: (1) that trial counsel, who was also appellate counsel, was ineffective because he "opened the door" to damaging evidence during his opening statement; and (2) that the trial court erred by failing to seek Petitioner's waiver of his right to silence prior to defense counsel's opening statement. On December 9, 1996, the Appellate Division unanimously denied Petitioner's motion for a writ of error coram nobis.

People v. Banks, 651 N.Y.S.2d 877 (2d Dept. 1996). The Court of Appeals dismissed Petitioner's application to appeal from the denial of his motion for writ of error coram nobis as not appealable under N.Y. Crim. P. Law § 450.90(1) on January 15, 1997.

People v. Banks, 89 N.Y.2d 939 (1997). Thereafter, on April 22, 1997, Petitioner filed his habeas petition.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),² which became effective on April 24, 1996, significantly amended 28 U.S.C. §§ 2244, 2253, 2254 and 2255. As a result, 28 U.S.C § 2244(d)(1) now provides that federal habeas petitions challenging a judgment of a state court are subject to a one-year statute of limitations.³ The limitations period, with certain exceptions, begins to run either after

² Pub. L. No. 104-132, 110 Stat. 1214 (1996).

³ 28 U.S.C. § 2244(d)(1) states:

(1) 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

the completion of direct review of the judgment by the state courts or upon the expiration of the time for seeking such review. See 28 U.S.C. § 2244(d)(1). However, Congress did not provide specific guidelines regarding the retroactivity of this provision, thereby leaving the resolution of that issue to the courts. The Court of Appeals of the Second Circuit has held that in cases where, as here, the judgment of conviction became final before the effective date of the AEDPA, the habeas petition may be filed outside the one-year period but within a “reasonable time” after April 24, 1996. See Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997). Yet, it declined to set forth a precise definition of “reasonable time.”

In Peterson, the court held that the petitioner’s filing of his petition seventy-two days after the effective date of the AEDPA was timely. Id. at 93. Yet, the court stated that “where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition,” it saw no need to accord a full year after the effective date of the AEDPA. Id. at 93. Further, the court cautioned that the reasonable time alternative should not be applied with undue rigor. Id.

In order to analyze the effect of the AEDPA on the instant case, it is necessary to

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.

reiterate the dates of the relevant events. As set forth above, Petitioner's state court conviction became final on March 1, 1995, when the Court of Appeals denied Petitioner leave to appeal further. Petitioner filed a motion for a writ of coram nobis on October 1, 1996. That motion was denied on December 9, 1996. Petitioner appealed the denial and that appeal was denied on January 15, 1997. Banks' current habeas petition was filed on April 22, 1997.

Properly filed collateral review applications within the meaning of § 2244(d)(2) toll the one-year limitations period for filing a habeas petition. See Hughes v. Irvin, 967 F. Supp. 775, 778 (E.D.N.Y. 1997). However, the limitations period is tolled only for the period in which the motions are pending. Id.

In this case, Petitioner's collateral motion tolled the limitations period for approximately three months and two weeks. Petitioner's statute of limitations period began to run on April 24, 1996, the effective date of the AEDPA. See Pub. L. No. 104-132, 110 Stat. 1214 (1996). The limitations period ran for five months and one week prior to the filing of the writ of coram nobis on October 1, 1996. The period was then tolled through January 15, 1997. As stated above, Bank's petition was filed on April 22, 1997, three months later. The Court finds that in light of the tolling the petition was filed within a reasonable time period as contemplated in Peterson. Accordingly, the respondents' motion to dismiss is denied. See Rondon v. Artuz, 1998 WL 182424 *2 (S.D.N.Y. April 17, 1998) (finding habeas petition was not time-barred because there

were pending collateral motions that tolled the one-year limitations period and petitioner's motion for state collateral relief was not denied until September 12, 1996); Valentine v. Senkowski, 966 F. Supp. 239, 241 (S.D.N.Y. 1997) ("Regardless of the overall time that passed since his conviction, [petitioner] filed his federal habeas corpus petition less than a year after his leave to appeal the denial of the coram nobis was denied."); Batts v. Artuz, 1997 WL 642322, at * 2 (E.D.N.Y. Sept.5, 1997) (finding that it was reasonable for petitioner to wait from April 24, 1996 until April 22, 1997 to file his habeas petition in light of the fact that his motion for state collateral relief was not denied until September 12, 1996). See also Hughes v. Irvin, 967 F. Supp. 775, 778 (E.D.N.Y. 1997) (concluding petitioner's continuous stream of pending collateral motions operated to immediately toll the running of the statute of limitations giving him eight months after the enactment of the AEDPA to file his habeas petition).

CONCLUSION

For the reasons set forth above, Respondent's motion to dismiss the petition for untimeliness is denied. Respondent shall file an answer to the petition by May 29, 1998. Petitioner has filed a memorandum of law on the merits, however, any further reply by Petitioner shall be filed by June 18, 1998.

SO ORDERED.

Dated: April 29, 1998
Brooklyn, New York


U.S.D.J.