

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

WINSTON JORDAN,

Petitioner,

vs.

JOHN A. THALACKER, Warden,

Respondent.

No. C01-4077-MWB

REPORT AND RECOMMENDATION

ON MOTION TO DISMISS

I. INTRODUCTION

This matter is before the court on the Petition for Writ of *Habeas Corpus*, filed July 16, 2001 (Doc. No. 1), by Winston Jordan ("Jordan"). The respondent (the "State") filed its Answer on October 5, 2001 (Doc. No. 4). At the same time, the State filed a Motion to Dismiss (Doc. No. 5), with supporting brief (Doc. No. 6), and documents from the state court proceedings (*see* Doc. No. 7).

Jordan obtained extensions of time to resist the motion to dismiss, and filed his resistance and supporting brief on December 14, 2001 (Doc. Nos. 15 & 16). The State filed a reply brief on December 26, 2001 (Doc. No. 17).

On October 24, 2001, this case was referred to the undersigned United States Magistrate Judge for the filing of a report and recommended disposition. (Doc. No. 8) Accordingly, the court turns to consideration of the State's motion.

II. PROCEDURAL HISTORY

The State argues the issues Jordan attempts to raise in this court are all time barred, or, alternatively, are either procedurally defaulted, improperly exhausted, or fail to state a claim cognizable in a federal *habeas* action. The court will examine the record below to determine whether the State's arguments have merit.

On February 2, 1996, Jordan was convicted of two counts of conspiracy to commit a forcible felony, assault while participating in a felony causing serious injury, first-degree robbery, and second-degree

robbery. (Doc. No. 1, ¶ 4; Doc. No. 6, p. 5; *State v. Jordan*, No. 7-223/96-0880, slip op. at 2) Jordan was sentenced on April 12, 1996, to 25 years' imprisonment. (Doc. No. 1, ¶ 3)

Jordan filed a timely appeal, raising a single issue, to-wit: "Whether the District Court erred in failing to grant [Jordan's] motion for judgment of acquittal based on the insufficiency of the evidence to support his convictions[.]" (Appellant's Brief and Argument, *State v. Jordan*, Sup. Ct. No. 96-880, filed Jan. 16, 1997)

On June 26, 1997, the Iowa Court of Appeals issued its opinion affirming Jordan's conviction (*Jordan, supra*, slip op.). The Iowa Supreme Court denied further review on October 3, 1997, and Procedendo issued October 14, 1997.⁽¹⁾

Before proceeding further in state court, Jordan filed a *pro se* petition for writ of *habeas corpus* in this court on January 14, 1998. (See Doc. No. 1 in Case No. C98-4004 (the "first *habeas* action")) In its Answer, filed April 13, 1998 (Doc. No. 6 in the first *habeas* action), the State pointed out that Jordan had not filed an action for post-conviction relief in state court, and therefore, he had failed to exhaust state remedies as to many of the issues asserted in his petition.

On May 20, 1998, Jordan filed in state court an "Application for Appointment of Counsel and Motion to Proceed In Forma Pauperis, Pursuant to Chapter 822 of the Iowa Code,"⁽²⁾ seeking the appointment of counsel for the purpose of filing an action for post-conviction relief ("PCR").⁽³⁾

Although the record does not contain a copy of the state court's order, it is clear the motion was denied; the record contains a copy of the state court's order denying Jordan's request for reconsideration, filed July 6, 1998. (See handwritten order dated July 6, 1998, in *Jordan v. State*, No. PCCV117125, Woodbury County District Court)

Counsel was appointed to represent Jordan in the first *habeas* action, and on July 29, 1998, Jordan filed a motion (Doc. No. 12 in the first *habeas* action) to dismiss the first *habeas* action without prejudice, because an action for post-conviction relief was pending in the Iowa District Court in and for Woodbury County. The motion was granted by the court on July 30, 1998, and the first *habeas* action was dismissed without prejudice on that date. (Doc. Nos. 13 & 14 in the first *habeas* action).

Jordan filed his PCR application on January 28, 1999, but failed to have it signed and sworn. He filed a properly completed PCR application on February 24, 1999. The Iowa District Court for Woodbury County (the "PCR court") granted the State's motion for summary judgment on May 28, 1999. In its order, the PCR court noted the following regarding Jordan's claims:

Jordan asserts several grounds for overturning his conviction, all of which are listed in his Application for Appointment of Counsel. He asserts that trial counsel was ineffective, that the trial court erred in overruling the motion for acquittal and/or a new trial, that the trial court erred in its rulings on jury instructions, charges, and severance, and that there was insufficient evidence to support the verdict.

(*Jordan v. State*, No. PCCV117125, Ruling Re: Summary Judgment, filed May 28, 1999 ("PCR Ruling"), at 3-4)

The PCR court held Jordan's claim of insufficient evidence was barred by Iowa Code section 822.8,

which provides issues finally adjudicated on appeal cannot serve as the basis for PCR relief. (PCR Ruling at 4) Further, the court noted Jordan had failed to argue any of the other issues raised in his PCR application on direct appeal. Therefore, Jordan was barred from raising those issues in a PCR action absent a showing of sufficient cause for failing to raise the issues on appeal and actual prejudice arising from the alleged error. (*Id.*, citing IOWA CODE § 822.8; *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998), and cases cited therein)

The PCR court held that although Jordan's claim of ineffective assistance of appellate counsel could constitute cause for the failure to raise his claims on appeal, "[n]either Jordan's application for post conviction relief nor his application for appointment of counsel list[s] ineffective assistance of appellate counsel as an error." (PCR Ruling at 5) Further, even if Jordan had listed ineffective assistance of appellate counsel as an error, the PCR court held Jordan had failed to make a showing of how he was prejudiced by his appellate counsel's failure to raise on appeal any issues besides insufficiency of the evidence. (*Id.* at 6)

The PCR court noted Jordan had filed his own brief with the Clerk of the Iowa Supreme Court to supplement his appellate counsel's brief. Thus, the PCR court "assume[d] the issues Jordan wanted raised were indeed before the Iowa Court of appeals and were not considered relevant. In that case, Jordan had the opportunity to raise his issues and simply was not victorious." (PCR Ruling, at 6) Even if that were not the case, the court noted:

Jordan has provided no indication of how the issues he would have raised would have affected the outcome of the trial. He merely states he suffered actual prejudice. This does not constitute "specific facts constituting competent evidence to support a prima facie claim." Humphries v. Methodist Episcopal Church, 566 N.W.2d 869, 872 (Iowa 1997).

(PCR Ruling, at 6-7)

The PCR court granted the State's motion for summary judgment, holding:

[T]he Court finds that Jordan has not provided sufficient evidence to make a prima facie showing that his appellate counsel was ineffective. This precludes him from raising in his post conviction hearing any issues that were not raised in his direct appeal. Because Jordan cannot raise new issues in his application for post conviction relief and is precluded from relitigating the claim of insufficient evidence, the Court holds that there is no basis for the post conviction relief application and that summary judgment is proper.

(*Id.* at 7)

Jordan appealed the denial of post-conviction relief. The sole issue raised in his PCR appeal was whether an Affidavit submitted by Jordan to the PCR court should have been sufficient to preclude summary judgment in the State's favor. (See Brief and Argument of Appellant Jordan in *Jordan v. Iowa*, Sup. Ct. No. 99-1030, filed Mar. 2, 2000) On June 28, 2000, the Iowa Court of Appeals affirmed the district court's grant of summary judgment for the State.⁽⁴⁾ Procedendo issued on August 15, 2000. Nothing in the record indicates Jordan sought further review by the Iowa Supreme Court.

As noted above, Jordan's petition for writ of *habeas corpus* was filed in this court on July 16, 2001. In his petition, Jordan asserts the following four grounds for relief:

A. Ground One: The District Court erred in overruling the Motions. (1) The Judgment of Acquittal and; (2) the New Trial.

B. Ground two: The Iowa Court of Appeals made a clearly erroneous finding of fact and their decision deprived [Jordan] of his 4th, 5th, 6th and 14th Amendment protections.

C. Ground three: The Iowa Court of Appeals rendered a decision that was in conflict with its own prior [h]olding.

D. Ground four: The Iowa Court of Appeals - ignored - U.S. Federal Constitutional Provisions in erroneously applying insufficient evidence test.

(Doc. No. 1, ¶ 12) As his reason for not presenting all of these grounds on appeal, Jordan states:

Ground A, B, C and D was not presented on direct appeal because the appointed attorney for direct appeal failed to raise the issues when knowing the Appellant was not a student of law. Because the Appellant Attorney failed it's [sic] ethical obligation to preserve the issues presented above, the issues were not allowed during P.C.R. proceedings.

(*Id.*, ¶ 13)

III. ANALYSIS

The State argues all of Jordan's claims are barred by the statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")⁽⁵⁾. In the alternative, if the court finds Jordan's claims are not time barred, the State argues the claims are either procedurally defaulted or do not state a federal claim.

The AEDPA provides that "[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." 28 U.S.C. § 2244(d)(1). The one-year limitations period runs from the latest of four events, only one of which is pertinent here,

to-wit: "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).

As noted in the procedural chronology set forth above, the Iowa Supreme Court denied further review of Jordan's direct appeal on October 3, 1997. Jordan had a period of 90 days following entry of the order to file a petition for a writ of certiorari with the United States Supreme Court.⁽⁶⁾ See Rule 13(1), Rules of the Supreme Court of the United States. Therefore, the date on which Jordan's judgment became final by expiration of the time for him to seek review was January 1, 1998. This is the date on which the AEDPA one-year statute of limitations began to run.

Jordan initiated PCR proceedings on May 20, 1998. The AEDPA provides that the time during which a PCR proceeding is pending is not counted toward the period of limitation. 28 U.S.C. § 2244(d)(2). Thus, by the time Jordan filed for PCR relief, he had used up 139 days of the 365 days available to him to file a federal *habeas* action.⁽⁷⁾ This left 237 days for Jordan to refile a federal *habeas* action after the conclusion of the PCR proceedings.

Jordan's PCR appeal was denied on June 28, 2000. Thus, Jordan had until February 20, 2001, to refile a federal *habeas* action. He filed his petition in this case on July 16, 2001, clearly well beyond the applicable period of limitation.⁽⁸⁾

Accordingly, Jordan's present *habeas* action is barred by the AEDPA's statute of limitations, and the State's motion to dismiss should be granted. Having so found, the court does not reach the alternative grounds for relief presented by the State in its motion.⁽⁹⁾

IV. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED**, unless any party files objections⁽¹⁰⁾ to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that the State's motion be granted and Jordan's petition be dismissed with prejudice.

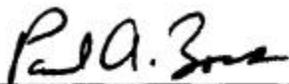
V. CERTIFICATE OF APPEALABILITY

A prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal habeas petition. See 28 U.S.C. § 2253(c). A certificate of appealability is issued only if the applicant makes a substantial showing of the denial of a constitutional right. See *Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998).

The court finds Jordan has not raised issues which might constitute a substantial showing that he was deprived of a constitutional right. Accordingly, the court recommends a certificate of appealability not be granted.

IT IS SO ORDERED.

DATED this 11th day of January, 2002.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

1. The Order and Procedendo are included in the state court documents supplied by the State.
2. A copy of the motion is included with the state court documents supplied by the State.
3. As the State points out (Doc. No. 6, p. 7, n.2), the PCR court deemed the filing of this motion as the date Jordan's PCR action was filed for statute of limitations purposes.
4. The ruling of the Iowa Court of Appeals is included in the state court documents supplied by the State.
5. The AEDPA is codified, in pertinent part, at 28 U.S.C. § 2244.
6. The State erroneously states the time to file a petition for *certiorari* expired 90 days from the issuance of Procedendo, rather than from entry of the order denying further review. (Doc. No. 6, p. 6) However, Rule 13(3) of the Supreme Court Rules specifically provides that the 90-day time limit "runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice)." Procedendo is the Iowa equivalent of a mandate.
7. Although Jordan filed the first *habeas* action on January 14, 1998, the period of time during which a federal *habeas* action is pending "does not toll the limitation period during the pendency of a federal habeas petition." *Duncan v. Walker*, ___ U.S. ___, ___, 121 S. Ct. 2120, 2129, 150 L. Ed. 2d 251 (2001).
8. The AEDPA statute of limitations is not tolled during the 90-day period during which a petition for writ of *certiorari* may be filed, or is pending, following denial of PCR relief. *Jones v. Garner*, 211 F.3d 1225, 1226 (11th Cir. 2000) (citing *Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999), and *Ott v. Johnson*, 192 F.2d 510 (5th Cir. 1999)). Even if this were not the case, Jordan's present *habeas* action still would not be timely filed.
9. Of some concern is that fact that Jordan's court-appointed counsel failed to address the AEDPA statute of limitations issue *at all* in his one-page resistance to the State's motion to dismiss. However, the court finds the inadequacy of the resistance to be irrelevant because Jordan's petition clearly was filed beyond the limitations period.
10. Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See Fed. R. Civ. P. 72*. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L.

Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).