STATE OF CONNECTICUT

DOCKET NUMBER: CV19-5000362-S 2024 JUN 11 A 8:05 SUPERIOR COURT

HILLBERT ROBERTS (INMATE # 276570)	:	TOLLAND JUDICIAL DISTRICT
	:	HABEAS DOCKET
V.	:	
COMMISSIONER OF CORRECTION	:	JUNE 11, 2024

MEMORANDUM OF DECISION ON RESPONDENT'S ORDER TO SHOW CAUSE

The petitioner, Hillbert Roberts, was convicted of, inter alia, murder, felony murder, and first degree robbery. State v. Roberts, 158 Conn. App. 144 (2015). The trial court, Licari, J., sentenced the petitioner to 65 years of incarceration. The Appellate Court affirmed his convictions. Id.

On or about August 3, 2011, the petitioner, with the assistance of assigned counsel, filed his first amended petition for a writ of habeas corpus alleging various ways in which his trial attorney, Paul Carty, had provided ineffective assistance of counsel. Roberts v. Commissioner of Correction, 155 Conn. App. 360, cert. denied, 316 Conn. 902 (2015). The Appellate Court rejected the petitioner's claims and affirmed the habeas court's judgment denying the habeas petition. The Supreme Court denied certification on March 11, 2015.

On September 30, 2019, the petitioner filed a pro se petition challenging the same underlying convictions. On or about January 22, 2024, the petitioner, with the assistance of assigned counsel, filed an amended petition. On February 13, 2024, the respondent, the Commissioner of Correction, filed both a return and a motion for order to show cause, pursuant to General Statutes § 52-470. On February 15, 2024, the habeas court, Bhatt, J., granted the respondent's motion and ordered the petitioner to file a responsive

pleading demonstrating good cause for his failure to file his second habeas petition within the statutory time limits prescribed by § 52-470(d). A hearing on this matter was held before this court on May 30, 2024 at which the petitioner and his first habeas attorney, Walter C. Bansley, testified.

After hearing and considering all the evidence and the arguments of both parties, the court concludes that the petitioner has not demonstrated good cause for filing his second habeas petition far more than two years after the judgement in his first habeas petition became final. Accordingly, the operative petition is DISMISSED pursuant to General Statutes § 52-470(e).

FACTUAL FINDINGS

This court adopts the following procedural history of the case, as set forth by the Appellate Court:

> The underlying case involved a shooting [on April 17, 2005, at approximately 2:00 p.m.] in New Haven, which resulted in the death of the victim, [Elijah Stovall]. On July 31, 2006, the petitioner was convicted, after a jury trial, of (1) murder in violation of General Statutes § 53a–54a; (2) felony murder in violation of General Statutes § 53a–54c; robbery in the first degree in violation of General Statutes § 53a–134 (a)(2); criminal possession of a firearm in violation of General Statutes § 53a–217 (a)(1); and carrying a pistol revolver without a permit in violation of General Statutes § 29–35. The petitioner was sentenced by the trial court to sixty-five years imprisonment....
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> On August 3, 2011, the petitioner filed an amended petition for a writ of habeas corpus, claiming that [Paul] Carty provided ineffective assistance of counsel. The habeas court denied the petition following a trial, concluding that the petitioner failed to prove that (1) Carty's actions were deficient when he failed to investigate and present an alibi defense; and (2) the petitioner was prejudiced by Carty's failure to call an expert in eyewitness identification issues. On September 7, 2012, the habeas court granted the petitioner's petition for certification to appeal.

Roberts v. Commissioner of Correction, 155 Conn. App. at 362. The Appellate Court affirmed the judgment of the habeas court.

On September 30, 2019, the petitioner filed his second petition for a writ of habeas

corpus, again challenging Carty's representation in the underlying criminal trial. With the assistance of assigned counsel, the petitioner filed an amended petition averring, in Count One, myriad ways in which Carty had provided ineffective assistance of counsel at the criminal trial; in Count Two, various ways in which habeas counsel, Walter C. Bansley had been ineffective at the first habeas trial; and, in Count Three, various ways in which habeas appellate counsel, Michael Zariphes, had been ineffective in appealing he judgment of the first habeas court.

The respondent filed a motion for order to show cause arguing that the petitioner's amended petition should be dismissed under General Statutes § 52-470, in that it was not timely filed. Specifically, the respondent averred that the § 52-470(d) provided the petitioner two years from the date that his habeas matter became a final judgement, which, the respondent asserted, was March 11, 2015, when the Supreme Court denied certification in his habeas appeal, and, thus, appellate review had concluded. The respondent pointed out the petitioner waited until September 30, 2019 to file his latest petition, which was far beyond the two-year time limit allotted in § 52-470(d).

The petitioner filed an objection to the respondent's motion in which he did not deny that his petition had been filed outside the statutory time frame for filing a second petition. However, he argued that his lack of access to statutes while he was incarcerated, coupled with the death of his habeas appellate attorney, constituted good cause to excuse the delay.[1]

[1] During the hearing, the parties stiplulated, and the court accepts as fact, that the attorney who represented the petitioner in both his direct appeal and his appeal from the denial of his first habeas petition, Michael Zariphes, died on August 4, 2015.

A hearing was held on this matter on May 30, 2024. The petitioner testified that he was not aware of General Statutes § 52-470 until recently. He stated that he could not recall Attorney Zariphes discussing filing deadlines with him after the Appellate Court decided his habeas appeal. The petitioner also testified that he had no access to a law library at Corrigan CI, where he was incarcerated at the conclusion of appellate review in his first habeas case. The petitioner acknowledged, however, that he has been continually incarcerated since 2005, and that he had been housed in several different facilities, including MacDougal CI and Cheshire CI, which did have law libraries. He further testified that he timely filed his first pro se habeas petition on July 2, 2009, while his direct appeal was still pending.

Attorney Walter C. Bansley, who represented the petitioner in his first habeas trial, testified that he had only a vague recollection of that case. He stated that at the time of the petitioner's first habeas trial, he was aware of the statutory deadlines imposed by § 52-470. He stated that he had no specific recollection regarding whether or not he discussed such deadlines with the petitioner. Bansley testified that he may well have advised the petitioner of relevant deadlines because his general practice at the time was to discuss § 52-470 with his clients.

DISCUSSION

General Statutes § 52-470(d) gave the petitioner two years after the "date on which the judgement in a prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review." The Supreme Court denied certification in his appeal of his first habeas case on March 11, 2015. "The petitioner's conviction became final ninety days later, after the expiration of the time for

filing a petition for a writ of certiorari to the United States Supreme Court." Rose v. Commissioner of Correction, 348 Conn. 333, 337 (2023). By this calculation, the petitioner had until approximately June 11, 2017 to file his second habeas petition. There is no dispute that he did not file within that time frame, but, instead, waited until more than two years to file his second petition on September 30, 2019. For the reasons that follow, this court concludes that the petitioner has not demonstrated good cause for his delay, and that his petition must, therefore, be dismissed.

A. Relevant Legal Principles

In 2012, General Statutes § 52-470 was extensively amended by Public Act 12-115 (Substitute House Bill No. 5554), entitled "An Act Concerning Habeas Reform." On October 1, 2012, the new provisions of § 52-470 took effect, and the statute, entitled, in relevant part, **"Summary disposal of habeas corpus case. Determination of good cause for trial,"** states, as pertinent to this appeal,

> (d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) *Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review*; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act....
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> (e) *In a case in which the rebuttable presumption of delay under subsection (d) ... of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed.* The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. *If,* after such opportunity, *the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition.* For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the

> merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) ... of this section.

(Emphasis added) Conn. Gen. Stat. § 52-470.

Good cause sufficient to rebut the presumption of delay in General Statutes § 52-470(c) and (e) requires that "something outside of the control of the petitioner or habeas counsel caused or contributed to the delay." (Internal quotation marks omitted) Kelsey v. Commissioner, 343 Conn. 424, 441-42 (2022). Factors that are relevant to the inquiry include:

> (1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition.

Id. at 442. "A factor is external to the defense if it cannot fairly be attributed to the [petitioner].... Objective factors external to the defense include, but are not limited to, a showing that the factual or legal basis for a claim was not reasonably available to counsel, outside interference by officials that made compliance impracticable, and ineffective assistance of counsel that violates the sixth amendment." Rose v. Commissioner of Correction, 348 Conn. 333, 347 (2023). Although ineffective assistance is an external factor because it deprives a petitioner of his constitutional right to counsel, a habeas court may nevertheless conclude, "on the basis of the particular factual circumstances presented, that a petitioner should be bound by his counsel's inadvertence, ignorance, or other mistakes that do not rise to the level of ineffective assistance of counsel." Id. at 349.

Moreover, although a petitioner's lack of knowledge of a change in the law could,

under extenuating circumstances, potentially establish good cause for an untimely filing,

> the legislature did not intend for a petitioner's lack of knowledge of the law, standing alone, to establish that a petitioner has met his evidentiary burden of establishing good cause. ... As with any excuse for a delay in filing, the ultimate determination is subject to the same factors previously discussed, relevant to the petitioner's lack of knowledge: whether external forces outside the control of the petitioner had any bearing on his lack of knowledge, and whether and to what extent the petitioner or his counsel bears any personal responsibility for that lack of knowledge.

Kelsey v. Commissioner, 343 Conn. at 444-45.

Because the determination of good cause under § 52-470 "requires the balancing of several factors, many of which require factual determinations," it is well-settled that a habeas court has broad discretion in making its good cause determination. Id. at 440. This is because "no single [Kelsey] factor" is dispositive and, "in ascertaining whether good cause exists, the habeas court must consider all relevant factors in light of the totality of the facts and circumstances presented." Rose v. Commissioner of Correction, 348 Conn. at 343.

B. The Petitioner Has Not Sustained His Burden Of Demonstrating Good Cause For His Failure To Timely File His Second Habeas Petition

Considering the factors delineated by Kelsey, this court concludes that the petitioner adduced no evidence that would amount to good cause for failing to file his second pro se habeas petition within two years of final judgment on his first habeas matter.

The first and second Kelsey factors do not favor the petitioner. The petitioner testified that he was not aware of General Statutes § 52-470, and that he had no access to a law library at Corrigan CI, where he was then incarcerated. However, he did acknowledge that he had been housed in several different facilities, some of which did indeed have law libraries. Although the petitioner explained that there was a lengthy

waiting list to obtain access to the law libraries, no evidence was adduced showing that he had availed himself of the opportunity to get on such list. See, e.g., Kelsey v. Commissioner, 343 Conn. at 446 n.10 (petitioner's burden to produce evidence that statutes were out of date and contributed to inability to timely file). These explanations are precisely the "lack of knowledge of the law, standing alone" that is insufficient to establish good cause under Kelsey. "The familiar legal maxims, that everyone is presumed to know the law, and that ignorance of the law excuses no one, are founded upon public policy and in necessity, and the idea b[ehind] them is that one's acts must be considered as having been done with knowledge of the law, for otherwise its evasion would be facilitated and the courts burdened with collateral inquiries into the content of men's minds." Atlas Realty Corp. v. House, 123 Conn. 94, 101 (1937). Therefore, as the Kelsey Court noted, ignorance of legal deadlines, standing alone, even for an incarcerated pro se petitioner, generally does not excuse non-compliance therewith. Kelsey v. Commissioner of Correction, 343 Conn. at 444-46. "Prisoners are not exempt from the principle that everyone is presumed to know the law and is subject to the law whether or not he is actually aware of the particular law of which he has run afoul." Baker v. Norris, 321 F.3d 769, 772 (8th Cir.), cert. denied, 539 U.S. 918 (2003).

Moreover, the petitioner acknowledged that he filed his first pro se habeas petition in 2009 while his direct appeal was still pending, thus demonstrating that he had both the ability and knowledge to file relevant legal documents in a timely manner. "Generally, a petition for a writ of habeas corpus is filed by a self-represented petitioner for whom a public defender is later appointed." Zollo v. Commissioner, 133 Conn. App. 266, 285, cert. granted on other grounds, (2012). General Statutes § 52-470 imposes the rebuttable

presumption of lack of good cause for delay on first-time habeas petitioners, who have no preexisting connection to habeas counsel and yet must satisfy the statute without counsel's guidance on filing deadlines, as well as on repeat filers. The statute thus expects that habeas petitioners can and will familiarize themselves with the filing deadlines. The petitioner offered no evidence that warrants treating him as the exception to the rule binding other similarly situated petitioners.

The fact that Attorney Zariphes had died in 2015 and, therefore, was not able to testify as to his conversations with the petitioner regarding deadlines for filing another habeas action does not inure to the petitioner's benefit, as he seemed to suggest at the hearing. See Jordan v. Commissioner of Correction, 341 Conn. 279, 290 (2021) (when trial counsel not available to testify, absence of such testimony does not alter relevant inquiry). On the contrary, it remains the petitioner's burden to adduce evidence sufficient to establish good cause for delay. Conn. Gen. Stat. § 52-470(e). See Jordan v. Commissioner of Correction, 197 Conn. App. 822, 866 (2020) ("Because the petitioner has the burden of proof, [any] evidentiary lacuna must be resolved in favor of the respondent."), aff'd, 341 Conn. 279 (2021). The petitioner testified only that *he could not recall* Zariphes mentioning § 52-470, specifically, or any time limits, generally, for filing a second habeas petition.[2] Thus, Zariphes may well have mentioned statutory deadlines to the petitioner. The fact that the petitioner had no recollection of such advisement, and

[2] The court does not credit the petitioner's testimony that he never spoke to Zariphes after the Appellate Court affirmed the judgement of the first habeas court. Zariphes filed a petition for certification to the Supreme Court on the petitioner's behalf. It strains credulity to believe that Zariphes would have done so without discussing such filing with the petitioner, or notifying the petitioner of the Supreme Court's eventual denial of certification, both of which necessarily would have occurred after the Appellate Court had issued its decision. This credibility finding goes to the third Kelsey factor.

that Zariphes was unable to testify as to what he did or did not say to the petitioner, falls short of the affirmative proof required to establish that some external factor outside the petitioner's control contributed to his delay in filing. Rose v. Commissioner of Correction, 348 Conn. at 347.

Likewise, the petitioner's attempts to attribute his delay to Attorney Bansley are not persuasive. Bansley testified that he had only a vague recollection of representing the petitioner in his first habeas matter. He stated that at the time of the petitioner's first habeas trial, he was aware of the statutory deadlines imposed by § 52-470, but that he had no specific recollection regarding whether or not he discussed such deadlines with the petitioner. Bansley testified that he may well have advised the petitioner of relevant deadlines because his general practice at the time was to discuss § 52-470 with his clients. A lack of memory about a particular event falls short of the affirmative evidence required to establish that some external factor outside the petitioner's control contributed to his delay in filing his second habeas matter. See Rodriquez v. Commissioner of Correction, 35 Conn. App. 527, 536-37 (fact that attorney could not recall specifically informing petitioner of right to testify did not establish that he never told petitioner of his right to testify and was not sufficient, by itself, to demonstrate deficient performance), cert. denied, 231 Conn. 935 (1994).

Finally, the court notes that the petitioner filed his second habeas petition more than two years after the conclusion of appellate review in his first habeas action, a situation identical to that in Kelsey. Kelsey v. Commissioner, 343 Conn. at 446. Thus, the fourth Kelsey factor weighs against the petitioner.

In short, the petitioner adduced no evidence of good cause for delay. His own ignorance of relevant statutory deadlines is, under Kelsey and its progeny, insufficient to constitute good cause. To the extent that the petitioner attempts to attribute his delay to Zariphes or Bansley, the court finds that because one attorney was unable to testify and the other one had no recollection of his advice to the petitioner, he failed to sustain his burden of demonstrating that either lawyer failed to advise him of relevant statutory deadlines.

CONCLUSION

This court concludes that the petitioner has failed to sustain his burden, under General Statutes § 52-470(d) and (e) and controlling jurisprudence, of demonstrating good cause sufficient to excuse his delay in filing his second habeas petition challenging the same conviction as his first petition. Accordingly, pursuant to General Statutes § 52-470(e), this court must DISMISS the petition.

Hon. Melissa L. Streeto

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