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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JASON S. SEXTON,

Petitioner-Appellant,

v.

LYNEAL WAINWRIGHT, Warden,

Respondent-Appellee.

No. 19-3370

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:18-cv-00424—George C. Smith, District Judge.

Decided and Filed: August 4, 2020

Before: GUY, BOGGS, and WHITE, Circuit Judges.

COUNSEL

ON BRIEF: Jay R. Carson, Aaron A. Hessler, WEGMAN HESSLER, Cleveland, Ohio, for Appellant. Jerri Fosnaught, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION

RALPH B. GUY, JR., Circuit Judge. Petitioner Jason Sexton is an Ohio prisoner who wishes to pursue a habeas corpus petition. The district court dismissed his petition as untimely, but he says that was error. We agree, vacate the judgment, and remand the case.

I.

In 1997, Sexton pleaded guilty to aggravated murder and aggravated robbery. And on October 15 of that year, an Ohio state court judge sentenced him to life imprisonment with the possibility of parole. Sexton now says this should not have occurred because Ohio law required a three-judge panel to receive his plea and impose the sentence. *See* Ohio Rev. Code § 2945.06. But he was not aware of this purported error at the time. Nor was he told that he had a right to appeal his sentence, and he did not do so.

He did, however, write a letter to the Office of the Ohio Public Defender sometime within the next 13 months, inquiring about how to file certain claims.[1] The office wrote back on December 3, 1998, telling Sexton that the "appropriate remedy" for his claims was a "petition for post-conviction relief," but the office was not currently taking on those types of claims in cases where the defendant pleaded guilty. So, the office enclosed a form that Sexton could use to pursue the claims pro se. (PageID 178.)

A little over two weeks later, Sexton filed in the trial court a pro se petition to vacate or set aside his sentence. The petition focused almost exclusively on Sexton's co-defendant, who apparently testified against him and received a more lenient sentence. In the memorandum portion of the petition, Sexton asserted that his trial attorney "failed to look at several details in the case, did not file certain motions pertaining to the case, and encouraged [Sexton] not to fight the case," which, according to Sexton, amounted to ineffective assistance of counsel. (PageID 51.) The trial court dismissed the petition the following month, principally because it was time-barred, but also because the petition failed to make out any claims warranting either relief or an evidentiary hearing. (PageID 55–61.)

And that is how things remained for nearly two decades. But Sexton says that in 2017, while researching his case, a fellow inmate informed him that he should have been sentenced by a three-judge panel.[2] The inmate also told Sexton that a direct appeal was the only avenue for

[1]The letter is not part of the record, so its exact date and contents are not known.

[2]Precisely when in 2017 this occurred is unclear. Sexton filed three affidavits, two signed by him and one signed by the assisting inmate. (PageID 67–68, 174, 176.) One of Sexton's affidavits says that he discovered the error in January, while the other two affidavits say he made the discovery in June.

redressing that error. (PageID 174.) Rule 5 of Ohio's Rules of Appellate Procedure allows for delayed criminal appeals and places no restriction on how long the delay may be, but the defendant must move in the Court of Appeals for leave to do so. Ohio App. R. 5(A)(2); *Board v. Bradshaw*, 805 F.3d 769, 773 (6th Cir. 2015). So, on July 23, 2017, Sexton filed an application for leave to file a delayed appeal along with a motion for appointed counsel. The filings included the affidavits from Sexton and the other inmate, two letters further evidencing Sexton's recent legal research, and a five-page memorandum. The application explained Sexton's two bases for wishing to appeal: (1) the lack of a three-judge panel and (2) the failure of the judge and Sexton's own attorney to advise him of his right to appeal. (PageID 66–74.) The state filed a memorandum opposing the motion and Sexton filed a reply. (PageID 75–83; 102–106.)

Shortly thereafter, the Ohio Court of Appeals denied Sexton's application for leave in a very short opinion, observing simply, "Sexton has presented no viable reason for the delay in his attempt to appeal." (PageID 107–08.) Sexton appealed the decision to the Ohio Supreme Court, but it declined jurisdiction on January 31, 2018. (PageID 112–13.)

Sexton filed the instant action three months later. The warden who holds Sexton moved to dismiss the petition as untimely and a magistrate judge recommended that the motion be granted. Over Sexton's objections, the district court adopted the magistrate judge's report and dismissed the petition. We then granted Sexton a certificate of appealability on one of his claims and appointed counsel for him.

II.

In this appeal, we are considering only Ground One of Sexton's habeas petition, which reads:

> Mr. Sexton was denied due process and equal protection of the law when the Franklin County Court of Appeals denied his motion for leave to file a direct appeal, and appointment of counsel for that appeal, a violation of the Fourteenth Amendment to the United States Constitution.

(PageID 17.) Specifically, we are considering whether that claim was timely made under 28 U.S.C. § 2244(d).

By way of background, § 2244(d)(1) imposes a one-year period of limitation for a state prisoner to file an application in federal court for a writ of habeas corpus. The limitation period runs from the latest of four dates, but the only date relevant to this appeal is the one in subsection (D), which is "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

Sexton says that date was September 21, 2017: the date the Ohio Court of Appeals denied his application for leave to file a delayed appeal. If Sexton is correct, then his application was timely, for it was filed less than one year after the denial. But the Warden says Sexton is incorrect because he did not act diligently up until that point. And if Sexton cannot rely on subsection (D), then his petition was untimely.

A.

How we measure diligence in this case is affected by several prior cases, beginning with *Johnson v. United States*, 544 U.S. 295 (2005). There, the Supreme Court considered the very similarly worded provision in 28 U.S.C. § 2255(f), which governs a period of limitation for federal prisoners. It too allows prisoners to rely on the latest of four dates, one of which is "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4). The defendant in that case, Robert Johnson, had received an enhanced sentence for a federal offense because of a prior state-court conviction. Later, though, he succeeded in having the prior state conviction vacated and three months later he filed a motion under § 2255 to vacate or correct his enhanced federal sentence. The question before the Supreme Court was whether such a vacatur constituted a discoverable "fact" as that term is used in § 2255(f)(4).

The Court unanimously concluded that a vacatur did constitute a "fact," but the justices split on a different distinction. Section 2255(f)(4) turns on the date that the fact "could have been discovered through the exercise of due diligence." Johnson had filed his motion within one year of the date that the state court vacated his prior conviction, but he had not begun his attempt to obtain that vacatur until three years after learning he needed it for his § 2255 motion. *Johnson*, 544 U.S. at 311. The majority held that he had therefore not acted "diligently to obtain

the state-court order vacating his predicate conviction," and his petition was deemed untimely. *Id.* at 310. The dissent disagreed with this approach and would have measured Johnson's diligence from the date of the entry of the vacatur onward. *Id.* at 314 (Kennedy, J., dissenting) ("[I]f petitioner has acted diligently in discovering entry of that vacatur, the proper conclusion is that he may bring a § 2255 petition within one year of obtaining the vacatur, or one year of reasonably discovering it.").

Four months later, we decided *DiCenzi v. Rose*, 419 F.3d 493, 500 (6th Cir. 2005), *opinion amended and superseded*, 452 F.3d 465 (6th Cir. 2006). As in Sexton's case, petitioner Alfred DiCenzi pleaded guilty in an Ohio state court and was imprisoned, but the sentencing judge did not inform him of his right to appeal his sentence. 452 F.3d at 466–67. When DiCenzi learned of his right to appeal more than two years later, he "immediately filed a motion for leave to file a delayed appeal of his sentence[.]" *Id.* at 467. After the motion was denied, he filed a multi-claim federal habeas petition, which was dismissed in its entirety as untimely.

We vacated and remanded as to all the claims, but for different reasons. One of the claims was that the Ohio Court of Appeals violated DiCenzi's due process rights by denying his motion for leave to file a delayed appeal. Insofar as that denial was the purported constitutional violation, the one-year clock began to run from that denial and, accordingly, DiCenzi timely filed his petition. *Id.* at 469. The rest of the claims focused on what had purportedly happened years before at the trial court: trial counsel rendered ineffective assistance and the trial court imposed an illegal sentence and failed to mention the right to appeal. *Id.* at 469. We held that, if relying on § 2244(d)(1)(D), the clock for those claims began to run either "(a) when DiCenzi first learned of his right to appeal, [or] (b) when a reasonably diligent person in DiCenzi's position could be reasonably expected to learn of his appeal rights"—whichever was earlier. *Id.* at 471. We remanded for fact finding on that question.[3] *Id.*

[3]"On remand, the case was dismissed upon a joint motion by all parties because the petitioner had already completed his sentence. Factual findings as to due diligence regarding the conviction-based claims were never made, and the trial court did not rule on the merits of the appeal-based claims." *McIntosh v. Hudson*, 632 F. Supp. 2d 725, 732 n.3 (N.D. Ohio 2009) (internal citation omitted).

Ten years later, we revisited *DiCenzi* in *Shorter v. Richard*, 659 F. App'x 227 (6th Cir. 2016). The facts were again quite similar to those in Sexton's case: an Ohio guilty plea, a failure to advise of the right to appeal, and a belated discovery leading to a motion for delayed appeal that was ultimately denied. But unlike in *DiCenzi*, the panel in *Shorter* cited and discussed *Johnson* and its rationale of requiring a petitioner to be diligent in bringing about the court order he claims to have "discovered." *See Shorter*, 659 F. App'x at 230–32. The panel majority relied on *Johnson*'s reasoning to conclude that Charles Shorter had not been diligent in filing his motion for a delayed appeal and therefore could not rely on the denial order as a previously undiscovered fact under § 2244(d)(1)(D). *Id.* at 232.

Whether and how that conclusion reconciled with *DiCenzi* was a question that split the panel. The *DiCenzi* decision did not discuss diligence when assessing the claim about the denial of leave to appeal (which the majority termed an "appeal-based claim"), but it did discuss diligence when assessing the timeliness of the other claims ("sentencing-based claims"). The majority rejected the idea that an appeal-based claim "entail[s] no diligence inquiry" and instead inferred from a citation in the *DiCenzi* opinion that the panel must have considered this aspect and "been satisfied on the facts of that case" that Alfred DiCenzi was adequately diligent. *Id.* at 231-32. The third member of the panel disagreed with that reading of *DiCenzi* and observed that "*Johnson* admittedly casts some doubt on the soundness of *DiCenzi*'s categorical holding that the § 2244(d)(1) clock begins to run on delayed-appeal claims upon the denial of the motion for delayed appeal," but concurred in the judgment because the claim failed on the merits anyway. *Id.* at 233 (White, J., concurring in the judgment).

B.

Both parties now before us insist that *DiCenzi* and *Shorter* are irreconcilable, but they disagree about the upshot. Sexton urges us to follow *DiCenzi*, as it is a published opinion and, in his view, the more reasonable application of § 2244(d)(1)(D). The Warden suggests that *Shorter* is the better precedent because *DiCenzi* is inconsistent with *Johnson*, and *Johnson* trumps *DiCenzi*'s published status. The district court agreed with the Warden, reasoning that "*DiCenzi* should be modified in light of *Johnson*," and "that *Shorter* supports that conclusion." *Sexton v. Wainwright*, No. 2:18-CV-424, 2019 WL 1305867, at *5 (S.D. Ohio Mar. 22, 2019). The court's

conclusion was "that habeas claims predicated upon court actions, such as vacatur orders and delayed direct appeals, require federal and state habeas petitioners to diligently pursue such court actions." *Id.* And in the court's view, Sexton had not been diligent in seeking a delayed appeal. We conclude that *DiCenzi* is not inconsistent with *Johnson*, and is thus binding precedent on this panel, but not solely for the reason suggested in *Shorter*.

For one thing, the Supreme Court's holding in *Johnson* regarding § 2255(f) did not necessarily require us to reach the same result in *DiCenzi* when interpreting § 2244(d)(1)(D)'s similar-though-different wording. Although the Supreme Court has sometimes interpreted portions of these sections in the same way, it has not done so reflexively. *See, e.g.*, *Gonzalez v. Thaler*, 565 U.S. 134, 149 (2012); *Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394, 402 (2001) (extending a holding about § 2255 to § 2254 because the same concerns at issue in the case were "equally present in the § 2254 context"). We have not been reflexive, either. *See United States v. Asakevich*, 810 F.3d 418, 422–24 (6th Cir. 2016) (emphasizing the similarities between §§ 2255 and 2254 but conceding differences). We are reluctant to deem ostensibly long-binding precedent of *DiCenzi* no longer binding when it post-dated the purportedly conflicting authority of *Johnson* without discussing the statutory differences.

This is especially so given that both the majority and the dissent in *Johnson* recognized that vacaturs make for an odd fit with § 2255(f)(4). *See Johnson*, 544 U.S. at 308 ("Our job here is to find a sensible way to apply paragraph four when the truth is that with [other relevant precedent] not yet on the books, [the statute's] drafters probably never thought about the situation we face here."); *id.* at 313–14 (observing that the Court "should simply accept" that § 2255(f)(4) "is not a particularly good fit with the vacatur problem") (Kennedy, J., dissenting). If the holding was tailored to the special circumstance of vacaturs, there was no reason the logic had to be extended to cases like DiCenzi's.

Even so, *DiCenzi* did not run afoul of *Johnson*'s logic because it confronted a different situation. Robert Johnson knew in 1995 that relief in federal court would require a vacatur order from the state court. Yet he did not try to obtain that order until 1998. Alfred DiCenzi, on the other hand, acted "immediately" upon learning that he suffered an injury and the route for

remedying it. *See DiCenzi*, 452 F.3d at 467. And whereas Johnson received the requested relief from the state court, DiCenzi was rebuffed.

Johnson's success in the state court, as compared to DiCenzi's failure, is the distinguishing difference between the cases. For when Ohio's Court of Appeals denied DiCenzi the opportunity to file a delayed appeal, the denial was a fresh constitutional violation—if it was a violation at all—distinct from what occurred during his trial.[4] Had the trial court properly advised DiCenzi in the first place, perhaps there would have been no need to seek a delayed appeal. There is a difference, however, between the error of denying a motion and the error that precipitated the motion. DiCenzi challenged the Court of Appeals' decision itself as a separate claim distinct from his claims about the trial court and trial counsel. Consequently, we analyzed that appeal-based claim differently than the sentencing-based claims and deemed it timely. *Johnson* involved none of this.

The propriety of distinguishing between appeal- and trial-based claims becomes even clearer if one imagines a different outcome in *DiCenzi*. Suppose the Ohio Court of Appeals had granted DiCenzi's motion for a delayed appeal and permitted him to make his arguments about the trial court and trial counsel. If the Court of Appeals granted him relief—say, in the form of a resentencing—then there would be no need to pursue federal habeas relief. On the other hand, if the Court of Appeals rejected his arguments and affirmed the judgment of the trial court, DiCenzi could seek federal habeas relief by relying on 28 U.S.C. § 2244(d)(1)(A), which starts the one-year clock on "the date on which the judgment became final by the conclusion of direct review[.]" Regardless of what the Court of Appeals decided, though, DiCenzi would have had no appeal-based claim because the Court of Appeals would have given him what he asked for: a delayed appeal. It was when the court denied him leave to appeal that his new, appeal-based claim sprang to life.

[4]This further distinguished *DiCenzi* from the analysis in *Johnson*. One of the Supreme Court's concerns in *Johnson* was about reexamining "stale state proceedings." *See Johnson*, 544 U.S. at 303. The state proceeding relevant to DiCenzi's appeal-based claim was the Ohio Court of Appeals' decision, not the trial court proceeding itself, and thus it was far from stale.

C.

The same reasoning applies to Sexton's case. He raised three grounds for relief, two of which were about a proceeding in 1997, and one of which was about a proceeding in 2017.[5] (PageID 1719.) This appeal concerns only Ground One—the one about the 2017 proceeding. Sexton claims that the Court of Appeals denied him due process and equal protection by refusing to let him file his appeal late and that he remains confined because of that decision. The denial order was therefore a "necessary factual predicate" for Ground One, *Smith v. Meko*, 709 F. App'x 341, 346 (6th Cir. 2017), and he filed the instant action within one year of the order's entry. Ground One was therefore a timely made claim under 28 U.S.C. § 2244(d)(1)(D) and the district court erred in dismissing it as untimely. We will remand the case.

It bears noting, however, that Sexton's appeal-based claim is not a permission slip to pursue otherwise untimely trial-based claims. On remand, Sexton will need to show that the Ohio Court of Appeals failed to provide him with due process or equal protection simply because it declined to allow a years-late appeal. That will be a difficult argument to make, for courts of appeals have ample reasons to refuse to hear late appeals, even meritorious ones. The hill is particularly steep given the standard for granting habeas relief. *See* 28 U.S.C. § 2254(d). But these aspects go to the merits, not timeliness. We granted Alfred DiCenzi a remand so that he could pursue and argue his timely filed claims, and we do the same here.

With that understanding in mind, we believe the Warden's concerns are misplaced. The Warden insists that Sexton should not "get the benefit of a later starting date" for his habeas petition because he waited almost twenty years to seek a delayed appeal. But Sexton is not receiving such a benefit. He is being permitted to argue why a 2017 decision by the Ohio Court of Appeals violated his rights. His diligence (or lack thereof) in moving for the delayed appeal will likely factor into the analysis of that argument, but it has nothing to do with his diligence in

[5]Alfred DiCenzi divided his claims up in a similar way. *See DiCenzi*, 452 F.3d at 468. In contrast, Charles Shorter challenged the trial court's failure to advise him of his appeal rights and the Court of Appeals' refusal to allow a delayed appeal as a single ground for relief. *Shorter*, 659 F. App'x at 229.

asking a federal court to remedy an alleged error made by the Ohio Court of Appeals in 2017.[6] Moreover, even if the district court agrees with Sexton that the Ohio Court of Appeals should have granted him a delayed appeal, the appropriate remedy would likely not be an unconditional writ or even a writ conditioned on resentencing, as it would be for his trial-based claims. Rather, the more appropriate course would be a "writ conditioned upon Ohio courts granting a new, direct appeal," which "avoids unnecessarily interfering with Ohio's interest in correcting its own errors." *Mapes v. Tate*, 388 F.3d 187, 194 (6th Cir. 2004).

III.

The judgment of the district court is **VACATED**, and the case is **REMANDED** so that the district court may consider Ground One on the merits.

[6]To the extent that the panel in *Shorter* was confronting the same question we are now, we disagree with the majority's reasoning in that case. The majority syllogized diligence in obtaining a vacatur order with diligence in obtaining a denial-of-delayed-appeal order. *See Shorter*, 659 F. App'x at 232 ("it is not at all clear whether [the Court of Appeals'] denial could have come sooner"). Although § 2244(d)(1)(D) always requires diligence—regardless of the type of discovered fact a prisoner relies upon—it does not require diligence in bringing about a *new* constitutional injury. Sexton's case is about the 2017 error, not the 1997 errors, so the 19 years preceding it are irrelevant.