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In the
United States Court of Appeals
For the Second Circuit

August Term, 2016

No. 16-2364-cv

EMILY VEGA,
Petitioner-Appellant,

v.

ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of New York.
No. 12-cv-6994 — Paul G. Gardephe, *Judge.*

Argued: April 5, 2017
Decided: June 23, 2017

Before: JACOBS, PARKER, AND LIVINGSTON, *Circuit Judges.*

Petitioner-Appellant Emily Vega was convicted in New York state court of attempted criminal contempt in the second degree, a

1 misdemeanor, and harassment in the second degree, a violation
2 under state law. She was sentenced to a one-year conditional
3 discharge, with the condition that she abide by a two-year order of
4 protection. After exhausting remedies in state court, Vega filed a
5 petition for writ of habeas corpus in the United States District Court
6 for the Southern District of New York. *See* 28 U.S.C. § 2254. The
7 magistrate judge (Fox, *M.J.*), to whom the case had been referred,
8 recommended the petition be dismissed for lack of jurisdiction,
9 concluding that § 2254(a)'s custody requirement had not been
10 satisfied because the one-year conditional discharge expired before
11 she filed her petition. On review of the magistrate's
12 recommendation, the district judge (Gardephe, *J.*) dismissed the
13 petition on separate grounds, ruling that it was moot because Vega
14 failed to identify non-speculative collateral consequences flowing
15 from her conviction. Because we conclude that the order of
16 protection did not place Vega "in custody" for purposes of § 2254(a),
17 we affirm the district court's dismissal of the petition.

18

19 JODY RATNER (Robert S. Dean, *on the brief*), Center
20 for Appellate Litigation, New York, NY, *for*
21 *Petitioner-Appellant*.

22 CATHERINE M. RENO (Nancy D. Killian, *on the*
23 *brief*), Assistant District Attorney *for* Darcel D.
24 Clark, District Attorney for Bronx County, Bronx,
25 NY, *for Respondent-Appellee*.

26

27 BARRINGTON D. PARKER, *Circuit Judge*:

28 This appeal considers whether a state court order of protection
29 that prohibited Petitioner-Appellant Emily Vega from contacting the
30 victim of her harassment places her "in custody" within the meaning
31 of the habeas statute, 28 U.S.C. § 2254. We conclude that it does not.

I. BACKGROUND

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2 In July 2009, Vega confronted Magdalena Camacho in front of
3 an apartment building in the Bronx and an altercation ensued.
4 Because at the time of this confrontation there was an order of
5 protection in place against Vega directing her to stay away from
6 Camacho, Vega was arrested and charged with criminal contempt in
7 the second degree and harassment in the second degree. Before trial
8 in Bronx County Supreme Court, the criminal contempt charge was
9 reduced to attempted criminal contempt, a misdemeanor, which was
10 tried to the court along with the harassment charge. At the close of
11 the evidence, the court told the parties it would waive closing
12 arguments and that closing memoranda would not be accepted.

13 Vega was convicted on both charges and was sentenced to a
14 one-year conditional discharge, with the condition that she abide by
15 a two-year order of protection. The order of protection required
16 Vega to “stay away from [Camacho] and/or from” Camacho’s home,
17 school, business, and place of employment until September 20, 2012.
18 Appendix (“App.”) 109. While Camacho did not live at the Bronx
19 apartment where the confrontation occurred, she visited the
20 building every day so that her mother, who lived there, could look
21 after her children. Vega’s mother-in-law also lived in the building.

22 After exhausting state court remedies, Vega filed a petition
23 under § 2254 seeking habeas relief on the ground that the trial
24 court’s denial of an opportunity for defense counsel to make a
25 closing argument violated her Sixth Amendment right to assistance
26 of counsel under *Herring v. New York*, 422 U.S. 853 (1975). Vega
27 contended that although she was not incarcerated at the time she
28 filed her petition, she was still “in custody” within the meaning of
29 § 2254(a) because she was subject to an order of protection that
30 imposed a significant restraint on her liberty.

31 Magistrate Judge Fox recommended that the petition be
32 dismissed for lack of jurisdiction, concluding that, for a different
33 reason than we express here, § 2254(a)’s custody requirement had

1 not been satisfied. Judge Fox did not address the merits of Vega’s
2 claim. On review of Judge Fox’s recommendation, Judge Gardephe
3 dismissed the petition as moot, concluding that the potential
4 collateral consequences of Vega’s convictions were too speculative to
5 demonstrate the existence of a live case or controversy sufficient to
6 establish Article III standing. The district court granted Vega a
7 certificate of appealability on her Sixth Amendment claim.

8 9 II. DISCUSSION

10 We review *de novo* a district court’s dismissal of a §
11 2254 petition, including whether a petitioner was “in custody” at the
12 time of filing. See *Carvajal v. Artus*, 633 F.3d 95, 104 (2d Cir. 2011). In
13 order for a federal court to have jurisdiction over a habeas petition,
14 the petitioner must be “in custody pursuant to the judgment of a
15 State court” at the time the petition is filed. 28 U.S.C. § 2254(a);
16 *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989). The custody requirement
17 may be satisfied by restraints other than “actual, physical custody”
18 incarceration. *Jones v. Cunningham*, 371 U.S. 236, 239–40 (1963). A
19 petitioner may satisfy this requirement where she is subject to a
20 significant restraint upon her physical liberty “not shared by the
21 public generally.” *Id.* at 240. The focus is not so much on actual
22 physical custody, but “the ‘severity’ of an actual or potential
23 restraint on liberty.” *Poodry v. Towanda Band of Seneca Indians*, 85 F.3d
24 874, 894–95 (2d Cir. 1996).

25 It is well settled that the custody requirement is “designed to
26 preserve the writ of habeas corpus as a remedy for severe restraints
27 on individual liberty.” *Hensley v. Mun. Ct., San Jose Milpitas Jud. Dist.*,
28 411 U.S. 345, 351 (1973). Indeed, even before the Antiterrorism and
29 Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat.
30 1214, the use of habeas corpus was long “limited to cases of special
31 urgency, leaving more conventional remedies for cases in which the
32 restraints on liberty are neither severe not immediate.” See *id.*; see
33 also 28 U.S.C. § 2254(d), (e).

1 Accordingly, we have held that penalties that do not impose a
2 severe restraint on individual liberty or the imminent threat of such
3 a restraint do not satisfy the “in custody” requirement. *See, e.g.,*
4 *Kaminski v. U.S.*, 339 F.3d 84, 87–88 (2d Cir. 2003) (holding a
5 restitution order could not be challenged through habeas petition
6 because a monetary fine was not a sufficient restraint on liberty to
7 meet the ‘in custody’ requirement); *Ginsberg v. Abrams*, 702 F.2d 48,
8 49 (2d Cir. 1983) (petitioner’s removal from the bench, revocation of
9 his license to practice law, and disqualification as a real estate broker
10 and insurance agent did not satisfy the custody requirement). We
11 believe that the “restriction” on Vega’s liberty is an analogue to ones
12 we have held to be insufficient.

13 Vega, pointing to our recent decision in *Nowakowski v. New*
14 *York*, 835 F.3d 210 (2d Cir. 2016), argues that her sentence of a one-
15 year conditional discharge in which she was to abide by a two-year
16 order of protection was a sufficiently severe restraint on her liberty
17 for habeas purposes. In that case, we held that a sentence of one
18 year’s conditional discharge, which required the performance of one
19 day of community service within that time, sufficiently restrained
20 Nowakowski’s liberty to satisfy the “in custody” statutory
21 requirement. *Id.* at 217.

22 We found it significant that Nowakowski’s sentence required
23 his physical presence at particular times and locations both for
24 community service and court appearances. *Id.* We pointed to cases in
25 which the Supreme Court and other Courts of Appeals “considered
26 even restraints on liberty that might appear short in duration or less
27 burdensome than probation or supervised release severe enough
28 because they required petitioners to appear in certain places at
29 certain times . . . or exposed them to future adverse consequences on
30 discretion of the supervising court.” *Id.* at 216 (collecting cases).

31 Here, Vega’s sentence does not rise to the same level of
32 restraint as did the sentence in *Nowakowski*. First, Vega concedes
33 that, unlike in *Nowakowski*, her sentence never required her physical

1 presence at a particular time or location. Nor was she affirmatively
2 required to do anything such as perform community service.
3 Although she contends that this is a “distinction without a
4 difference,” Appellant’s Br. at 28–29, we disagree. The only restraint
5 on Vega’s freedom was that she stay away from Camacho. This
6 narrow and pinpointed restriction is neither severe nor significant.
7 In fact, at Vega’s trial in 2010, she testified that she had not seen
8 Camacho since 2006, and Camacho testified that she had only
9 encountered Vega “a couple of times” in the previous five years.
10 App. 47. In any event, the restriction is far less intrusive than the
11 restrictions imposed on Nowakowski which required him to be in a
12 particular place at a particular time and perform a specific act under
13 the threat of further penal sanction. *See Triestman v. Schneiderman*,
14 1:16-CV-01079 (LEK/DEP), 2016 WL 6106467, at *3 (N.D.N.Y. Oct. 19,
15 2016), *appeal filed* (Nov. 14, 2016) (No. 16-3831) (“[S]omeone who
16 must appear in court is required to be there at a specified time. She
17 has only one real choice as to how she spends the time allotted for
18 her court appearance, because if she fails to show up, she may face
19 serious consequences. But Triestman can go anywhere he likes at
20 any time so long as he avoids his daughter. The range of options
21 available to him on a given day is therefore much greater than that
22 open to someone who must appear in court that day.”) By contrast,
23 Vega can go anywhere at any time and do anything she wants as
24 long as she avoids an intentional confrontation with Camacho. We
25 view this “restriction” as modest, not severe.

26 Moreover, the order of protection did not expose Vega to
27 future adverse consequences at the discretion of a supervising court
28 as did the order in *Nowakowski*. Although Vega faced the possibility
29 of some new charge and future sanction if she were to violate the
30 order of protection, we are not convinced that the entirely
31 speculative possibility of a future charge for a future violation is
32 sufficiently severe to place Vega “in custody” for purposes of the

1 habeas statute. If this were enough, every state order of protection
2 could become the subject of federal habeas litigation.

3 Vega argues that because Camacho visited the apartment
4 building where Vega's mother-in-law lived every day to drop off
5 and pick up her children, "it was possible" that Vega would
6 encounter Camacho. Appellant's Br. at 29. Again, we are not
7 convinced. It is clear to us that an inadvertent encounter with
8 Camacho would not violate the order of protection unless Vega
9 engaged with her or drew attention to Vega's presence. Under N.Y.
10 Penal Law § 215.50, violation of the order of protection would
11 require the state to establish "intentional disobedience" of the order.
12 Thus, the chance or inadvertent encounter that concerns Vega would
13 not suffice. To place herself in jeopardy, Vega must intentionally
14 confront Camacho. In *Holmes v. Satterberg*, 508 Fed. App'x 660 (9th
15 Cir. 2013), the Ninth Circuit held that the district court lacked
16 jurisdiction over a habeas petition because "[t]he state court's order
17 that Holmes 'shall have no contact with' the victims of his
18 harassment did not place a 'severe' and 'immediate' restraint on
19 Holmes' individual liberty, and thus does not render him 'in
20 custody' for habeas purposes." *Id.* at 661 (citations omitted). The
21 court rejected the same argument that Vega makes here, holding that
22 the possibility of accidental contact would violate the order was
23 "highly speculative." *Id.*; see also *Dremann v. Frances*, 828 F.2d 6, 7
24 (9th Cir. 1987) (concluding petitioner was not "in custody" where a
25 significant restraint was merely speculative); *Triestman*, 2016 WL
26 6106467, at *3 (holding that because the petitioner, who was ordered
27 to stay away from his daughter, could coordinate with the mother of
28 his child to ensure that their daughter's schedule did not overlap
29 with his, he was not sufficiently constrained to rise to the level of
30 being "in custody"). We agree. For these reasons, we conclude that
31 the order of protection does not constitute a significantly severe
32 restraint to satisfy the "in custody" requirement of § 2254(a).

33 CONCLUSION

34 The judgment of the district court is affirmed.