

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RAYMOND ALFORD BRADFORD,) 1:06-cv-00626-OWW-TAG HC
Petitioner,)
v.) FINDINGS AND RECOMMENDATIONS TO
ALLEN K. SCRIBNER, Warden, et al.,) GRANT RESPONDENT'S DISMISS
Respondents.) PETITION FOR WRIT OF HABEAS CORPUS
) (Doc. 31)
) ORDER DIRECTING OBJECTIONS BE FILED
) WITHIN TWENTY DAYS
)

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner filed his petition on May 12, 2006, challenging his conviction for three counts of misdemeanor indecent exposure (Cal. Pen. Code 314(1)), and his resulting sentence of 365 days in county jail, to be served concurrent with his ongoing state prison sentence for an earlier felony conviction. (Doc. 1). On July 8, 2008, Respondent filed the instant motion to dismiss the petition, contending that, at the time the petition was filed, Petitioner had already completed his 365-day sentence on the convictions challenged in the petition, and therefore he could not satisfy the “in custody” requirement for petitions filed under § 2254. (Doc. 31). On July 14, 2008, Petitioner filed his reply to the motion to dismiss, contending that because he has been incarcerated since 1991 on the earlier felony conviction and remains incarcerated, that he satisfies the “in custody” requirement. (Doc. 34).

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DISCUSSION

A. Factual Context Of Petitioner's Case

3 On March 12, 2004, after being convicted in the Kings County Superior Court of three
4 counts of indecent exposure, Petitioner, an inmate of the California Department of Corrections
5 and Rehabilitation (“CDCR”) at the time the offenses were committed, was sentenced to a term
6 of 365 days in county jail, to be served concurrent with his ongoing felony prison term which
7 Petitioner had been serving since 1991. (Doc. 32, Lodged Document (“LD”) 1, p. 10; Doc. 34).¹
8 The minute order of the sentencing court does not reflect that Petitioner was awarded any pre-
9 sentence credits. (LD 1, p. 10). Thus, although Respondent has not provided any documentation
10 from the CDCR to establish precisely when Petitioner completed the 365 day sentence, under the
11 most charitable circumstances, Petitioner’s sentence would have commenced the day after
12 sentencing, March 13, 2004, and would have expired 365 days later, on March 12, 2005. The
13 instant petition was filed over a year after that date, on May 12, 2006.

B. Petitioner Does Not Satisfy “In Custody” Requirement For Federal Habeas Relief

15 Pursuant to 28 U.S.C. § 2254(a), “[t]he Supreme Court, a Justice thereof, a circuit judge,
16 or a district court shall entertain an application for a writ of habeas corpus in behalf of a person
17 *in custody pursuant to the judgment of a State court* only on the ground that he is in custody in
18 violation of the Constitution or laws or treaties of the United States.” (Emphasis supplied). This
19 “in custody” requirement has been interpreted to mean that federal courts lack jurisdiction over
20 habeas corpus petitions unless the petitioner is “under the conviction or sentence under attack at
21 the time his petition is filed.” Maleng v. Cook, 490 U.S. 488, 490-491, 109 S.Ct. 1923
22 (1989)(per curiam); Resendiz v. Kovensky, 416 F.3d 952, 955 (9th Cir. 2005).

23 It is well-established that “once the sentence imposed for a conviction has completely
24 expired, the collateral consequences of the conviction are not themselves sufficient to render an
25 individual ‘in custody’ for the purposes of a habeas attack upon it.” Maleng, 490 U.S. at 492;

¹Petitioner was sentenced to three terms of 365 days each, all to run concurrently with each other and concurrently with his prior felony sentence. (LD 1, p. 10).

1 Feldman v. Perrill, 902 F.2d 1445, 1448 (9th Cir. 1990). The Supreme Court has not taken a
2 literal view of the “in custody” requirement, observing that “besides physical imprisonment,
3 there are other restraints on a man's liberty, restraints not shared by the public generally, which
4 have been thought sufficient in the English-speaking world to support the issuance of habeas
5 corpus.” Jones v. Cunningham, 371 U.S. 236, 240, 83 S.Ct. 373 (1963) (holding that persons
6 released from incarceration on parole are “in custody” under 28 U.S.C. § 2241); see also, Gordon
7 v. Duran, 895 F.2d 610, 612 (9th Cir. 1989). Thus, if the petition were filed while petitioner
8 was “in custody,” his subsequent release would not necessarily deprive a federal court of subject
9 matter jurisdiction nor would it render the petition moot. Carafas v. LaValle, 391 U.S. 234, 238,
10 88 S. Ct. 1556 (1968).²

11 However, where a petitioner completes his sentence before the habeas petition is filed, the
12 issue becomes one of whether the conviction and sentence has merely collateral
13 consequences—themselves insufficient to establish the “in custody” requirement—or whether the
14 conviction and sentence impose a “restraint on liberty.” Williamson v. Gregoire, 151 F.3d 1180,
15 1183 (9th Cir. 1998). Thus, for example, a sentence of fourteen hours of attendance at an alcohol
16 rehabilitation program renders someone “in custody.” Dow v. Circuit Court of the First Circuit,
17 995 F.2d 922, 923 (9th Cir. 1993). Similarly, a convict released on his own recognizance
18 pending execution of his sentence is “in custody” because he is obligated to appear at times and
19 places ordered by the court. Hensley v. Municipal Court, 411 U.S. 345, 351, 93 S.Ct. 1571
20 (1973). Also, a parolee is “in custody” because, “[w]hile petitioner's parole releases him from
21 immediate physical imprisonment, it imposes conditions which significantly confine and restrain
22 his freedom.” Jones, 371 U.S. at 243. See Barry v. Bergen County Probation Department, 128
23 F.3d 152, 161 (3d Cir. 1997)(sentence of 500 hours community service placed petitioner “in
24 custody”). However, fines or restitution are simply “collateral consequences” and are

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27 ²Where a petition is filed while the petitioner is “in custody,” but he is subsequently
28 released, there is an irrebuttable presumption that collateral consequences arise from the prior
criminal conviction. Chacon v. Wood, 36 F.3d 1459, 1463 (9th Cir. 1994), superceded on other
grounds by 28 U.S.C. § 2253(c).

1 insufficient to render someone “in custody.” Williamson, 151 F.3d at 1183.

2 Here, there can be no question that Petitioner had completed his 365-day sentence well
3 before the instant petition was filed and thus Petitioner cannot meet the “in custody” requirement.
4 This is so despite Petitioner’s contention that he has been in custody since 1991. Indeed, it seems
5 incontrovertible that Petitioner has been in the CDCR’s physical custody during that period of
6 time; however, for all but 365 days of that period he was “in custody” of the CDCR on an
7 unrelated conviction that is not the subject of the instant habeas petition. The only relevant time
8 period for purposes of satisfying § 2254 is the time period Petitioner was “in custody” on the
9 offense which the petition is challenging.

10 In the Court’s view, the only constraint on Petitioner’s liberty that could conceivably
11 satisfy the “in custody” requirement is the fact that someone, such as Petitioner, convicted in
12 California of indecent exposure is required to register as a sex offender. However, in Williamson
13 v. Gregoire, 151 F.3d at 1183-1184, the Ninth Circuit, after carefully analyzing the case law
14 regarding the “in custody” requirement, held that a similar registration requirement in a
15 Washington sex offender law did not sufficiently restrain the petitioner’s liberty to satisfy the
16 “in custody” requirement:

17 The sex offender registration and notification provisions apply to Williamson whether he
18 stays in the same place or whether he moves. Indeed, even if Williamson never leaves his
19 house, he must still verify his address with the sheriff every year. [Citation.] The
20 Washington sex offender law does not require Williamson even to personally appear at a
21 sheriff’s office to register; registration can be accomplished by mail. Thus, the law
22 neither targets Williamson’s movement in order to impose special requirements, nor does
23 it demand his physical presence at any time or place. Furthermore, the law does not
24 specify any place in Washington or anywhere else where Williamson may not go.

25 Id.

26 In this case, at sentencing, Petitioner was advised that he must register as a sex offender
27 pursuant to California Penal Code § 290. (Doc. 32, LD 1, p. 10). Section 290 requires,
28 generally, that registrants notify authorities within five days of moving into a county or
jurisdiction, or within five days of changing addresses within a county or jurisdiction, as well as
annually within five days of his or her birthday. Cal. Pen. Code § 290(a)(1)(A), (D). The statute

1 imposes no limitation on the registrant's movements and does not specify places where the
2 registrant must live or where he or she cannot live.³ Although the statute does not expressly
3 provide for registration by mail, it also does not expressly exclude it. The law contains no other
4 provisions that impact a registrant's movements or location.

5 In Henry v. Lungren, 164 F.3d 1240 (9th Cir. 1999), the Ninth Circuit considered whether
6 California's sex offender registration law, when compared to Washington's registration law, was
7 sufficiently similar to require the same result as in Williamson, and found that it was:

8 The laws are very similar in their essentials, each requiring a convicted sex offender to
9 provide address and other background information, fingerprints, and a photograph to the
10 local law enforcement authority. California law is more restrictive in requiring annual
11 registration; Washington requires a one-time registration upon release from custody,
coupled with an annual address verification procedure. Both states require an individual
12 to reregister upon change of address. [Petitioner] claims the California law requires in-
person registration, although that is not spelled out in the statute.

13 The minimal differences between the two statutes do not justify a different result for
14 [Petitioner]. Registration, even if it must be done in person at the police station, does not
constitute the type of severe, immediate restraint on physical liberty necessary to render a
petitioner "in custody" for the purposes of federal habeas corpus relief. [Citation.]
15 Instead, the registration requirement is merely a collateral consequence of conviction that
16 is "not [itself] sufficient to render an individual 'in custody' for purpose of a habeas
attack upon it."

17 Williamson, 164 F.3d at 1242 (quoting Maleng, 490 U.S. at 492 (emphasis supplied)).

18 Accordingly, the Court concludes that the registration requirement imposed at sentencing
19 is merely a collateral consequence of Petitioner's convictions and does not impose such a
20 significant restraint on Petitioner's freedom to satisfy the "in custody" requirement. Henry, 164
21 F.3d at 1242. See Williamson, 151 F.3d at 183-184; McNab v. Kok, 170 F.3d 1246 (9th Cir.
22 1999)(Oregon registration requirement does not satisfy "in custody" requirement); McNeely v.
23 Lockyer, 2007 WL 3010771 *1 (Oct. 15, 2007 E.D. Cal.)(applying Williamson); Hutton v. Kern

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26 ³For a state prison inmate like Petitioner, the law specifies that prison authorities must
27 notify the Department of Justice of the registrant's incarceration and the Department of Justice
28 then has the responsibility to notify the agency with which the inmate last registered. Cal. Pen.
Code 290(f)(2). It does not appear that, while incarcerated, Petitioner is required to do anything
further regarding registration.

1 County Sheriff's Dept., 2007 WL 1176800 *2 (Apr. 20, 2007 E.D.Cal.)(applying Henry).

2 Accordingly, the Court lacks habeas jurisdiction and, therefore, the petition should be dismissed.

3 Henry, 164 F.3d at 1242.

4 **RECOMMENDATIONS**

5 For the foregoing reasons, the Court HEREBY RECOMMENDS that:

6 1. Respondent's motion to dismiss (Doc. 31), be GRANTED; and
7 2. The petition for writ of habeas corpus (Doc. 1) be dismissed.

8 These findings and recommendations are submitted to the United States District Judge
9 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of
10 the Local Rules of Practice for the United States District Court, Eastern District of California.

11 Within twenty (20) days after being served with a copy, any party may file written objections
12 with the Court and serve a copy on all parties. Such a document should be captioned "Objections
13 to Magistrate Judge's Findings and Recommendations." Replies to the objections shall be served
14 and filed within ten (10) court days (plus three days if served by mail) after service of the
15 objections. The District Judge will then review the Magistrate Judge's ruling pursuant to
16 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the
17 specified time may waive the right to appeal the District Judge's order. Martinez v. Ylst, 951
18 F.2d 1153 (9th Cir. 1991).

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20 IT IS SO ORDERED.

21 Dated: January 9, 2009

22 /s/ Theresa A. Goldner
23 UNITED STATES MAGISTRATE JUDGE