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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BRUCE BERNA,
Petitioner,
v.
XAVIER BECERRA,
Respondent.

Case No. 1:16-cv-00010-MJS (HC)

**ORDER DENYING PETITION FOR WRIT OF
HABEAS CORPUS AND DECLINING TO
ISSUE CERTIFICATE OF APPEALABILITY**

**CLERK TO ENTER JUDGMENT AND CLOSE
CASE**

Petitioner is a county inmate proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254. Xavier Becerra, the Attorney General of California, is hereby substituted as the proper named respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.¹ Respondent is represented by Charity Seraph

¹ The rules governing relief under 28 U.S.C. § 2254 require a person in custody pursuant to the judgment of a state court to name the "state officer having custody" of him as the respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (quoting Rule 2(a) of the Rules Governing Habeas Corpus Cases Under Section § 2254). This person typically is the warden of the facility in which the petitioner is incarcerated. Stanley v. Cal. Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). Here, it does not appear that Petitioner is in state custody pursuant to the judgment of a state court. He completed his prison term for the conviction he challenges in this action. (Petition, ECF No. 1 at 5.) At the time of filing, he was on probation, although his probation term may have since concluded. (Petition at 7.) It is unclear whether his current detention at the Fresno County Jail has any relation to the challenged proceedings. That he is not incarcerated for this offense does not moot the petition, see Spencer v. Kemna, 523 U.S. 1, 8-12, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) (courts may presume that a criminal conviction has continuing collateral consequences sufficient to avoid mootness), but it does appear that there is no warden, jailer, or probation officer who would be a proper respondent. Accordingly, Xavier Becerra, the Attorney General of California, is hereby substituted as the properly named respondent. See Rule 2(b), Rules Governing Habeas Corpus Cases Under Section § 2254, 1975 advisory committee's note (when petitioner is not incarcerated or on probation or parole, proper respondent is the Attorney General).

1 Whitney of the Office of the California Attorney General. Both parties have consented to
2 Magistrate Judge jurisdiction for all purposes pursuant to 28 U.S.C. § 636(c). (ECF Nos.
3 4, 11.)

4 **I. Procedural History**

5 Petitioner is challenging a November 8, 2013 judgment of the Superior Court of
6 California, County of Fresno, entered pursuant to Petitioner's plea of no contest to being
7 a felon in possession of a firearm and admission of a prior strike conviction. Petitioner
8 was sentenced to a negotiated prison term of two years eight months. (Lodged Doc. 1 at
9 107.)

10 On October 6, 2015, the California Court of Appeal, Fifth District, affirmed the
11 judgment of conviction in a reasoned opinion. People v. Berna, No. F068377, 2015 WL
12 5826963 (Cal. Ct. App. Oct. 6, 2015). (Lodged Doc. 17.)

13 Petitioner filed a Petition for Review in the California Supreme Court on
14 November 6, 2015, which was denied summarily on December 14, 2015. (Lodged Docs.
15 18-19.)

16 Petitioner filed the instant federal habeas petition on January 5, 2016. (ECF No.
17 1.) Respondent filed an answer to the petition on April 27, 2016. (Answer, ECF No. 18.)
18 Petitioner did not file a traverse and the time for doing so has passed.

19 **II. Factual Background²**

20 [Petitioner] was arrested for being a felon in possession of a
21 firearm after agents from the Department of Justice searched
22 the trailer where he lived and found a Mossberg 12-gauge
23 pump action shotgun and a box of 12-gauge shotgun shells.
[Petitioner] had a prior felony conviction, which prohibited him
from possessing a firearm.

24 [Petitioner] filed a motion to suppress the evidence and
25 argued the search of his trailer was unconstitutional. After an
evidentiary hearing, the court found [Petitioner] consented to

27 ² The California Court of Appeal's summary of the facts in its October 6, 2015 opinion is presumed correct.
28 28 U.S.C. § 2254(e)(1).

1 the search and denied the suppression motion. Thereafter,
2 [Petitioner] pleaded no contest to being a felon in possession
3 of a firearm (Pen.Code, § 29800, subd. (a)(1)), admitted one
4 prior strike conviction, and was sentenced to two years eight
5 months in prison based on a negotiated disposition.

6 People v. Berna, No. F068377, 2015 WL 5826963, at *1 (Cal. Ct. App. Oct. 6, 2015).
7 (Lodged Doc. 17.)

8 **III. Discussion**

9 **A. Jurisdiction**

10 Relief by way of a writ of habeas corpus extends to a prisoner under a judgment
11 of a state court if the custody violates the Constitution, laws, or treaties of the United
12 States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362,
13 375 n.7 (2000). Petitioner asserts that he suffered a violation of his rights under the
14 Fourth Amendment of the U.S. Constitution. Petitioner was convicted in Fresno County
15 in the Eastern District of California. 28 U.S.C. § 2241(d); 2254(a). The Court concludes
16 that it has jurisdiction over the action.

17 **B. Legal Standard of Review**

18 Petitioner contends that the search and seizure that led to his conviction were
19 unlawful and in violation of the Fourth Amendment. (Petition at 5.)

20 The Supreme Court has held that a federal district court cannot grant habeas
21 corpus relief on the ground that evidence was obtained by an unconstitutional search
22 and seizure if the state court has provided the petitioner with “an opportunity for full and
23 fair litigation of a Fourth Amendment claim.” Stone v. Powell, 428 U.S. 465, 494 (1976).
24 See Newman v. Wengler, 790 F.3d 876, 881 (9th Cir. 2015) (noting Stone survived
25 enactment of the AEDPA); Moormann v. Schriro, 426 F.3d 1044, 1053 (9th Cir. 2005).
26 Thus, this Court may only determine whether Petitioner had a full and fair opportunity to
27 litigate his claim, not whether the claim was correctly decided. Ortiz–Sandoval v. Gomez,
28 81 F.3d 891, 899 (9th Cir. 1996) (“The relevant inquiry is whether petitioner had the
opportunity to litigate his claim, not whether he did, in fact, do so, or even whether the

1 claim was correctly decided.” (citations omitted)); see also Gordon v. Duran, 895 F.2d
2 610, 613 (9th Cir. 1990) (holding that because Cal. Penal Code § 1538.5 provides
3 opportunity to challenge evidence, dismissal under Stone was necessary even when the
4 petitioner never moved to suppress).

5 The court in Stone noted that the purpose of the exclusionary rule is to stop future
6 unconstitutional conduct by law enforcement. 428 U.S. at 492. However, excluding
7 evidence that is not untrustworthy creates a windfall to the defendant at a substantial
8 societal cost. Id. at 489–90. Thus,

9 in cases where a petitioner's Fourth Amendment claim has
10 been adequately litigated in state court, enforcing the
11 exclusionary rule through writs of habeas corpus would not
12 further the deterrent and educative purposes of the rule to an
13 extent sufficient to counter the negative effect such a policy
14 would have on the interests of judicial efficiency, comity and
15 federalism.

16 Woolery v. Arave, 8 F.3d 1325, 1326 (9th Cir. 1993).

17 **C. Analysis**

18 Petitioner's Fourth Amendment claim was litigated through a fully-briefed
19 suppression hearing in the trial court on January 29, February 7, March 13, March 20,
20 and April 11, 2013. (Lodged Docs. 3, 6-8.) It also was litigated and addressed in
21 Petitioner's direct appeal to the Fifth District Court of Appeal (Lodged Docs. 16, 17), and
22 was raised in Petitioner's Petition for Review before the California Supreme Court
23 (Lodged Doc. 18). Petitioner does not allege that he was denied the opportunity to
24 litigate the claim in state court. He does not contend that any of these proceedings were
25 inadequate or deficient. He alleges only that the issue was wrongly decided against him.
26 The question of whether Petitioner's Fourth Amendment claim was decided correctly is
27 not cognizable under Stone. His petition must be denied.

28 **V. Certificate of Appealability**

A state prisoner seeking a writ of habeas corpus has no absolute entitlement to
appeal a district court's denial of his petition, and an appeal is only allowed in certain

1 circumstances. Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003). The controlling statute
2 in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which
3 provides as follows:

4 (a) In a habeas corpus proceeding or a proceeding under
5 section 2255 before a district judge, the final order shall be
6 subject to review, on appeal, by the court of appeals for the
7 circuit in which the proceeding is held.

8 (b) There shall be no right of appeal from a final order in a
9 proceeding to test the validity of a warrant to remove to
10 another district or place for commitment or trial a person
11 charged with a criminal offense against the United States, or
12 to test the validity of such person's detention pending
13 removal proceedings.

14 (c) (1) Unless a circuit justice or judge issues a certificate
15 of appealability, an appeal may not be taken to the court of
16 appeals from—

17 (A) the final order in a habeas corpus
18 proceeding in which the detention complained
19 of arises out of process issued by a State court;
20 or

21 (B) the final order in a proceeding under section
22 2255.

23 (2) A certificate of appealability may issue under
24 paragraph (1) only if the applicant has made a
25 substantial showing of the denial of a constitutional
26 right.

27 (3) The certificate of appealability under paragraph (1)
28 shall indicate which specific issue or issues satisfy the
showing required by paragraph (2).

If a court denies a petitioner's petition, the court may only issue a certificate of
appealability "if jurists of reason could disagree with the district court's resolution of his
constitutional claims or that jurists could conclude the issues presented are adequate to
deserve encouragement to proceed further." Miller-El, 537 U.S. at 327; Slack v.
McDaniel, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the

1 merits of his case, he must demonstrate “something more than the absence of frivolity or
2 the existence of mere good faith on his . . . part.” Miller-El, 537 U.S. at 338.

3 In the present case, the Court finds that no reasonable jurist would find the
4 Court’s determination that Petitioner is not entitled to federal habeas corpus relief wrong
5 or debatable, nor would a reasonable jurist find Petitioner deserving of encouragement
6 to proceed further. Petitioner has not made the required substantial showing of the
7 denial of a constitutional right. Accordingly, the Court hereby DECLINES to issue a
8 certificate of appealability.

9 **VI. Conclusion and Order**

10 Based on the foregoing, it is HEREBY ORDERED that:

- 11 1. The petition for writ of habeas corpus is DENIED;
- 12 2. The Clerk of Court is directed to enter judgment and close the case; and
- 13 3. The Court DECLINES to issue a certificate of appealability.

14
15 IT IS SO ORDERED.

16 Dated: April 7, 2017

17 /s/ Michael J. Seng
18 UNITED STATES MAGISTRATE JUDGE