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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DOCK MCNEELY,

Petitioner,

No. CIV S-09-2375 DAD P

vs.

JOHN MCGINNESS,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner, currently confined at the Sacramento County Main Jail, is proceeding pro se and in forma pauperis with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

PRELIMINARY SCREENING

A court entertaining an application for a writ of habeas corpus must award the writ or direct the respondent to show cause as to why the writ should not be granted, “unless it appears from the application that the applicant or the person detained is not entitled thereto.” 28 U.S.C. § 2243. For the reasons discussed below, summary dismissal is appropriate in this case.

BACKGROUND

On January 22, 2009, petitioner commenced this action by filing a petition for writ of habeas corpus in this court. On that same date petitioner filed a motion for an evidentiary

1 hearing and a motion seeking a court order requiring the state court to provide the record to
2 petitioner. (Doc. Nos. 4 and 5.) On March 3, 2009, petitioner filed with this court a notice of
3 change of address, advising the court that he had been transferred from the Sacramento County
4 Jail to the Napa State Hospital. Accordingly, on March 13, 2009, this court transferred the case
5 to the United States District Court for the Northern District of California where petitioner was
6 confined.

7 On April 27, 2009, the United States District Court for Northern District granted
8 petitioner’s application to proceed in forma pauperis and denied his motion for appointment of
9 counsel. On June 15, 2009, petitioner filed a notice of change of address indicating that he had
10 been transferred from Napa State Hospital to the Sacramento County Main Jail. On August 24,
11 2009, the Northern District transferred the case back to this court without screening the petition
12 or ruling on petitioner’s pending motions.

13 At the time petitioner filed the instant petition he was a pretrial detainee awaiting
14 prosecution in Sacramento County Superior Court Case No. 07F09282. In his petition pending
15 before this court, he asserts only two grounds for relief. First, petitioner claims that his arrest and
16 pre-trial detention for failing to register as a sex offender are improperly based on a 1995 Placer
17 County conviction that was subsequently invalidated. In this regard, according to petitioner, the
18 United States Court of Appeals for the Ninth Circuit invalidated his 1995 conviction in McNeely
19 v. Blanas, 336 F.3d 822 (9th Cir. 2003). Second, petitioner claims that his current arrest and pre-
20 trial detention violated the Ninth Circuit’s 2003 decision in his case and constitutes a double
21 jeopardy violation as well as a violation of res judicata and collateral estoppel doctrines.

22 ANALYSIS

23 The instant petition should be dismissed because there is no factual basis for
24 petitioner’s claims. As noted above, petitioner contends that the state arrested and confined him
25 for failing to register as a sex offender based on his 1995 Placer County conviction. Petitioner
26

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1 asserts that the Ninth Circuit invalidated his 1995 conviction in its 2003 decision in McNeely v.
2 Blanas. Petitioner, however, is mistaken.

3 Before the Ninth Circuit, petitioner had alleged that his continued confinement
4 without a preliminary hearing or trial violated his right to a speedy trial. See McNeely, 336 F.3d
5 822. The facts underlying that case were as follows. On April 13, 1998, petitioner was arrested
6 and charged two days later in the Sacramento County Municipal and Superior Court with lewd
7 and lascivious conduct upon a child under the age of 14 and failing to register as sex offender.
8 Id. at 824. In June of 2000, petitioner filed a petition for writ of habeas corpus in this court
9 challenging the delay in his state court criminal proceedings. Id. at 824-25. The assigned
10 district judge ultimately dismissed the petition. Id. at 826. On appeal from that dismissal, the
11 Ninth Circuit held that a pretrial delay in state court of more than five years violated petitioner's
12 Sixth Amendment right to a speedy trial and ordered his immediate release from custody with
13 prejudice to re-prosecution of the criminal charges then pending against petitioner in state court.
14 Id. at 826-32.

15 In its opinion, the Ninth Circuit did not address, let alone invalidate, petitioner's
16 underlying 1995 Placer County conviction.¹ Nor did the Ninth Circuit suggest in any way that
17 the state was forever barred from prosecuting petitioner for failure to register as a sex offender
18 based on his 1995 Placer County Superior Court conviction. The undersigned notes that the most
19 recent felony complaint filed against petitioner in Sacramento County Superior Court Case No.
20 07F09282 alleges that he violated state law in 2006 and 2007 by failing to register as a sex
21 offender in violation of California Penal Code § 290. Nowhere does that complaint mention the
22 state's charges brought against petitioner in 1998 that were dismissed by the Ninth Circuit in
23 2003. The charges brought against petitioner with respect to his failure to register in 2006 and

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25 ¹ On March 25, 1994, petitioner pled guilty in the Placer County Superior Court to
26 continuous sexual abuse in violation of California Penal Code § 288.5. On August 25, 1995, the
court sentenced petitioner to five years probation. See Case No. CIV S-00-1358 DFL PAN P
(Order Filed Jan. 29, 2004 at 2).

1 2007 as required by his 1995 conviction in the Placer County Superior Court are new charges,
2 distinct from the 1998 dismissed charges. Accordingly, petitioner's claims set forth in the
3 pending petition are without any factual basis.²

4 The court also notes that it has reviewed the docket in Sacramento County
5 Superior Court Case No. 07F09282. According to the docket, on August 20, 2009, a jury found
6 petitioner guilty on both felony counts of violating California Penal Code §§ 290(G)(2) and
7 290.018(B). To the extent that petitioner seeks to challenge those conviction, petitioner is
8 advised that he must first exhaust state judicial remedies. A petitioner satisfies the exhaustion
9 requirement by providing the highest state court with a full and fair opportunity to consider all
10 claims before presenting them to the federal court. See Picard v. Connor, 404 U.S. 270, 276
11 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1986).

12 OTHER MATTERS

13 Also pending before the court are petitioner's motion for an evidentiary hearing,
14 motion for a court order requiring the state to provide him and this court with state court records
15 to determine the validity of his arrest, a motion for summary judgment in his favor on his claims,
16 and a motion for his immediate release. All of petitioner's motions are based on the premise that

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18 ² The court's own records reveal that on January 25, 2008, petitioner filed a similar
19 application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 with this court in Case No.
20 CIV S-08-0175 LEW JFM. See United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) (a
21 court may take judicial notice of court records). Therein, petitioner also claimed that he should
22 not be required to register as a sex offender in light of the Ninth Circuit's 2003 decision in
23 McNeely v. Blanas. Petitioner again argued in that habeas action that the state prosecution
24 against him in Sacramento County Superior Court Case No. 07F09282 violated the Double
25 Jeopardy Clause. On March 7, 2008, the assigned magistrate judge issued findings and
26 recommendations, recommending that the action, CIV S-08-0175 LEW JFM, be dismissed. The
magistrate judge explained that, in McNeely, the Ninth Circuit had addressed the charges brought
against petitioner in Sacramento County in 1998. In contrast, in Sacramento County Superior
Court Case No. 07F09282, petitioner was being charged with failing to register as a sex offender
in 2006 and 2007 as required by his 1995 conviction in the Placer County Superior Court. The
magistrate judge rejected petitioner's double jeopardy claim, observing that the charges of failing
to register in 2006 and 2007 were new and distinct offenses from both his underlying 1995
conviction and the dismissed 1998 charges. On April 4, 2008, the assigned district judge adopted
those findings and recommendations in full and entered judgment. On November 3, 2008, the
Ninth Circuit affirmed the decision of the district court dismissing that petition.

1 his arrest and custody are in violation of the Ninth Circuit's decision in McNeely v. Blanas. For
2 the reasons discussed above, the decision in McNeely v. Blanas has no bearing on this action.
3 Accordingly, the undersigned will recommend that all of petitioner's pending motions be denied
4 as moot.

5 **CONCLUSION**

6 IT IS HEREBY ORDERED that the Clerk of the Court is directed to randomly
7 assign a United District Judge to this action.

8 IT IS HEREBY RECOMMENDED that:

- 9 1. Petitioner's application for writ of habeas corpus (Doc. No. 1) be dismissed;
10 2. Petitioner's motions (Doc. Nos. 4, 5, 13 & 18) be denied as moot; and
11 3. This action be closed.

12 These findings and recommendations will be submitted to the United States
13 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
14 fifteen days after being served with these findings and recommendations, petitioner may file
15 written objections with the court. The document should be captioned "Objections to Findings
16 and Recommendations." Petitioner is advised that failure to file objections within the specified
17 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
18 (9th Cir. 1991).

19 DATED: September 1, 2009.

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22 _____
23 DALE A. DROZD
24 UNITED STATES MAGISTRATE JUDGE

23 DAD:9
24 mcne2375.156