UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL BAZLEY,

Petitioner,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondent.[1]

No. 2:15-cv-02673 GEB AC P

ORDER and FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a former state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Currently pending before the court is respondent's motion to dismiss the first of petitioner's three grounds for relief because it

[1] The California Department of Corrections and Rehabilitation (CDCR) is substituted as respondent herein. Petitioner was released from prison in September 2016 and asserts that he remains in "constructive custody," apparently because on parole. See ECF No. 21. "Under California law, 'an inmate-turned-parolee remains in the legal custody of the [CDCR] through the remainder of his term[.]'" Thomas v. Yates, 637 F. Supp. 2d 837, 841 (E.D. Cal. 2009) (quoting Samson v. California, 547 U.S. 843, 851 (2006)). A federal petition for writ of habeas corpus must name as respondent the state officer or entity having custody of the petitioner. See 28 U.S.C. § 2254; Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts; Smith v. Idaho, 392 F.3d 350, 354-55 (9th Cir. 2004); Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994).

fails to state a cognizable federal claim.[2] See ECF Nos. 11, 18.

This matter is referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302(c). For the reasons that follow, this court recommends that petitioner's Claim One be dismissed, and that this action proceed on petitioner's remaining Claims Two and Three.

II. The Petition

In his petition for writ of habeas corpus, petitioner challenges his no contest plea leading to his August 14, 2015 conviction and five-year prison sentence for violations of California Penal Code sections 530.5(a) (unauthorized use of personal identifying information), and 115.5(b) (making false sworn statement to induce notarial act affecting title to real property). See ECF No. 1. The petitioner asserts the following claims: Claim One – unreasonable search and seizure; Claim Two – no contest plea was not knowing or voluntary; Claim Three – ineffective assistance of counsel on multiple grounds, including failure to challenge the subject search.

III. Motion to Dismiss Claim One

Petitioner's Claim One challenges the legality of the search of his son's car which led in part to the charges underlying petitioner's convictions.[3] Petitioner contends that the search was

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[2] Respondent has withdrawn his contention this action should be dismissed as premature. See ECF No. 18; see also ECF Nos. 15, 16, 19.

[3] Petitioner's Claim One provides in full, ECF No. 1 at 6-7 (with minor edits):

> On or about 3/26/14, Deputy Probation Officer William (Bill) Collins conducted a so called Probation Search of petitioner's apartment, doing the search Officer Collins removed a set of keys from petitioner's bed rm. and left the apartment premises. When Officer Collins returned to the apartment, he stated he found a loaded magazine to a gun in petitioner's car. Petitioner stated under Miranda advisement that he didn't own a car. Officer Collins searched a car owned and registered to Michael Lee Bazley, petitioner's son. . . . Michael Lee Bazley owned the property searched and item seized.
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> All times relevant before the warrantless unreasonable search of Michael Lee Bazley's car, petitioner was never in custody or control of the property searched and item seized. Petitioner was never in constructive possession, custody nor control of the property search and item seized, therefore rendering the search unreasonable.

unreasonable under the Fourth Amendment

Respondent moves to dismiss petitioner's Claim One on the ground that it is barred from federal habeas review under the Supreme Court's decision in Stone v. Powell, 428 U.S. 465 (1976).

Petitioner responds that his Fourth Amendment claim should not be dismissed "because the state proceedings did not amount to a full and fair opportunity to litigate the claim either because petitioner was denied a full and fair opportunity to litigate the claim at the trial level or on appeal or both." ECF No. 15 at 2 (sic). Petitioner further contends that he "was not provide[d] a fair opportunity to raise Claim One/4th Amendment Claim in the state trial court because trial counsel's representation fell below an objective standard of reasonableness." ECF No. 20 at 2.

The Fourth Amendment, as applied by the exclusionary rule, prohibits the use of illegally obtained evidence in a criminal proceeding. "The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment." Stone, 428 U.S. at 482. "'The rule is calculated to prevent, not to repair.'" Id. at 484 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)). "[T]hese considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions." Stone, 428 U.S. at 493. However, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Id. at 494, fns. omitted.

Pursuant to this authority, the court finds that petitioner's Claim One, premised on the Fourth Amendment, is not cognizable on federal habeas review and must therefore be dismissed. Petitioner may, however, continue to pursue his argument that his Fourth Amendment rights were not adequately protected in the state criminal proceeding, to the extent such a theory is

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> Proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable warrantless governmental intrusion into that place.

encompassed by his Sixth Amendment ineffective assistance of counsel claim (Claim Three). See Lockhart v. Fretwell, 506 U.S. 364, 380, n.6 (1993) ("although certain Fourth Amendment violations are themselves not cognizable on federal habeas review, see Stone v. Powell, 428 U.S. 465 (1976), counsel's failure to litigate such Fourth Amendment claims competently may still give rise to a cognizable ineffective-assistance claim") (citing Kimmelman v. Morrison, 477 U.S. 365, 374 (1986)).

IV. Petitioner's Request for Appointment of Counsel

Petitioner has filed a second "form request" for appointment of counsel. His first request was denied without prejudice. See ECF No. 10. Petitioner again asserts that he is indigent and unlearned in the law, and requires the assistance of counsel to protect his interests; petitioner notes that he has a twelfth-grade education. See ECF No. 17. As the court previously informed petitioner, there is no absolute right to appointed counsel in habeas proceedings. See Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996). Nevertheless, the court may appoint counsel at any stage of a habeas proceeding "if the interests of justice so require." See 18 U.S.C. § 3006A; Rule 8(c), Fed. R. Governing § 2254.

This court finds that appointment of counsel is not required at the present time to ensure that the interests of justice are met in this case, particularly because plaintiff has not demonstrated a reasonable likelihood of success on the merits of his remaining claims. Therefore, petitioner's instant request for appointment of counsel, ECF No. 17, will be denied without prejudice.

V. Petitioner's Request for an Evidentiary Hearing

Petitioner requests that the court convene an evidentiary hearing "on the grounds, That The defendant failed and/or Refused to address The Merits of This Case, and Withdraw Their Motion To dismiss." ECF No. 21 at 1 (sic).

The Supreme Court has made clear that in determining whether an evidentiary hearing is warranted under 28 U.S.C. 2254(e)(2), the court must consider the standards for habeas relief under section 2254(d). See Cullen v. Pinholster, 563 U.S. 170, 183 (2011) ("'[B]ecause the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is

appropriate.'") (quoting Schiro v. Landrigan, 550 U.S. 465, 474 (2007).). In other words, the process of determining whether an evidentiary hearing should be granted necessarily includes an analysis of both sections 2254(d) and 2254(e)(2). See Cullen at 183-86; see also Landrigan, 550 U.S. at 474 ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.").

In light of this analytical overlap and the overwhelming demand on the court's docket, the court finds that the most prudent approach is to defer a decision on whether an evidentiary hearing is appropriate until the court conducts a section 2254(d) analysis. See Landrigan, 550 U.S. at 473 (decision to grant an evidentiary hearing generally left to the sound discretion of the district court) (citations omitted).

Therefore, petitioner's request for an evidentiary hearing will be denied without prejudice and the court will address sua sponte whether an evidentiary hearing is warranted when the merits of the petition are considered.

VI. Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Petitioner's motion for appointment of counsel, ECF No. 17, is denied without prejudice; and

2. Petitioner's motion for an evidentiary hearing, ECF No. 21, is denied without prejudice.

Additionally, IT IS HEREBY RECOMMENDED that:

1. Respondent's motion to dismiss petitioner's Claim One, ECF No. 11, be granted;

2. This action proceed on petitioner's Claims Two and Three;

3. Respondent be directed to file and serve an answer within sixty days, accompanied by all transcripts and other documents relevant to the remaining issues presented in the petition, see Rules 4 and 5, 28 U.S.C. foll. § 2254; and

4. Petitioner be accorded the option of filing and serving a reply within thirty days after service of the answer.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. §636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections, he shall also address whether a certificate of appealability should issue and, if so, why and as to which issues. See 28 U.S.C. § 2253(c)(2). Any reply to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: January 27, 2017

ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE