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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ROBERT KANG,
Petitioner,
v.
KAMALA D. HARRIS,
Respondent.

Case No. [5:12-cv-02776-EJD](#)
**ORDER GRANTING RESPONDENT’S
MOTION TO DISMISS**
Re: Dkt. No. 10

Petitioner Robert Kang (“Kang”) filed a petition for habeas corpus under 28 U.S.C. § 2254 (the “Petition”) challenging a conviction and sentence imposed by San Francisco Superior Court in 2010. Respondent Kamala D. Harris, in her capacity as the California Attorney General (the “State”), moves to dismiss the Petition for lack of subject matter jurisdiction. See Docket Item No. 10. The State argues that Kang was not “in custody” at the time he filed the Petition. On this record, the must agree. Thus, the State’s motion will be granted and the Petition will be dismissed for the reasons explained below.

I. BACKGROUND

On October 1, 2009, Kang was charged with burglary, assault, unlawful driving or taking of a vehicle, possession of a controlled substance, and possession of a firearm by a felon. According to the Petition, Kang, while “enmeshed in the vortex of methamphetamine addiction engaged in an extensive and ongoing enterprise to steal vehicles from the Fillmore Center” in San Francisco. During one incident, Kang “maced” a security guard. After he was apprehended, authorities discovered methamphetamine and a revolver during a search of his vehicle.

1 On May 24, 2010, Kang pled guilty to one count of unlawful driving or take of a vehicle in
2 violation of California Vehicle Code § 10851(a) and one count of possession of a firearm by a
3 felon in violation of California Penal Code § 12021(a)(1). He was sentenced on June 14, 2010, to
4 two 16-month concurrent terms of incarceration followed by a 48-month term of parole.

5 During the sentencing hearing, Kang’s attorney mistakenly represented to the court that
6 Kang was a United States citizen, and the probation report was corrected to reflect that statement.
7 Counsel’s representation seems to have been based on several facts about Kang’s life. He “was
8 born out of wedlock to a United States serviceman and an alien mother” and was ultimately
9 adopted from Korea by another United States citizen. However, neither the status of his biological
10 father nor that of his adoptive father was apparently sufficient to impart citizenship to Kang under
11 immigration laws.

12 Removal proceedings were initiated against Kang upon his release from state custody. He
13 petitioned the superior court for a writ of coram nobis and a writ of habeas corpus. Those petitions
14 were denied on August 4, 2011, and November 10, 2011, respectively. Similar petitions made to
15 the California Court of Appeal and California Supreme Court were denied on December 1, 2011,
16 and May 16, 2012. The instant Petition followed on May 31, 2012.

17 **II. DISCUSSION**

18 On the merits, Kang argues that his state trial counsel was ineffective for failing to identify
19 and advise him of the immigration consequences that would ensue from his guilty plea. Citing
20 Padilla v. Kentucky, 559 U.S. 356 (2010), Kang believes effective counsel would have negotiated
21 a plea deal that was both satisfactory to the prosecution but at the same time precluded him from
22 being deemed a deportable alien. In response, the State raises a procedural argument. It moves to
23 dismiss the Petition because Kang is no longer in actual or constructive state custody.

24 It is well-settled that a habeas petitioner challenging a state conviction must be “in custody
25 pursuant to the judgment of a State court” at the time the petition is filed. 28 U.S.C. § 2254(a).
26 This “in custody” requirement is jurisdictional. Bailey v. Hill, 599 F.3d 976, 978 (9th Cir. 2010)
27 (“Section 2254(a)’s ‘in custody’ requirement is jurisdictional and therefore ‘it is the first question
28

1 we must consider.”); Resendiz v. Kovensky, 416 F.3d 952, 956 (9th Cir. 2005) (observing that
2 the “‘in custody’ requirement has been interpreted to mean that federal courts lack jurisdiction
3 over habeas corpus petitions unless the petitioner is ‘under the conviction or sentence under attack
4 at the time his petition is filed.’”). Thus, a failure to satisfy the “in custody” requirement requires
5 the dismissal of a habeas petition. See De Long v. Hennessey, 912 F.2d 1144, 1146 (9th Cir.
6 1990) (“A petitioner who files a habeas petition after he has fully served his sentence and who is
7 not subject to court supervision is not ‘in custody’ for the purposes of this court’s subject matter
8 jurisdiction.”).

9 Here, Kang does not directly claim in the Petition that he was in state custody or on parole
10 at the time it was filed. But in his opposition to the State’s motion, Kang indicates he was
11 formally discharged from parole on March 25, 2012. Accordingly, it appears undisputed that
12 Kang was not in custody pursuant to the state court judgment when this action was commenced on
13 May 31, 2012.

14 In light of those circumstances, Kang argues for exceptions to the custody requirement.
15 Importing equitable tolling principles that apply to a statute of limitations, Kang believes the court
16 should “toll” the “in custody” requirement because he was on parole when he commenced the writ
17 process in state court. In addition or as an alternative to that argument, Kang further contends that
18 state trial counsel’s misstatement about his citizenship status at the sentencing hearing was the
19 “functional equivalent” of a complete failure to appoint counsel in violation of the right to counsel
20 recognized in Gideon v. Wainwright, 372 U.S. 335 (1963).¹

21 These arguments are unpersuasive. As to Kang’s tolling request, the State points out that §
22 2254’s statute of limitations is subject to equitable tolling because it is not jurisdictional. Lee v.
23 Lampert, 653 F.3d 929, 933 (9th Cir. (“AEDPA’s statute of limitations is subject to equitable
24 exceptions ‘in appropriate cases’ Because § 2244(d) is not jurisdictional, it is ‘subject to a
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26 _____
27 ¹ In Gideon, the United States Supreme Court held that “any person haled into court, who is too
28 poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” 372 U.S.
at 344.

1 ‘rebuttable presumption’ in favor ‘of equitable tolling.’”). In contrast, the “in custody”
2 requirement is a jurisdictional prerequisite. Generally, jurisdictional requirements are not subject
3 to equitable exceptions. See Bowles v. Russell, 551 U.S. 205, 214 (2007). As such, this court is
4 unable to accept that Kang was in custody for the purposes of this Petition simply because he was
5 in constructive custody at the time he commenced the writ process in state court. Other federal
6 courts to have examined this issue have rejected similar arguments, and, like the petitioners in
7 those cases, Kang has not cited authority holding otherwise or supporting the suggestion that an
8 equal protection violation will result if tolling is not applied. See Kazyak v. Super. Ct., No. CV
9 14-3781 MWF (JCG), 2015 U.S. Dist. LEXIS 1675, at *1-2 (C.D. Cal. Jan 5, 2015) (citing
10 Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973); Dewald v. Wriggelsworth, No. 1:08-cv-906, 2012
11 U.S. Dist. LEXIS 110002, 2012 WL 3205859 (W.D. Mich. Aug. 7, 2012)).

12 With regard to the purported Gideon violation, the state court records reveal that Kang was
13 not denied counsel during the criminal proceedings underlying this Petition. If anything, Kang’s
14 complaint about his state trial counsel’s performance is more accurately classified as a potential
15 claim for ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984),
16 rather than “a complete absence of counsel.” Resendiz, 416 F.3d at 959. Kang therefore cannot
17 rely on this exception to the custody requirement because it arises from a “failure to appoint
18 counsel for an indigent defendant,” not from appointed counsel’s deficient performance. Custis v.
19 United States, 511 U.S. 485, 494 (1994).

20 Kang finally requests the court construe this Petition was one for a writ of error coram
21 nobis. But as he concedes in sur-reply, a petition for a writ of coram nobis “lies only to challenge
22 errors occurring in the same court.” Hensley v. Mun. Ct., 453 F.2d 1252, 1252 n.2 (9th Cir.
23 1972), rev’d on other grounds, 411 U.S. 345 (1973). That form of writ relief cannot be utilized in
24 federal court to challenge purported errors that occurred during proceedings before the state court.

25 In sum, the court concludes it lacks subject matter over Kang’s § 2254 Petition because he
26 was not “in custody” pursuant to a state court judgment when it was filed. For that reason, the
27 Petition must be dismissed.

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III. ORDER

Based on the foregoing, the State’s Motion to Dismiss (Docket Item No. 5) is GRANTED. The Petition is DISMISSED for lack of subject matter jurisdiction.

A certificate of appealability will not issue because the court finds that “jurists or reason” could not find debatable either that Kang was not in custody when he filed the § 2254 petition, or that this requirement was not somehow excused. See Slack v. McDaniel, 529 U.S. 473, 478 (2000).

Judgment will be entered in favor of the State and the Clerk shall close this file. The hearing scheduled for November 19, 2015, is VACATED.

IT IS SO ORDERED.

Dated: November 16, 2015


EDWARD J. DAVILA
United States District Judge