



Not Reported in F.Supp.2d, 2001 WL 1352120 (M.D.Pa.)

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United States District Court, M.D. Pennsylvania.

Robert BOLUS, Petitioner

v.

DISTRICT ATTORNEY OF LACKAWANNA
COUNTY, Attorney General of the Commonwealth of
Pennsylvania, Respondent
No. 3:CV-01-1990.

Oct. 26, 2001.

MEMORANDUM

CAPUTO, District J.

*1 Presently before me is Petitioner Robert Bolus' petition for writ of habeas corpus pursuant to [28 U.S.C. § 2241](#) and [§ 2254](#), filed October 17, 2001. The District Attorney of Lackawanna County and the Attorney General of The Commonwealth of Pennsylvania are named as respondents. Because I find that Petitioner does not meet the "in custody" requirement, I will dismiss his petition for writ of habeas corpus.

BACKGROUND

On September 21, 1991, Petitioner was found guilty in the Court of Common Pleas of Lackawanna County of two (2) counts of receiving stolen property, one (1) count of tampering with or fabricating physical evidence, and one (1) count of criminal solicitation to commit the criminal offense of tampering with or fabricating physical evidence. (Doc. 1.) Petitioner was sentenced on September 29, 1992 to four (4) to twenty-four (24) months of imprisonment. (Doc. 1.)

Petitioner completed his sentence prior to the conclusion of his direct appeals. On October 8, 1992, Petitioner filed a motion for reconsideration and/or to modify sentence. The motion was denied on October 9, 1992. (Doc. 1.)

On October 10, 1992, Petitioner appealed to the Pennsylvania Superior Court. This appeal was denied

August 19, 1993. Petitioner took a further appeal to the Pennsylvania Supreme Court. This appeal was denied on December 5, 1995. (Doc. 1.)

Petitioner alleges that in September 2001 he discovered the existence and significance of records seized by the police, which form the basis for relief. (Doc. 1.)

On October 9, 2001, Petitioner filed a state habeas corpus motion in the Lackawanna County Court of Common Pleas. On October 10, 2001, Petitioner filed a motion for an expedited hearing and determination of his state habeas corpus claim.

On October 17, 2001, petitioner filed the instant petition for habeas corpus.

DISCUSSION

This petition, though styled as a petition under [28 U.S.C. § 2241](#) and [§ 2254](#), arises only under [28 U.S.C. § 2254](#).

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person *in custody* pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

[28 U.S.C. § 2254\(a\)](#) (emphasis added). While the "in custody" requirement is liberally construed for purposes of habeas corpus, [Maleng v. Cook](#), [490 U.S. 488, 492, 109 S.Ct. 1923, 1926, 104 L.Ed.2d 540 \(1989\)](#), a petitioner must be in custody under the conviction he is attacking when the petition is *filed*, in order for this court to have jurisdiction under [§ 2254](#). [Maleng](#), [490 U.S. at 490-91, 109 S.Ct. at 1925](#).

No court has held that a habeas petitioner is in custody when a sentence imposed for a particular conviction had fully expired at time the petition was filed. Indeed, [Carafas v. LaVelle](#),^{FN1} [391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 \(1968\)](#), "strongly implies the

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contrary ... The unconditional release [of petitioner] raised a ‘substantial issue’ as to [whether] the statutory ‘in custody’ requirement [was satisfied].” [Maleng, 490 U.S. at 491-92, 109 S.Ct. at 1925-26](#), (quoting [Carafas v. LaVelle, 391 U.S. at 238, 88 S.Ct. at 1559-60](#)).

FN1. In *Carafas*, the petitioner filed his habeas petition while he was still incarcerated under the sentence he sought to attack. While his appeal for the denial of habeas relief was pending, he was subsequently unconditionally discharged from custody. The Supreme Court there held that the case was not moot, noting the “collateral consequences” of petitioners conviction, such as his inability to vote, engage in certain businesses, hold public office, or serve as a juror. [Carafas, 391 U.S. at 237-38, 88 S.Ct. 1559](#).

*2 In *Maleng*, a federal prisoner brought a habeas corpus petition alleging that his prior, expired conviction was illegally used to enhance his current sentence. The Supreme Court held that a habeas petitioner could challenge sentences imposed upon him even if he was not serving those sentences, because he was incarcerated in federal prison on other charges. [Maleng, 490 U.S. at 488, 109 S.Ct. At 1923](#). The Supreme Court based its *Maleng* decision to allow petitioner to bring a habeas suit on the fact that the petitioner had been in custody at the time the petition was filed and that petitioner was attacking the sentence he was then serving as well as the prior sentence that was used to enhance the sentence he was serving. The Court also noted, however, that “[o]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render the individual ‘in custody’ for the purposes of a habeas attack upon it.” [Maleng, 490 U.S. at 492, 109 S.Ct. at 1926](#).^{FN2} Collateral consequences of a conviction include such things as deprivation of the right to vote, to hold office, to serve on a jury, or to engage in certain businesses, see [St. Pierre v. United States, 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed. 1199 \(1943\)](#) (*per curiam*), or the possibility that the conviction would be used to impeach testimony he might give in a future proceeding, [Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 \(1985\)](#).

FN2. A conviction underlying an expired sentence could be challenged in a collateral attack on a subsequent sentence that the expired sentence was to enhance. [Maleng, 490 U.S. at 493-94, 109 S.Ct. at 1927](#).

The effect of collateral consequences of Petitioner's conviction is the disqualification from service in public office. That is simply not sufficient to establish that Petitioner is in custody. The result Petitioner seeks today is available only in cases where a judge uses a petitioner's allegedly improper prior conviction to enhance his newer, current, sentence. See [Lackawanna County District Attorney v. Coss, Jr., 532 U.S. 394, 121 S.Ct. 1567, 149 L.Ed. 608 \(2001\)](#) (holding that relief is generally unavailable to a state prisoner through a petition for a writ of habeas corpus when the challenge of the current sentence was on the ground that it was enhanced based on an allegedly unconstitutional prior conviction for which the petitioner is no longer is custody.)

Therefore, the collateral consequences of an expired sentence do not confer “in custody” status on a habeas corpus petitioner. [Maleng, 490 U.S. at 492, 109 S.Ct. at 1926](#). (“Once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual “in custody” for the purposes of a habeas attack upon it”).

Here the Petitioner's sentence was served and has completely expired. He is therefore not “in custody” for purposes of eligibility for relief under [28 U.S.C. § 2254](#). I therefore hold that Petitioner is not “in custody” based on his conviction and not being able to serve in elected office as a consequence. Accordingly, the Petitioner's petition for a writ of habeas corpus will be denied.

*3 An appropriate order will follow.

ORDER

NOW, this 26th day of October, 2001, it is hereby ORDERED that:

1. The petition for a writ of habeas corpus is dismissed for failure to satisfy the “in custody”

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requirement.

2. The Clerk of Court is directed to close this case.

3. There is no basis for the issuance of a certificate of appealability.

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