[Cite as *State ex rel. Gray v. Karnes,* 2010-Ohio-5364.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Dennis Gray,	:	
Petitioner,	:	
v.	:	No. 10AP-789
Franklin County Sheriff Jim Karnes,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on November 4, 2010

Shaw & Miller, and *Mark J. Miller,* for petitioner.

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV,* for respondent.

IN HABEAS CORPUS
ON MOTION TO DISMISS
ON OBJECTION TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Petitioner, Dennis Gray, commenced this original action requesting that this court issue a writ of habeas corpus against respondent, Jim Karnes, the Sheriff of Franklin County, Ohio.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In his decision the magistrate concluded, pursuant to respondent's motion to dismiss, that the petition fails to state a facially valid claim. Accordingly, the magistrate decided this court should not allow the writ and should dismiss the petition.

II. Objection

{¶3} Petitioner filed a single objection to the magistrate's conclusions of law:

> Petitioner objects to the magistrate's decision that the petition failed to state a facially valid claim worthy of Habeas Corpus relief based on the magistrate's interpretation of "concurrent" sentence.

Petitioner's single objection reargues the issues the magistrate fully and appropriately addressed and resolved in his decision.

{¶4} Petitioner's request for a writ of habeas corpus involves a three-year sentence a Franklin County judge imposed on petitioner; the trial judge ordered the sentence to be served concurrently with petitioner's federal sentence. Had petitioner served his entire federal sentence, it would have extended beyond the length of the sentence the Franklin County judge imposed for petitioner's state conviction. Petitioner, however, was released early from his federal prison sentence and contends his state sentence, because it was to be served concurrently with his federal sentence, necessarily expires at the same time he was released from federal confinement. As the magistrate appropriately determined, "[a]t issue here is the meaning of the word 'concurrently' as that

term was used by the common pleas court in sentencing petitioner to three years of incarceration on the state charge 'to run concurrently' with the federal sentence." (Mag. Dec., ¶25.)

{¶5} The magistrate properly relied on the Second District's decision in *State v. Bellamy,* 181 Ohio App.3d 210, 2009-Ohio-888, where the court specified that "the imposition of a concurrent sentence normally means that the sentence being imposed is to run concurrently with the *undischarged* portion of the previously imposed sentence." (Emphasis sic.) Id. at ¶12, quoting *Bianco v. Minor* (June 6, 2003), M.D.Pa. No. Civ.A. 303CV0913, 2003 WL 21715347. Citing *Richards v. Eberlin,* 7th Dist. No. 04-BE-1, 2004-Ohio-2636, the court contrasted that definition with a consecutive sentence, where the second sentence cannot begin to be served until the first sentence has been completed.

{¶6} Using those definitions, the magistrate correctly relied on a decision applying the concepts relevant here: "[t]he fact that sentences run concurrently merely means that the prisoner is given the privilege of serving each day a portion of each sentence. However, if the sentences which are to run concurrently are of different lengths, the prisoner cannot be discharged until he has served the longest sentence." *Brinklow v. Riveland* (Colo., 1989)*,* 773 P.2d 517. The magistrate thus concluded that even though the federal sentence was reduced subsequent to petitioner's state court sentencing, so that petitioner's federal release occurred less than three years after the state sentence began, the shortened federal sentence "does not provide a basis for reduction of the state court sentence so that it corresponds to the federal release date." (Mag. Dec., ¶45.)

{¶7} The magistrate having properly resolved the issue presented in petitioner's objection, we overrule the objection.

III. Disposition

{¶8} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we grant respondent's motion to dismiss.

Objection overruled;
motion to dismiss granted.

TYACK, P.J., and FRENCH, J., concur.

_____

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Dennis Gray,	:	
Petitioner,	:	
v.	:	No. 10AP-789
Franklin County Sheriff Jim Karnes,	:	(REGULAR CALENDAR)
Respondent.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on September 24, 2010

Shaw & Miller and *Mark J. Miller*, for petitioner.

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*, for respondent.

IN HABEAS CORPUS
ON MOTION TO DISMISS

{¶9} In this original action, petitioner, Dennis Gray, requests that a writ of habeas corpus issue against respondent, Jim Karnes, the Sheriff of Franklin County, Ohio.

Findings of Fact:

{¶10} 1. According to the petition, petitioner is currently incarcerated by respondent at the Franklin County Corrections Center I, located at 370 South Front Street, Columbus, Ohio.

{¶11} 2. According to the petition, on October 3, 2006, petitioner was sentenced to a period of incarceration by the United States District Court, Northern District of Ohio in case No. 505-CR-131-10.

{¶12} 3. According to the petition, at the time of petitioner's federal sentencing, his scheduled release date from federal prison was September 10, 2011.

{¶13} 4. According to the petition, on November 28, 2007, petitioner entered a guilty plea to count one of an indictment, to wit: aggravated trafficking in drugs, a violation of R.C. 2925.03 and a felony of the third degree. He also entered a guilty plea to count two of the indictment, to wit: aggravated trafficking in drugs, a violation of R.C. 2925.03 and a felony of the fourth degree.

{¶14} Following acceptance of the guilty pleas, the Franklin County Court of Common Pleas ("common pleas court") imposed sentence in case No. 05CR-08-5660. Petitioner has attached a copy of the court's sentencing entry, which states in part:

> The Court hereby imposes the following sentence: Three (3) years as to Count One and Eighteen (18) months as to County Two to run concurrently at the Ohio Department of Rehabilitation and Correction. Sentence shall run concurrently with Case No. 05CR-4684 and Federal Case No. 505-CR-131-101 [sic]. * * * Defendant shall be returned to federal correction institution in Elkton, OH as soon as possible.

{¶15} 5. According to the petition, petitioner was released from federal incarceration under his federal sentence in April 2010.

{¶16} 6. According to the petition, on August 3, 2010, the common pleas court held a hearing with petitioner present with his counsel in case Nos. 05CR-08-5660 and 05CR-08-4684. Attached to the petition is a copy of a transcript of the August 3, 2010 hearing:

> [Petitioner's counsel:] Judge, based on our conversations, it's my understanding the court wishes to proceed with enforcement of a sentence. Just for the record, briefly, we will object.
>
> The defendant has served over five years, did over five years on the federal case. That sentence ended, it's over with, it ended in April of this year. Concurrent means concurrent, sentences run at the same time. And that's our basis for the objection. Since the federal sentence has now expired, the state sentence is over with too.
>
> THE COURT: Thank you. But that wasn't my understanding at the time of my sentencing. And if you'd please refer to your judgment entry sheet, you will see that this is a three-year sentence and it is to run concurrent with the federal but it is not a federal sentence. So, this sentence was a concurrent, I could have given it consecutive, I didn't. * * * The fact that the feds let him out is really - - has nothing to do with my case at all, and enforcement will take place today.

{¶17} 7. According to the petition, the common pleas court lacked jurisdiction to order the further incarceration of petitioner following release from his federal sentence in April 2010.

{¶18} 8. On August 19, 2010, petitioner, through counsel, filed the instant petition for a writ of habeas corpus.

{¶19} 9. On August 23, 2010, the magistrate held a conference with counsel for petitioner and counsel for respondent. In his order filed August 24, 2010, the magistrate noted that it was agreed by the parties that respondent shall file a motion to dismiss supported by a memorandum of law to be filed no later than August 27, 2010. Petitioner was ordered to file his brief in opposition no later than September 3, 2010.

{¶20} 10. Pursuant to the magistrate's order, on August 27, 2010, respondent filed a motion to dismiss supported by a memorandum.

{¶21} 11. On September 3, 2010, petitioner filed his memorandum in opposition to the motion.

Conclusions of Law:

{¶22} It is the magistrate's decision that this court grant respondent's motion to dismiss.

{¶23} In *State ex rel. Sneed v. Anderson*, 114 Ohio St.3d 11, 2007-Ohio-2454, ¶5, the court quotes from its decision in *Pegan v. Crawmer*, 73 Ohio St.3d 607, 609, 1995-Ohio-175:

> * * * " 'R.C. Chapter 2725 prescribes a basic, summary procedure for bringing a habeas corpus action.' " *Waites v. Gansheimer*, 110 Ohio St.3d 250, 2006-Ohio-4358, 852 N.E.2d 1204, ¶ 8, quoting *Chari v. Vore* (2001), 91 Ohio St.3d 323, 327, 744 N.E.2d 763. "First, application is by petition that contains certain information. R.C. 2725.04. Then, if the court decides that the petition states a facially valid claim, it must allow the writ. R.C. 2725.06. Conversely, if the petition states a claim for which habeas corpus relief cannot be granted, the court should not allow the writ and should dismiss the petition." * * *

{¶24} The magistrate finds, based upon the analysis presented below, that the petition fails to state a facially valid claim and, thus, this court should not allow the writ and should dismiss the petition.

{¶25} At issue here is the meaning of the word "concurrently" as that term was used by the common pleas court in sentencing petitioner to three years of incarceration on the state charge "to run concurrently" with the federal sentence.

{¶26} R.C. 2929.41 authorizes the imposition of sentences to be served "concurrently" with other terms of incarceration, but the word "concurrently" is not defined by the statute.

{¶27} In *State v. Prince* (Dec. 13, 1999), 12th Dist. No. CA99-04-078, while serving time on two misdemeanor sentences in the county jail, appellant, Marshall Prince, was convicted of an unrelated felony and was sentenced by a common pleas court to serve a term of imprisonment to run concurrently with the misdemeanor sentences. Prince was then transferred from the county jail to a state institution to serve his felony sentence.

{¶28} Following his November 11, 1998 release from prison on his felony sentence, Prince was arrested March 3, 1999 on a municipal court bench warrant. On April 1, 1999, the court ordered Prince to serve the remaining portion of his misdemeanor sentences.

{¶29} In *Prince*, the appellant argued that, under R.C. 2929.41, the misdemeanor sentences were "absorbed" into his subsequent felony sentence and, thus, after completion of his felony sentence, his misdemeanor time must be deemed as automatically completed as well.

{¶30} Rejecting appellant's argument for immediate release, the Twelfth District Court of Appeals explained:

> * * * We see no reason to define the term "concurrently" in R.C. 2929.41 to mean that appellant's misdemeanor sentences were "absorbed" into his felony sentence. Rather, we find that "concurrently" should be given its plain meaning. Black's Law Dictionary defines concurrent sentences as "[t]wo or more terms of imprisonment, all or part of each term of which is served simultaneously and the prisoner is entitled to discharge at the expiration of the longest term specified." Black's Law Dictionary (6 Ed.Rev.1990) 291. Further, the term "concurrent" is simply defined as "running together." *Id* .

Id. at 2.

{¶31} Citing *Prince*, petitioner argues that, because his federal sentence was, at least originally, for a longer incarceration term than his state sentence, his state sentence necessarily expired when he was released from federal prison. The magistrate disagrees.

{¶32} It is perhaps worthy to note that, in his petition, *State v. Bojar* (Jan. 21, 1999), 8th Dist. No. 74919 is cited, but the petition states that *Bojar* is distinguishable from petitioner's case.

{¶33} In *Bojar*, pursuant to a state plea agreement, appellant, James J. Bojar, was convicted and sentenced in common pleas court to an indefinite three to fifteen years of imprisonment on a second degree felony for drug trafficking. The agreement also included a plea of guilty to one count of criminal tool possession for which a one-year term of imprisonment was imposed. The trial court indicated that the sentences on both counts were to run concurrently with each other and with a five-year federal sentence for a firearms violation.

{¶34} Bojar was transferred to federal custody following his sentencing in state court. He served a period of 38 months and 17 days in federal prison. Prior to his release from federal prison, Bojar moved to withdraw his state court guilty pleas on grounds that his counsel had advised him at the time of sentencing that his state sentence would be satisfied by the time he served in federal prison. The trial court denied Bojar's motion and Bojar appealed.

{¶35} Affirming the trial court's decision, the Eighth District Court of Appeals explained:

> The sentencing journal entry dated July 30, 1987 demonstrates that the defendant was sentenced to an indefinite three to fifteen year term at the Chillicothe Correctional Facility. Additionally, the trial court ordered the sentence to run concurrently with the federal sentence, a five-year term of imprisonment, under the supervision of federal authorities. To the extent that the state sentence could run concurrently with the federal sentence, it obviously did. Once defendant served his federal sentence, the original indefinite state sentence continued. Accordingly, there was no breach of the plea agreement by the State.
>
> * * * Obviously, the original trial court judge believed that his sentencing order meant that defendant would serve his federal time first and his state sentence would run concurrently and continue after his federal incarceration concluded. * * *

Id. at 3.

{¶36} According to petitioner, *Bojar* is distinguishable from petitioner's case because the state's indefinite sentence of three to fifteen years was a longer sentence than the federal five-year term. Petitioner points out that, in the instant case, the federal sentence had more than three years remaining on the date of his state court sentencing.

The magistrate disagrees with petitioner's suggestion that *Bojar*, in any way, supports his petition for a writ of habeas corpus.

{¶37} In his memorandum in support of his motion to dismiss, respondent cites *State v. Bellamy*, 181 Ohio App.3d 210, 2009-Ohio-888. *Bellamy* supports the granting of respondent's motion to dismiss and will thus be reviewed below.

{¶38} In *Bellamy*, appellant, James Bellamy, pleaded guilty to one count of forgery and one count of misuse of a credit card. The pleas were offered in July 2006 to the Champaign County Court of Common Pleas ("Champaign County Court"). The Champaign County Court sentenced Bellamy to three-years imprisonment on each count, to be served concurrently with each other and concurrently with a one-year sentence Bellamy had received in Clark County. According to Bellamy, he had served seven months of his Clark County sentence when he was sentenced in Champaign County.

{¶39} In January 2008, Bellamy filed a motion for resentencing with the Champaign County Court. Bellamy protested that the department of corrections would not give him credit for the seven months he had served on his Clark County case before he was sentenced in Champaign County. Bellamy asked the trial court to resentence him, giving him credit for those seven months. The trial court overruled Bellamy's motion, and Bellamy appealed.

{¶40} In affirming the trial court's decision and denying Bellamy's assignment of error, the Second District Court of Appeals explained:

> * * * [T]he trial court properly determined that Bellamy's Champaign County sentence did not implicitly include credit for the time Bellamy had previously served on his Clark County sentence. "[T]he imposition of a concurrent sentence normally means that the sentence being imposed is to run

> concurrently with the *undischarged* portion of the previously imposed sentence." (Emphasis sic.) *Bianco v. Minor* (June 6, 2003), M.D.Pa. No. Civ.A. 303CV0913, 2003 WL 21715347. See also *Richards v. Eberlin*, Belmont App. No. 04-BE-1, 2004-Ohio-2636, 2004 WL 1152863, ¶ 20-22 (stating that concurrent sentences mean that "a person need not finish serving the first sentence before the time for the second sentence can be served, as is the case with consecutive sentences"). As the Eleventh Circuit explained regarding federal criminal sentencing:
>
> "Whatever else the word [concurrent] means with regard to the second sentence, however, it does not mean that the two sentences 'hav[e] the same starting date because a federal sentence cannot commence prior to the date it is pronounced, even if made concurrent with a sentence already being served.' " *Coloma v. Holder* (C.A.11, 2006), 445 F.3d 1282, 1284, quoting *United States v. Flores* (C.A.5, 1980), 616 F.2d 840, 841.
>
> Using the common understanding of the term "concurrent," the trial court's sentence indicates that the two concurrent three-year terms in Champaign County were to run concurrently with the portion of Bellamy's sentence that remained to be served in Clark County.
>
> In reaching our conclusion, we make no findings as to whether the trial court had authority under Ohio law to order retroactive concurrent sentences. Even assuming that such authority exists, however, we would not presume that the court had imposed retroactive concurrent sentences in the absence of clear and unambiguous statements from the trial court expressing its intent that the start dates of the newly-imposed concurrent sentences were to relate back to the start date of the previously imposed sentence. Neither Bellamy's sentencing entry nor the transcript excerpt contains any such statements.

Id. ¶12-15.

{¶41} In *Brinklow v. Riveland*, 773 P.2d 517 (Colo. Jan. 17, 1989) (NO. 87SA245), a case cited by respondent, the Supreme Court of Colorado aptly pronounced:

> * * * A concurrent sentence is one which runs simultaneously, in whole or in part, with another sentence. It is distinct from a consecutive sentence which begins to run only after the completion of a prior sentence. The fact that sentences run concurrently merely means that the prisoner is given the privilege of serving each day a portion of each sentence. However, if the sentences which are to run concurrently are of different lengths, the prisoner cannot be discharged until he has served the longest sentence. * * *

Id. at 520.

{¶42} Applying the above discussed authorities to the facts alleged in the petition, it is clear that the petition fails to state a facially valid claim for a writ of habeas corpus.

{¶43} On the November 28, 2007 sentencing date when the common pleas court sentenced petitioner to a three-year prison term to run concurrently with the federal sentence, petitioner allegedly anticipated that the federal sentence would be the longer one because he was allegedly scheduled for federal release on September 10, 2011, i.e., more than three years after the November 28, 2007 state sentencing date. According to the petition, the federal sentence was later reduced and release occurred in April 2010, i.e., less than three years after the November 28, 2007 state sentencing date.

{¶44} Had petitioner served federal time until the originally scheduled release date, his state sentence would have presumably expired and there would be no basis for further incarceration in state prison.

{¶45} That the federal sentence was reduced subsequent to the November 28, 2007 state court sentencing such that federal release occurred less than three years after the state sentencing does not provide a basis for reduction of the state court sentence that corresponds to the federal release date.

{¶46} Here, there is no allegation that petitioner's state sentence is not being credited for the federal time he actually served following the state sentencing. And it is clear from the case law that petitioner cannot claim credit against his state sentence for any of the federal time served prior to the state sentencing when the state sentence was ordered to run concurrently with the federal sentence.

{¶47} Thus, based upon the above analysis, the petition clearly fails to state a facially valid claim for a writ of habeas corpus.

{¶48} Accordingly, it is the magistrate's decision that this court grant respondent's motion to dismiss.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).