

NO. 12-10-00219-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:

§

YAKOV ELMAKISS,

§

ORIGINAL PROCEEDING

RELATOR

§

MEMORANDUM OPINION

This is an original habeas proceeding in which Relator Yakov Elmakiss complains of certain actions taken by the trial court during a divorce proceeding. Specifically, Relator asserts in his habeas petition that (1) the trial court wrongfully withheld his passport from him after ordering that it be returned and that (2) Relator's confinement on two occasions after being found in contempt was the result of void actions by the trial court. We dismiss the petition.

BACKGROUND

The underlying proceeding is a divorce action between Relator and Ruth Marie Elmakiss.¹ Initially, the trial court ordered both parties to deliver their passports to the court. The parties complied, and the trial court later ordered that the passports be returned to the parties. Relator's passport was not returned to him because, according to email communications that are part of the mandamus record, he declined to pick up the passport in person as required by the court.

During the course of the divorce proceedings, Relator was held in contempt twice. The first contempt finding arose from Relator's failure to answer a question propounded by Ruth's counsel at a review hearing. In response to counsel's questions, Relator testified that he lived in a camping trailer on the property of a friend near Henderson, Texas. But he declined to answer when he was asked for the property owner's telephone number. The trial court warned Relator of the

¹ The Honorable Randall L. Rogers, Judge of the County Court at Law No. 2, Smith County, Texas, presided over the divorce action. The parties are now divorced.

consequences for failing to answer the question and instructed him to answer. Relator again refused. The trial court found Relator in contempt, ordered him confined in the county jail for sixty days, and announced that the hearing would resume “after 60 days.”

The hearing resumed sixty-seven days after it was continued, but Relator did not appear. The trial court asked the bailiff to call Relator’s name on the front steps of the courthouse. He stated further that Relator was given actual notice of the hearing when, “[a]s they hauled him off to jail, we told him here in open court what day we were going to come back.” The bailiff did not locate Relator outside the courthouse, and the trial court found him in contempt a second time. A *capias* was issued, and Relator was arrested and jailed. He was released after posting a five thousand dollar appearance bond. Although Relator was notified of the date a contempt hearing would be conducted, that hearing did not occur. The divorce action was transferred to another trial court, and no further action was taken pertaining to the second contempt finding.

FAILURE TO RETURN PASSPORT

Relator first argues that the trial court’s retention of his passport is an unconstitutional restriction on his freedom of movement and violates the court’s own order. He requests that a writ of habeas corpus issue directing the trial court to return his passport to him. However, we lack jurisdiction to address the merits of this complaint.

The jurisdiction of appellate courts to issue writs of habeas corpus is limited. By statute, an appellate court’s original jurisdiction to issue a writ of habeas corpus is limited to those cases in which a person’s liberty is restrained because the person has violated an order, judgment, or decree entered in a civil case. *See* TEX. GOV’T CODE ANN. § 22.221(d) (West 2004). Here, the record does not reflect that the trial court ordered Relator to surrender his passport because he had violated an order, judgment, or decree entered in the divorce proceeding. Accordingly, we are without jurisdiction to address the merits of this complaint. *See id.*

CONTEMPT

Relator next asserts that the first contempt order is void because the trial court failed to follow the relevant notice requirements of the family code. He also argues that the *capias* and order of commitment pertaining to the second contempt are void because they were racially motivated and because he was never given notice of the specific date the review hearing was to resume.

The function of a writ of habeas corpus is to secure release from an unlawful custody. *In re Ragland*, 973 S.W.2d 769, 771 (Tex. App.–Tyler 1998, orig. proceeding). Habeas corpus is available to review a contempt order entered by a lower court confining a contemnor. *Ex parte Gordon*, 584 S.W.2d 686, 687–88 (Tex.1979) (orig. proceeding). Its purpose is not to determine the ultimate guilt or innocence of the relator, but only to ascertain whether the relator has been unlawfully confined. *Id.* at 688.

To be entitled to habeas corpus relief, a relator must establish that he was either “confined” or “restrained” unlawfully at the time the habeas petition was filed. *See State v. Collazo*, 264 S.W.3d 121, 126 (Tex. App.–Houston [1st Dist.] 2007, pet. ref’d). The terms “confinement” and “restraint” encompass incarceration, release on bail or bond, or any other restraint on personal liberty. *Id.* Where the premise of a habeas corpus petition is destroyed by subsequent developments, the legal issues raised in the petition are rendered moot. *Saucedo v. State*, 795 S.W.2d 8, 9 (Tex. App.–Houston [14th Dist.] 1990, no writ) (citing *Ex parte Branch*, 553 S.W.2d 380 (Tex. Crim. App. 1977)). Thus, when a relator is released from confinement after filing his habeas petition, the petition is rendered moot. *See In re Okumu*, No. 02-09-00147-CV, 2009 WL 1905178, at *1 (Tex. App.–Fort Worth June 30, 2009, orig. proceeding) (mem. op., not designated for publication).

In the first instance of contempt, Relator was sentenced to sixty days in jail. He does not assert in his habeas petition that he is still confined or restrained, and it appears from the record that his confinement had ended at the time the petition was filed. Therefore, he has not invoked this court’s jurisdiction in connection with the trial court’s first contempt finding. *See Collazo*, 264 S.W.3d at 126; *Dahesh v. State*, 51 S.W.3d 300, 303 (Tex. App.–Houston [14th Dist.] 2000, pet. ref’d) (dismissing for want of jurisdiction because appellant was not confined or restrained in his liberty at time he filed habeas application).

As to the second instance of contempt, a capias was issued and Relator was jailed until he posted a five thousand dollar bond to ensure his appearance at the scheduled contempt hearing. A person is considered restrained or in custody when he has been required to post an appearance bond. *See Ex parte Armes*, 582 S.W.2d 434, 437 (Tex. Crim. App. 1979). Therefore, Relator showed the requisite confinement to invoke this court’s jurisdiction. *See id.*

A violation of a court order outside the presence of the court, including the failure to appear for a hearing, is constructive contempt. *Ex parte Alloju*, 907 S.W.2d 486, 487 (Tex. 1995) (orig. proceeding); *Ex parte Cooper*, 657 S.W.2d 435, 437 (Tex. Crim. App. 1983) (orig. proceeding).

Due process of law requires that the constructive contemnor be given “full and complete notification” and a reasonable opportunity to meet the charges by way of defense or explanation. *Ex parte Gordon*, 584 S.W.2d at 688. Consequently, the court must issue a valid show cause order or equivalent legal process apprising the contemnor of the accusation. *Id.* We cannot determine from the mandamus record that this occurred here. Moreover, although the trial court scheduled a contempt hearing for a date after Relator’s release from jail, that hearing was never conducted, and no further action has been taken on the contempt. And finally, the bonding company has provided information confirming that, due to the trial court’s inaction, the bond is no longer in effect. Because the bond is no longer in effect, Relator is no longer “confined.” Therefore, his complaints relating to the second contempt finding are moot. *See In re Okumu*, 2009 WL 1905178, at *1.

CONCLUSION

For the reasons set forth above, we have held that this court lacks jurisdiction to consider the merits of Relator’s complaints pertaining to the trial court’s failure to return his passport and the court’s first contempt finding. We have also concluded that Relator’s complaints pertaining to the second contempt finding are moot. Accordingly, we *dismiss* Relator’s petition for writ of habeas corpus.

BRIAN HOYLE
Justice

Opinion delivered June 20, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)



COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

JUNE 20, 2012

NO. 12-10-00219-CV

YAKOV ELMAKISS,
Relator
v.
HON. RANDALL L. ROGERS,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the original habeas proceeding filed by **YAKOV ELMAKISS**, who is the relator in Cause No. 05-1172-F, pending on the docket of the County Court at Law #2 of Smith County, Texas. Said petition for writ of habeas corpus having been filed herein on July 12, 2010, and the same having been duly considered, because it is the opinion of this Court that this court lacks jurisdiction to consider the merits of Relator's complaints pertaining to the trial court's failure to return his passport and the trial court's first contempt finding, the said petition for writ of habeas corpus should not issue, it is therefore **CONSIDERED, ADJUDGED and ORDERED** that the said petition for writ of habeas corpus be, and the same is, hereby **DISMISSED FOR WANT OF JURISDICTION**. Further, it being the opinion of this court that the trial court's second contempt finding has been rendered moot by further proceedings in the court below, we **dismiss** that portion of the petition for writ of habeas corpus as **moot**.

Brian Hoyle, Justice.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.