Towne v. Hofmann, No. 211-4-07 Wmcv (Howard, J., Feb. 20, 2008)

STATE OF VERMONT
WINDHAM COUNTY, SS.

EDWIN A. TOWNE, JR.,
Plaintiff,

v. **WINDHAM SUPERIOR COURT**
DOCKET NO. 211-4-07 Wmcv

ROBERT HOFMANN,
COMMISSIONER of VERMONT
DEPARTMENT OF CORRECTIONS,
Defendant.

ORDER ON MOTION TO DISMISS

Edwin Towne filed this Rule 75 action for review of a decision by Commissioner Hofmann denying Towne's claim that he has not been provided adequate access to Vermont courts while he is a federal inmate on account of his inadequate access to the Vermont statutes. Originally, Mr. Towne sought damages and improved library access or a return to Vermont to permit him to file new post conviction relief petitions. He has since withdrawn his request for monetary relief. Defendant moves to dismiss for various reasons including Plaintiff's lack of standing alleging he is not under Vermont custody[1], the late filing of his Rule 75 complaint, the lack of an actual injury, and that Defendant does not have the authority to transfer him to a Vermont facility.

[1] The State's motion asserts petitioner's Vermont sentence is consecutive to his Federal one and that he is not serving it yet, attaching a mittimus reflecting this. Petitioner in his reply asserts his sentence was amended to be concurrent and that he requested the record of such to be sent to the court. The court has not received anything, but based on the analysis, it finds a similar result regardless of this contradiction.

According to the complaint, Plaintiff's original grievance with DOC was denied on January 8, 2007. Mr. Towne made a timely appeal to Commissioner Hofmann, who denied it on February 7, 2007. In his letter, Commissioner Hofmann explained that Vermont was providing Mr. Towne access to legal materials via DOC Chief of Legal Education, Carol Callea.[2] Mr. Towne filed the instant complaint in superior court more than two months later on April 16, 2007.

It is well established that prison inmates have a constitutional right of "adequate, effective and meaningful" access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821-22(1977). Recognizing that more than pen and paper are necessary to afford this right, the United States Supreme Court determined that prisoners must be provided with assistance "in the preparation and filing of meaningful legal papers" in the form of "adequate law libraries or adequate assistance from persons trained in the law." *Id*. at 828 (reaffirming *Younger v. Gilmore*, 404 U.S. 15(1971)). Nevertheless, there is no "abstract, freestanding right to a law library or legal assistance, [and] an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." *Lewis v. Casey*, 518 U.S. 343, 351(1996). To satisfy the actual injury element of the standing doctrine, inmates must be pursuing direct appeals from the conviction for which they are incarcerated, a habeas corpus petition, or a section 1983 claim to vindicate basic constitutional rights. *Id*. at 354. Moreover, the prisoner must show that a non-frivolous legal claim was frustrated or impeded by the failure of access. *Id*. at 352-53.

[2] Documents which Mr. Towne has attached to various pleadings suggest that he is in regular correspondence with Ms. Callea.

First contending that Mr. Towne lacks standing to assert his right of access in a suit against a Vermont official, the Defendant argues that the burden of providing Mr. Towne's constitutionally protected access belongs solely to federal officials due to his Vermont sentence being consecutive. Thus Defendant essentially contends that he is an improper party.

In a case decided shortly after *Bounds*, the United States District Court recognized Vermont's obligation to provide access to Vermont prisoners transferred to federal prisons. *Hohman v. Hogan*, 458 F. Supp. 669(D.Vt. 1978)(holding specialized library program as well public defender program each independently meets out-of-state prisoners' needs to access state law); see also *Colbeth v. Civiletti*, 516 F. Supp.73, 80 (S.D. Ind.1980)(transfer of Vermont inmate to federal system does not automatically violate prisoner's right of access to the courts). In *Rich v. Zitnay*, 644 F. 2d 41(1st Cir. 1981), the First Circuit reached a similar result in a suit by Maine prisoners who were transferred to a federal prison. Rejecting the defendants' claim that the prisoners should have sued federal officials, the court reasoned as follows:

> Here it is the Maine state courts to which appellants seek meaningful access. A federal court, in fashioning relief to insure such access, might necessarily have to call on Maine rather than Leavenworth authorities to supply professionals trained in Maine criminal law. Or the most ready sources of pertinent legal research materials may be found only in Maine. In view of the likelihood that Maine officials will necessarily have to play a role in the remedy and because of the fundamental nature of the right involved, we think that Maine authorities may not wash their hands of their obligation to insure access to Maine courts simply by transferring a prisoner out of state.

Id. at 42-43(also noting that prison authorities in place where defendant is currently incarcerated share responsibility for insuring prisoners' access to courts).[3]

Other courts have reached the same conclusion imposing an obligation on sending states to assure prisoners' access to the courts. See *Clayton v. Tansy*, 26 F. 3d 980, 981(10th Cir. 1993)(under interstate compact, sending state is obliged to satisfy transferred inmates' meaningful access to home courts); *Boyd v. Wood*, 52 F. 3d 820, 821(9th Cir. 1995)(same); *Johnson v. Delawar*e, 442 A. 2d 1362, 1367(Del. 1982)(state must provide Delaware inmates housed out-of-state with reasonable access to Delaware legal reference materials or provide reasonable alternative); *Demps v. State*, 696 So.2d 1296 (Fla.App. 1997) (failure of Florida to provide access to legal resources for prisoner held in Indiana tolled time limitation on post-conviction relief); but see *Goodnow v. Perrin*, 421 A. 2d 1008, 1011(N.H. 1980)(suggesting that federal officials may be better situated to providing meaningful access for transferred state prisoner since they controlled the conditions of incarceration but finding New Hampshire had met any obligation it had by appointment of counsel to represent plaintiff). So clearly if Mr. Towne is serving his sentences concurrently, the defendant is a proper party.

As noted, though, the State would distinguish Mr. Towne's circumstances from these cases arguing he is currently incarcerated in a federal penitentiary under only a federal sentence. So far as this Court is aware, there is no applicable binding precedent which considers Vermont's obligation in such circumstances. Other states have dealt with the issue of post-conviction relief and consecutive and concurrent sentences involving different issues, such as the jurisdiction of a court to hear the case. In *Adams v. State*, 677

[3] See also 28 C.F.R. §543.10, setting out Bureau of Prisons obligation to provide inmates with reasonable legal access.

S.W.2d 408, 411 (Mo.App. 1984), the court found jurisdiction even though the state sentence was consecutive to a federal one and not being served yet. But see *State v. Whitmore*, 452 N.W.2d 31 (Neb. 1990) (prisoner serving federal sentence with consecutive state sentence could not file for post-conviction relief).

In the post-conviction setting, the Vermont Supreme Court has also rejected the idea that custody is only a literal status. *In re Stewart*, 140 Vt. 351, 357(1981).[4] Petitioner Stewart was not incarcerated in a Vermont prison but was serving a Colorado sentence that had been enhanced on account of prior Vermont sentences he had already completed serving. Reversing the trial court's dismissal of Stewart's post-conviction petition, the Court determined "that a person is 'in custody' … if he suffers a significant restraint on personal liberty as a direct result of the challenged Vermont conviction." *Id.* at 359-60(citation omitted). Various factors represent "useful indicia" of custody: the petitioner's conduct is under the supervision or direction of judicial officers to some degree; or the petitioner may face the possibility of imminent incarceration without formal trial and conviction, creating a restraint on liberty sufficient to constitute custody. *In re Liberty*, 154 Vt. 643, 644(1990)(mem.) citing *Fleming v. Abrams*, 522 F.Supp. 1203, 1205 (S.D.N.Y.1981), aff'd, 697 F.2d 290 (2d Cir.1982).

Applying this standard to defendant's claim, Mr. Towne is clearly in Vermont's custody for purposes of PCR. Moreover, whether because the same analysis is applied or because as a corollary, his right to access the courts is measured along side the statutory remedy to which he is generally entitled, the Court concludes that Vermont officials do bear a burden of satisfying Mr. Towne's constitutional right of access to the Vermont

[4] Pursuant to 13 V.S.A. § 7131, post conviction relief available only to prisoners "in custody under sentence of a court."

court even if his sentences are consecutive with the Vermont one to follow the federal one. Accordingly, the Court rejects Defendant's argument that he is the wrong party even under that circumstance.

Defendant also argues that Mr. Towne has no actual injury. For his part, Mr. Towne asserts that actual injury is proven by the multiple instances in which his prior appeals to the Vermont courts have been dismissed on account of his failure to follow proper procedure. He continues to seek the opportunity to prove his actual innocence in the murder of Paulette Crickmore. See *State v. Towne*, 158 Vt. 607 (1992) (affirming first degree murder conviction). A recent Vermont Supreme Court entry order reveals that since his direct appeal, Mr. Towne has filed more than eight PCR petitions. *In re Towne*, 2007 VT 80, ¶ 6, 18 Vt. L. W. 310.[5] In response to what it characterized as his ninth petition, the Court held his efforts to re-litigate did not present any new grounds and was barred under standards announced in *In re Laws*, 2007 VT 54, ¶¶11, 20-22, 18 Vt. L. W. 184, which holds that "second and subsequent PCRs may be denied without a hearing if they constitute an 'abuse of the writ.'" 2007 VT 80, ¶¶ 5-6. To the extent that the PCR had raised a claim of actual innocence, the Court also concluded that Mr. Towne had failed to meet his burden of proof with a colorable claim merely by alleging, as he has many times before, his trial counsel's failure to call certain alibi witnesses. 2007 VT 80, ¶ 8. In light of Mr. Towne's long and fruitless history of appellate and post-conviction proceedings and in light of the Supreme Court's most recent conclusion that his last effort constituted an "abuse of the writ," this Court concludes that Mr. Towne's proposed

[5] The public record establishes that Mr. Towne was represented by counsel at his trial and on direct appeal but not in the petition which is the subject of 2007 VT 80. From another entry order in Towne's eighth PCR, In *re Towne*, No. 2004-521, slip. Op. (Vt. October 10, 2005), it also appears that he was represented by counsel in some of his post-conviction proceedings. *Id*. (noting that counsel had been permitted to withdraw before new counsel assigned).

petition as the court understands it would represent a frivolous if not abusive repetition of prior failed efforts. No matter how phrased, Mr. Towne essentially continues to raise repeated arguments as to his guilt and the fairness of his trial, all of which have been repeatedly denied. Accordingly, Mr. Towne cannot establish the injury element of standing necessary to advance this claim.

Finally, the Court also finds the action subject to dismissal on account of timeliness. Under Rule 75, where no time limit is separately provided by statute, review is available only if a complaint is filed within 30 days from notice of the governmental action or refusal to act complained of. V.R.C.P. 75(c).[6] In this matter no separate time limit is established and Mr. Towne did not file his Rule 75 complaint within 30 days from the notice of the Commissioner's refusal to act on his behalf. Although Mr. Towne alleges that he had to make repeated requests for information about filing a Rule 75 motion, he also acknowledges that his requests for legal resources were answered on March 27, 2007. Nevertheless, he still did not file at the first possible opportunity thereafter, but waited another two weeks before signing and dating his Rule 75 claim on April 12, 2007. Accordingly, even if some limited additional time were warranted to account for the delay of legal resources or for any delay after Mr. Towne delivered his complaint to prison officials, Mr. Towne's admitted failure to file as quickly as possible once they were received, leads the Court to conclude that his claim was not timely under any measure.[7]

---

[6] While V.R.C.P. 75(c) permits extension of the time for filing in accordance with V.R.C.P. 6(b), no request for extension was made prior to expiration of the time period and there has been no showing of excusable neglect to justify an extension after the period.

[7] Without deciding that Vermont might adopt a similar standard, the Court notes *Houston v. Lack*, 487 U.S. 266(1988), which considered a pro se prisoner's notice of appeal timely because it was delivered to prison authorities within the 30 days required by F.R.A.P. 4.

Because the Court has concluded that Mr. Towne cannot prove an actual injury and that his petition was filed beyond the period permitted by Rule 75, the Court need not evaluate whether or not Defendant has already met his obligation to provide adequate access for Mr. Towne to Vermont courts nor whether, if he has not, any of the proposed remedies are within Defendant's power to grant. Defendant's motion to dismiss is **GRANTED**.

Dated at Newfane, VT, this _____ day of February, 2008.

_____
David Howard
Presiding Judge