

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

March 5, 2018

Elisabeth A. Shumaker
Clerk of Court

FRANK COSTELON,

Petitioner - Appellant,

v.

STATE OF NEW MEXICO,

Respondent - Appellee.

No. 17-2208

(D.C. No. 2:16-CV-01327-JCH-SCY)

(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE, HOLMES, and MATHESON**, Circuit Judges.

Frank Costelon is a federal prisoner. The district court dismissed his pro se 28 U.S.C. § 2254 application for lack of jurisdiction and, alternatively, as time-barred under the one-year statute of limitation in 28 U.S.C. § 2244(d)(1)(A). He now seeks a certificate of appealability (“COA”) from this court to challenge the district court’s dismissal. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal “the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .”). He also requests leave to proceed *in forma pauperis*

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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("*ifp*"). Exercising jurisdiction under 28 U.S.C. § 1291, we deny both requests and dismiss this matter.¹

On July 16, 2003, Mr. Costelon pled guilty in New Mexico state court to possession with intent to distribute marijuana, and judgment was entered on July 28. He was sentenced to three years in prison followed by two years of parole. Mr. Costelon is no longer incarcerated or on parole for this state conviction. He is, however, currently imprisoned at the United States Penitentiary in Leavenworth, Kansas, based on a 2011 federal conviction and sentence.

Mr. Costelon's § 2254 application challenged his state conviction on various grounds. The district court did not address the merits and dismissed because Mr. Costelon failed to meet the jurisdictional prerequisite of being in state custody. The court also held the application was untimely. It denied a COA.

To receive a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). But when a federal district court denies a § 2254 application on procedural grounds—as happened here—the COA standard requires an applicant to show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added). Because we may "dispose of the application in a fair and prompt

¹ Because Mr. Costelon is pro se, we liberally construe his filings but do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

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manner" by resolving whichever issue presents the "more apparent" answer, *id.* at 485, we begin and end our discussion with the district court's procedural ruling.

An application under § 2254 must be brought "in behalf of a person in custody pursuant to the judgment of a State court . . ." 28 U.S.C. § 2254. Accordingly, "[t]he first showing a § 2254 petitioner must make is that he is in custody pursuant to the judgment of a State court." *McCormick v. Kline*, 572 F.3d 841, 847 (10th Cir. 2009) (quotation omitted). Mr. Costelon could not do so here because when he filed his § 2254 application, he had long since completed his state-imposed sentence and was no longer incarcerated or on parole for his state court conviction.

The Supreme Court "ha[s] never held . . . that a habeas petitioner may be 'in custody' under a conviction when the sentence imposed for that conviction has *fully expired* at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488, 491 (1989). Because "Section 2254's in-custody requirement is jurisdictional," *McCormick*. 582 F.3d at 848 (citing *Fleming v. Evans*, 481 F.3d 1249, 1252 n.1 (10th Cir.2007)), the district court properly dismissed his application.

In his brief to this court, Mr. Costelon states that he completed his state sentence and that his federal sentence was enhanced based on his state conviction. Aplt. Br. at 5. His contention that the district court's jurisdictional dismissal was wrong under *Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394 (2001), is misplaced. In *Lackawanna*, the Supreme Court considered "whether federal postconviction relief is available when a prisoner challenges *a current sentence* on the ground that it was

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enhanced based on an allegedly unconstitutional prior conviction for which the prisoner is no longer in custody." *Id.* at 396 (emphasis added).

But Mr. Costelon is not challenging his current federal sentence; he is challenging his prior state conviction, for which he has completely served his sentence. He argues the district court "was able to construe" his § 2254 application "as a challenge to his 2011 Federal sentence as enhanced by the 2003 [state] conviction," and therefore erred in its dismissal. Aplt. Br. at 16. But that is not so. The district court could not and did not construe his § 2254 application as a challenge to his federal sentence. Such a challenge would need to have been brought under 28 U.S.C. § 2255 (providing for a motion to "vacate, set aside or correct the [federal] sentence"), not § 2254.

Reasonable jurists would not debate the district court's jurisdictional ruling, so we deny Mr. Costelon's request for a COA and dismiss this matter. We also deny Mr. Costelon's request to proceed *ifp*.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

APPENDIX "B"

FRANK COSTELON, Petitioner, vs. STATE OF NEW MEXICO, Respondent.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
2017 U.S. Dist. LEXIS 182637
No. CV 16-01327 JCH/SCY
November 3, 2017, Filed

Editorial Information: Prior History

State v. Costelon, 2013 N.M. App. Unpub. LEXIS 344 (N.M. Ct. App., Nov. 25, 2013)

Counsel Frank Costelon, Petitioner, Pro se, Leavenworth, KS.

Judges: Steven C. Yarbrough, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: Steven C. Yarbrough

Opinion

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court under Rule 4 of the Rules Governing Section 2254 Proceedings on the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody filed by Frank Costelon on December 5, 2016 ("Petition") (Doc. 1). The Court will dismiss the Petition for lack of jurisdiction because Petitioner Costelon is not in state custody pursuant to a judgment of a state court and on the grounds that the Petition is barred by the statute of limitations of 28 U.S.C. § 2244(d)(1).

Costelon is currently incarcerated at the United States Penitentiary, Leavenworth, Kansas, on a federal conviction and sentence entered against him in the United States District Court for the Western District of Texas. See *United States of America v. Frank Emmanuel Costelon*, No. CR 11-01895. In this proceeding, he does not seek to challenge his federal conviction or sentence. Instead, he seeks to collaterally attack a 2003 conviction by the New Mexico state courts. (Doc. 1 at 1).

On February 13, 2003, Costelon was indicted by a New Mexico Grand Jury on charges of distribution of marijuana. Costelon was convicted pursuant to a guilty plea and Judgment was entered on July 28, 2003. Costelon was sentenced to three years of imprisonment, followed by two years of parole. See *State of New Mexico v. Frank Emmanuel Costelon*, State of New Mexico, County of Dona Ana, Third Judicial District case no. D-307-CR-2003-00126. The Court takes judicial notice of the records in case no. D-307-CR-2003-00126. *United States v. Ahidley*, 486 F.3d 1184, 1192 n. 5 (10th Cir.2007) (The Court may take judicial notice of publicly filed records in this court and other courts concerning matters that bear directly upon the disposition of the case at hand); *Shoulders v. Dinwiddie*, 2006 U.S. Dist. LEXIS 102160, 2006 WL 2792671 (W.D.Okla.2006) (court may take judicial notice of state court records available on the world wide web including docket sheets in district courts).

Almost ten years after entry of the judgment in case no. D-307-CR-2003-00126, Costelon filed a Petition for Writ of *Coram Nobis* to Set Aside Judgment of Conviction Pursuant to Rule 1-060(B)

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N.M.R.A. The Petition was summarily dismissed by the State District Judge on February 18, 2013 based on waiver of collateral review by Costelon's entry of a guilty plea. On February 7, 2014, the New Mexico Court of Appeals reversed the summary dismissal and remanded the matter to the District Court for consideration of the *Coram Nobis* Petition on the merits. See D-307-CR-2003-00126. The District Court then substantively reviewed and dismissed the Petition on its merits. Costelon appealed the ruling to the New Mexico Court of Appeals, which affirmed the District Court's dismissal on September 29, 2015. (Doc. 2-2 at 2-7). Costelon filed a request for rehearing, which the Court of Appeals granted before issuing a substituted decision of affirmance on November 4, 2015. See D-307-CR-2003-00126. The New Mexico Supreme Court denied Costelon's Petition for Writ of Certiorari on January 6, 2016. (Doc. 2-3 at 2-3). Costelon then filed his § 2254 Petition in this Court on December 5, 2016. (Doc. 1).

I. Costelon is Not In Custody Pursuant to a State Judgment: Section 2254(a) requires a petitioner to be "in custody pursuant to the judgment of a State court ... in violation of the Constitution or laws or treaties of the United States." The in-custody requirement of § 2254(a) is jurisdictional. *Mays v. Dinwiddie*, 580 F.3d 1136, 1139 (10th Cir.2009). A petitioner must satisfy the custody requirement at the time the habeas petition is filed. *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998).

A prisoner need not, however, show actual, physical custody to obtain relief. *Maleng v. Cook*, 490 U.S. 488, 491, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989) (per curiam). Habeas corpus relief under § 2254 is available for prisoners released on parole or personal recognizance. *Jones v. Cunningham*, 371 U.S. 236, 242-43, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963) (parole); *Hensley v. Municipal Court*, 411 U.S. 345, 346, 93 S. Ct. 1571, 36 L. Ed. 2d 294 (1973) (personal recognizance). Such relief is also available to prisoners serving consecutive sentences, aliens seeking entry into the United States, and persons "questioning the legality of an induction or enlistment into the military service." *Garlotte v. Fordice*, 515 U.S. 39, 46-47, 115 S. Ct. 1948, 132 L. Ed. 2d 36 (1995); *Duncan v. Walker*, 533 U.S. 167, 176, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001); *Jones*, 371 U.S. at 240 & n. 9, 11.

The writ of habeas corpus is available in situations where a state-court criminal conviction has subjected the petitioner to "severe restraints on [his or her] individual liberty." *Hensley*, 411 U.S. at 351. A restraint is severe when it is "not shared by the public generally." *Jones*, 371 U.S. at 240. But the remedy of a writ of habeas corpus is not "generally available ... for every violation of federal rights." *Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 510, 102 S. Ct. 3231, 73 L. Ed. 2d 928 (1982). "Thus, the collateral consequences of a conviction, those consequences with negligible effects on a petitioner's physical liberty of movement, are insufficient to satisfy the custody requirement." *Virsnieks v. Smith*, 521 F.3d 707, 718 (7th Cir.2008) (collecting cases). Effects, such as the payment of restitution or a fine, inability to vote, hold public office, or serve as a juror, are not the sort of significant restraint on liberty contemplated in the custody requirement of the federal habeas statutes. *Erlanson v. Northglenn Mun. Court*, 528 F.3d 785, 788 (10th Cir.2008); *Maleng*, 490 U.S. at 491-92; *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir.1998); *Calhoun v. Attorney Gen. of Colorado*, 745 F.3d 1070, 1073-74 (10th Cir. 2014).

Costelon has completed his sentence in D-307-CR-2003-00126 and is no longer incarcerated or on probation for the conviction in that case. Nor does Costelon allege any other ongoing restraint on his liberty as a consequence of the conviction. Costelon is not "in custody pursuant to the judgment of a State court" as required by 28 U.S.C. § 2254. As a result, this Court lacks jurisdiction and will dismiss Costelon's Petition. *Mays v. Dinwiddie*, 580 F.3d at 1139.

II. Costelon's Claims are Barred by the Statute of Limitations: Even if Costelon is in custody for purposes of § 2254, his Petition is subject to dismissal because it was not filed within the one-year

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statute of limitations governing § 2254 proceedings. Petitions for a writ of habeas corpus by a person in state custody are governed by a one-year statute of limitations. 28 U.S.C. § 2244(d). Section 2244(d)(1) states:

"A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."28 U.S.C. § 2244(d)(1).

As grounds for his Petition, Costelon alleges that the strip search that led to his conviction was unconstitutional. (Doc. 1 at 3). Because the grounds asserted by Petitioner Costelon were available to him from the time Judgment was entered on his criminal conviction, the limitation period of § 2244(d)(1)(A) is the applicable period in this case. The 1-year period governing Costelon's § 2254 claims, then, began to run on August 27, 2003, thirty days after the entry of Judgment on his conviction. *Harris v. Dinwiddie*, 642 F.3d at 906 n. 6.

Section 2244(d) further provides:

"The time during which a properly filed application for State post-conviction Or other collateral review with respect to the pertinent judgment or claim is Pending shall not be counted toward any period of limitation under this Subsection."28 U.S.C. § 2244(d)(2). The 1-year statute of limitations for filing a § 2254 petition under the Anti-Terrorism and Effective Death Penalty Act runs from the time the conviction becomes final and is subject to statutory tolling. See 28 U.S.C. § 2244(d). This one-year statute of limitations is tolled while "a properly filed application for [s]tate post-conviction" relief is "pending." See *id.* § 2244(d)(2). The 1-year statute of limitations clock begins to run again when the proceedings on the state habeas corpus petition are finally concluded. *Holland v. Florida*, 560 U.S. 631, 638, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (state habeas corpus proceedings were concluded and statute of limitations clock began to tick when the State Supreme Court issued its mandate). A § 2254 petition filed after the 1-year period has expired is time-barred. 28 U.S.C. § 2244(d).

In this case, the Judgment on Costelon's State criminal conviction became final on August 27, 2003, the deadline for Costelon to file a direct appeal. The one-year statute of limitations for him to file a § 2254 proceeding ran on August 27, 2004. Because the one-year time period had already expired in August, 2004, the filing of his *Coram Nobis*/Rule 1-060(B) Motion in 2013 did not serve to statutorily toll the running of the limitations period. 28 U.S.C. § 2244(d)(2). See *Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006). Therefore, absent equitable tolling, Costelon's § 2254 claims are barred by the § 2244(d) statute of limitations.

Equitable tolling is only available when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control. *Marsh v.*

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Soares, 223 F.3d 1217, 1220 (10th Cir. 2000); *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003). Ignorance of the law, ignorance of the limitation period, and inability to obtain legal assistance do not excuse the failure to file within the statutory time period. See *Miller v. Marr*, 141 F.3d 976, 977-78 (10th Cir. 1998); *Sanders v. Mahaffey*, No. 00-6101, 2000 U.S. App. LEXIS 29617, 2000 WL 1730893, at *2 (10th Cir. Nov. 22, 2000); *Washington v. United States*, No. 99-3383, 2000 U.S. App. LEXIS 17464, 2000 WL 985885, at *2 (10th Cir. July 18, 2000).

Costelon contends that his Petition is timely because it was filed within one year after the New Mexico Supreme Court's denial of certiorari on his Rule 1-060(B) motion. (Doc. 1 at 14). The § 2244(d) statute of limitations had expired long before **Costelon** even filed his Rule 1-060(B) motion and the filing of the 1-060(B) motion did not serve to statutorily toll the running of the statute of limitations. 28 U.S.C. § 2244(d)(2). **Costelon** does not give any reason why he did not file his State collateral challenge to his conviction until after the statute of limitations had run and after he was released from custody upon completion of his sentence. Costelon's decision to wait almost ten years to file his State post-conviction Rule 1-060(B) challenge does not constitute an extraordinary circumstance beyond his control that would entitle him to equitable tolling of the 1-year limitation period. *Marsh*, 223 F.3d at 1220.

Dismissal of a § 2254 habeas corpus petition on the grounds that it is time-barred properly proceeds under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1290 (10th Cir. 2001). Petitioner Costelon's Petition was filed over eight years after the expiration of the 1-year statute of limitations. No statutory or equitable basis exists for tolling of the statute of limitations. Therefore, even if **Costelon** is still "in custody" for purposes of § 2254, his claims Costelon's claims under 28 U.S.C. § 2254 are barred by the statute of limitations of § 2244(d). Costelon's Petition fails to state a claim on which relief can be granted and must be dismissed under 28 U.S.C. § 2244(d) and Fed. R. Civ. P. 12(b)(6).

Under rule 11 of the Rules Governing Section 2254 Cases, the Court determines that Petitioner has failed to make a substantial showing of denial of a constitutional right. The Court will also deny a certificate of appealability. 28 U.S.C. § 2253(c).

IT IS ORDERED that the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 1) is **DISMISSED** for lack of jurisdiction or, alternatively, on the grounds that it is barred by the 1-year statute of limitations in 28 U.S.C. § 2244(d) and a certificate of appealability is **DENIED**.

/s/ Steven C. Yarbrough

UNITED STATES DISTRICT JUDGE

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

April 2, 2018

Elisabeth A. Shumaker
Clerk of Court

FRANK COSTELON,

Petitioner - Appellant,

v.

No. 17-2208

STATE OF NEW MEXICO,

Respondent - Appellee.

ORDER

Before BRISCOE, HOLMES, and MATHESON, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**