

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID V. ROCK,)
Petitioner-Appellant,)
v.)
CHARMAINE BRACY, Warden,)
Respondent-Appellee.)

FILED
Apr 17, 2018
DEBORAH S. HUNT, Clerk

O R D E R

David V. Rock, an Ohio state prisoner, moves for a certificate of appealability and in forma pauperis status and appeals pro se a district court order dismissing his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

This petition challenged a 1998 conviction on a guilty plea to charges of driving under the influence and unauthorized use of a motor vehicle, with three prior convictions of driving under the influence, for which Rock was sentenced to sixty days of incarceration. He alleged that it was not clear if he had counsel for his prior convictions, the prosecutor withheld this information, and his counsel failed to investigate. Moreover, he alleged that his plea was involuntary because the provisions of post-release control were not explained to him. The district court dismissed the petition because Rock was no longer in custody as a result of that conviction. Rock's motion for reconsideration was denied.

To be entitled to a certificate of appealability, Rock must demonstrate that reasonable jurists could debate whether his petition should have been resolved in a different manner. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Rock cannot make such a showing.

Rock was convicted of operating a motor vehicle under the influence with five prior convictions in 2014 and sentenced to seven years of imprisonment. *State v. Rock*, No. 2015-L-047, 2015 WL 6951676 (Ohio Ct. App. Nov. 9, 2015). Even though the challenged 1998 conviction might have been used to enhance Rock's present sentence, Rock may not challenge it in a federal habeas corpus action because the earlier conviction itself may no longer be attacked in state court. *See Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394, 403-04 (2001); *Steverson v. Summers*, 258 F.3d 520, 524-25 (6th Cir. 2001).

Therefore, reasonable jurists could not debate the district court's dismissal of this petition, and the motion for a certificate of appealability is **DENIED**. The motion for in forma pauperis status is therefore **DENIED** as moot.

APR 4 2018

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID V. ROCK, <i>Pro Se</i>,	)	Case No.: 1:17 CV 2099
)	
Petitioner)	
)	
v.	)	JUDGE SOLOMON OLIVER, JR.
)	
CHARMAINE BRACY,)	
)	
Respondent	)	<u>ORDER</u>

Currently pending before the court in the above-captioned case is *Pro Se* Petitioner David V. Rock's ("Petitioner" or "Mr. Rock") Motion for Reconsideration ("Motion") (ECF No. 7) of this court's October 31, 2017 Order (ECF No. 5) dismissing his Petition for a Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2254 ("§ 2254 Petition", ECF No. 1). Mr. Rock's § 2254 Petition challenged his 1998 conviction for unauthorized use of a motor vehicle and driving under the influence of alcohol or drugs (DWI) in the Lake County, Ohio Court of Common Pleas in *Ohio v. Rock*, No. 97-CR-363 (Lake Cty. Court of Common Pleas March 30, 1998). Mr. Rock was sentenced to sixty days of local incarceration and three years of community control sanctions as a result of this conviction. Petitioner contended that his conviction was unconstitutional.

On October 30, 2017, this court dismissed the § 2254 Petition, pursuant to Rule 4 of the Rules Governing *Habeas Corpus* Cases under § 2254 Petition, for lack of jurisdiction. (Order, Oct. 31, 2017, 2.) The court found that because Petitioner was not "in custody" pursuant to the state

conviction at issue when the § 2254 Petition was filed, the court lacked jurisdiction. (*Id.*) The court also held that the exception to this general rule due to the absence of counsel did not apply. (*Id.*) Mr. Rock now asks the court to reconsider its Order, asserting that it is no longer necessary for a person to be under physical restraint in order to obtain relief under § 2254 and asserting that he received ineffective assistance of counsel. (Mot., 2.)

The Sixth Circuit has instructed that district courts may treat a motion to reconsider as a motion to alter or amend a judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008); *In re Saffady*, 524 F.3d 799, 802-03 (6th Cir. 2008). District courts may grant a Rule 59(e) motion to amend or alter judgment for the following reasons: (1) to correct a clear error or law; (2) to address newly discovered evidence; (3) to address an intervening change in controlling law; or (4) to prevent manifest injustice. *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 808-09 (N.D. Ohio 2010) (citing *Gencorp, Inc. v. Am. Int'l Underwriters Co.*, 178 F.3d 804, 834 (6th Cir. 1999)). None of these situations apply here. Rather, the Motion presents only legal arguments, citing authority predating this court's Order, to challenge this court's ruling. Thus, the court denies Petitioner's Motion for Reconsideration (ECF No. 7).

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

November 29, 2017

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID V. ROCK, <i>Pro Se</i>,	)	Case No.: 1: 17 CV 2099
)	
Petitioner)	
	)	JUDGE SOLOMON OLIVER, JR.
v.)	
)	
CHARMAINE BRACY,)	
)	
Respondent	)	<u>JUDGMENT ENTRY</u>

In accordance with the court's accompanying Memorandum of Opinion and Order, the Petition is denied and this action is dismissed. Additionally, the court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith and there is no basis on which to issue a certificate of appealability.

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT COURT

October 30, 2017

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID V. ROCK, <i>Pro Se</i>,	)	Case No.: 1:17 CV 2099
)	
Petitioner)	
	)	JUDGE SOLOMON OLIVER, JR.
v.)	
)	
CHARMAINE BRACY,)	
	)	<u>MEMORANDUM OF OPINION</u>
Respondent	)	<u>AND ORDER</u>

Petitioner David V. Rock, an Ohio prisoner proceeding *pro se*, has filed a Petition for a Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2254, in which he challenges his 1998 conviction in the Lake County Court of Common Pleas in *State of Ohio v. Rock*, Case No. 97-CR-000363 (Lake Cty. Court of Common Pleas). (See Doc. No. 1 at 1.) Petitioner pled guilty in that case to unauthorized use of a motor vehicle and driving under the influence of alcohol or drugs (DWI) was sentenced to 60 days of local incarceration and three years of community control sanctions. The degree of his DWI charge was enhanced by the presence of three or more prior violations. Petitioner contends his conviction was unconstitutional.

Pursuant to Rule 4 of the Rules Governing *Habeas Corpus* Cases Under § 2254, a district court is required to examine a *habeas corpus* petition and determine whether “it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” Rule 4 of the Rules Governing § 2254 Cases; *see also* 28 U.S.C. § 2243. If so, the district court must dismiss the petition. Rule 4; *see also Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to “screen out” petitions that lack merit on their face).

Upon review, the court finds that this Petition must be dismissed.

A *habeas corpus* petitioner must be “in custody” pursuant to a state conviction when the petition is filed in order to vest the district court with jurisdiction. *See 28 U.S.C. § 2254(a); White v. Kapture*, 42 F. App’x. 672, 673 (6th Cir. 2002), citing *Maleng v. Cook*, 490 U.S. 488, 490 (1989). When a petitioner’s sentence for a conviction has fully expired, the conviction may not be directly challenged because the petitioner is no longer “in custody” pursuant to that conviction. *White*, 42 F. App’x at 673, citing *Lackawanna Cty Dist. Attorney v. Coss*, 532 U.S. 394, 401 (2001). Although there is an exception to this general rule, which allows a conviction for which the sentence has expired to be challenged if it was obtained in the absence of counsel, *see White*, 42 F. App’x at 674, the judgment entry in Petitioner’s Lake County case, which Petitioner has submitted with his Petition, clearly indicates that Petitioner was represented by counsel during the 1998 proceedings. (Doc. No. 1 at 31.)

Thus, it is evident that this Petition must be dismissed for lack of jurisdiction. The sentence for the convictions Petitioner challenges expired long before the Petition was filed, and Petitioner is no longer “in custody” for purposes of § 2254.

Conclusion

Accordingly, Petitioner’s motion to proceed *in forma pauperis* (Doc. No. 2) is granted, and the Petition is dismissed pursuant to Rule 4 of the Rules Governing § 2254 Cases. The court further certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith and that there is no basis to issue a certificate of appealability. Fed. R. App. P. 22(b); 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.

UNITED STATES DISTRICT COURT

October 30, 2017