

***AMENDED
DLD-143**

**April 15, 2019
March 28, 2019**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-1069**

LEVAR LEE ANTHONY SPENCE, Appellant

v.

SUPERINTENDENT COAL TOWNSHIP SCI; ET AL.

(M.D. Pa. Civ. No. 1-17-cv-00881)

Present: JORDAN, GREENAWAY, JR., and NYGAARD, Circuit Judges

Submitted are:

- (1) Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c);
- (2) Appellant's document dated January 13, 2019, in support of appeal;
- (3) Appellant's documents titled "Interlocutory Injunction" and "Emergency Motion for Summary Judgment";
- (4) Appellant's document titled "Judicial Notice of "Non-Response";
- (5) Appellant's document titled "Notice of Default"; and
- (6) ***Appellant's document titled "Judicial Notice"**

in the above-captioned case.

Respectfully,

Clerk

ORDER

***AMENDED DLD-143**

April 15, 2019

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Spence's request for a certificate of appealability (COA) is denied. Even if jurists of reason could debate the correctness of the District Court's procedural-default ruling, they would agree that Spence has not stated "a valid claim of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 484 (2000). More specifically, jurists of reason would not debate that he is a "person" covered by Pennsylvania's Controlled Substance Act. See 35 Pa. Stat. Ann. §§ 780-102, 780-113(a)(30). Jurists of reason would also agree without debate that Spence's Fourth Amendment claim is barred by Stone v. Powell, 428 U.S. 465 (1976), see Marshall v. Hendricks, 307 F.3d 36, 82 (3d Cir. 2002); see also United States v. Crews, 445 U.S. 463, 474 (1980), and that, to the extent Spence has raised a sufficiency-of-the-evidence claim, he has not made the necessary showing, see Jackson v. Virginia, 443 U.S. 307, 319 (1979) (defining test as "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). Finally, contrary to his argument, the York County Court of Common Pleas had jurisdiction in his case, see Commonwealth v. McNeil, 665 A.2d 1247, 1251 (Pa. Super. Ct. 1995), and his claims alleging violations of state law and state procedural rules are not cognizable on federal habeas review, see Estelle v. McGuire, 502 U.S. 62, 67 (1991). To the extent that Spence's other filings request additional relief, they are denied.

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: April 24, 2019
Lmr/cc: Levar Lee Spence
Stephanie E. Lombardo



A True Copy:

Patricia S. Dodsweitz, Clerk
Certified Order Issued in Lieu of Mandate

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEVAR LEE ANTHONY : CIVIL ACTION
SPENCE, :
Petitioner, :
v. :
No. 16-5710
THOMAS L. MCGINLEY, et al., :
Respondents.

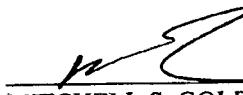
ORDER

MITCHELL S. GOLDBERG, J.

AND NOW, this 20th day of March, 2017 upon careful and independent consideration of the petition for a writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Timothy R. Rice, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;
2. The petition for a writ of habeas corpus shall be TRANSFERRED to the United States District Court for the Middle District of Pennsylvania in accordance with 28 U.S.C. § 2241(d);
3. There is no probable cause to issue a certificate of appealability; and
4. The Clerk of the Court shall mark this case closed for statistical purposes.

BY THE COURT:



MITCHELL S. GOLDBERG
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEVAR LEE SPENCE,

CIVIL ACTION

Petitioner,

v.

THOMAS L. MCGINLEY, et al.,

No. 16-5710

Respondents.

REPORT & RECOMMENDATION

**TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE**

February 10, 2017

Petitioner Levar Lee Spence, a prisoner at the State Correctional Institution in Coal Township, Northumberland County, Pennsylvania, in the Middle District of Pennsylvania, 28 U.S.C. § 118(b), has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state court convictions arising in York County, also located in the Middle District, 28 U.S.C. § 118(b). See 2/2/2017 Revised Hab. Pet. (doc. 9). I recommend that the case be transferred to the United States District Court for the Middle District of Pennsylvania.

PROCEDURAL HISTORY

On January 14, 2016, Spence was convicted of the offenses of possession with intent to deliver and possession of marijuana. See Commonwealth v. Spence, CP-67-CR-3301-2015, Crim. Dkt. at 3. On March 1, 2016, he was sentenced to an aggregate term of three to eight years imprisonment. See id. Although Spence contends he appealed, see Revised Hab. Pet. at 27-35, the docket does not show any appeal was filed. See Crim. Dkt. at 6. It only shows that Spence filed correspondence after the appeal period expired.¹ See id. Spence also has not filed a

¹ Spence additionally alleges he filed a matter in the Pennsylvania Supreme Court docketed at 538 MT 2016. See Revised Hab. Pet. at 3. However, the case cannot be located when

petition for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act, 42 Pa. C.S. § 9541 et seq. ("PCRA"), though it appears that the statute of limitations period for such a petition has not yet expired.²

On or about October 27, 2016, Spence filed a "Writ of Habeas Corpus" in this Court.³ See Writ of Hab. Corpus (doc. 1). He also filed a request for a stay and abeyance based on allegations that he was still litigating his case in the Pennsylvania Supreme Court. See 11/21/2016 Letter (doc. 2). This Court then entered several orders directing Spence to refile his request for habeas relief on the required form and pay the filing fee or an application to proceed in forma pauperis. See 11/23/2016 Order (doc. 3), 12/22/2016 Order (doc. 6), 1/12/2017 Order (doc. 8). On January 19, 2017, Spence filed a revised petition using the required forms.⁴ See Revised Hab. Pet.

searching that docket number or Spence's name on the Pennsylvania Judicial System website. Spence also cites to a miscellaneous docket regarding a civil forfeiture action he filed. See In re York County District Attorney's Office, CP-67-MD-1697-2015. However, that case is separate from his criminal case.

² Spence's conviction became final on March 31, 2016, thirty days after his judgment of sentence was entered. See 42 Pa. C.S. § 9545 (judgment becomes final at the expiration of time for seeking direct review). He has one year from that date to file a PCRA petition in the Pennsylvania state courts. See id. (PCRA petition must be filed within one year of the date a judgment becomes final).

³ Spence's petition was filed on or about October 27, 2016, because the envelope containing his writ of habeas corpus was date stamped on October 27, 2016. See Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998) ("[A] pro se prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court.").

⁴ Spence appears to raise three claims: (1) the Pennsylvania Controlled Substance, Drug, Device, and Cosmetic Act of 1972 is ambiguous; (2) the Commonwealth prosecuted and convicted him in absentia without probable cause, due process, or proper authority; and (3) the state court proceedings violated his rights to due process of law. Revised Hab. Pet. at 29-37. It is not clear whether he exhausted these claims in state court as required.

DISCUSSION

Habeas petitions must be filed in either “the district court for the district wherein such person is in custody,” or “the district within which the State court was held which convicted and sentenced him.” 18 U.S.C. § 2241(d). Each of those district courts have “jurisdiction to entertain the application.” Id.

Because Spence was convicted in a county located within the Middle District of Pennsylvania and is currently serving his sentence in a county within the Middle District, that district has jurisdiction over his petition and this Court lacks jurisdiction. Id. Nevertheless, in the interests of justice, this Court should transfer the case to the Middle District, rather than dismiss it, because Spence is proceeding pro se and dismissing the petition for lack of jurisdiction would cause unnecessary delay that could potentially prejudice his case. See 28 U.S.C. § 1404(a) (“[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought”); see also In re Nwanze, 242 F.3d 521, 526 n. 2 (3d Cir.2001) (§ 1404(a) applies to transfers of habeas corpus petitions); Helfrich v. Coleman, No. 10-958, 2010 WL 1337728, at *1 (E.D. Pa. Apr. 6, 2010) (transferring case to district court in the interests of justice where the petitioner was pro se and dismissal would cause unnecessary delay).

Accordingly, I make the following:

RECOMMENDATION

AND NOW, on February 10, 2017, it is respectfully recommended that the petition for a writ of habeas corpus be TRANSFERRED to the United States District Court for the Middle District of Pennsylvania in accordance with 28 U.S.C. § 2241(d). It is further recommended that there is no probable cause to issue a certificate of appealability.⁵ The petitioner may file objections to this Report and Recommendation within fourteen days after being served with a copy thereof. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. See Leyva v. Williams, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT:

/s/ Timothy R. Rice
TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE

⁵ Jurists of reason would not debate my recommended procedural or substantive dispositions of the petitioner's claims. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Therefore, no certificate of appealability should be granted. See id.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LEVAR LEE ANTHONY SPENCE, :
Petitioner, : 1:17-cv-0881
: :
v. : Hon. John E. Jones III
: :
THOMAS L. MCGINLEY, *et al.*, :
Respondents. :

ORDER

December 17, 2018

NOW THEREFORE, upon consideration of the Revised Petition (Doc. 9) for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and for the reasons set forth in the Court's Memorandum of the same date, it is hereby ORDERED that:

1. The Revised Petition (Doc. 9) for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED.
2. There is no basis for the issuance of a certificate of appealability. 28 U.S.C. § 2253(c); *see also*, R. Governing §2254 Cases R, 11(a) (stating that “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant”).
3. The Clerk of Court is directed to CLOSE this case.

s/ John E. Jones III
John E. Jones III
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1069

LEVAR LEE ANTHONY SPENCE,
Appellant

v.

SUPERINTENDENT COAL TOWNSHIP SCI; ATTORNEY GENERAL
PENNSYLVANIA

Present: SMITH, *Chief Judge*, MCKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS,
PORTER, MATEY, and NYGAARD,* *Circuit Judges*.

The petition for rehearing filed by Appellant in the above-entitled case having
been submitted to the judges who participated in the decision of this Court and to all the
other available circuit judges of the circuit in regular active service, and no judge who
concurred in the decision having asked for rehearing, and a majority of the judges of the
circuit in regular service not having voted for rehearing, the petition for rehearing by the
panel and the Court en banc is denied.

BY THE COURT,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: May 30, 2019
Lmr/cc: Levar Lee Spence
Stephanie E. Lombardo

* Judge Nygaard's vote is limited to panel rehearing only.