

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-6825

JEREMY FONTANEZ,

Petitioner - Appellant,

v.

J. COAKLEY, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. John Preston Bailey, District Judge. (2:17-cv-00011-JPB-MJA)

Submitted: September 26, 2019

Decided: October 1, 2019

Before GREGORY, Chief Judge, and MOTZ and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Jeremy Fontanez, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jeremy Fontanez appeals the district court's order denying relief on his action alleging denial of access to courts. We have reviewed the record and find no reversible error. Accordingly, we grant Fontanez leave to proceed in forma pauperis and affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
for the
Northern District of West Virginia

JEREMY FONTANEZ

Plaintiff(s)

v.

Civil Action No. 2:17CV11

J. COAKLEY, Warden

Defendant(s)

JUDGMENT IN A CIVIL ACTION

The court has ordered that:

Judgment award Judgment costs Other

other: The Court finds that Hazelton has not violated any of the petitioner's constitutional rights and it is the opinion of this Court that the 2241 Petition be DISMISSED WITH PREJUDICE.

This action was:

tried by jury tried by judge decided by judge

decided by Judge John Preston Bailey

Date: May 20, 2019

CLERK OF COURT

Cheryl Dean Riley

J. Schoonover

Signature of Clerk or Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS**

JEREMY FONTANEZ,

Petitioner,

v.

**CIVIL ACTION NO. 2:17-CV-11
(BAILEY)**

J. COAKLEY, Warden,

Respondent.

ORDER OF DISMISSAL

This case is now before the Court for consideration of *pro se* petitioner Fontanez' Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2241. This matter is pending for an initial review.

On February 13, 2017, petitioner filed his § 2241 [Doc. 1]. He subsequently paid his \$5.00 filing fee on March 6, 2017 [Doc. 5]. Petitioner challenges his conviction and sentence, alleging various Constitutional violations surrounding the Bureau of Prisons' insufficient state legal materials, which have allegedly impeded his ability to timely appeal his 2004 Pennsylvania State sentence.

Discussion

In addition to his December 7, 2004, sentence of 420 months' incarceration out of the Eastern District of Pennsylvania, petitioner is serving a Commonwealth of Pennsylvania life sentence plus twenty-four to forty-eight years after pleading guilty to murder in the first

degree, robbery, attempted criminal homicide causing serious bodily injury, attempted criminal homicide, aggravated assault, recklessly endangering another person, and criminal conspiracy to commit robbery. The petitioner did not file a direct appeal within thirty days of his Pennsylvania State sentence as required by Pa. R. App. P. 903.

On April 23, 2007, more than two and one-half years after the thirty day time period for filing a direct appeal expired, petitioner filed a *pro se* notice of appeal in the Commonwealth Court of Pennsylvania (No. 1180 CD 2008). On July 2, 2008, the appeal was transferred to the Superior Court of Pennsylvania (No. 2411 EDA 2008). While that appeal was pending, petitioner filed a second notice of appeal to the Superior Court of Pennsylvania (No. 979 EDA 2007). By order dated January 24, 2008, the Superior Court of Pennsylvania quashed the second appeal "since the purported order on appeal does not appear on the lower court docket." See State Court Record. The Commonwealth filed a motion to quash the first appeal (No. 2411 EDA 2008) on the ground that it was untimely. By order dated December 18, 2008, the Superior Court granted the motion and quashed the first appeal as untimely. *Id.* Petitioner filed a petition for leave to file the appeal to the Supreme Court of Pennsylvania on January 7, 2009 (No. 55 MAL 2009), which was denied. *Id.*

Subsequently, petitioner filed a § 2254 petition in the United States District Court for the Middle District of Pennsylvania, which was transferred to the Eastern District on June 14, 2010. The Eastern District of Pennsylvania dismissed the petition as time-barred by the statute of limitations and denied a Certificate of Appealability. *Fontanez v. Holt*, 2010 WL 4812981 (E.D. Pa. 2010). His appeal to the Court of Appeals for the Third Circuit was denied on November 28, 2011, his petition for reargument *en banc* was denied on January

4, 2012, and a petition for writ of *certiorari* was denied on October 1, 2012. *Fontanez v. Holt*, 568 U.S. 905 (2012). Again, on March 7, 2014, the Superior Court of Pennsylvania denied yet another petition as untimely. *Com. v. Fontanez*, 2014 WL 10965162 (Pa. Super. Mar. 7, 2014). On October 23, 2017, the petitioner filed the instant § 2241 petition [Doc. 1].

Petitioner is presently confined at USP Hazelton. He represents that he has been held in a federal facility since the day he was sentenced in the Commonwealth of Pennsylvania [Doc. 1-1 at 9]. He contends the BOP "has violated his First Amendment right to reasonable access to the Commonwealth Court of Pennsylvania" because of its "policy not requiring federal institutions to provide legal resources to state sentenced inmates housed in federal facilities." (Id. at 1). As a result, he asserts he has been prejudiced, and as a direct result of the lack of state legal materials, he was time-barred from submitting his appeal in the Commonwealth of Pennsylvania, and has been unable to present non-frivolous issues for appeal. (Id.). Petitioner, however, does not state what those non-frivolous issues are. He makes a brief comment in passing that "no hearing was held as to the ineffective assistance of counsel claim." (Id. at 4). However, the issue before this Court is, as succinctly stated by the petitioner:

Petitioner now presents to this Honorable Court his petition pursuant to 28 U.S.C. § 2241, claiming that the B.O.P. policy not to supply state sentenced inmates with state law resource material creates an unconstitutional barrier between the state sentenced inmate, and the state courts, violating petitioner's First Amendment protection guaranteeing reasonable access to

the courts.

[Doc. 1-1 at 5].

Under the First Amendment, "prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). This right "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. However, 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). The Supreme Court held that in order to fulfill the actual injury requirement, derived from the constitutional doctrine of standing, on a law library claim where there is a lack of access to the courts, the inmate must be pursuing direct appeals from the conviction for which he . . . was incarcerated, a *habeas corpus* petition, or a civil rights claim pursuant to 1983 "to vindicate basic constitutional rights." *Lewis*, 518 U.S. at 354. Accordingly, to prove an actual injury, a plaintiff "must show that a non-frivolous legal claim was frustrated or impeded due to the actions of prison officials." *Murray v. Michael*, 2005 WL 2204985, at *16 (N.D.N.Y. Sept. 7, 2005)(citing *Warburton v. Underwood*, 2 F.Supp.2d 306, 312 (W.D.N.Y. 1998)).

Pursuant to 28 C.F.R. § 543.10, the Warden is provided with the authority to "establish an inmate law library, and procedures for access to legal reference materials and to legal counsel, and for preparation of legal documents." It also states that "[t]he Bureau of Prisons affords an inmate reasonable access to legal materials and counsel, and

reasonable opportunity to prepare legal documents." Id. BOP Program Statement 1315.07, 2(d) clearly states that "[t]he Maryland Reporter and Atlantic 2d Reporter are the only required state case law that are provided." It further emphasizes that "[t]he Bureau is not mandated to provide state case law and other state legal materials." Id. (Emphasis in original). The Program Statement further provides that "[s]tate officials are responsible for providing state legal assistance and/or state legal materials to state inmates transferred to Federal custody." Id.

A court must make its own inquiry into the constitutionality of the law library, "and while such an evaluation may consider the view of the Bureau of Prisons, it may not wholly defer to it." *Stover v. Carlson*, 408 F.Supp. 696, 698 n.1 (D. Conn. 1976)(citing *Cruz v. Beto*, 405 U.S. 319, 321 (1972)). Moreover, it has been held that federal prisons are not required to include in their law libraries state reports and digests. *Gaglie v. Ulibarri*, 507 F.2d 721, 722 (9th Cir. 1974)(approving the contents of a federal prison library that did not include state law reports or digests but did contain United States Supreme Court Reports and Federal Reporter); see also *Kivela v. United States Attorney Gen.*, 523 F.Supp. 1321, 1325 (S.D.N.Y. 1981)(noting that "[i]t is hardly to be expected, nor is it required, that every federal penal institution have in its library the law books of each of the fifty states of the Union. Indeed, there are many courts throughout the United States, federal and state, which do not maintain such elaborate libraries."); *Stover v. Carlson*, 408 F.Supp. at 699 (observing that the BOP has a limited budget and must strike a "balance between the rights of federal inmates to have access to the courts and the need to spend the government's money carefully.").

Here, the petitioner asserts that the prejudice is the time bar that has prevented him from presenting his non-frivolous appeal to the state court. [Doc. 1-1 at 16]. This is simply not true of the instant facility in which he is incarcerated. Any such time bar occurred years prior to the petitioner being transferred to Hazelton. It is clear from his petition that the petitioner has long since learned of the appeal period for pursuing his appeal for his state sentence, and petitioner has litigated that issue several times in other courts. Thus, any alleged deficiencies in the library at Hazelton could not serve as the impediment of which petitioner speaks or any resulting prejudice suffered as a result. Even if petitioner's claim had merit, the basis for that claim would have occurred at a different facility more than a decade ago. Accordingly, this Court finds any lack of state materials at Hazelton has not violated any of the petitioner's constitutional rights.

Conclusion

Upon careful review of the above, it is the opinion of this Court that the § 2241 petition [Doc. 1] be **DISMISSED WITH PREJUDICE**. This Court further **DIRECTS** the Clerk to enter judgment in favor of the respondent and to **STRIKE** this case from the active docket of this Court.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to any counsel of record and to mail a copy to the *pro se* petitioner.

DATED: May 20, 2019.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE