

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30694



A True Copy
Certified order issued May 05, 2020

TERRY SMITH, also known as Terry Lynn Smith,

Judy W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

ORDER:

Terry Smith, Louisiana prisoner # 618207,¹ a pretrial detainee at the Louisiana State Prison in Angola, moves for a certificate of appealability (COA) to appeal the district court's dismissal without prejudice of his 28 U.S.C. § 2241 petition. *See Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998). In his § 2241 petition, Smith challenged his detention for the attempted murder of a sheriff's deputy on grounds that his state and Sixth Amendment rights to a speedy trial and his Fourteenth Amendment due process rights had been violated. In his request for relief, Smith asked that his indictment be quashed.

¹ Smith was previously convicted and sentenced to life imprisonment on non-capital charges unrelated to this petition. *See State v. Smith*, No. 2016 KA 1222, 2017 WL 658784 (La. Ct. App. Feb. 17, 2017).

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In his motion for a COA, Smith recounts the procedural history of his case in state court and asserts that his claim of improper calculation of tolling or suspension of the period in which the state must proceed has never been addressed. He does not specifically address the district court's reasons for denying his § 2241 petition based on *Dickerson v. Louisiana*, 816 F.2d 220, 226 (5th Cir. 1987).

To obtain a COA, Smith must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). He may satisfy "this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. When the district court denies relief on procedural grounds, "a COA should issue when the prisoner shows, at least, 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). Smith has not met this standard.

Accordingly, his motion for a COA is DENIED.

Patrick E. Higginbotham

PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TERRY SMITH, #618207

CIVIL ACTION

VERSUS

NO. 19-1348

STATE OF LOUISIANA

SECTION: M (1)

ORDER & REASONS

Before the Court is a petition for writ of *habeas corpus* brought under 28 U.S.C. § 2241 by *pro se* petitioner, Terry Smith (“Smith”),¹ to which the St. John the Baptist Parish District Attorney (“the State”) responds in opposition,² and Smith further replies.³ Having considered the parties’ memoranda and the applicable law, the Court dismisses the petition without prejudice because *habeas corpus* relief is not available to Smith at this time.

I. BACKGROUND & PENDING PETITION

On August 12, 2012, Smith was arrested on charges related to the attempted murder of a St. John the Baptist Parish Sheriff’s Deputy.⁴ On October 10, 2012, Smith and five co-defendants were indicted in state court for the same attempted murder.⁵ Smith was charged as a principal to attempted first-degree murder.⁶ In the course of his defense, Smith filed various

¹ R. Doc. 3. Although the Court construes *pro se* filing liberally, *pro se* parties are still required to “abide by the rules that govern the federal courts.” *E.E.O.C. v. Simbaki, Ltd.*, 767 F.3d 475, 484 (5th Cir. 2014).

² R. Doc. 11.

³ R. Doc. 14. Smith also filed a motion to consider the State’s response waived as untimely filed. R. Doc. 16. This Court ordered the State’s response to be filed within thirty days of March 13, 2019. R. Doc. 6. The State’s opposition was filed on April 12, 2019, within the thirty days permitted, and thus, was timely filed. Therefore, Smith’s motion is DENIED.

⁴ R. Doc. 3-3 at 2. Smith is currently incarcerated by the Louisiana Department of Corrections in the Louisiana State Penitentiary at Angola, having been previously convicted and sentenced in the Thirty-Second Judicial District Court, Parish of Terrebonne, State of Louisiana, on non-capital charges unrelated to this petition. R. Doc. 3 at 1. Smith is not challenging his conviction but instead files the instant petition based on a detainer and charges pending in the Fortieth Judicial District Court, Parish of St. John the Baptist, State of Louisiana. *Id.*

⁵ R. Doc. 3-3 at 2-3.

⁶ *Id.* at 3.

motions, has been represented by at least three attorneys, has proceeded *pro se*, and requested to continue the trial date on at least one occasion.⁷

On March 20, 2017, Smith filed a *pro se* motion to quash the indictment pursuant to Louisiana Code of Criminal Procedure article 578(A)(2), which mandates that “trial shall be commenced … [within] two years from the date of institution of the prosecution” for non-capital felony cases.⁸ The State opposed⁹ the motion and the trial court heard the motion to quash on May 26, 2017.¹⁰ On July 14, 2017, the trial court denied Smith’s motion to quash finding the prescriptive period for bringing a defendant to trial had not yet expired, after it calculated suspension periods for open motions, writs of appeal, and Smith’s requested continuance.¹¹

On August 20, 2017, Smith, proceeding *pro se*, sought supervisory review of the trial court’s order denying the motion to quash in the Louisiana Fifth Circuit Court of Appeal, docketed as case number 17-K-465.¹² Smith’s counsel also filed a writ of review of the same order on September 8, 2017, in the Louisiana Fifth Circuit, docketed as case number 17-K-501.¹³ Both of Smith’s writ applications reasserted his argument that the prescribed statutory period for commencing trial had expired under Louisiana Code of Criminal Procedure article 578(A).¹⁴ The Louisiana Fifth Circuit denied both of Smith’s supervisory writs on October 25, 2017.¹⁵ The court denied Smith’s *pro se* writ, docket 17-K-465, for failure to include the record pursuant to local rules but, on the showing made, the Louisiana Fifth Circuit found that the trial court did not

⁷ R. Docs. 3-8 at 7; 3-9 at 5, 7. *See also* State Rec., Vol. 5 of 22, Application for Supervisory Writ, No. 17-K-501 (La. App. 5 Cir.).

⁸ R. Doc. 3-9 at 2-3.

⁹ *Id.* at 4-20.

¹⁰ State Rec., Vol. 5 of 22, Opinion Denying Writ, No. 17-K-501 (La. App. 5 Cir. Oct. 25, 2017).

¹¹ R. Doc. 3-9 at 25 (Smith’s motion to quash was filed “six months before the two year [prescriptive] period would expire”).

¹² State Rec., Vol. 5 of 22, Application for Supervisory Writ, No. 17-K-465 (La. App. 5 Cir.).

¹³ State Rec., Vol. 5 of 22, Application for Supervisory Writ, No. 17-K-501 (La. App. 5 Cir.).

¹⁴ *Id.*; Application for Supervisory Writ, No. 17-K-465 (La. App. 5 Cir.).

¹⁵ State Rec., Vol. 5 of 22, Opinion Denying Writ, No. 17-K-501 (La. App. 5 Cir. Oct. 25, 2017); Opinion Denying Writ, No. 17-K-465 (La. App. 5 Cir. Oct. 25, 2017).

abuse its discretion in denying Smith's motion to quash.¹⁶ The court also denied the writ filed by Smith's counsel, docket 17-K-501, holding that the trial court did not abuse its discretion upon the showing before it, without the motion hearing transcript.¹⁷ Thereafter, Smith, proceeding *pro se*, sought supervisory review of the Louisiana Fifth Circuit's opinion, docket 17-K-465, in the Louisiana Supreme Court.¹⁸ On January 8, 2018, the supreme court denied Smith's writ application without stated reasons.¹⁹

Smith now petitions this Court for *habeas corpus* relief under 28 U.S.C. § 2241 contending that his Sixth Amendment right to a speedy trial and his Fourteenth Amendment due process rights have been violated.²⁰ The State sparsely opposes Smith's petition, asserting only that Smith has not exhausted all of his claims in state court because "the matter has not yet been adjudicated" on the merits.²¹

II. LAW & ANALYSIS

Pretrial *habeas corpus* relief under 28 U.S.C. § 2241 "applies to persons in custody regardless of whether final judgment has been rendered and regardless of the present status of the case pending against him." *Dickerson v. Louisiana*, 816 F.2d 220, 224 (5th Cir. 1987). To be eligible for relief under section 2241, a petitioner must be in custody and must have exhausted available state remedies. *Id.* Exhaustion requires that "the very issue which forms the basis for relief in the federal courts has been raised in the [highest] state court." *Id.* at 228 (citing *Piccard v. Connor*, 404 U.S. 270 (1971)); *see also Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999) (Louisiana Supreme Court must have "fair opportunity to pass upon the claim"). Although

¹⁶ State Rec., Vol. 5 of 22, Opinion Denying Writ, No. 17-K-465 (La. App. 5 Cir. Oct. 25, 2017).

¹⁷ State Rec., Vol. 5 of 22, Opinion Denying Writ, No. 17-K-501 (La. App. 5 Cir. Oct. 25, 2017).

¹⁸ R. Doc. 3-3 at 4-24.

¹⁹ R. Doc. 3-3 at 28. Justice Hughes concurred in the denial but noted that "La. C. Cr. P. art. 580(A) provides for a one year, not two year, period for the state to proceed after a suspension." *Id.* at 29.

²⁰ R. Doc. 3.

²¹ R. Doc. 11 at 1. In support of its opposition, the State cites two cases relating to *habeas* petitions under 28 U.S.C. § 2254, rather than 28 U.S.C. § 2241, neither of which addresses the speedy trial issue raised here. *Id.*

section 2241's statutory language does not expressly mandate exhaustion, the requirement is established through *habeas* doctrine, rooted in principles of federalism, which limit federal interference in state court adjudication. *Dickerson*, 816 F.2d at 225; *see also Braden v. 30th Jud. Cir. Ct. Ky.*, 410 U.S. 484, 490-91 (1973); *Atkins v. Michigan*, 644 F.2d 543, 546 (6th Cir. 1981). Indeed, principles of abstention typically bar federal courts from interfering with pending state judicial proceedings, including most requests for pretrial *habeas* relief, absent extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37 (1971); *but see Braden*, 410 U.S. at 491-93 (lack of available forum justified *habeas* intervention to protect speedy trial rights).

It is well-established that "federal *habeas corpus* does not lie, absent 'special circumstances,' to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court." *Dickerson*, 816 F.2d at 226 (quoting *Braden*, 410 U.S. at 489). "Three sets of circumstances typically qualify as 'special': '(1) there is evidence of state proceedings motivated by bad faith, (2) irreparable injury would occur, or (3) there is no adequate alternative state forum where the constitutional issues can be raised.'" *Vassar-El v. Orleans Par. Prison*, 2018 WL 4462544, at *2 (E.D. La. Sept. 18, 2018) (quoting *Champer v. Florida*, 2014 WL 7070079, at *2 (M.D. Fla. Dec. 15, 2014)). Thus, pretrial *habeas* relief is "generally not available to consider a petitioner's claim that a state is barred from trying him because it has violated his sixth amendment right to a speedy trial." *Dickerson*, 816 F.2d at 226. However, in *Braden*, the Supreme Court drew a distinction between a petitioner attempting to derail a state proceeding, by seeking the dismissal of an indictment, and a petitioner seeking "to enforce the state's obligation to bring him promptly to trial." *Id.* (citing *Brown v. Estelle*, 530 F.2d 1280, 1283 (5th Cir. 1976)). The *Braden* Court held that *habeas* relief may be available for a petitioner seeking to force the state to go to trial, whereas a petitioner seeking "the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in

federal court" is not entitled to pretrial *habeas* relief. 410 U.S. at 493; *Dickerson*, 816 F.2d at 226 (quoting *Brown*, 530 F.2d at 1283); *see also Atkins*, 644 F.2d at 547; *Moore v. DeYoung*, 515 F.2d 437, 445-46 (3d Cir. 1975).

In the instant case, Smith is in the custody of Louisiana at the Louisiana State Penitentiary for a prior non-capital conviction and is also awaiting trial on pending non-capital felony charges.²² Thus, 28 U.S.C. § 2241 is the appropriate mechanism to seek *habeas* relief on the detainer for his pending charges, where such relief is available. Smith seeks to quash his indictment on the grounds that his Sixth Amendment right to a speedy trial and his Fourteenth Amendment due process rights have been violated. However, absent special circumstances, this Court may not "adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court." *Dickerson*, 816 F.2d at 226 (quoting *Braden*, 410 U.S. at 489). Smith has not articulated any special circumstances that would entitle him to such relief, nor can this Court, after a careful review of the record, surmise any special circumstances which Smith might be invoking under a liberal construction of his arguments as a *pro se* litigant.²³ To state it another way, this Court may not grant the relief Smith seeks: to disrupt the state judicial process through the dismissal of his indictment under the circumstances presented here. *Id.* at 226 (citing *Brown*, 530 F.2d at 1283).

However, because Smith is entitled to a liberal construction of his arguments, this Court pauses to consider the possibility that Smith invokes his speedy trial rights in an effort to force the state to trial. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *see, e.g., Dickerson*, 816 F.2d at

²² R. Doc. 3-3 at 2-3. *See also* R. Doc. 3-9 at 4-6 (State's opposition to Smith's motion to quash applying non-capital felony statutory provision for limitations period). The Court notes that although the State is not seeking capital punishment against Smith, the State is seeking capital punishment against two of Smith's co-defendants. *See* State Rec., Vol. 5 of 22, State Response Brief to Application for Supervisory Writ, No. 17-K-501 (La. App. 5 Cir.) (discussing capital and non-capital companion indictments).

²³ The right to a speedy trial itself is not a special circumstance. *Dickerson*, 816 F.2d at 227.

227. Such relief may be permissible under a writ of *habeas corpus*, so long as the exhaustion requirement is met. *Braden*, 410 U.S. at 489. Smith has been very clear about the relief he seeks at each stage of his appeal on his motion to quash. As he has sought from every court, Smith wishes this Court to overrule the trial court's tolling calculations to force the dismissal of his indictment. Unlike the prisoner in *Braden* who filed numerous motions for speedy trial at the trial court level prior to seeking *habeas* relief, Smith has never filed a motion for speedy trial in state court. Moreover, Smith has requested or stipulated to a continuance of the trial date at least once. Therefore, the Court, in good conscience, cannot liberally construe Smith's argument as seeking to force the State to trial. Even with such a liberal construction, this Court may not consider *habeas* relief at this time because the Louisiana Supreme Court has not had "a fair opportunity to pass upon the claim" of speedy trial. *Mercadel*, 179 F.3d at 275. Nevertheless, Smith's own words and the trial record indicate that Smith is seeking to "derail" the proceeding on constitutional defenses that cannot be adjudicated in federal court at this time. *Braden*, 410 U.S. at 489.

Smith also argues that the delay in his state trial violates his Fourteenth Amendment due process rights. The same principles of federalism that render *habeas* relief inappropriate for Sixth Amendment defenses, absent special circumstances, equally apply to due process defenses. *Dickerson*, 816 F.2d at 229. Both Sixth Amendment and Fourteenth Amendment defenses may be appropriately addressed in state court. *Id.* Moreover, in considering Smith's motion to quash, the trial court had already calculated the limitations period for commencing trial under Louisiana Code of Criminal Procedure article 578(A), and held that the motion to quash was premature because it was filed six months prior to the limitations deadline.²⁴ This Court will not and need

²⁴ R. Doc. 3-9 at 25.

not wade into tolling calculations under state criminal statutes by state courts for the purpose of “derail[ing]” state criminal proceedings. *Braden*, 410 U.S. at 489.

Thus, pretrial *habeas* relief is not available at this time under the circumstances of this case. As appropriate, Smith may bring his speedy trial and due process claims in state court for consideration. *See Dickerson*, 816 F.2d at 229.

III. CONCLUSION

Accordingly, for the foregoing reasons,

IT IS ORDERED that Smith’s petition for writ of *habeas corpus* under 28 U.S.C. § 2241 is **DISMISSED WITHOUT PREJUDICE**.

New Orleans, Louisiana, this 9th day of August, 2019.



BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30694

TERRY SMITH, also known as Terry Lynn Smith,

Petitioner - Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

Before HIGGINBOTHAM, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

SUPREME COURT OF LOUISIANA

No. 2018-KH-29

STATE EX REL. TERRY SMITH

VS.

JAN 08 2019

STATE OF LOUISIANA

ON SUPERVISORY WRITS TO THE 40th JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. JOHN



Hughes, J., concurring.

While I concur with the denial of this writ, I note that La. C. Cr. P. art. 580(A) provides for a one year, not two year, period for the state to proceed after a suspension.



The Supreme Court of the State of Louisiana

STATE EX REL. TERRY SMITH

NO. 2018-KH-0029

VS.

STATE OF LOUISIANA

IN RE: Terry Smith; - Plaintiff; Applying For Supervisory and/or Remedial Writs, Parish of St. John, 40th Judicial District Court Div. C, No. 12,303; to the Court of Appeal, Fifth Circuit, No. 17-K-465;

January 8, 2019

Denied.

JLW

BJJ

GGG

MRC

SJC

JTG

HUGHES, J., concurs and assigns reasons.

Supreme Court of Louisiana
January 8, 2019

Jessica McPhee
Deputy Clerk of Court
For the Court

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