FILED
United States Court of Appeals
Tenth Circuit

January 4, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SKYLER CHIRAS,

Plaintiff - Appellant,

v.

JILL MARSHALL,

Defendant - Appellee.

No. 20-1277
(D.C. No. 1:20-CV-00682-LTB-GPG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **KELLY**, and **EID**, Circuit Judges.

Skyler Chiras is in state custody at the Colorado Mental Health Institute at Pueblo. Appearing pro se, he seeks a certificate of appealability ("COA") to challenge the district court's denial of his application for relief under 28 U.S.C. § 2241. *See* 28 U.S.C. § 2253(c)(1)(A); *Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir. 2000) (requiring state prisoners bringing a § 2241 claim to obtain a COA before being heard on the merits of

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

the appeal). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss this matter. We also deny his request to proceed *in forma pauperis* ("*ifp*").[1]

I. BACKGROUND

Mr. Chiras pled not guilty by reason of insanity to assault charges. In his § 2241 application, he alleged violations of his (1) Sixth Amendment right to a speedy trial; (2) Eighth Amendment rights due to denial of requested diet, harassment, theft of property, and other claims; and (3) Fourteenth Amendments rights due to harassment and mail tampering.

The magistrate judge recommended dismissal because his (1) first claim challenged the validity of his conviction and should have been brought under 28 U.S.C. § 2254, and (2) second and third claims concerned his conditions of confinement and should have been brought under 42 U.S.C. § 1983.

The district court, noting that Mr. Chiras had not objected to the magistrate judge's recommendation, dismissed the § 2241 application without prejudice, denied a COA, and denied *ifp* status on appeal.

In response to a show-cause order from this court to address whether he had waived his right to appellate review by failing to object to the magistrate judge's recommendation, Mr. Chiras appeared to say he did not receive the recommendation.

[1] We construe Mr. Chiras's pro se filings liberally, but we do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

II. DISCUSSION

Under this court's "firm waiver rule," failure to timely object to a magistrate judge's findings and recommendations "waives appellate review of both factual and legal questions." *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010) (quotations omitted). We may grant relief from the rule "in the interests of justice." *Id.* (quotations omitted). We have considered as factors "the force and plausibility of the explanation for his failure to comply and the importance of the issues raised." *Id.* (quotations and alterations omitted).

Even if we accept Mr. Chiras's explanation for his failure to object, he faces another waiver problem: His brief fails to address whether the substantive reasons for denial of his application were valid. As a general rule, a party's failure to address an issue in the opening brief results in that issue being deemed waived, and we will decline to reach the merits of waived issues. *See Wyo. v. Livingston*, 443 F.3d 1211, 1216 (10th Cir. 2006) ("Wyoming did not address this issue in its opening appellate brief. The issue is therefore waived."); *accord LifeWise Master Funding v. Telebank*, 374 F.3d 917, 927 n.10 (10th Cir. 2004). This rule applies equally to pro se litigants. *See Toevs v. Reid*, 685 F.3d 903, 911 (10th Cir. 2012).

Beyond these problems, the magistrate judge and district court correctly determined that Mr. Chiras's speedy trial claim should have been brought under 28 U.S.C. § 2254, and his Eighth and Fourteenth Amendment conditions-of-confinement claims should have been brought under 42 U.S.C. § 1983. A § 2241 application ordinarily attacks the execution of a sentence rather than its validity. *See Brace v. United*

States, 634 F.3d 1167, 1169 (10th Cir. 2011). Mr. Chiras needed to file a § 2254 application "to collaterally attack the validity of a conviction and sentence." *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997) (citations omitted). And "[i]t is well-settled law that prisoners who wish to challenge only the conditions of their confinement . . . must do so through civil rights lawsuits . . . not through federal habeas proceedings." *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012) (omissions in original) (quotation omitted).

Before we may exercise jurisdiction over Mr. Chiras's appeal, he must obtain COAs for the issues he wishes to raise. *See* 28 U.S.C. § 2253(c)(1)(A), (c)(3). "At the COA stage, the only question is whether the applicant has shown 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.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

III. CONCLUSION

For the foregoing reasons, we conclude that Mr. Chiras has not made the showing required for a COA. We therefore affirm the dismissal of his § 2241 application and deny his request to proceed *ifp*.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

January 04, 2021

Skyler Chiras
CMHIP - Colorado Mental Health Institute at Pueblo
1600 West 24th Street
Pueblo, CO 81003

RE: 20-1277, Chiras v. Marshall
Dist/Ag docket: 1:20-CV-00682-LTB-GPG

Dear Appellant:

Enclosed is a copy the court's final order issued today in this matter.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of the Court

CMW/na

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00682-LTB-GPG

SKYLAR CHIRAS,

Applicant,

v.

JILL MARSHALL,

Respondent.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge filed on June 22, 2020 (ECF No. 12). The Recommendation states that any objection to the Recommendation must be filed within fourteen days after its service. *See* 28 U.S.C. § 636(b)(1)(C). The Recommendation was served on June 22, 2020. No timely objection to the Recommendation has been filed, and Plaintiff is therefore barred from de novo review.

Accordingly, it is

ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 12) is accepted and adopted. It is

FURTHER ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 1) and this action are DISMISSED WITHOUT PREJUDICE for failure to assert a cognizable § 2241 habeas corpus claim. It is

FURTHER ORDERED that all pending motions are DENIED as moot. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. It is

FURTHER ORDERED that no certificate of appealability issue because jurists of reason would not debate the correctness of this procedural ruling and Applicant has not made a substantial showing of the denial of a constitutional right.

DATED at Denver, Colorado, this 21st day of July, 2020.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00682-LTB-GPG

SKYLAR CHIRAS,

Applicant,

v.

JILL MARSHALL,

Respondent.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 1)[1] filed pro se by Applicant on March 11, 2020. The matter has been referred to this Magistrate Judge for recommendation (ECF No. 11)[2].

---

[1] "(ECF No. 1)" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

[2] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive, or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. United States v. Raddatz, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. Thomas v. Arn, 474 U.S. 140, 155 (1985); Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991).

The Court has reviewed the filings to date. The Court has considered the case file and the applicable law and is sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the action be dismissed.

I. Background

Applicant Skylar Chiras is currently in the custody of the Colorado Mental Health Institute at Pueblo (CMHIP). He has filed pro se an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 1) and a Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 in a Habeas Corpus Action (ECF No. 2). He has been granted leave to proceed in forma pauperis. (ECF No. 7).

On May 1, 2020, the Court ordered Applicant to file an Amended Habeas Application. (ECF No. 8). Specifically, Mr. Chiras was directed to file an Amended Habeas Application that asserted cognizable habeas claims pursuant to 28 U.S.C. § 2241. He was informed that if he wished to assert claims challenging the conditions of his confinement, he must file a new civil action in this Court and utilize the court-approved Prisoner Complaint form. Further, if he wished to assert claims challenging the validity of his conviction, he should file an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254.

Mr. Chiras failed to file an amended application within the time allowed. Therefore, the § 2241 application filed on March 11, 2020, is the operative pleading.

The court must construe the § 2241 application liberally because Mr. Chiras is not represented by an attorney. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972);

Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the court should not be an advocate for a pro se litigant. See Hall, 935 F.2d at 1110.

Mr. Chiras asserts three claims for relief. He contends in claim one that his Sixth Amendment speedy trial rights were violated. According to Mr. Chiras, he was arrested on February 10, 2017. (ECF No. 1 at 3). He pled not guilty by reason of insanity ("NGRI") on March 29, 2018. (Id. at 2-3). His trial commenced on January 18, 2019. (Id. at 3). He was ultimately sentenced to one day to life for assault. (Id. at 2). Mr. Chiras alleges that the time between his arrest and trial was 1 year 10 months and, therefore, his speedy trial rights were violated.

He contends in claim two that he has been subjected to cruel and unusual punishment in violation of his Eighth Amendment rights. To support claim two, he alleges the following:

> Denied lactose free diet, denied high calorie diet, lost 17 pounds, sexual harrassment [sic], assault, hurt back, HIPA [sic] violation, Blocked letter, violation of freedom of speech, violation of attorney client privelage [sic], sleep deprived, Put on bus with someone I was supposed to be segregated from, discriminated against with assignment of cellmate, ignored by deputy when threatened verbally, property stolen, Ignored by mental health after sexual harrassment [sic], pressured into signing a waiver of 35 day rule, no Miranda Rights, harrassed [sic] about medication, given someone else's medication, Punched wall, denied peer restriction, denied apts. w/ Whitney Lockhart, denied restraining order and peer restriction against Maleek Green, denied legally mandated diet in a State facility, Police Charge not filed, Privacy Act violated, abandonment – my attorney did not show up to see me for over 30 days and filed for extension against my wishes.

(ECF No. 1 at 3-4).

In claim three, he asserts that his Fourteenth Amendment due process rights

were violated because of harassment and mail tampering. For relief, he requests release from CMHIP.

II. Standard of Review

The writ of habeas corpus is available if a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). A habeas proceeding is "an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." McIntosh v. U.S. Parole Common, 115 F.3d 809, 811 (10th Cir.1997) (quoting Preiser v. Rodriguez, 411 U.S. 475, 484 (1973)). "Petitions under § 2241 are used to attack the execution of a sentence, . . . [while] § 2254 habeas and § 2255 proceedings, . . . are used to collaterally attack the validity of a conviction and sentence." *McIntosh v. United States Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997).

III. Analysis

As Mr. Chiras was informed in the May 1, 2020 Order to Amend, his habeas application is deficient because he has not asserted any cognizable § 2241 habeas claims. First, Applicant's second and third claims challenge the conditions of his confinement and not the execution of his sentence. Such claims may not be asserted in a habeas corpus action. "[P]risoners who wish to challenge only the conditions of their confinement, as opposed to its fact or duration, must do so through civil rights lawsuits filed pursuant to 42 U.S.C. § 1983 or Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) - not through federal habeas proceedings." Standifer v. Ledezma, 653 F.3d 1276, 1280 (10th Cir. 2011). Constitutional attacks pursuant to 42 U.S.C.

§ 1983 or Bivens that do not affect the fact or duration of confinement are not grounds for federal habeas corpus relief and therefore should not be brought in a habeas corpus petition. See Nelson v. Campbell, 541 U.S. 637, 643 (2004).

Therefore, claims two and three are not proper habeas claims. To the extent Mr. Chiras includes some vague factual allegations in claim two regarding the potential validity of his conviction and sentence, such as "no Miranda rights" and ineffective assistance of counsel, those allegations are not conditions of confinement claims but may be an attempt to challenge his conviction or sentence. As Mr. Chiras was informed in the May 1, 2020 Order to Amend, if he is attempting to challenge his conviction or sentence, he should pursue such claims through a § 2254 habeas action. "Petitions under § 2241 are used to attack the execution of a sentence, . . . [while] § 2254 habeas and § 2255 proceedings, . . . are used to collaterally attack the validity of a conviction and sentence." *McIntosh v. United States Parole Comm' n*, 115 F.3d 809, 811 (10th Cir. 1997); see also Palma-Salazar v. Davis, 677 F.3d 1031, 1035 (10th Cir. 2012) (discussing distinction between habeas corpus claims pursuant to § 2241 and conditions of confinement claims raised in civil rights actions).

Additionally, Mr. Chiras's first claim appears to attack the validity of his conviction, not the execution of his sentence. Mr. Chiras is not a pretrial detainee; he has been sentenced. (See ECF No. 1 at 2). Therefore, his allegation of a speedy trial violation challenges his conviction and sentence, not the execution of his sentence. Such claim is properly asserted pursuant to 28 U.S.C. § 2254 rather than 28 U.S.C. § 2241. See Montez v. McKinna, 208 F.3d 862, 865 (10th Cir. 2000); see Yellowbear v.

Wyoming Atty. Gen., 525 F.3d 921, 924 (10th Cir. 2008) ("Section 2241 is a vehicle . . . for attacking the execution of a sentence . . . A § 2254 petition, on the other hand, is the proper avenue for attacking the validity of a conviction and sentence.") (citations omitted).

Mr. Chiras has not asserted any cognizable habeas claims pursuant to 28 U.S.C. § 2241. Therefore, I recommend that the habeas application be dismissed.

III. Recommendation

For the reasons set forth herein, this Magistrate Judge respectfully

RECOMMENDS that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 1) and this action be DISMISSED WITHOUT PREJUDICE for failure to assert a cognizable § 2241 habeas corpus claim.

DATED June 22, 2020.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge