

DLD-061

November 30, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-2895

ANDY BUXTON, Appellant

VS.

MERCER SCI, et al.

(W.D. Pa. Civ. No. 2-17-cv-00062)

Present: JORDAN, SHWARTZ and KRAUSE, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

in the above-captioned case.

Respectfully,

Clerk

MMW/BCA/tyw

ORDER

Federal courts have jurisdiction to consider petitions for habeas relief only from persons who are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added). See also 28 U.S.C. § 2254(a); Maleng v. Cook, 490 U.S. 488, 490-92 (1989). Buxton was not in custody on the challenged 2013 conviction when he filed this petition for a writ of habeas corpus under 28 U.S.C. § 2254. See Maleng, 490 U.S. at 490-91 (noting that for a federal court to have jurisdiction over a habeas corpus petition, the "petitioner must be 'in custody' under the conviction or sentence under attack at the time his petition is filed"). Additionally, any possible collateral consequences from Buxton's 2013 conviction cannot, by themselves, render him "in custody" in order to confer habeas jurisdiction. See Maleng, 490 U.S. at 492 ("once the sentence imposed for a conviction has completely expired, the

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collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it").

Because jurists of reason would not debate the District Court's dismissal of Buxton's petition for lack of jurisdiction, the foregoing application for a certificate of appealability is denied. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). We note, as the District Court did, that Buxton is free to file a habeas corpus petition attacking his current conviction if he wishes. As the District Court noted, his ability to attack any prior conviction in such a proceeding would be quite limited. See Lackawanna Cty. Dist. Att'y v. Coss, 532 U.S. 394, 403-05 (2001).

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: December 12, 2017
tyw/cc: Andy Buxton
Rusheen R. Pettit, Esq.



A True Copy

Marcia M. Waldron

Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ANDY BUXTON,	)	
	)	
Petitioner,	)	Civil Action No. 17-62
	)	Judge David Stewart Cercone/
v.	)	Chief Magistrate Judge Maureen P. Kelly
	)	
SCI-MERCER; and THE ATTORNEY	)	
GENERAL OF THE STATE OF	)	
PENNSYLVANIA,	)	
	)	
Respondents.	)	

ORDER

Andy Buxton ("Petitioner") initiated these proceedings under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody on January 13, 2017. ECF No. 1. Petitioner is seeking to attack his Driving Under the Influence ("DUI") conviction and related convictions obtained in the Court of Common Pleas of Allegheny County. Commonwealth v. Buxton, CP-02-CR-0008697-2012 (Allegheny County CCP). The case was referred to Chief Magistrate Judge Maureen Kelly in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Civil Rules 72.C and D.

Chief Magistrate Judge Kelly issued a Report and Recommendation (the "Report"), recommending that the Petition be dismissed for lack of jurisdiction because all custody stemming from the convictions that he challenged herein had long since ceased at the time that Petitioner initiated these proceedings. ECF No. 15. The Report was served upon Petitioner at his address of record and he was informed that he could file Objections to the Report. Petitioner filed his timely Objections on August 8, 2017. ECF No. 16. Those Objections do not merit rejection of the Report and Recommendation.

Petitioner seemingly contends that he is in custody for the DUI convictions that he seeks to attack herein because he suffers collateral consequences from those convictions. However,

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“collateral consequences” stemming from a conviction do not render the person “in custody” for purposes of habeas corpus. Williams v. D.A. of Allegheny County No. Civ. A. 10-353, 2010 WL 4388073 (W.D. Pa. Oct. 29, 2010) (“While collateral consequences of a conviction can prevent a habeas case from becoming moot if the habeas petitioner is released from custody while his petition is still pending, collateral consequences alone will not satisfy the jurisdictional ‘in custody’ requirement. *Maleng*, 490 U.S. at 492 (‘the collateral consequences of [a] conviction are not themselves sufficient to render an individual ‘in custody’ for the purposes of a habeas attack upon it’). If the petitioner is not ‘in custody’ when he files his petition, any still-remaining collateral consequences of his conviction alone will not satisfy the jurisdictional ‘in custody’ requirement.”).

Accordingly, after *de novo* review of the Report and Recommendation as well as the Objections and the record of this case, it is hereby **ORDERED** that the Report is adopted as the opinion of the Court and we hereby **ORDER** that the Petition be dismissed for lack of subject matter jurisdiction because, when Petitioner initiated these proceedings, he was no longer in custody pursuant to the DUI convictions that he sought to attack via this habeas petition. Because jurists of reason would not find this disposition debatable a certificate of appealability is

DENIED.¹

Date: August 16, 2017



David Stewart Cercone
United States District Judge

¹ Although the Objections are not entirely clear on this point, to the extent that Petitioner seeks to attack in his Objections his current conviction/sentence as having been unconstitutionally enhanced by the DUI conviction he attacks herein, he may do so by filing a Section 2254 Petition in this Court attacking the currently served sentence. But he may only do so on the ground that his previously served DUI conviction was obtained in a proceeding where there was a failure to appoint counsel in violation of the Sixth Amendment. Lackawanna County District Atty. v. Coss, 532 U.S. 394 (2001).

cc: The Honorable Maureen P. Kelly
Chief United States Magistrate Judge

Andy Buxton
MS1885
SCI Mercer
801 Butler Pike
Mercer, PA 16137
(*Via First Class Mail*)

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ANDY BUXTON,	)	
	)	
Petitioner,	)	Civil Action No. 17-62
	)	Judge David Stewart Cercone/
v.	)	Chief Magistrate Judge Maureen P. Kelly
	)	
SCI-MERCER; and THE ATTORNEY	)	
GENERAL OF THE STATE OF	)	
PENNSYLVANIA,	)	
	)	
Respondents.	)	

REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Petition, seeking to challenge the validity of state court convictions, be dismissed pre-service for lack of subject matter jurisdiction, pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

II. REPORT

Andy Buxton ("Petitioner") is currently a state prisoner who has already completely served a sentence for Driving Under the Influence, and various traffic violations imposed by the Court of Common Pleas of Allegheny County. Petitioner was sentenced on May 20, 2013 to seven days of house arrest and six months of probation for these offenses. Because it is indisputable that all custody stemming from these convictions that he seeks to challenge herein had ceased prior to his filing the current Petition, the Petition should be dismissed due to lack of subject matter jurisdiction.

"APPENDIX B"

A. Discussion

1. Courts can raise subject matter jurisdiction sua sponte.

A court always has the inherent power to sua sponte raise its own subject matter jurisdiction. Palmer v. Barram, 184 F.3d 1373, 1377 (Fed. Cir. 1999) (“The question of subject matter jurisdiction, therefore, is one that may be raised sua sponte by the court, as it was here, and our jurisdiction to address and decide it is inherent.”). See also Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (“[i]t has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.”) (citations omitted). Rule 4 of the Rules Governing Section 2254 Cases permit Courts to dismiss petitions before service for lack of subject matter jurisdiction. Rohn v. Coleman, Civ. A. No. 14-851, 2014 WL 4824625 (W.D. Pa. Sept. 24, 2014).

2. The Petition should be dismissed due to lack of jurisdiction.

We take judicial notice of the dockets in the criminal case against Petitioner in Commonwealth v. Buxton, CP-02-CR-0008697-2012 (Allegheny County CCP), which is the case that he is seeking to attack via the instant Petition in this Court.

In an Order to Show Cause, this Court took judicial notice of the fact that Petitioner had completely served the sentence in CP-02-CR-0008697-2012 before he initiated the current Petition in this Court and accordingly, directed Petitioner in the Order to Show Cause to explain why this Petition should not be dismissed due to lack of subject matter jurisdiction given that he was no longer in custody for the convictions that he sought to challenge. ECF No. 11.

Petitioner filed a Motion for Leave to File an Amended Petition, ECF No. 12, which merely sought to have the current Petition construed to include a Petition for Writ of Coram

Nobis. ECF No. 12. The Court denied the Motion as futile given that federal courts have no authority to grant Writs of Error Coram Nobis to invalidate state court convictions. ECF No. 13. Obado v. New Jersey, 328 F.3d 716, 718 (3d Cir. 2003) (“Four Courts of Appeals have held that coram nobis is not available in a federal court as a means of attack on a state criminal judgment... We agree with those cases. Obado can seek coram nobis relief only in state court.”)).

Petitioner filed a Response to the Order to Show Cause. ECF No. 14. In the one page Response, Petitioner complains about the alleged errors that occurred in the course of the state court proceedings leading to his conviction for the DUI and related charges, asserting, *inter alia*, that his Sixth Amendment right to counsel was violated. Petitioner also argues that there was a breakdown in the state court process. However, no matter what errors occurred during the procedures leading to his conviction and or during the appellate procedures or post conviction procedures in state court, if Petitioner was not in custody pursuant to the conviction being challenged herein at the time he filed this Petition, then the Court lacks subject matter jurisdiction. Maleng v. Cook, 490 U.S. 488, 492 (1989).

Petitioner does not assert that he is in custody pursuant to the conviction that he seeks to challenge herein. Accordingly, the Petition for Writ of Habeas Corpus should be dismissed pre-service due to lack of subject matter jurisdiction.

3. Certificate of Appealability

Because jurists of reason would not find the foregoing analysis to be debatable, a Certificate of Appealability should be denied.

III. CONCLUSION

For the reasons set forth herein, it is respectfully recommended that the case be dismissed before being served because this Court lacks subject matter jurisdiction over this case.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rule 72.D.2, the parties are permitted to file written objections in accordance with the schedule established in the docket entry reflecting the filing of this Report and Recommendation. Objections are to be submitted to the Clerk of Court, United States District Court, 700 Grant Street, Room 3110, Pittsburgh, PA 15219. Failure to timely file objections will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n. 7 (3d Cir. 2011). Any party opposing objections may file their response to the objections within fourteen (14) days thereafter in accordance with Local Civil Rule 72.D.2.

Respectfully submitted,

Date: July 27, 2017

s/Maureen P. Kelly
MAUREEN P. KELLY
CHIEF UNITED STATES MAGISTRATE JUDGE

cc: The Honorable Stewart Cercone
United States District Judge

ANDY BUXTON
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801 Butler Pike
Mercer, PA 16137

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **17-2895**

ANDY BUXTON, Appellant

VS.

MERCER SCI, et al.

(W.D. Pa. Civ. No. 2-17-cv-00062)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN,
GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and BIBAS,
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/ Kent A. Jordan
Circuit Judge

DATE: January 10, 2018
tmm/cc: Andy Buxton

"APPENDIX C"

Rusheen R. Petit, Esq.