

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RAYMOND A. ROUSSEL)
)
 Plaintiff)
)
 v.) Civil No. 00-231-B-S
)
 CORRECTIONS, MAINE COMM.,)
 et al.)
 Defendants)

RECOMMENDED DECISION

Petitioner Raymond A. Roussel has filed a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Roussel’s sole ground for relief, previously raised in his state court direct appeal, is that he was convicted on insufficient evidence in violation of the Due Process Clause of the Fourteenth Amendment. Because Roussel is not “a person in custody” pursuant to § 2254 (a), I recommend that the petition be **DISMISSED**. In the event the Court does consider the merits of the petition, I recommend that the Writ be **DENIED**.

Background

Raymond Roussel was indicted by the Piscataquis County Grand Jury on January 6, 1999, on charges of aggravated trafficking in schedule Z drugs, in violation of 17-A M.R.S.A. § 1105(1)(E)(West Supp. 2000), based on an allegation that he grew or cultivated 100 or more marijuana plants within 1000 feet of a school. A jury trial was held on September 22, 1999, and Roussel was convicted of the lesser included offense of unlawful trafficking in scheduled drugs, in violation of 17–A M.R.S.A. § 1103 (2) (B)

(West 1983 & Supp. 2000). The jury found that Roussel grew or cultivated 100 or more marijuana plants, but failed to find that he did so within 1000 feet of a school.

Roussel was sentenced the same day. He received a one-year term of imprisonment with all but thirty days in the Piscataquis County Jail suspended, followed by one year of probation, with a number of special conditions. Roussel went into execution of that sentence on September 22, 1999. Pursuant to state law, Roussel's probationary period commenced upon completion of thirty-day term of imprisonment on October 18, 1999. The record reflects no tolling of the probation period for a probation violation or for any other reason. Roussel's sentence was therefore completed in its entirety on October 18, 2000. The instant petition was filed on November 20, 2000.

While in execution of his sentence, Roussel filed a notice of appeal to the Maine Supreme Judicial Court on October 21, 1999. At no time did he apply for post-conviction bail under 15 M.R.S.A. § 1051(West Supp. 2000), nor was bail granted. As a result there was never a stay of execution of the sentence pursuant to Maine Rule of Criminal Procedure 38(a). In addition to raising the insufficiency of the evidence ground raised by this petition, Roussel also challenged his conviction on the basis that certain evidence was improperly admitted and that clerical errors in the Judgment and Commitment resulted in reversible error. The Maine Law Court denied his direct appeal. *State v. Roussel*, 2000 ME 185, 760 A.2d 1062. There was no state post-conviction activity in this case.

Facts

The evidence presented at trial, as viewed in the light most favorable to the State, showed that Roussel assisted Timothy Farrar (a key prosecution witness) in tending

marijuana plants at three locations. These plots were described and distinguished at trial by reference to natural and manmade landmarks: they tended 48 marijuana plants in the ground across the Pleasant River (Tr. at 36, 46–47, 51, 59; *but see* Tr. at 78 (officer says 45 plants at this location)), 40 marijuana plants in the ground near the Boston and Aroostook Railroad tracks (Tr. at 47), and 24 marijuana plants in milk buckets in the woods next to the trail to the railroad tracks. (Tr. at 47-48, 63-65.) There was also evidence relating to approximately 200 marijuana plants growing at Farrar’s parents’ house, which the state alleged was located within 1000 feet of a school. (Tr. at 41-42.) The jury’s verdict rebuffing the aggravated trafficking charge reflects that either they rejected the argument that the house was within 1000 feet of a school or they rejected the contention that Roussel assisted in the cultivation of those plants. In any event the evidence relative to the 200 plants is not relevant to the instant petition.

The organization underlying these growing efforts was rudimentary. Timothy Farrar planned to grow marijuana outdoors during the late spring and early summer of 1998, but he needed help from others. (Tr. at 50, 52.) Farrar asked Roussel for assistance in exchange for a cut of the profits and Roussel agreed. (Tr. at 50.) Roussel’s assistance consisted of watering plants, digging and moving dirt used to plant seedlings, and transplanting plants from milk jugs into the ground. (Tr. at 45, 51.) Roussel assisted Farrar during a three-week period in May of 1998. (Tr. at 50, 52-53.) During that period Farrar told Roussel that he had as many as 500 plants growing that he was planning to plant. (*Id.*) The police caught Roussel and Farrar while they were carrying water to the marijuana plants on May 28, 1998. (Tr. at 36, 54.)

About thirty yards from location where Farrar and Roussel were apprehended, an officer located the 24 marijuana plants in the milk jugs along a well-beaten path. (Tr. at 75-77.) When two officers returned to the area by the railroad tracks after the apprehension, they located 40 marijuana plants that had already been transplanted into the ground. (Tr. at 77.) The first marijuana plot located by the officers, and the one which formed the basis of the information that led to a search warrant for Farrar's residence, was the plot containing what is variously described as 45 –48 plants situated in ground across the Pleasant River in a location distinct from the area surrounding the Bangor and Aroostook Railroad tracks where the 24 milk jug plants and the 40 transplanted plants were seized. (Tr. at 78-79.) At the location by the railroad tracks officers discovered a homemade carrier made from two-by-fours used to move planting provisions to the growing sites. (Tr. at 49-50, 80.) The carrier required two people to carry it. (Tr. at 49, 80.) The marijuana in the plastic jugs was clearly visible as you walked down the well-beaten path, in fact one had to step around them to continue on the path. (Tr. at 81.) The path led to an area where potting soil and other planting implements were stored and to the spot where the 40 plants in the ground were growing, at the most, fifty to sixty yards from the plastic milk jugs. (Tr. at 81 –82.)

In this case the jury was properly instructed that Roussel could be convicted as a principal or an accomplice. *Roussel*, 2000 ME 185, ¶ 9, 760 A.2d at 1064; (Tr. at 107).

Discussion

A. Preliminary Procedural Issues

This action brought pursuant to 28 U.S.C. § 2254 must pass at least three preliminary hurdles before this Court considers Roussel's claim. First, the petition must

fall within the one-year period of limitations set forth in 28 U.S.C. § 2244(d) (1).

Second, Roussel must satisfy the exhaustion doctrine as set forth in 28 U.S.C. § 2254 (b) and (c), in that his federal constitutional ground asserted in the petition must have been “fairly presented” to the state court. Finally, Roussel must be “in custody” pursuant to a judgment of a state court within the meaning of § 2254 (a). In the present case the State does not dispute that this petition is timely filed or that the federal constitutional ground was fully considered by the Law Court. The State, however, maintains that Roussel was not “in custody” at the time he filed this petition and that the matter should be dismissed.

The concept of custody has been construed liberally and is certainly not limited to actual incarceration. *See, e.g., Hensley v. Mun. Ct.*, 411 U.S. 345 (1973)(stay of execution of sentence); *Jones v. Cunningham*, 371 U.S. 236 (1963)(parole); *Barry v. Bergen County Prob.*, 128 F.3d 152, 159-62 (3rd Cir. 1997)(community service); *Fawcett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992)(probation). Furthermore, if a petitioner is “in custody” at the time the petition is filed, a subsequent change in status will not prevent full consideration of the petition. *Carafas v. LaVallee*, 391 U.S. 234 (1968).

Although custody does not require incarceration, it does require that the person be subject to restraints not imposed on the public generally and at least be under some manner of continuing governmental supervision. *Tinder v. Paula*, 725 F.2d 801, 803 (1st Cir. 1984). The *Tinder* case, like the instant matter, involved a petitioner who had completed his sentence, including a three-year period of probation. The First Circuit noted that *Tinder*’s failure to make court ordered restitution during the probationary period and the remote possibility that the Massachusetts courts could somehow regain supervision over him for that purpose did not amount to custody sufficient to invoke

habeas corpus relief. *Tinder*, 725 F.2d at 804-05. Roussel, from all indications in the record, satisfied all of his financial obligations while on probation, and therefore there is even less reason to argue that he is subject to governmental control.

The prospect that Roussel's conviction might have undesirable secondary repercussions for him does not save this petition. Decisions post-*Tinder* have uniformly recognized that the collateral consequences attendant to a prior felony conviction are insufficient to invoke habeas corpus relief. *See e.g. Maleng v. Cook*, 490 U.S. 488, 492 (1989) (holding that the mere possibility that conviction may be used to enhance sentence in subsequent criminal prosecution not sufficient to constitute custody); *Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998) (concluding that the requirement to register as a convicted sex offender did not constitute custody for purposes of habeas corpus relief); *Lefkowitz v. Fair*, 816 F.2d 17, 19-21 (1st Cir. 1987)(determining that revocation of medical license not sufficient to satisfy habeas corpus "in custody" requirement).

Based upon the foregoing, I am satisfied that the instant Petition is subject to dismissal for lack of jurisdiction.

B. The merits of the federal constitutional claim

In his petition Roussel essentially challenges the sufficiency of the evidence as it pertains to the 24 marijuana plants in the milk jugs. He concedes that there is sufficient evidence to find him guilty of cultivating 80 odd marijuana plants in the two separate plots. The federal courts will only grant habeas relief on a claim of insufficiency of the evidence if the petitioner can show that no rational trier of fact, "viewing the evidence in the light most favorable to the prosecution," "could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

This is identical to the standard of review applied under Maine law, *see State v. Gray*, 2000 ME 145, ¶ 25, 755 A.2d 540, 546, and in the Law Court’s review in this case, *Roussel*, 2000 ME 185, ¶ 8, 760 A.2d at 1064.¹

Roussel relies in large part upon Farrar’s testimony that the 24 milk jug plants were not part of the 40 odd plants by the railroad tracks. (Tr. at 48.) Roussel argues that the factfinder ought to draw the inference that *those* 24 plants were intended for yet a third plot of marijuana that involved only Farrar and his cousin Daryl. (Tr. at 59 –60.) Farrar never clearly stated such to be the case. Asked whether “the 24 plants that were growing in the cut-off jugs” were “part of the 40 odd plants” or were “in addition to the 40 plants,” Farrar responded, “That was something different.” (Tr. at 48.) Farrar could have simply meant that there were more than 40 plants intended for the plot by the railroad tracks, i.e., the 40 already in the ground and the 24 waiting in milk jugs.

However, even if Farrar’s statement had the “spin” attributed to it by Roussel and Farrar flatly disavowed Roussel’s involvement with the 24 milk jugs, there is still sufficient evidence in the record to support the guilty verdict. Roussel knew that Farrar had upwards of 500 plants and that he needed help cultivating them. (Tr. at 50, 52 –53.)

¹ Even though the Supreme Court’s and the Law Court’s standards are identical, the Law Court at no time indicated that it was deciding Roussel’s federal constitutional claim. Therefore, the standard of review in the 1996 Antiterrorism and Effective Death Penalty Act, § 2254(d), for matters adjudicated on the merits by the State court, may be inapplicable. *Compare Washington v. Schriver*, ___ F.3d ___, 2001 WL 12841, *6-8 (2nd Cir. 2001)(concluding that there was no adjudication on the merits because of the state’s court’s failure to discuss or cite to federal law in disposing of the petitioner’s federal constitutional claim and that the pre-AEDPA standard of review was appropriate), *with Bell v. Jarvis*, ___ F.3d ___, 2000 WL 1886613 (4th Cir. 2000)(concluding that the state court’s failure to articulate a rationale for rejecting the petitioner’s constitutional claim did not mean it was not an adjudication on the merits warranting the deferential AEDPA standard of review). *See generally Williams v. Taylor*, 529 U.S. 362 (2000).

Under the pre-AEDPA standard, I review pure questions of law and mixed questions of law and fact de novo and I presume that the state court’s factual findings, including historical facts and inferences drawn from them, were correct. *Washington*, ___ F.3d ___, 2001 WL at *8 (observing that the presumption applies to the factual findings of state appellate courts as well as trial courts). *See also Coombs v. Maine*, 202 F.3d 14, 18 n.2 (1st Cir. 2000)(“AEDPA did not meaningfully alter the standard for reviewing determinations of fact.”).

He worked with Roussel carrying water, moving dirt, and transplanting plants, including plants from milk jugs. (Tr. at 45, 51.) The two men were caught together carrying water to plants on a well-beaten path that ran right by the 24 milk jugs. (Tr. at 36, 54, 75, 81.) Roussel had been involved with Farrar the previous year on a much smaller scale (Tr. at 50-51) and he knew he was intended to get a cut of the profits for his work during this growing season (Tr. at 50). The evidence was certainly sufficient to convict Roussel as an accomplice, if not one of the principals, of this marijuana cultivation operation.

Conclusion

Based upon the foregoing, I recommend that the Peititon for Habeas Corpus Relief be **DISMISSED** and I further recommend that if the Court considers the merits of the argument raised, the petition must be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated this 6th day of February, 2001.

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 00-CV-231

ROUSSEL v. CORRECTIONS, ME COMM, et al Filed: 11/20/00

Assigned to: Judge GEORGE Z. SINGAL

Demand: \$0,000

Nature of Suit: 530

Lead Docket: None

Jurisdiction: Federal Question

Dkt # in PiscCtySupCt

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

RAYMOND A ROUSSEL STUART W. TISDALE, JR, ESQ.

plaintiff

[COR LD NTC]

TISDALE & DAVIS

P.O. BOX 572

PORTLAND, ME 04112

879-9177

v.

CORRECTIONS, ME COMM JAMES M. CAMERON, ESQ.

defendant

[COR LD NTC]

ASSISTANT ATTORNEY GENERAL

CRIMINAL PROSECUTION DIV.

STATE HOUSE STATION NO. 6

AUGUSTA, ME 04333-0006

MAINE, STATE OF JAMES M. CAMERON, ESQ.

defendant

(See above)

ATTORNEY GENERAL, ME JAMES M. CAMERON, ESQ.

defendant

(See above)