

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NOREEN-EVELYN STROUT,)
)
 Plaintiff)
)
v.) Civil No. 04-40-P-S
)
STATE OF MAINE,)
)
 Defendant)

RECOMMENDED DECISION

Petitioner Noreen Evelyn Strout has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Because Strout is not “in custody” within the meaning of § 2254(a) I recommend this court **DISMISS** the pending petition.

Background

The history of this criminal case began on June 24, 2002, when the Maine State Police received a complaint in reference to a possible violation of a protection from abuse order issued by the Maine state courts. Ultimately on June 26, 2002, Noreen Strout was charged in the South Paris District Court with Violation of a Protection Order (Class D), Violation of a Condition of Release (Class E), and Refusal to Submit to Arrest (Class D). On Strout’s request the matter was transferred to the Oxford County Superior Court. On December 16, 2002, Strout’s jury trial took place.¹ Following the presentation of the

¹ Prior to the initiation of this particular criminal case, a wholly separate two count complaint charging Strout with a Title 19-A violation of a protection from abuse order, 19-A M.R.S.A. § 4011(1)(A), Class D (Count 1) and a Title 17-A criminal trespass, 17-A M.R.S.A. § 402(1) (B), Class E (Count 2) had been filed on April 10, 2002. The criminal docket number assigned to the case by the District Court at South Paris was SOPSC-CR-2002-00164. (See attached docket record in SOPSC-CR-2002-00164.) On September 20, 2002, the State dismissed this criminal case, pursuant to Maine Rule of Criminal Procedure. 48(a), giving as its reason “insufficient evidence.” (See Pet’r’s Appendix, Tab 1, paragraph (G), page 24; see also attached docket record in SOPSC-CR-2002-00164.) Accordingly, SOPSC-CR-2002-00164 is irrelevant to this § 2254 proceeding.

State's case, the court granted Strout's motion for judgment of acquittal on the violation of a condition of release charge. The next day the jury returned a verdict of not guilty on the violation of a protection order charge and a verdict of guilty on the charge of refusal to submit to arrest. Strout filed a post verdict motion for judgment of acquittal that the court took under advisement. Ultimately, on May 1, 2003, the motion was denied and on May 8, 2003, Strout was sentenced to ten days in the Oxford County Jail, all suspended, one year's probation with the condition that she perform fifty hours community service work. The court also directed that probation could be terminated upon the completion of the community service work. A request for a stay of the sentence pending appeal was denied.

On July 23, 2003, the probation officer assigned to Strout's case filed a motion for termination of probation, averring that the fifty hours of public service work had been satisfactorily completed. On August 4, 2003, a Superior Court justice ordered the probation terminated. In the meantime, on May 8, 2003, Strout filed a timely direct appeal to the Maine Law Court and on December 2, 2003, the Law Court issued a memorandum of decision affirming the judgment of conviction. Although Strout made an untimely effort to have the Law Court reconsider her appeal, she never sought collateral relief from the underlying criminal judgment. Instead, on February 12, 2004, Strout filed this petition attempting to invoke this court's subject matter jurisdiction pursuant to 28 U.S.C. § 2254 by challenging the underlying criminal conviction in this case.

Sadly, Strout's original petition, with its thirteen asserted grounds for relief, is merely the tip of the iceberg of a long and convoluted family law dispute that has

involved a contested divorce, protection from abuse orders on behalf of minor children in both the State of Maine and the State of New Hampshire, and a tangentially related appeal to the Maine Law Court in a civil protection from abuse matter. Strout has filed voluminous copies of pleadings, orders, and opinions from the state court civil proceedings in the form of a notebook appendix and a supplemental appendix. While these submissions do little to elucidate the issues this court must decide on this petition, they do tell the story of Strout's ongoing legal battles with her ex-husband, various attorneys, a number of state court judicial officers, and assorted law enforcement personnel.

Discussion

The State of Maine has moved to dismiss this petition contending that this court lacks subject matter jurisdiction because in order to exercise jurisdiction over the petition under 28 U.S.C. § 2254(a) Strout must demonstrate that she is “in custody pursuant to the judgment of a State court.” (Mot. Dismiss at 12). Because Strout was fully discharged from her sentence at the time she filed this petition, she cannot possibly satisfy the “in custody” requirement.

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. Strout, from all indications in the record, satisfied all of her financial obligations while on probation, and therefore there is even less reason to argue that she is subject to governmental control.

This petition is not saved by the fact that Strout's conviction might have undesirable secondary repercussions for her. The fact that Strout has this conviction on her record may have negative consequences for her during the ongoing litigation with her ex-husband. Decisions post-Tinder have uniformly recognized that collateral consequences attendant to a prior felony conviction are insufficient to invoke habeas corpus jurisdiction. 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 is 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 is not sufficient to satisfy habeas corpus "in custody" requirement).

Strout seems to urge the court to find that the outstanding protection from abuse civil orders in both Maine and New Hampshire are a restraint upon her liberty entitling her to habeas relief. She describes the situation as akin to termination of all her parental rights, what she refers to as "capital punishment" of her right to be a parent. While I certainly agree that Strout's rights have been substantially impacted by the civil protection orders, that does not mean that Strout is "in custody" within the meaning of § 2254. As indicated above, all sorts of serious collateral consequences to a criminal

conviction have been found not to create an “in custody” status. In this case the civil protection orders are not even collateral consequences of the criminal conviction, they are independent civil judgments to which the State of Maine was not even a party. Courts of competent jurisdiction have entered various orders, judgments, and mandates on appeals. This court is not a court of appeal apropos those judgments.

As a practical matter at least one United States District Court, when confronted with a similar habeas petition involving a challenge to a protection from abuse civil order, has concluded that the petitioner was not “in custody” pursuant to the civil order, even though that petitioner, unlike Strout, was firmly incarcerated at the time the civil protection order issued. See Jones v. McKibben, No 93-4536 FMS, 1994 WL 62105, *1 (N.D.Cal. Feb. 8, 1994). The petitioner in that case, a pretrial detainee incarcerated in the Lake County Jail, filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 complaining that while incarcerated he was not permitted, either by jail staff or by the presiding judge, to attend a hearing at which his wife obtained a three-year restraining order. The District Court held that the petitioner was not “in custody” because of the restraining order.

In order for this court to have subject matter jurisdiction over a petition for writ of habeas corpus, the petitioner must be "in custody pursuant to the judgment of a state court." 28 U.S.C. § 2254(a). Accordingly, a request for a writ of habeas corpus must be denied.

Conclusion

Based upon the foregoing, I recommend that Defendant's Motion to Dismiss (Docket No. 4) be **GRANTED** and that the petition be **DISMISSED**.

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.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated May 27, 2004

STROUT v. MAINE, STATE OF
Assigned to: JUDGE GEORGE Z. SINGAL
Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK
Demand: \$
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus
(State)

Date Filed: 02/12/04
Jury Demand: None
Nature of Suit: 530 Habeas Corpus
(General)
Jurisdiction: Federal Question

Plaintiff

NOREEN-EVELYN STROUT

represented by **NOREEN-EVELYN STROUT**
P.O. BOX 476
WEST PARIS, ME 04289
207-674-2948
PRO SE

V.

Defendant

MAINE, STATE OF

represented by **CHARLES K. LEADBETTER**
ASSISTANT ATTORNEY
GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333-0006
626-8800
Email:
charles.leadbetter@maine.gov
ATTORNEY TO BE NOTICED