

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Nikaya Jones

Court of Appeals No. L-10-1360

Petitioner

v.

Deborah Gasser, Director of the
Lucas County Work Release Facility

DECISION AND JUDGMENT

Respondent

Decided: January 18, 2011

* * * * *

Frank J. Simmons II, for petitioner.

* * * * *

OSOWIK, P.J.

{¶ 1} This matter is before the court on a petition for a writ of habeas corpus and memorandum in support filed by petitioner, Nikaya Jones, on December 13, 2010, pursuant to R.C. Chapter 2725. The facts, taken from the petition and attached copies of the trial court's journal entries, are as follows.

{¶ 2} On May 13, 2008, petitioner entered a plea of no contest in Toledo Municipal Court to one count of driving while under the influence of alcohol, in violation of Toledo Municipal Code 333.01(A)(1). (Case No. TRC-06-25853-0102) On August 28, 2008, the trial court ordered petitioner to complete a three-day driver's intervention program, and imposed a six-month jail sentence, which was suspended. Petitioner was placed on probation for one year, until August 28, 2009.

{¶ 3} On May 26, 2009, petitioner entered a guilty plea in Toledo Municipal Court to one count of driving without a valid operator's license, in violation of Toledo Municipal Code 335.01(A)(1). (Case No. TRD-08-34177-0103) That same day, the trial court imposed a six-month sentence, which was suspended pending petitioner's successful completion of one year's probation on May 26, 2010.

{¶ 4} On August 4, 2009, a show cause motion was filed against petitioner for violating the terms of his probation in both cases. The trial court set a probation violation hearing in both cases for September 1, 2009; however, petitioner did not appear at the hearing. On April 8, 2010, the trial court issued orders enforcing petitioner's six-month sentence in case Nos. TRC-06-25853-0102 and TRD-08-34177-0103, respectively, and ordered the two sentences to be served consecutively. No appeal was taken from the trial court's order in either case. On September 7, 2010, the trial court found that petitioner was eligible to serve in a work release program, and modified both sentences accordingly.

{¶ 5} On December 13, 2010, petitioner filed this original action, in which he claims that he is being wrongfully imprisoned and unlawfully restrained of his liberty by

respondent, Deborah Gasser, Director of the Lucas County Work Release Facility. In support, petitioner states that the trial court did not have jurisdiction to sentence him for a probation violation in case No. TRC-06-25853-0102 because his probation in that case expired on August 28, 2009, and the probation violation hearing was not scheduled until September 1, 2009. Petitioner further argues that, since the first of the two consecutive sentences was illegal, he should be excused from serving the remainder of his work-release sentence in case No. TRD-08-34177-0103.

{¶ 6} "Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation." R.C. 2725.01. "The purpose of habeas corpus is to determine the legality of the restraint under which a person is held, not to determine guilt or innocence." *Young v. Brunsman*, 4th Dist. No. 06CA2938, 2008-Ohio-64, ¶ 15, citing *In re Lockhart* (1952), 157 Ohio St. 192, 194.

{¶ 7} Habeas corpus is an extraordinary writ which is only available in cases "'where there is an unlawful restraint of a person's liberty and no adequate remedy at law.'" *Rowe v. Brunsman*, 4th Dist. No. 06CA2891, 2006-Ohio-1964, ¶ 4, quoting *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶ 8. Moreover, "[h]abeas corpus is generally appropriate in the criminal context only if the prisoner is entitled to immediate release from prison." *Ridenour v. Randle*, 96 Ohio St.3d 90, 2002-Ohio-3606, ¶ 7. "For example, a writ of habeas corpus will generally lie to compel a defendant's release from prison when he will be able to prove that the trial court in the underlying criminal case

lacked the jurisdiction to enter the conviction." Rowe, *supra*, citing *Heddleston v. Mack*, 84 Ohio St.3d 213, 1998-Ohio-320. However, "[i]t has long been established that a writ of habeas corpus will not be allowed when a prisoner is held by virtue of the judgment of the court of record that had jurisdiction to render that judgment." *Wireman v. Ohio Adult Parole Auth.* (1988), 38 Ohio St.3d 322.

{¶ 8} In cases where "it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in proceeding is only error in the "exercise of jurisdiction," as distinguished from the want of jurisdiction in the first instance." *Young, supra*, at ¶ 19, quoting *Jimison v. Wilson*, 106 Ohio St.3d 342, 2005-Ohio-5143, ¶ 11, quoting *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 240. "Errors in the exercise of jurisdiction should be raised on direct appeal instead of in habeas corpus." *Id.*

{¶ 9} In this case, petitioner argues that the trial court lacked jurisdiction to sentence for a probation violation in case No. TRC-06-2583-0102 because the sentencing hearing was not scheduled until after his probationary period in that case had expired. Petitioner further argues that he was not given an opportunity to address the court and point out that his probationary period had expired. Consequently, petitioner argues that, since his six-month sentence in case No. TRC-06-2583-0102 was void, he should be immediately released from prison since he has already served more than the six-month sentence imposed in case No. TRD-08-34177-0103. In support of his arguments, petitioner relies on *Hilton v. Osterud*, 6th Dist. No. WD-08-082, 2009-Ohio-1741, and *State v. Miller*, 6th Dist. No. WD-06-086, 2007-Ohio-6364.

{¶ 10} In *Hilton*, supra, this court stated that, "even in instances where the revocation or extension procedure was instituted prior to expiration of the probationary term, but not completed until after expiration of the term of probation, there was no subject matter jurisdiction [for the trial court to impose a penalty for a probation violation]." *Hilton*, supra, at ¶ 13, citing *Miller*, supra. In *Miller*, supra, we held that, once a probationary period expires without being extended, the sentencing court is divested of jurisdiction to impose a penalty for a probation violation. Id. at ¶ 12, relying on *Davis v. Wolfe* (2001), 92 Ohio St.3d 549, 552. However, the Ohio Supreme Court's holding in *Davis* was predicated on former R.C. 2951.09 which stated, in relevant, part, that:

{¶ 11} "At the end or termination of the period of probation, the jurisdiction of the judge or magistrate to impose sentence ceases and the defendant shall be discharged."

{¶ 12} Former R.C. 2951.09 was repealed by the Ohio Legislature, effective January 1, 2004. Accordingly, Ohio courts have recently refused to find that trial courts lack jurisdiction to impose a sentence for a probation violation after the probationary period has expired, based on the reasoning expressed in *Hilton* and *Miller*. See *State v. Breckenridge*, 10th Dist. No. 09AP-95, 2009-Ohio-3620; *State v. Semenchuk*, 4th Dist. No. 10CA3140, 2010-Ohio-4864.

{¶ 13} Second, it is undisputed that relator did not file an appeal from either the finding of a probation violation or his sentence in case No. TRC-06-2583-0102, and that relator's punishment for a probation violation in that case has been completed.

Accordingly, any challenge by way of a habeas corpus action has become moot. *State v.*

Peters (Dec. 24, 1998), 11th Dist. No. 97-T-0220; *Maxwell v. Jones*, 12th Dist. No CA2009-07-179, 2010-Ohio-1633; *Alexander v. Eberlin*, 7th Dist. No. 06 BE 38, 2007-Ohio-5000.

{¶ 14} Petitioner's request for a writ of habeas corpus is not well-taken and is denied. Petition dismissed at petitioner's costs.

{¶ 15} To the Clerk: Manner of Service.

{¶ 16} Serve upon all parties in a manner prescribed by Civ.R. 5(B) notice of the judgment and its date of entry upon the journal.

WRIT DENIED.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.