

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEROY G. BUHL
F.R.N. 40114-066
P.O. Box 8500, D-B-108
Florence, Co. 81266

CIVIL ACTION

NO. 97-1173

v.

WM. HENDRICK, Warden,
U.S. Pen. Marion, Il., et al.

MEMORANDUM

Broderick, J.

February 19, 1998

Petitioner Leroy G. Buhl is currently incarcerated at the United States Penitentiary in Florence, Colorado, serving a life sentence for kidnaping imposed in 1989 by the Honorable Daniel H. Huyett of this Court (Criminal Action No. 88-490). The petitioner has also been convicted for several state crimes, some for which he has already served and others for which he has been sentenced to 20 to 40 years imprisonment in Pennsylvania and 30 years to life imprisonment in New Jersey, to run consecutively with his federal sentence.

On February 18, 1997, Mr. Buhl filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and/or a petition for a writ of error coram nobis pursuant to 28 U.S.C. § 1651. Petitioner seeks to challenge his 1974 state court conviction for participating in a riot. He has already served the sentence imposed in connection with this conviction but claims that it was used to enhance his federal life sentence.

The United States Magistrate Judge to whom the petition was referred filed a Report and Recommendation on September 30, 1997 recommending that the § 2254 petition be dismissed for lack of jurisdiction and the coram nobis petition be denied. Petitioner filed objections to the Magistrate Judge's findings which appear to have been mailed from prison within the time allowed.

Having conducted a de novo review of each of the petitioner's objections, the Court will approve and adopt the Magistrate Judge's Report and Recommendation. Mr. Buhl's petition for a writ of habeas corpus will be dismissed and his petition for a writ of error coram nobis will be denied. The Court will also dismiss two other motions filed by the petitioner to compel the respondent to provide him legal postage.

I. BACKGROUND

On May 22, 1974, after a jury trial in the Court of Common Pleas for Schuylkill County in Pottsville, Pennsylvania, Leroy G. Buhl was convicted for participating in a riot in violation of Section 401 of the Penal Code of 1939 (Docket No. 603-1969). In the opinion denying Mr. Buhl's post-trial motion, the trial judge, the Honorable John E. Lavelle, summarized the facts underlying the conviction as follows:

On May 29, 1969, an incident began at the Deer Lake Drive-In Theatre between 11:30 p.m. and 12:00 p.m. and lasted for over one half hour. A man, identified as Defendant, was seen jumping up and down on top of an automobile, yelling, "I'm going to kill all you niggers," and yelling about "black bastards." Some black persons were in the automobile upon which

Defendant was jumping, and they were struck and otherwise abused by the crowd that began to gather around the car as they tried to get out of the car. A free-for-all ensued involving between thirty and fifty people all yelling, punching and kicking each other. Police were called to the scene, and one of them pulled Defendant from the top of the car and searched him. At this point the free-for-all engaged the officer's attention, and when he returned to where he had left Buhl, the Defendant had disappeared.

Commonwealth v. Buhl, Docket No. 603-1969, slip op. at 1-2 (Schuyl. Co. C.C.P. Dec. 23, 1974). On December 8, 1975, the petitioner was sentenced to a term of one to three years imprisonment. No direct appeal was taken; however, he filed three separate post-conviction petitions in state court, all of which were denied.

Mr. Buhl's first state post-conviction petition was denied by the trial court in an unpublished opinion and order dated October 24, 1977, affirmed without opinion in Commonwealth v. Buhl, 404 A.2d 1354 (Pa. Super. 1979). He did not appeal further. Mr. Buhl's second post-conviction petition was denied by the trial court in an unpublished opinion and order dated November 5, 1990, and his appeal was dismissed as untimely on October 24, 1991. Mr. Buhl's third attempt for relief took the form of a petition for a writ of error coram nobis, which the trial court denied by order dated October 20, 1995 and by unpublished opinion dated January 23, 1996. This decision was affirmed by the Superior Court, Commonwealth v. Buhl, 679 A.2d 843 (Pa. Super. May 24, 1996) [table], and the petition for allowance of appeal in the Supreme Court was denied, Commonwealth

v. Buhl, 686 A.2d 1307 (Pa. Dec. 10, 1996) [table].

The petitioner has also had an extensive writ history before this Court, both for his 1974 riot conviction and for other state and federal convictions. Mr. Buhl's current § 2254 petition is his seventh such petition before this Judge. The first petition, filed in 1977, challenged his 1975 conviction for prison escape, and was denied on July 28, 1977 for failure to exhaust state remedies (Docket No. 77-2451). His second petition, filed in 1981, challenged his 1977 conviction for rape and involuntary deviate sexual intercourse. This Court, on September 10, 1981, again denied the petition for failure to exhaust state remedies (Docket No. 81-2794). The petitioner filed his third habeas petition in 1992, this time challenging his 1974 conviction for participating in a riot. By Memorandum and Order dated July 1, 1993, this Court dismissed the petition for lack of jurisdiction, as the petitioner had fully served his 1974 sentence prior to filing the petition and was therefore not "in custody" for purposes of § 2254. Buhl v. Turner, 1993 WL 241541 (E.D. Pa. 1993) (Docket No. 92-7312). The petitioner then filed a fourth habeas petition, also in 1992, challenging his 1977 conviction for rape and involuntary deviate sexual intercourse. On July 7, 1993, this petition was dismissed for lack of jurisdiction, and after reversal by the Third Circuit, it was dismissed on May 3, 1994 for failure to exhaust state remedies (Docket No. 92-7408). Petitioner's fifth habeas petition, filed in 1993, challenged his 1989 conviction for rape, involuntary deviate sexual assault, and

theft of a motor vehicle. This petition was dismissed on July 6, 1993 for failure to exhaust state remedies (Docket No. 93-3362). Finally, the petitioner filed his sixth habeas petition in 1994, challenging his 1989 conviction for rape, incest, and unlawful restraint. On November 2, 1994, the petition was again dismissed for failure to exhaust state remedies (Docket No. 94-1988).

Mr. Buhl has also filed two motions under 28 U.S.C. § 2255 challenging his federal conviction for kidnaping. The facts underlying this conviction were summarized by Judge Huyett in two pre-trial opinions and need not be repeated here. United States v. Buhl, 712 F. Supp. 53 (E.D. Pa. 1989); United States v. Buhl, 1988 WL 130674, Docket No. 88-490 (E.D. Pa. Dec. 2, 1988). As heretofore discussed, Mr. Buhl was sentenced in 1989 by Judge Huyett to life imprisonment, and both his sentence and conviction were affirmed by the Third Circuit. United States v. Buhl, 899 F.2d 1219, Docket No. 89-1763 (3d Cir. Mar. 23, 1990) [table]. Mr. Buhl's first § 2255 motion, filed on June 7, 1991, alleged ineffective assistance of trial and appellate counsel, prosecutorial misconduct, and abuse of judicial discretion. Judge Huyett denied the motion and was affirmed by the Third Circuit. United States v. Buhl, 1992 WL 221333, Docket Nos. 91-3596, 88-490 (E.D. Pa. Sept. 3, 1992), aff'd 17 F.3d 1431 (3d Cir. Jan. 31, 1994) [table]. Mr. Buhl then filed a second motion under § 2255 on May 5, 1997, which the district court reviewed under the newly enacted provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. On

July 15, 1997, Chief Judge Cahn signed an order for Judge Huyett which dismissed the first claim in Buhl's second § 2255 motion and submitted his remaining three claims to the Third Circuit for a determination of whether the district court could consider them (Docket No. 97-3218). Some of these three claims were exactly the same as his claims in the instant petition before this Court. On August 6, 1997, the Third Circuit denied Mr. Buhl's application to make these three claims in a second petition under 28 U.S.C. § 2255 (C.A. Misc. No. 97-8097). The Circuit Court determined that Buhl had failed to make the required showing under 28 U.S.C. § 2244 that the claims relied on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, or that the claims were based on facts which could not have been discovered previously and which would be sufficient to establish constitutional error in his underlying conviction by clear and convincing evidence.

II. CLAIMS PRESENTED

The petition for a writ of habeas corpus and/or a writ of error coram nobis and the accompanying briefs present the following two claims in connection with Mr. Buhl's 1974 state conviction for participating in a riot: (1) the petitioner's Fifth Amendment right against self-incrimination was violated when the Commonwealth's prosecutor allegedly remarked during closing argument that "the defendant must have something to hide by his not testifying on his own behalf;" and (2) the trial court

abused its discretion when it refused to deliver a "no adverse inference" instruction to the jury that it should not draw any adverse inference from the defendant's failure to testify. Because petitioner filed timely objections to each one of the Magistrate Judge's findings on these claims, the Court will review each claim in accordance with 28 U.S.C. § 636(b)(1)(C).

III. DISCUSSION

A. Petition for a writ of habeas corpus

Having conducted a thorough and independent review of the Magistrate Judge's findings, the Court agrees with the Magistrate Judge that Mr. Buhl's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 must be dismissed for lack of subject matter jurisdiction. This Court has already so held in dismissing the petitioner's third habeas petition in 1993 on exactly the same grounds. Buhl v. Turner, 1993 WL 241541 (E.D. Pa. 1993) (Docket No. 92-7312). The petitioner's sentence for his 1974 riot conviction has fully expired, so he is no longer "in custody" for purposes of establishing jurisdiction under 28 U.S.C. § 2254. Id. (citing Maleng v. Cook, 490 U.S. 488, 490-91, 109 S. Ct. 1923, 1925 (1989)).

In support of this result, this Court need only restate what it wrote in 1993, when Mr. Buhl was also challenging his 1974 riot conviction:

In Maleng, the Supreme Court stated: "We have never held that a habeas petitioner may be "in custody" under a conviction when the sentence imposed for that

conviction has fully expired at the time the petition is filed." Id. The Court further noted that " ... once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual "in custody" for the purposes of a habeas attack upon it." Id. at 1926. The Supreme Court in its opinion in Maleng specifically points out that a habeas petitioner is not "in custody" under a conviction after the sentence imposed for that conviction has fully expired. Id.

Buhl, 1993 WL 241541 at *1.

The Third Circuit's recent decision in Young v. Vaughn, 83 F.3d 72 (3d. Cir. 1996), does not alter this analysis, as the petitioner contends. In Young, the Third Circuit held that when a district court is faced with a habeas petition challenging an expired state conviction, the court should construe the petition as challenging the petitioner's current sentence if the expired conviction was used to enhance or had other effects on the current sentence. Id. at 73 & 76-79 (discussing Clark v. Pennsylvania, 892 F.2d 1142 (3d Cir. 1989)). Because Mr. Buhl is challenging his expired 1974 state conviction on the basis that it was used to enhance his 1989 federal life sentence, Young and Clark instruct this Court to construe his petition as a challenge to his current federal sentence. Such a challenge must take the form of a motion pursuant to 28 U.S.C. § 2255.

In her Report and Recommendation, the Magistrate Judge declined to treat the instant petition as a motion filed under § 2255 because Mr. Buhl failed to present evidence that his 1974 state conviction was used to enhance his 1989 federal life sentence. However, a review of the transcript from Mr. Buhl's

1989 federal sentencing hearing indicates that his 1974 state conviction was indeed used to calculate his criminal history points under the federal sentencing guidelines, and thus to enhance his federal sentence. See Tr. of Sentencing Hearing, Aug. 24, 1989, at 52-55, 67-70 & 73. During the course of his 1989 sentencing hearing, the petitioner challenged the validity of his 1974 conviction, but Judge Huyett "declined to re-adjudicate the sufficiency of the evidence of a 15 year old conviction which defendant [had] never appealed." Id. at 67. The petitioner's 1989 sentence to life imprisonment was affirmed by the Third Circuit.

Thus, although this Court will dismiss Mr. Buhl's § 2254 petition for lack of jurisdiction, it will nevertheless construe his claims in accordance with Young and Clark, supra, as a challenge to his current federal sentence under 28 U.S.C. § 2255. Even construed as a § 2255 motion, however, the petitioner's claims must still be dismissed under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. This would be his third attempt to file a § 2255 motion. The petitioner failed to raise his current claims in his first § 2255 motion, and the Third Circuit denied his attempt to raise them in his second § 2255 motion. Therefore, he is procedurally barred from raising them now. See United States v. Walker, 980 F. Supp. 144, 146 (E.D. Pa. 1997) (reaching same conclusion).

Accordingly, the Magistrate Judge's Report and Recommendation will be approved and adopted, and the petition for

a writ of habeas corpus pursuant to either 28 U.S.C. § 2254 or § 2255 will be dismissed.

B. Petition for writ of error coram nobis

The petitioner has also requested the Court to grant him a writ of error coram nobis. Coram nobis is an ancient common law writ which is available to federal courts in criminal matters under the All Writs Act, 28 U.S.C. § 1651(a). United States v. Morgan, 346 U.S. 502 (1954). It has been abolished in civil cases by Rule 60(b) of the Federal Rules of Civil Procedure. However, relief under coram nobis is extremely limited, and only lies where no other remedy is available and sound reasons exist for the petitioner's failure to seek appropriate relief earlier. Id. at 512.

Having conducted a thorough and independent review of the Magistrate Judge's findings, the Court agrees with the Magistrate Judge that Mr. Buhl's petition for a writ of error coram nobis must be denied. The petitioner seeks to attack his 1974 riot conviction on the basis that the prosecutor improperly commented during closing arguments on his right not to testify, and because the trial court refused to give a "no adverse inference" instruction. The closing arguments of Mr. Buhl's 1974 trial were not transcribed in the state court records. Nevertheless, the petitioner's allegations of error do not justify coram nobis relief. As the Third Circuit has ruled, "The error must go to the jurisdiction of the trial court, thus rendering the trial

itself invalid. An error which could be remedied by a new trial, such as an error in jury instructions, does not normally come within the writ." United States v. Stoneman, 870 F.2d 102, 106 (3d Cir. 1989).

The petitioner's proper avenue for relief is not coram nobis or any other common law writ, but as heretofore stated, a motion challenging his current federal sentence under 28 U.S.C. § 2255. The Supreme Court has ruled that the "All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." Carlisle v. United States, 116 S. Ct. 1460, 1467 (1996).

As noted above, the Third Circuit has already ruled that Mr. Buhl may not pursue his current claims under 28 U.S.C. § 2255, since he has not made the required showing for filing a second or successive motion under the Antiterrorism and Effective Death Penalty Act of 1996. The fact that the petitioner is barred from raising his claims under § 2255, however, does not make such relief "unavailable" so as to justify coram nobis or other forms of relief. United States v. Damiano, 1997 WL 539704, Docket No. 90-488 (E.D. Pa. Aug. 6, 1997) (Antwerpen, J.). As the Third Circuit has recently confirmed in connection with an analogous writ, "we do not suggest that § 2255 would be 'inadequate or ineffective' so as to enable a second petitioner to invoke § 2241 merely because that petitioner is unable to meet the stringent

gatekeeper requirements of the amended § 2255. Such a holding would eviscerate Congress's intent in amending § 2255." In re Ocsulis Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997). The same conclusion must be reached in connection with the petitioner's request for coram nobis relief.

Accordingly, the Magistrate Judge's Report and Recommendation will be approved and adopted, and the petition for a writ of error coram nobis pursuant to 28 U.S.C. § 1651 will be denied.

IV. CONCLUSION

For the foregoing reasons, the Court agrees with the Magistrate Judge's findings that Leroy Buhl's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 must be dismissed for lack of subject matter jurisdiction. Even construing his petition as a challenge to his current federal sentence under 28 U.S.C. § 2255, however, the petition must also be dismissed because it would be his third such motion and is procedurally barred. The Court also agrees with the Magistrate Judge that the petitioner has failed to satisfy the strict requirements for awarding coram nobis relief. Accordingly, the Court will adopt the Magistrate Judge's Report and Recommendation, dismiss the petition for a writ of habeas corpus, and deny the petition for a writ of error coram nobis.

An appropriate Order follows.

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ORDER

AND NOW, this 19th day of February, 1998; after careful and independent consideration of the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and/or a writ of error coram nobis pursuant to 28 U.S.C. § 1651; and after a de novo review of the Report and Recommendation of M. Faith Angell, United States Magistrate Judge, and the petitioner's objections thereto;

IT IS ORDERED:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 or § 2255 is DISMISSED with prejudice and the petition for a writ of error coram nobis is DENIED.
3. A certificate of appealability is not granted.
4. The petitioner's motions for a Court Order to compel the respondent to provide him with legal postage (Document Nos. 6 and 8) are DISMISSED AS MOOT.

RAYMOND J. BRODERICK, J.