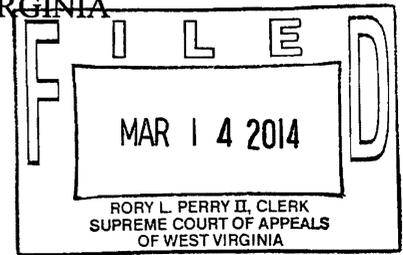


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

NUMBER 13-1200



STATE OF WEST VIRGINIA ex rel.
ROGER E. CLINE,

Petitioner,

v.

WILLIAM M. FOX, WARDEN,
ST. MARYS CORRECTIONAL CENTER,

Respondent.

PETITION FOR APPEAL
FROM DENIAL OF PETITION
FOR A WRIT OF HABEAS CORPUS

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I.

TABLE OF AUTHORITIES

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I.

ASSIGNMENT OF ERROR

The Circuit Court of Greenbrier County erred in dismissing, as moot, the Petitioner's habeas corpus action following the Petitioner's release from incarceration.

II.

STATEMENT OF THE CASE

In 1992, the Petitioner, Roger Cline (hereinafter "the Petitioner"), was convicted in the Circuit Court of Greenbrier County of First-Degree Murder. Following the jury recommendation, the Petitioner was sentenced to life with mercy and his direct appeal to this Court was refused on October 1992.

On July 1, 1999, the Greenbrier County Circuit Court denied the Petitioner's first habeas corpus action, and this Court summarily denied his appeal.

In the above-mentioned habeas corpus petition (Greenbrier Circuit Court Case Number 95-C-34), the Petitioner alleged ineffective assistance of trial counsel, prosecutorial misconduct during the State's summation, error in the introduction into the evidence of the Petitioner's self-incriminating testimony offered at the prior trial of a co-defendant, and errors in the jury instructions. The record did not reveal the waiver of any other issues as required by Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981).

Undeterred by the dismissal of that action, the Petitioner filed his second (current) habeas corpus petition in 2006. There, the Petitioner alleged: (1) ineffective assistance of the original habeas counsel; (2) grounds which had not been raised in the first habeas corpus action or which had not been waived by the Losh mandate; (3) newly discovered evidence; (4) and (5)

substantive change in the law in the area of diminished capacity; (6) ineffective assistance of trial counsel; and (7) cumulative error in the original criminal proceedings.

After some four (4) years of inaction, the undersigned counsel assumed representation of the Petitioner and, as mentioned above, filed an Amended Petition for Writ of Habeas Corpus. Appendix Record (hereinafter "AR"), pp. 3-30. By that time, the Petitioner had been continually incarcerated for some twenty (20) years, most recently at St. Marys Correctional Center. After several continuances by the Greenbrier County Circuit Court, the Omnibus Habeas Corpus Hearing was finally scheduled for October 3, 2013. However, prior to that hearing, the Petitioner was released on parole. In addition to the numerous standard parole restrictions, the West Virginia Parole Board banned the Petitioner from Greenbrier County, West Virginia. AR 65-66.

At the time of the Omnibus Habeas Corpus Hearing, the Respondent moved to dismiss the habeas action as moot due to the Petitioner's release from incarceration. Alternatively, the Respondent suggested the Petitioner's action should take the form of the Petition for a Writ of Coram Nobis. The Petitioner argued that under the decisional Federal and State precedent (including dispositive opinions from the United States Supreme Court), the restraints imposed upon him by the Parole Order effectively rendered the Petitioner "in custody" and defeated the Respondent's mootness argument. The Greenbrier County Circuit Court requested submission of the relevant case law for the Court's review and took the matter under advisement. AR 61-63.

On November 7, 2013, the Circuit Court issued its ruling dismissing the Petitioner's habeas corpus action as moot, in light of the latter's release from incarceration. AR 67-71. The lower court essentially based its decision upon two (2) cases: the per curiam opinion in Kemp v. State, 203 W.Va. 1, 506 S.E.2d 38 (1997) and Leeper-El v. Hoke, 203 W.Va. 641, 741 S.E.2d

886 (2013). As to both opinions, the Circuit Court observed that the Petitioner's release from incarceration rendered habeas relief moot. AR 70. "Because Petitioner was released from incarceration and paroled to the State of Ohio, habeas corpus as a remedy, is no longer available to him." AR 70.

Because the Petitioner believes that the Circuit Court erred in its interpretation of the term "in custody" in the context of the parole restraints, and in its reliance upon the case law inapplicable to the case at bar, the Petitioner seeks this appeal.

III.

SUMMARY OF ARGUMENT

The Petitioner remains "in custody" for the purpose of defeating the argument of mootness of his habeas corpus petition. The case law relied upon by the Circuit Court is inapplicable to the case at bar. The United States Supreme Court, the Fourth Circuit Court of Appeals and this Court have unequivocally held that release from incarceration is different from release from "custody." Even though the Petitioner was no longer incarcerated, his habeas corpus petition survives since the Petitioner remains in custody of the State subject to severe restrictions upon his liberty.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asserts that under Rule 18(a) of the West Virginia Revised Rules of Appellate Procedure, oral argument is necessary, and the case should be set for a Rule 20

argument on this issue of whether his physical release from incarceration to parole constitutes release from custody for the purpose for rendering moot his habeas corpus petition.

V.

ARGUMENT

Over a half century ago, the United States Supreme Court expansively defined the reach of the Great Writ of Habeas Corpus in Jones v. Cunningham, 371 U.S. 236 (1963), holding that “(t)he writ of habeas corpus can do more than ... reach behind prison walls and iron bars It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose - the protection of individuals against the erosion of their right to be free from wrongful restraints upon their liberty.” *Id.*, at 243.

In holding that a state prisoner who was placed on parole was “in custody” within a meaning of a federal statute, 28 U.S.C. § 2241, so that the federal court has jurisdiction to determine constitutionality of his state sentence, the High Court emphasized that the release of a paroled prisoner from the confines of his incarceration into “the custody of the (Virginia) Parole Board,” involves “significant restraints on petitioner’s liberty,” *ibid.*, at 242, once the petitioner is placed on parole under the control and custody of the Virginia Parole Board.

The Jones Court soundly rejected the Respondent’s argument that a parole prisoner’s release from incarceration is tantamount to his release from custody. In doing so, the Court enumerated significant restraints on the petitioner’s liberty:

Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away

from undesirable places, and live a clean, honest, and temperate life. Petitioner must not only faithfully obey these restrictions and conditions but he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution. He can be rearrested at any time the Board or parole officer believes he has violated a term or condition of his parole, and he might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime. It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. *Id.*, at 242.

Holding that the petitioner's release on parole does not meet or otherwise defeat his habeas corpus petition, the High Court remanded the case for "a decision on the merits of the petitioner's case." *Id.*, at 244.

The United States Supreme Court subsequently upheld Jones in Mabry v. Johnson, 467 U.S. 504 (1984), where the Court emphatically held that a habeas corpus proceeding was not moot even though the petitioner was paroled, since he remained in the custody of the State of Arkansas. *Id.*, at 507, ft. 3 (and the cases cited therein). The United States Supreme Court further clarified the term "in custody" for the purpose of granting habeas corpus relief in Maleng v. Cook, 490 U.S. 488 (1989):

Our interpretation of the "in custody" language has not required that a prisoner be physically confined in order to challenge his sentence on habeas corpus. In Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), for example, we held that a prisoner who had been placed on parole was still "in custody" under his unexpired sentence. We reasoned that the petitioner's release from physical confinement under the sentence in question was not unconditional; instead, it was explicitly conditioned on his reporting regularly to his parole officer, remaining in a particular community, residence, and job, and refraining from certain activities. *Id.*, at 242, 83 S.Ct., at 376-377; see also Hensley v.

Municipal Court, San Jose-Milpitas Judicial Dist., Santa Clara County, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973); *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973). *Maleng*, supra, at 491.

The Fourth Circuit of Appeals followed suit. In *United States v. Pregent*, 190 F.3d 279, 283 (4th Cir. 1999), the Appellate Court unequivocally held that “(a) prisoner on supervised release is considered to be “in custody” for purposes of a § 2255 motion. See *Maleng v. Cook*, 490 U.S. 488, 491, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989).”

This Court has never directly addressed the question presented in this Petition. *Kemp v. State*, supra, so heavily relied on by the court below, was a *per curiam* opinion, and, therefore, “not a legal precedent.” *Id.*, at 203 W.Va. at 1, 506 S.E.2d at 38, ft.1. Save for announcing that Kemp’s habeas corpus petition was moot due to release from prison, the Court’s brief opinion offers no rationale for its holding. Further, deepening the mystery is the somewhat cryptic language of footnote 3: “... with this particular set of facts we will not decide ...” the issue of whether “parole or probation is sufficient restriction of freedom to warrant a writ to be issued.” *Id.* While the *Kemp* Court never explained what the phrase “this particular set of facts” meant, the Court squarely refused to address the issue at bar in the present appeal. Finally, in refusing to decide the issue at bar in *Kemp*, the Court did not make pellucidly clear whether Kemp was on parole. The *per curiam* decision indicates only that “(o)ne week prior to oral arguments, the appellant was released from the penitentiary.” *Ibid.*, 203 W.Va. at 1, 506 S.E.2d at 38. Therefore, the Greenbrier County Circuit Court’s reliance on *Kemp* is misplaced.

Similarly to *Kemp*, this Court declined to address the specific issue presented today in *State ex rel. McCabe v. Seifert*, 220 W.Va. 79, 640 S.E.2d 142 (2006), “Here, as in *Kemp*, the aspects of confinement or “incarceration” due solely to parole are not before this Court.” *Id.*, at 220 W.Va. at 85, 640 S.E.2d. at 148. Finally, in *Leeper-El*, supra, the second decision the

Circuit Court espoused as dispositive, the Petitioner requested an unconditional discharge from State custody so he could begin his federal sentence. Once he started serving his federal sentence (having been paroled from the West Virginia Department of Corrections) he has accomplished his habeas goal and his petition became moot, hardly a set of facts and circumstances similar to (let alone controlling in) the present case.

Most recently, this Court held that:

“an offender who has been sentenced pursuant to the Home Incarceration Act and is accordingly subject to substantial restrictions on his or her liberty by virtue of the terms and conditions imposed by a home incarceration order, which include arrest and resentencing for a violation of those terms and conditions, is “incarcerated under sentence of imprisonment” for purposes of seeking post-conviction habeas corpus relief under West Virginia Code § 53-4A-1. In view of the clear and undisputed restrictions of a substantial nature that are currently imposed on Petitioner pursuant to the governing home incarceration order combined with the ongoing possibility that his alternative sentence could be revoked at any time, we have no difficulty in viewing him as “incarcerated under sentence of imprisonment.” *Id.* As a result, Mr. Elder is entitled to seek post-conviction habeas corpus relief pursuant to West Virginia Code § 53-4A-1 for his claims that are grounded in constitutional law.” Elder v. Scopalia, 230 W.Va. 422, 428, 738 S.E.2d. 924, 930 (2013).

Citing, as dispositive, the United States Supreme Court’s opinion in Jones, *supra*, this Court observed:

“Just as the United States Supreme Court equated the “in custody” trigger of the federal habeas corpus statutes with the imposition of significant restraints on an individual’s “liberty to do those things which ... free men are entitled to do,” we find the existence of significant restraints on Petitioner’s freedoms to be indicative of whether he is “incarcerated” for purposes of post-conviction habeas review. *Jones*, 371 U.S. at 243; W.Va. Code § 53-4A-1. As the record in this case makes clear, Petitioner does not enjoy the liberty to freely wander the physical confines of his yard, let alone his community, this state, or this country. Virtually every decision that he makes with regard to exiting his house is subject to

the terms of the home incarceration order. And, as is the case with any offender, a violation of the terms of the controlling incarceration order can result in revocation of that alternate means of sentencing and the imposition of a traditional sentence in the penitentiary or jail.” Elder, supra, 230 W.Va. at 427-28, 739 S.E.2d at 929-930.

The restriction upon the Petitioner’s liberty by the terms of his home confinement were sufficient to bring him into the ambit of “incarceration” for the purpose of a successful habeas corpus challenge.

In the present case, contrary to the decisions of the United States Supreme Court as well as the Fourth Circuit Court of Appeals, and in reliance upon the inapplicable, or, at a minimum distinguishable. After all, this Court equated “incarceration” with “confinement” in McCabe (“confinement” or “incarceration,” id., at 220 W.Va. at 85, 640 S.E.2d. at 148), and even more emphatically in Elder, supra, where the restrictions incident to home confinement were defined as “incarceration” for purposes of habeas corpus relief under West Virginia Code § 53-4A-1(a) (2008).

The present case is akin to Elder, supra. Subject to substantial restrictions on his liberty by virtue of the terms and conditions imposed by the Parole Order, including place of residence, travel, associations, etc., and possible arrest and resentencing for a violation of those terms and conditions, the Petitioner is in custody, and incarcerated for the purpose of the West Virginia Habeas Corpus Statute. Since he remains in the “custody” of the State, his habeas corpus petition must survive the mootness argument advanced by the Respondent and adopted by the Circuit Court. Elder, supra, and five decades of the United States Supreme Court decisional language necessitate reversal of the erroneous Circuit Court decision.

IV.

CONCLUSION

For the foregoing reasons, the Petitioner prays for a reversal of the Order of the Circuit Court of Greenbrier County dismissing his Habeas Corpus Petition, for the reinstatement of the collateral proceedings, with directions for the Circuit Court to hold the Omnibus Habeas Corpus Hearing and to render the decision on the merits.

Respectfully submitted,
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By Counsel



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CERTIFICATE OF SERVICE

I, Matthew A. Victor, counsel for the Petitioner, do hereby certify that on this 14th day of March, 2014, I served a true copy of the foregoing Petition for Appeal by hand delivering the same to; and/or by placing the same in the U.S. Mail, postage prepaid and addressed to, and/or by faxing the same to:

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