STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1610

Andy Roger Baccam, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 23, 2010
Affirmed; motion denied
Klaphake, Judge

Nobles County District Court
File No. 53-K6-01-000118

Andy Roger Baccam, Pekin, Illinois (pro se appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Gordon L. Moore, III, Nobles County Attorney, Worthington, Minnesota (for respondent)

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Collins, Judge.*

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant Andy Roger Baccam seeks review of the district court's order denying his petition for a writ of habeas corpus. Because a state court cannot grant habeas relief

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

to a federal inmate and because appellant's challenge to his 2001 Minnesota conviction amounts to an improper collateral attack, we affirm the district court.

D E C I S I O N

Appellant is currently in federal prison on a federal drug conviction, and is incarcerated until 2020. In July 2009, he filed this petition for a writ of habeas corpus in state district court alleging that he was being held in federal prison because of a 2001 Minnesota terroristic threats conviction. His petition requests that his 2001 Minnesota conviction be overturned due to ineffective assistance of counsel in connection with his decision to plead guilty. The district court summarily denied the petition, concluding that appellant was not being held in federal prison for the 2001 state court conviction and that there was no basis for habeas relief.

On appeal, appellant continues to claim, in both his informal brief and in his reply brief, that he agreed to plead guilty in 2001 to avoid a prison term, that he was deceived by his attorney at the time who told him that he would go to prison if he was found guilty, and that he maintained his innocence throughout the plea hearing. He asserts that his attorney was ineffective because she informed him that he could face a prison term, when in fact he would only have had to serve the remainder of the year in county jail due to several prior revocations, and that her inaccurate advice was a material factor that impacted his decision to plead guilty. He further asserts that he should be allowed to withdraw his *Alford* plea because it was accepted without an adequate factual basis; he insists that he only believed there would be a "risk" of a conviction on the dismissed disorderly conduct charge had the case been tried, not a belief that he would be convicted

of terroristic threats. Appellant concludes by stating that he "received severe federal sentencing enhancements that were triggered by the inclusion" of his 2001 state conviction. He requests that this court grant him an evidentiary hearing to determine the validity of his claims or in the alternative that his conviction be vacated.

Habeas proceedings are designed to test the legality of the detention, and the petitioner must be in the custody of the state for a writ of habeas corpus to lie. *State ex rel. Meldahl v. Tahash*, 278 Minn. 51, 53, 153 N.W.2d 147, 148 (1976); *State v. Clark*, 270 Minn. 181, 185, 132 N.W.2d 811, 814 (1965). A petition for a writ of habeas corpus that is directed to the state, when the state does not have custody of the petitioner, is improper and subject to dismissal. *Id.*

As the state notes, appellant cites no authority to establish that a prisoner in *federal* custody has the right to a writ of habeas corpus from a *state* district court in order to challenge a state conviction used to enhance the length of his federal sentence. Appellant is not being held in state custody or in federal custody due to a state conviction; rather, he is in federal custody due to a federal conviction. As such, habeas cannot lie in state court to challenge this federal conviction and detention. *Cf. Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 401-02, 121 S. Ct. 1567, 1572-73 (2001) (holding that petitioner satisfies "in custody" requirement to bring federal habeas petition when his petition is construed as challenging federal sentence he was currently serving as enhanced by allegedly invalid prior state convictions). Thus, habeas

relief in state court is not available to appellant because he is not in the custody of the state and is not in custody on state charges.[1]

In addition, "[a]n application for a writ of habeas corpus is an independent proceeding to enforce a civil right," and it "may not be used . . . for a collateral attack upon a judgment of a competent tribunal which had jurisdiction of the subject matter and of the person of the defendant." *Breeding v. Utecht*, 239 Minn. 137, 139, 59 N.W.2d 314, 316 (1953). If a defendant wishes to attack criminal proceedings for error or irregularity, he or she must do so by direct appeal or by postconviction petition. *Id*. at 140, 59 N.W.2d at 316; *see* Minn. R. Crim. P. 28.02, subd. 2 (providing for direct appeal from conviction); Minn. Stat. § 590.01, subd. 1 (2008) (providing that defendant may file postconviction petition "in the district court in the county in which the conviction was had to vacate and set aside the judgment . . . or make other disposition as may be appropriate").

All of the issues raised by appellant challenge his 2001 state criminal conviction and do not involve his current federal detention or the enforcement of his civil rights in connection with his federal conviction. Because appellant's arguments amount to an improper collateral attack on the 2001 state court criminal proceedings, the district court did not err in denying his petition for a writ of habeas corpus. *See Lackawanna*, 532 U.S.

[1] In his reply brief, appellant argues that he continues to be in state custody because the state could still revoke his probation when he is released from federal prison. But appellant's five-year probationary period on his 2001 terroristic threats conviction appears to have expired in 2006. Thus, the state may no longer have jurisdiction to revoke appellant's probation. *See* Minn. Stat. § 609.14, subd. 1(b) (2008).

at 402, 121 S. Ct. at 1573 (holding that federal prisoner who failed to pursue available remedies to challenge prior state conviction may not collaterally attack that conviction through habeas petition directed at enhanced federal sentence).

Finally, appellant has filed a motion to accept a supplemental brief in support of his reply brief. Because the motion is untimely, having been filed less than three weeks before nonoral conference was held on this case, and because the proposed supplemental brief merely reiterates arguments already made by appellant in his initial and reply brief, the motion to accept is denied.

Affirmed; motion denied.