

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

FEB 09 1989

MARK P. TURNER,
Plaintiff-Appellant,
v.
HERB MASCHNER; ATTORNEY GENERAL,
STATE OF KANSAS,
Defendants-Appellees.

ROBERT L. HOECKER
Clerk

No. 88-1513
(D.C. No. 87-3065)
(D. Kan.)

ORDER AND JUDGMENT

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court granting habeas corpus relief in an action commenced pursuant to 28 U.S.C. § 2254. In its order, the district court expressly found that petitioner's guilty plea was "involuntary and cannot withstand attack." The matter was "remanded" to the state trial court with instructions to "vacate" petitioner's sentence and "reconsider disposition of petitioner's guilty plea."

Petitioner's argument on appeal, as we understand it, is that the district court erred in not vacating the conviction as well as the underlying sentence.

This, however, overlooks the fundamental purpose and limitation of habeas corpus. Historically, the principal purpose of the remedy of habeas corpus has been to secure release from unlawful physical confinement. Peyton v. Rowe, 391 U.S. 54, 63 (1968); Preiser v. Rodriguez, 411 U.S. 475, 485 (1973). Federal habeas corpus does not provide an additional appeal from a state court conviction. Sinclair v. Turner, 447 F.2d 1158, 1161 (10th Cir. 1971), cert. denied, 405 U.S. 1048 (1972).

We agree with the district court's assessment as apparently does respondent, that the guilty plea is infirm. Implicit in the district court's order was a determination that petitioner's present custody was unlawful and that habeas corpus relief was appropriate.

Generally, a determination that present custody is unlawful does not necessarily bar retrial or further proceedings on the original charge. Bromley v. Crisp, 561 F.2d 1351, 1364 (10th Cir. 1977), cert. denied, 435 U.S. 908 (1978).

We assume that it was the intent of the district court to grant habeas corpus relief conditionally because the order expressly contemplates further proceedings in the state trial court.

In order that this matter be resolved as "law and justice require" (28 U.S.C. § 2243) the judgment of the district court is modified to provide that a writ of habeas corpus is issued

conditionally. The district court will order petitioner's release from custody, unless, within thirty days of the issuance of the mandate of this court, petitioner is allowed to plead anew in the state trial court. If there are further proceedings of the type contemplated by this order within the time allowed, the district court shall dismiss the § 2254 proceeding. See White v. Gaffney, 435 F.2d 1241, 1245 (10th Cir. 1971).

As modified, the judgment of the United States District Court for the District of Kansas is AFFIRMED. It is further ordered that the stay issued by the district court on May 16, 1988, is vacated. In view of the disposition of this appeal, petitioner's application for release pending appeal is denied as moot and also for the reason that the application was not presented in the first instance to the district court.

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM