

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

MAY 30 1990

ROBERT L. HOECKER
Clerk

FLOYD AUGUST DAVIS, JR.,
Plaintiff-Appellant,
v.
RON CHAMPION, Warden, C.C.C.;
and ATTORNEY GENERAL, State of
Oklahoma,
Defendants-Appellees.

No. 90-5005
(D.C. No. 89-C-378-C)
(N.D. Oklahoma)

ORDER AND JUDGMENT*

Before, MCKAY, MOORE, 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.

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This is an appeal from a denial of a state prisoner's petition for writ of habeas corpus. The district court denied the writ because petitioner was not "in custody" within the meaning of 28 U.S.C. § 2254. We affirm that decision for the reasons stated by the magistrate and the district judge.

Petitioner claims the court's reasoning is wrong because he is in custody as a consequence of sentences imposed consecutively to the sentence he now attacks. He therefore claims he is still in custody pursuant to that sentence even though it has been fully served.

What petitioner has failed to perceive is that even if the sentence of twenty years he now attacks is voided, as he wishes, he would still remain in custody on the unexpired time yet to be served on the remaining sentences. Petitioner was first sentenced on May 27, 1968, to a term of five years. Thereafter, on October 21, 1968, he was given the twenty-year sentence he now attacks, followed by a five-year sentence on December 13, 1968, and a fifteen-year sentence on March 11, 1969. Petitioner also states in 1984 he was sentenced to an additional term of six years. All of these terms were consecutive, placing his presumptive release date sometime in the year 2019. Thus, even if his twenty-year sentence were voided, he would still be subject to an unexpired term of some seven years. That fact distinguishes his cases from those upon which he relies.

The district court correctly determined petitioner is not in custody on the sentence he now attacks. The judgment of the district court is **AFFIRMED**.

Entered for the Court

John P. Moore
Circuit Judge