

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4907
Summary Calendar

ADEMOLA MICHAEL OGUNLEYE,

Plaintiff-Appellant,

VERSUS

WARDEN, F.D.C., OAKDALE,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
CA 92 0003

September 2, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Ademola Ogunleye appeals the dismissal of his petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Concluding that certain further inquiry is called for, we affirm in part and vacate and remand in part.

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Ogunleye filed a petition for federal habeas relief, alleging that he had been deported based upon a state conviction for larceny of a retailer and that he is being unlawfully detained as a result of that conviction. The district court determined that Ogunleye had unsuccessfully pursued federal habeas relief on similar grounds in the federal district courts of Oklahoma and the Tenth Circuit. Accordingly, the court ordered him to file a "Model Form for Use in Applications for Habeas Corpus Under 28 U.S.C. § 2254" and to explain how the current petition differs from his previous petitions. Ogunleye re-filed his petition.

The district court denied Ogunleye relief for claims of insufficient evidence, denial of the right to appeal, and Brady violations because they previously had been resolved on the merits in a decision in the Western District of Oklahoma. The district court also determined (on the merits) that Ogunleye was not entitled to relief on his claims of Fourth Amendment violations¹ and ineffective assistance of counsel.

Ogunleye alleged in his petition that the INS should have allowed him to waive the filing fee required by 8 U.S.C. § 1255a(c)(7), which governs the adjustment of the status of entrants, because "the condition of his statutory eligibility is unsettled." The district court denied relief on Ogunleye's allegation that the INS had deprived him of his rights under

¹ The district court also determined that the Fourth Amendment claims were repetitive of Ogunleye's earlier federal habeas petition.

8 U.S.C. § 1255a. The court found that Ogunleye was not entitled to relief because he had committed a felony in Oklahoma and was barred from an adjustment of eligibility status by § 1255a(a)(4)(B), which precludes an alien from being considered for admissibility if he has been convicted of a felony.

II.

A.

Ogunleye is not presently in custody under the Oklahoma conviction but apparently is in custody because he has returned to the United States without the permission of the Attorney General. The "in custody" language of § 2254 requires that the petitioner be "in custody" under the conviction or sentence under attack at the time the petition is filed. Maleng v. Cook, 490 U.S. 488, 490-91 (1989). For a petitioner to prove that he is "in custody," he must establish some nexus between the current custody and the allegedly unconstitutional conviction. Willis v. Collins, 989 F.2d 187, 189 (5th Cir. 1993) (citing Young v. Lynaugh, 821 F.2d 1133, 1137 (5th Cir. 1987), cert. denied, 484 U.S. 986 (1987) and 484 U.S. 1071 (1988)).

An alien held in custody pursuant to an order of deportation may obtain judicial review through habeas corpus proceedings. United States ex rel. Marcello v. District Director of INS, 634 F.2d 964, 972 (5th Cir. Jan. 1981), cert. denied, 452 U.S. 917 (1981). Each of the statutory enactments governing habeas cases

that may apply to Ogunleye requires that he be "in custody." See 8 U.S.C. § 1105(a)(9); 28 U.S.C. §§ 2241, 2254, 2255. Ogunleye has attacked his state court conviction, but that does not appear to be the basis for his current detention.

The district court did not consider the in-custody requirement as it relates to Ogunleye's circumstance. Accordingly, we vacate and remand as to the claims relating to the state court conviction, with instructions that the district court discern whether there is a sufficient nexus between Ogunleye's current incarceration and the state court conviction to meet the "in custody" jurisdictional requirement of habeas corpus. See Lowe v. Ingalls Shipbuilding, Div. of Litton Sys., 723 F.2d 1173, 1176-77 (5th Cir. 1984) (appropriateness of sua sponte consideration of jurisdiction). If there is no nexus, the petition should be dismissed for lack of subject matter jurisdiction.

B.

Ogunleye argues that the district court erred by dismissing his claim that the INS wrongfully refused to remit the fee application of adjustment of status required under 8 U.S.C. § 1255a(c)(7). Assuming, arguendo, that the district court had jurisdiction over the claim,² Ogunleye is not entitled to relief.

Pursuant to § 1255a(a)(4)(B), to be admissible as an immigrant, an alien must establish that he has not been convicted of a felony. 8 U.S.C. § 1255a(a)(4)(B) (West Supp. 1993). Ogunleye was

² See Garcia-Ortega v. INS, 862 F.2d 564, 566 (5th Cir. 1989).

convicted of larceny of a retailer in Oklahoma state court. See OKLA. STAT. ANN. tit. 21 § 1731 (West 1992) (punishment for larceny of a retailer of goods valued at over \$50 is imprisonment for not less than one year, nor more than five years, in the state penitentiary); OKLA STATE. ANN. tit. 21 § 5 (West 1992) (a felony is a crime that is punishable by imprisonment in the state penitentiary). Ogunleye's multiple habeas petitions have not "unsettled" his status as a felon, so we affirm the district court's denial of relief on this ground.

AFFIRMED in part and VACATED and REMANDED in part.