NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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August 21, 2019

LETTER OPINION

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Re: *Sandra Africano Nino v. Harold W. Clarke, et al.*
Case No. CL-2019-8814

Dear Counsel:

This case is before the Court on the Petition for a Writ of Habeas Corpus Ad Subjiciendum of Ms. Sandra Africano Nino ("Petitioner" or "Nino") alleging that her misdemeanor conviction for Driving While Under the Influence of Alcohol ("DWI") in the

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Fairfax County General District Court ("GDC") must be set aside based on a claim of ineffective assistance of counsel. Before reaching the merits of the claim, this Court is presented with the threshold question of whether Petitioner has named the proper adverse parties in this case, to wit, Harold W. Clarke, Director, Virginia Department of Corrections, and Tracy Lavely, Chief Probation Officer, Fairfax Office of Virginia Probation and Parole ("Respondents"). Because Petitioner is not a state-responsible offender, nor supervised by a "probation agency" or "probation officer," this Court concludes the only jurisdictionally proper party respondent to this suit is the Sheriff of Fairfax County. Thus, the Petition against the currently named Respondents must be dismissed, while granting leave for the proper respondent to be named.

BACKGROUND

Nino pled and was found guilty of DWI on September 27, 2018, by the GDC. Nino filed a Petition for a Writ of Habeas Corpus Ad Subjiciendum contending her lawyer had rendered ineffective assistance of counsel in derogation of the minimum standard for legal representation set by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Nino served her suit on Harold W. Clarke, Director of the Virginia Department of Corrections "(VDOC") and on Tracy Lavely, Chief Probation Officer, Fairfax Office, of the Virginia Department of Probation and Parole.

Nino was charged on a local warrant with DWI, second offense, under Fairfax County Code § 82-1-6, incorporating Virginia Code §§ 18.2-266 and 18.2-270. Upon her plea of guilty, Nino was sentenced to 180 days in jail with 150 days suspended, 10 days of which constituted a mandatory minimum sentence. Nino was also referred to the

Alcohol Safety Action Program ("ASAP"). Her privilege to operate a motor vehicle was suspended for 36 months, with leave to seek a restricted license.

In her Petition, Nino contends her plea of guilty was not knowing and voluntary and, that if it were not for the errors of her counsel, she would have elected to go to trial. Specifically, Nino contends she was not advised of all possible defenses nor of the full consequences of her plea.

The Attorney General of Virginia ("the AG"), counsel for Respondents, maintains that irrespective of whether Nino's claims have any merit, she has served the wrong party respondents. The AG essentially contends that Nino is neither in the custody of the Commonwealth nor is she subject to a suspended sentence of adequate duration to be a state-responsible prisoner, and is further, not under the supervision of Respondents. Therefore, the AG contends the claims against Respondents must be dismissed as a matter of law.

ANALYSIS

Pursuant to Virginia Code § 8.01-654(B)(3), Nino is in "custody" for jurisdictional purposes of pursuing a habeas corpus claim because she is currently within a one year period of court-ordered good behavior and compliance with the ASAP program, during which a suspended sentence of 150 days jail could be imposed.[1] Nino has alleged that

[1] The convicting court did not specify the length of the period of probation. Therefore, although Petitioner's driver's license is suspended for 36 months and she has been ordered to complete the ASAP program, her suspended jail sentence may only be revoked for violations that occurred "within the maximum period for which the defendant might originally have been sentenced to be imprisoned," in this case one year. Va. Code § 19.2-306. While the GDC retains jurisdiction over matters affecting the license suspension, such as issuing and supervising the terms of a restricted license, probation in the sense of being able to impose the suspended jail sentence in the instant case expires for any misconduct occurring after September 26, 2019. Petitioner timely filed her Petition on June 26, 2019, within the period of probation, and thus this Court has

she is on "probation," presumably referring to the fact she was referred to the ASAP program by the GDC. ASAP acts as a quasi-probation office in reporting noncompliance with its program or new convictions to the GDC. On the face of the warrant upon which her conviction was recorded, Nino was not referred to Ms. Lavely's office, though such referral is authorized as a matter of discretion under Virginia Code § 53.1-146. Whether Director Clarke or Ms. Lavely are proper parties to this suit depends on whether the suspended imprisonment sentence that could be imposed on Petitioner is less than one year and on whether Nino is truly under supervision of Ms. Lavely's probation agency.

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jurisdiction over this action provided the appropriate respondent is named. *See Escamilla v. Superintendent*, 290 Va. 374, 381, 777 S.E.2d 864, 868 (2015). The Supreme Court has further addressed the question of whether this Court could enter relief in favor of Petitioner after September 26, 2019, the date after which her suspended sentence can no longer be imposed for violation of probationary terms occurring subsequent to such date. The answer depends on whether the collateral consequences of her criminal conviction for DWI are of a sufficient magnitude so that the claim of Petitioner is not moot.

> Release from confinement, probation or parole during the pendency of the proceeding does not automatically render the proceeding moot.
>
> This holding does not dramatically expand habeas corpus jurisdiction. The predicate to establish habeas corpus jurisdiction remains; the petitioner must have been detained at the time the petition is filed and the petition must be filed within a discrete time period. Code § 8.01–654(A)(1), (2). Not all collateral consequences of a conviction will be sufficient to avoid a finding that the case is moot. Whether the collateral consequences claimed by the petitioner are sufficient to preclude a finding that the case is moot will be made on a case by case basis.

E.C. v. Virginia Dept. of Juvenile Justice, 283 Va. 522, 536, 722 S.E.2d 827, 834–35 (2012) (holding a habeas corpus petition is not moot when the collateral consequences of the challenged adjudication of juvenile delinquency include not being able own or possess a firearm *and* being required to register as a sex offender). The Supreme Court of Virginia has not detailed a governing principle of which collateral consequences defeat a claim of mootness, but it can be inferred that deprivation of the freedom to travel or change residence without reporting to law enforcement may be qualifying circumstances. *See id.* Conversely, since "not all collateral consequences will be sufficient," it is unclear whether those restrictions that are automatically attendant to felony convictions such as losing the right to vote or bear arms, *in isolation*, would be enough to defeat mootness. *See id.* Parsing the language of the Supreme Court, the effects of the challenged conviction must be of some severity, but not likely such effects that would afford every defendant an automatic excuse from the bar of mootness. One example of a consequence of sufficient qualifying severity may be deprivation of a professional license leading to loss of employment. *See Desetti v. Lee*, 87 Va. Cir. 16, 2013 WL 9419656, at *2 (Augusta Cir. Ct. 2013) (holding a habeas corpus petition was not moot when the collateral consequence to the petitioner was forfeiture of her nursing license leading to loss of employment).

The maximum sentence that Nino could receive upon violation of the conditions of her suspended sentence is, in this instance, 150 days. Director Clarke would only be a proper party respondent in the circumstance where "the judgment of conviction the petitioner challenges has a suspended sentence of one year or more." Va. Code 8.01-658(B)(3). Such prerequisite is clearly not met in this instance. "If the petitioner has a suspended sentence and is not under supervision by a probation or parole officer, respondent shall be . . . the local sheriff if the judgment of conviction the petitioner challenges has a suspended sentence of less than one year. . . ." *Id*. The analysis cannot, however, end there. If the Petitioner is under probation supervision, then the proper respondent is not the Sheriff but is instead "the probation and parole officer responsible for supervising the applicant or the official in charge of the parole or probation agency." Va. Code § 8.01-658(B)(2).

At first blush, the law seems to direct that the proper responding party to this suit is the official in charge Petitioner's probation. In this case, Ms. Lavely cannot be that person as her office has not been assigned supervision of Petitioner. Petitioner was instead referred to the ASAP program. The ASAP program is not part of VDOC. Parole, state probation, and VDOC, are under the administration of the Secretary of Public Safety and Homeland Security, part of the Executive Branch. Va. Code § 2.2-221. In contrast, ASAP is a program of the Legislative Branch of Virginia. Va. Code § 18.2-271.2. It is thus clear that neither Director Clarke nor Ms. Lavely are proper parties to this suit.

If Nino is on probation supervision at all, it is through the ASAP program to which she was referred for alcohol treatment. The question thus arises whether ASAP can be considered a "probation agency" or whether its employees can at least be said to be

"probation officers" under the Code of Virginia. Stated more succinctly, the ensuing question for this Court is whether the person in charge of the local ASAP office or alternatively the Sheriff of Fairfax County, is the proper respondent in this cause. For an answer to this query the Court must look to how the Code defines "probation agency," and whether ASAP falls squarely within such term. If ASAP is not a "probation agency," the Court must determine further whether the supervision of Nino provided by its employees nevertheless makes them "probation officers."

On the warrant of conviction, the District Court judge *did not* check the box next to the notation "on PROBATION for," *did* check the subpart stating "ASAP," but *did not* check the box "local community-based probation agency." Local supervision in the community "means probation, parole, postrelease supervision, programs authorized under the Comprehensive Community Corrections Act for local responsible offenders," and such supervision is under the ambit of the Executive Branch. Va. Code § 53.1-1. So, at a minimum, Nino is not on probation with a local probation agency and ASAP does not qualify as such an entity under Virginia Code § 8.01-658(B)(3).

It is telling that by statute, a convicting court must require a DWI offender "*as a condition of probation* or otherwise, to enter into and successfully complete *an alcohol safety action program*." Va. Code § 18.2-271.1 (emphasis added). Compliance with ASAP is a condition of probation but not a referral to a probation agency. This distinction is subtle but significant to the inquiry applicable herein. Specific words in a statutory enactment must "be construed to embrace only objects similar in nature to those objects identified. . . ." *Commonwealth v. United Airlines, Inc.*, 219 Va. 374, 389, 248 S.E. 2d 124, 132-33 (1978) (citations omitted). A "program" under the tutelage of the Legislative

Branch cannot thus be recast as a statutory "probation agency" merely because such program shoulders functions which may aid the courts in enforcement of terms of a suspended sentence. The Code refers to ASAP not as a "probation agency," but rather as what it is: a "program" designed to promote substance abuse rehabilitation.

As already noted, ASAP does perform quasi-probationary functions to ensure completion of its programs. While ASAP monitors offenders' compliance with the terms of suspended sentences, such as by reporting new convictions on the part of program participants to the courts, this is not dispositive of whether ASAP employees are "probation officers" under Virginia Code § 8.01-658(B)(2). The fact that ASAP either assumes or is requested to exercise probationary functions by the courts does not make their employees probation officers under the Code of Virginia, for their duties are not specifically demarcated by statute as "probationary." The powers and duties of local and state probation officers respectively, are specifically delineated by Code, and ASAP personnel are not included therein. *See* Va. Code §§ 9.1-176.1, 16.1-237, 53.1-145. Therefore, ASAP employees are not "probation officers" as that term is contemplated within Virginia Code § 8.01-658(B)(2).

Having determined that ASAP is neither a statutory "probation agency" nor are its employees "probation officers" for purposes of habeas corpus litigation, this Court concludes that in application of Virginia Code § 8.01-658(B)(3), it is the Sheriff of Fairfax County who is the sole proper responding party to which this suit can jurisdictionally pertain. Consequently, Petitioner shall be given leave to amend her Petition within a time frame set by the Court, upon expiration of which the claims against Director Clarke and Ms. Lavely shall be dismissed.

CONCLUSION

This Court has considered the Petition for a Writ of Habeas Corpus Ad Subjiciendum of Ms. Sandra Africano Nino alleging her misdemeanor conviction for Driving While Under the Influence of Alcohol in the Fairfax County General District Court must be set aside based on a claim of ineffective assistance of counsel. Before reaching the merits of the claim, this Court is presented with the threshold question of whether Petitioner has named the proper adverse parties in this case, to wit, Harold W. Clarke, Director, Virginia Department of Corrections, and Tracy Lavely, Chief Probation Officer, Fairfax Office of Virginia Probation and Parole. Because Petitioner is not a state-responsible offender, nor supervised by a "probation agency" or "probation officer," this Court concludes the only jurisdictionally proper party respondent to this suit is the Sheriff of Fairfax County. Thus, the Petition against the currently named Respondents must be dismissed, while granting leave for the proper respondent to be named.

The Court shall enter an order incorporating its ruling herein, and until such time, THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

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