

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 2, 2013

Elisabeth A. Shumaker
Clerk of Court

In re:

JEWEL WESLEY GIST,

Petitioner.

No. 13-5137
(D.C. No. 4:13-CV-00083-JED-TLW)
(N.D. Okla.)

ORDER

Before **BRISCOE**, Chief Judge, **KELLY** and **PHILLIPS**, Circuit Judges.

Jewel Wesley Gist, proceeding pro se, has filed a “Petition for Writ of Mandamus Order for Release from Incarceration.” For the following reasons, we deny the petition.

According to Mr. Gist’s petition, he pleaded guilty to violating Oklahoma state statutes for committing larceny of an automobile and burglary in the second degree. In August 2001, he was sentenced to concurrent terms of twenty years’ imprisonment with all but the first ten years suspended. He sought state post-conviction relief, but it was denied. In July 2010, the State of Oklahoma filed an application to revoke Mr. Gist’s suspended sentence. The state district court granted the application and revoked five years of the suspended sentence and returned Mr. Gist to prison. He filed an appeal with the Oklahoma Court of Criminal Appeals (OCCA). After the appeal had been pending for twenty months, he filed a 28 U.S.C. § 2254 habeas

petition in the Northern District of Oklahoma. Subsequently, the OCCA denied his appeal. Mr. Gist's habeas petition is still pending in the district court (it has been at issue for just over six months).

He now asks this court to order the Northern District of Oklahoma and Justin Jones, the Director of the Oklahoma Department of Corrections to release him "from incarceration pending litigation and adjudication of [his] appeal of the revocation of his suspended sentence." Pet. at 6. In support, he cites to 18 U.S.C. §§ 3142 and 3143. But Mr. Gist is not entitled to relief under those sections because they apply to defendants seeking release pending trial, *see id.* § 3142, or release pending sentencing or appeal, *see id.* § 3143.

Although Mr. Gist says he seeks release pending the adjudication of his appeal, there is no appeal pending before this court. The only federal action involving Mr. Gist appears to be his pending § 2254 habeas petition, but a habeas petition does not constitute an *appeal* from a state court decision. If the district court ultimately denies habeas relief, Mr. Gist may appeal to this court from that denial and may seek release pending review of that decision pursuant to Rule 23 of the Federal Rules of Appellate Procedure. *See United States v. Mett*, 41 F.3d 1281, 1282 (9th Cir. 1994) (explaining that the Bail Reform Act, 18 U.S.C. § 3143(b), does not apply to habeas prisoners seeking bail pending appeal; instead, "Fed. R. App. P. 23 governs the issue of release or detention of a prisoner, state or federal, who is collaterally attacking his or her criminal conviction").

Because Mr. Gist's petition is premature, there is no relief we may grant him at this time. Accordingly, we deny his petition. We grant his motion to proceed in forma pauperis.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", written over a dotted grid background.

ELISABETH A. SHUMAKER, Clerk