

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

ANDRE K. WATERS,)	
Petitioner)	
)	
v.)	Civil Action No. 7:08-cv-555
)	
WARDEN TERRY O'BRIEN,)	By: Hon. Michael F. Urbanski
Respondent.)	United States Magistrate Judge

REPORT AND RECOMMENDATION

Petitioner Andre K. Waters, an inmate at United States Penitentiary Lee County, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Waters asserts that he has not received proper credit for time served on his present sentence under 18 U.S.C. § 3585(a). Respondent concedes that prior to the commencement of this action, Waters properly exhausted his administrative remedies. On December 18, 2008, respondent filed a motion to dismiss, to which Waters responded. On May 11, 2009, this matter was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B). After review of subsequent filings by the parties, there are no disputed issues of fact, and this case is ripe for disposition. As there is no merit to Waters' claim that his federal sentence has been erroneously computed, it is **RECOMMENDED** that this case be **DISMISSED**.

I.

On August 7, 1996, Waters was named in a two-count indictment filed in the United States District Court for the Middle District of Tennessee. He was charged with violations of Title 18 U.S.C. § 2113(d), armed bank robbery, and § 924(c), use of a firearm during a crime of violence. A separate one-count indictment was later filed in the Northern District of Georgia on August 26, 1998 and charged Waters with armed bank robbery in that district, in violation of 18

U.S.C. § 2113(a) and (d). Pursuant to Rule 20 of the Federal Rules of Criminal Procedure, the Georgia indictment was transferred to the Middle District of Tennessee for disposition.

Meanwhile, on August 14, 1997, Waters was arrested in New York by state authorities for offenses that occurred on May 20, 1997. Waters was charged with Criminal Use of a Firearm First Degree, Attempted Murder Second Degree, Assault with Intent to Cause Serious Injury with a Weapon, and Attempted Robbery in the First Degree.

Subsequently, on December 17, 1997, the Middle District of Tennessee requested temporary custody of Waters, who was then being held in New York state custody at the Rikers Island correctional facility, by means of a writ of habeas corpus ad prosequendum. Pursuant to that writ, the U.S. Marshals Service picked up Waters in New York on January 13, 1998 and transported him to Tennessee. Because New York State had primary jurisdiction over Waters, he was scheduled to return to the state correctional facility in New York after his appearance in federal court in Tennessee.

On February 12, 1999, Waters was sentenced in the Middle District of Tennessee to sixty (60) months imprisonment for the armed bank robbery offense committed in Georgia (Case No. 3:98-00162) and sixty (60) months imprisonment each for the armed bank robbery offense and the firearm offense committed in Tennessee (Case No. 3:96-00095-01). See Resp.'s Ex. 1, and Attach. A thereto, Judgment and Commitment Order dated February 12, 1999.¹

After Waters' federal sentencing on February 12, 1999, the U.S. Marshals Service took steps to transport Waters back to state custody in New York. These steps were as follows. The U.S. Marshals Service delivered Waters to the Federal Transfer Center in Oklahoma City on February 22, 1999. On March 2, 1999, the U.S. Marshals Airlift Operations transported Waters to the U.S. Penitentiary in Atlanta, Georgia. Waters was housed in Atlanta for two days as a

¹ The sixty (60) month term imposed for violation of Title 18 U.S.C. § 2113(d) in Case Number 3:96-00095-01 was ordered to run concurrent with the sixty (60) month term imposed in Case Number: 3:98-00162. Thus, Waters' federal sentence is a total of 120 months.

holdover prisoner awaiting his return to New York state officials. He was then delivered to the Metropolitan Detention Center in Brooklyn, New York on March 4, 1999 and remained there until March 8, 1999.² On March 8, 1999, Waters was returned to New York state authorities, and the federal judgment was placed as a detainer with the New York State Department of Correctional Services. See Resp.'s Ex. 2 at 2.

Subsequently, on April 22, 1999, Waters was sentenced in New York state court to a seven and a half (7 ½) to fifteen (15) year term of imprisonment for criminal possession of a weapon and was committed to the New York Department of Corrections for service of that sentence. On January 23, 2007, Waters was paroled from his state sentence and turned over to federal custody pursuant to the detainer, where he remains. See Resp.'s Ex. 1 at 2.

In his original petition, Waters asserted that he served his federal sentence in state prison and must be released from federal custody. Waters asserts that his transfer to state authorities on March 8, 1999 constituted an illegal interruption of the service of his federal sentence and that he should receive federal credit for the time he served in state custody, beginning on February 12, 1999, the date of his federal sentence. The record indicates that a U.S. Marshals Individual Custody and Detention Report (USMS 129) noted a federal prison designation request. However, the designation request was not granted. Respondent states that this designation was an error because the same report indicates that Waters was initially temporarily released from New York state authorities by the Eastern District of New York for further transfer to the Middle District of Tennessee pursuant to a federal writ of habeas corpus ad prosequendum. See Resp.'s

² Initially, Petitioner did not receive any credit toward his federal sentence for his transit time to Tennessee from January 15, 1998 through January 29, 1998, to New York from February 12, 1999 through March 7, 1999. However, this credit has since been awarded toward Petitioner's federal sentence in accordance with 18 U.S.C. § 3585(b). As Attachment 7 to the United States' Supplemental Response to Order to Show Cause makes plain, Waters received state credit for the other days he was in federal pretrial custody pursuant to the writ, January 14, 1998 and January 30, 1998 – February 11, 1999. It is therefore clear that Waters has received credit, from either New York or the Bureau of Prisons, for each day he has been in custody. Likewise, it is plain that Waters has not received double credit, which he mistakenly seeks in this petition.

Ex. 2 at 2. Therefore, Respondent contends that Waters' federal sentence began to run on January 23, 2007, and not in 1999.

Waters filed a Counter-Affidavit on June 11, 2009 which makes a different claim. In this document, Waters states that "N.Y. State relinquished its primary jurisdiction on January 13, 1998 when it allowed Federal Government to take precedence. Petitioner is entitled to jail credit from January 13, 1998 – March 8, 1999." Pet. Counter-Aff. at 2, Dkt. 16.

For ease of reference during the analysis, the following dates are relevant:

- (a) August 14, 1997-- Waters arrested on state charges in New York.
- (b) January 13, 1998 -- Waters taken into federal custody in Brooklyn for transit to Tennessee for prosecution via ad prosequendum writ.
- (c) February 12, 1999 -- Waters sentenced in Tennessee federal court.
- (d) February 12, 1999 – March 8, 1999 -- Waters in transit from Tennessee federal court to New York state custody.
- (e) March 8, 1999 -- Waters returned back to state custody, federal detainer lodged.
- (f) April 22, 1999 -- Waters sentenced in state court.
- (g) January 23, 2007 -- Waters paroled from New York state and released to federal custody per detainer.

II.

The court must determine if Waters' federal sentence commenced on February 12, 1999, the date his federal sentence was imposed, or on January 23, 2007, the date on which Waters was paroled from his state sentence. When an inmate has sentences imposed by federal and state authorities, the sovereign that arrested him first acquires and maintains primary jurisdiction over him until the sentence imposed by that sovereign has been satisfied. United States v. Evans, 159 F.3d 908, 912 (4th Cir. 1998). "A detainer neither effects a transfer of a prisoner from state to federal custody nor transforms state custody into federal custody by operation of law." Thomas

v. Whalen, 962 F.2d 358, 360 (4th Cir. 1992). Additionally, a writ of habeas corpus ad prosequendum does not change the defendant's primary custody status, as the writ only authorizes federal authorities to "borrow" the defendant for court proceedings. Id. at 358 n.3; See also Crawford v. Jackson, 589 F.2d 693, 695 (D.C. Cir. 1978) ("When an accused is transferred pursuant to a writ of habeas corpus ad prosequendum he is considered to be 'on loan' to the federal authorities so that the sending state's jurisdiction over the accused continues uninterrupted. Failure to release a prisoner does not alter that 'borrowed' status, transforming a state prisoner into a federal prisoner.").

A federal sentence commences "on the date the defendant is received in custody awaiting transportation to . . . the official detention facility at which the sentence is to be served." 18 U.S.C. § 3585(a) (2000). Where a state has primary custody over the defendant, federal custody under the federal criminal sentence "commences only when the state authorities relinquish the prisoner on satisfaction of the state obligation." Evans, 159 F.3d at 912. One exception to this rule exists: "When a federal court imposes a sentence on a defendant who is already in state custody, the federal sentence may commence if and when the Attorney General or the Bureau of Prisons agrees to designate the state facility for service of the federal sentence." Id. at 911-12. Since the Bureau of Prisons did not designate a state facility as the place for service of a federal sentence in the instant case, respondent asserts that a nunc pro tunc designation is not warranted.

Waters seeks credit on his federal sentence for his time of incarceration beginning February 12, 1999. Waters asserts that he is entitled to this credit on a theory that his federal sentence commenced on February 12, 1999, the date his federal sentence was imposed. Waters contends that his transfer to state authorities on March 8, 1999 constituted an illegal interruption of the service of his federal sentence and that he should receive federal credit for the time he

served in state custody. To support his argument, Waters relies on three pieces of evidence to suggest that he actually began serving the federal sentence on February 12, 1999: (1) The USMS 129 form submitted by the Respondent indicates that for several days after sentencing in Tennessee, the USMS retained physical custody of Waters. On March 4, 1999, the U.S. Marshals Service transferred Waters to a Bureau of Prisons facility—MDC Brooklyn for four days. On March 8, 1999, he was transferred to a New York state facility; (2) During his state sentence, defense counsel and the state trial judge expressed their belief that Waters had been designated to a federal prison facility, and on that ground, the trial judge ordered his state sentence to run concurrent to the federal sentence; and (3) In a sentence computation update in January 2007, the BOP awarded prior custody against Waters' federal sentence for days he served before and immediately after the federal sentencing, because New York authorities had not given credit against Waters' state sentence for time between February 12, 1999 (the date of the federal sentence) and March 7, 1999 (the day before Waters was returned to state custody).³ Waters asserts that this evidence proves that he had begun serving his federal sentence in March 1999, when state authorities interrupted that sentence illegally by taking him back to state custody to face his charges in state court.

The fact that Waters remained in the physical custody of U.S. Marshals Service for two weeks after the federal sentence was imposed does not indicate that state authorities had relinquished primary jurisdiction over him. State authorities obtained primary jurisdiction over Waters when they arrested him on August 14, 1997 on state criminal charges. When federal authorities removed Waters from the state prison facility for transport to Tennessee for his federal trial and sentencing, pursuant to a writ of habeas corpus ad prosequendum, they only had

³ As noted in footnote 2, the 39 days which the state did not credit, from January 15, 1998 to January 29, 1998 and from February 12, 1999 to March 7, 1999, during which Waters was in transit to and from Tennessee federal court, were credited against Petitioner's federal sentence.

physical custody over him. The subsequent federal judgments did not affect his status as being in the primary custody of New York state. After Waters received his federal sentence, the U.S. Marshals Service transported him back to New York, where he still faced state charges. The February 12, 1999 federal judgment was filed with state authorities as a detainer against Waters, requiring that he be taken into federal custody once he completed his state obligations. The imposition of the federal judgment on February 12, 1999 did not trigger a change in New York state's primary jurisdiction over Waters; it merely stated the penalty he would face in federal prison once he completed his obligations to New York.

The facts in the instant case are similar to those in Trowell v. Beeler, 135 Fed. Appx. 590, 590-93 (4th Cir. 2005). In Trowell, the petitioner was first sentenced in federal court, but the judgment was silent as to whether any subsequently imposed state sentence was to be concurrent with or consecutive to petitioner's federal sentence. Id. at 592. When Trowell was sentenced in state court, the state sentence was ordered to run concurrent to Trowell's federal sentence. Id. The Fourth Circuit noted that "[h]ad [the State] wished to give effect to its court's concurrency order, the state could have, for example, attempted to relinquish or waive primary jurisdiction after Trowell was sentenced in state court." Since the State obtained primary jurisdiction as the first arresting sovereign and did not attempt to relinquish or waive its primary jurisdiction, the Fourth Circuit concluded that the Bureau of Prisons had discretion to deny Trowell's request for a nunc pro tunc designation. Id. at 593.

Just as in Trowell, Waters was first sentenced in federal court, and the federal court judgment was silent as to whether any subsequently imposed state sentence was to be concurrent with or consecutive to Waters' federal sentence. Although the state trial judge ordered the state sentence to run concurrent to Waters' federal sentence, New York did not try to relinquish or waive its primary jurisdiction. Since federal authorities borrowed Waters pursuant to a writ of

habeas corpus ad prosequendum, Waters remained in primary state custody. See Thomas, 962 F.2d at 316 n.3 (producing state prisoner under writ of habeas corpus ad prosequendum does not relinquish state custody). Despite the statements of the defense attorney and the judge during the state sentencing hearing on April 22, 1999, documentation indicates that federal authorities returned Waters to the physical custody of the state on March 8, 1999. Furthermore, Waters received credit against his state sentence for the period from March 8 to April 22, 1999, the date of his state sentence.

Waters asserts that his transfer to state authorities on March 8, 1999, constituted an illegal interruption of the service of his federal sentence. See, e.g., Weekes v. Fleming, 301 F.3d 1175, 1181 (10th Cir. 2002); Luther v. Vanyur, 14 F. Supp. 2d 773 (E. D. N. C. 1997). However, both Weekes and Luther are not applicable to the facts of the instant case. Weekes only held that the interruption of the defendant's federal sentence when he was returned to Idaho entitled him to credit on the federal sentence because the United States and Idaho agreed to a permanent change of custody of the prisoner. As such, the United States was under no duty to return the defendant to state custody after federal sentencing. Id. Similarly, Luther is distinguishable from the instant case because it concerns a prisoner who was actually received at the federal penitentiary and spent over three years in federal custody. Additionally, the transfer in Luther was "much more complete and final than a transfer pursuant to a writ of habeas corpus ad prosequendum." Id. at 778. The court adds: "Even if one could argue that this transfer began as a loan, a period of three years, four months and five days far exceeds the period in which a prisoner transfer should be considered a loan." Id. Therefore, since the United States and New York State did not agree to a permanent change in custody nor keep Waters at a federal penitentiary for even close to three years, Weekes and Luther are not applicable to Waters' case.

At any point, state authorities could have relinquished primary custody of Waters. For example, after the state sentence was imposed, state authorities could have returned him to federal authorities and designated a federal prison facility as the location where he would serve his concurrent state sentence. Weekes v. Fleming, 301 F.3d 1175, 1181 (10th Cir. 2002). However, that did not happen here. The imposition of the federal judgment on February 12, 1999 did not trigger a change in primary custody. Therefore, Waters' federal sentence did not commence until January 23, 2007.

III.

For the reasons discussed above, the undersigned **RECOMMENDS** that the motion to dismiss be **GRANTED**.

The Clerk of the Court is directed immediately to transmit the record in this case to the Honorable Glen E. Conrad, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court is hereby directed to send a certified copy of this Report and Recommendation to all counsel of record.

Enter this 23rd day of June, 2009.

/s/

Michael F. Urbanski
United States Magistrate Judge