

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

GARY LEIGHTON THIMMES,

Petitioner,

v

File No. 12-29101-AH
HON. PHILIP E. RODGERS, JR.

WARDEN SHIRLEE A. HARRY,

Respondent.

Petitioner Acting in Pro Per

pc: Respondent

DECISION AND ORDER DENYING
COMPLAINT FOR WRIT OF HABEAS CORPUS INQUIRY

The Petitioner, Gary L. Thimmes, pled nolo contendere in Monroe County to one count of tampering with evidence in a criminal case, pursuant to MCL § 750.483a(6)(b) and one count of failing to stop at the scene of an accident resulting in death, pursuant to MCL § 257.617(3). Subsequently, the Petitioner was sentenced to serve 16 to 270 months with the Michigan Department of Corrections (MDOC), with a release date no earlier than May 19, 2013.

The Petitioner has now submitted a Complaint for Writ of Habeas Corpus challenging the legality of his incarceration at the Pugsley Correctional Facility in Grand Traverse County. The Petitioner alleges that he is not committed or detained by virtue of any written judgment of conviction signed by a competent Michigan criminal court.¹

A prisoner's right to file a complaint for habeas corpus is guaranteed by the Michigan Constitution.² The object of a writ of habeas corpus is to determine the legality of the restraint under which a person is held.³ Habeas corpus is the remedy when a sentence of imprisonment

¹While the Petitioner does not cite the Michigan Court Rules, MCR 6.427 would be the rule applicable to the Petitioner's claims.

²*Hinton v Parole Bd*, 148 Mich App 235, 244; 383 NW2d 626 (1986).

³*Moses v Dep't of Corrections*, 274 Mich App 481; 736 NW2d 269 (2006).

is wholly void for lack of authority to sentence to the institution in question.⁴ If a legal basis for detention is lacking, a judge must order the release of the detainee from confinement.⁵

Pursuant to MCL § 600.4301 *et seq*:

[A]n action for habeas corpus to inquire into the cause of detention may be brought by or on the behalf of any person restrained of his liberty within this state under any pretense whatsoever, except...persons convicted, or in execution, upon legal process, civil or criminal [and] persons committed on original process in any civil action on which they were liable to be arrested and imprisoned, unless excessive and unreasonable bail is required.⁶

Thus, habeas corpus cannot serve as a substitute for an appeal or writ of error and cannot be used to review the merits of a criminal conviction.⁷ MCL § 600.4310(3) prohibits a habeas action by or on behalf of “persons convicted, or in execution, upon legal process, civil or criminal,” and is not a means of testing the conditions of admittedly lawful custody.⁸ Furthermore, under MCL § 600.4310, habeas relief is open to a convicted person only where the convicting court was without jurisdiction to try the defendant for the crime in question.⁹ To qualify for habeas relief, the jurisdictional defect must be radical, rendering the conviction absolutely void.¹⁰ A radical defect in jurisdiction contemplates an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission.¹¹ Habeas relief may be denied in the exercise of a court’s discretion where full relief may be obtained in other more appropriate proceedings.¹²

In this case, the Petitioner plainly and improperly seeks to challenge through his habeas corpus petition the merits of his conviction and sentence, which the habeas procedure does not entitle him to do.¹³ Furthermore, the court rules provide no sanction for a court’s failure to

⁴*Ex parte Allen*, 139 Mich 712; 103 NW 209 (1905).

⁵MCL § 600.4352.

⁶MCL § 600.4307; § 600.4310.

⁷*Cross v Dep’t of Corrections*, 103 Mich App 409; 303 NW2d 218 (1981).

⁸*Harris v Nelson*, 394 US 286; 89 S Ct 1082; 22 L Ed 2d 281 (1969); *Walker v Wainwright*, 390 US 335; 88 S Ct 962; 19 L Ed 2d 1215 (1968), rehearing denied, 390 US 1036; 88 S Ct 1420; 20 L Ed 2d 299.

⁹*People v Price*, 23 Mich App 663, 669-670; 179 NW2d 177 (1970). A radical defect in jurisdiction so as to permit review of conviction by habeas corpus contemplates an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission. *Id.*

¹⁰*Id.*

¹¹*Id.* at 671.

¹²*Phillips v Warden, State Prison of Southern Mich*, 153 Mich App 557, 566; 396 NW2d 482 (1986).

¹³*Woods v Dep’t Corrections*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2011 (Docket No. 296609).

complete a judgment of sentence within seven days after sentencing.¹⁴ The underlying policy for MCR 6.427 is to encourage prompt execution of sentences.¹⁵ Failure to sign a judgment of sentence within seven days does not divest the court of jurisdiction to execute the sentence.¹⁶

For the reasons stated herein, the Court denies the Petitioner's Complaint for Writ of Habeas Corpus Inquiry.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

¹⁴*People v Levandoski*, 237 Mich App 612, 617-618; 603 NW2d 831 (1999).

¹⁵*Id.*

¹⁶*Id.* See also *Ex parte Curtis*, 264 Mich 431; 250 NW 280 (1933) [if a clerk inadvertently omits part of the record at time of sentencing the court may enter an order of *nunc pro tunc* to cure the defect and validate the sentence imposed]; *In re Rogers*, 308 Mich 392; 13 NW2d 862 (1944) [ministerial errors in court commitment papers which should and could be corrected by the court if brought to its attention may be corrected by an order *nunc pro tunc* the record made to speak the judicial determination of the conviction and grounds for sentence imposed]; *In re Elliott*, 315 Mich 662; 24 NW2d 528 (1946) [ministerial errors may be corrected and are not sufficiently defective to result in the release of a defendant on habeas corpus].