

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Nos. 20-2473 & 2474

Dentrell Brown,

Petitioner,
Appellee & Cross Appellant,

v.

Frank Vanihel,

Superintendent,
Wabash Valley
Correctional Facility,

Respondent,
Appellant & Cross-Appellee

Appeal from
the United States District Court for
the Southern District of Indiana,
Indianapolis Division

Case No. 1:13-cv-1981-JMS-DKL

The Honorable
Jane Magnus-Stinson, Chief Judge.

**Petitioner-Appellee's Verified Motion
to Dismiss Respondent-Appellant's Appeal in Case No. 20-2474**

For the reasons that follow, the Petitioner-Appellee, Dentrell Brown, by counsel, the Court should dismiss the Respondent Superintendent's appeal in Case No. 20-2474 for lack of jurisdiction.

1. On July 9, 2020, the district court entered its judgment conditionally granting Dentrell's petition for a writ of habeas corpus under §§ 28 U.S.C. 2254 & 2243. D.E. 110. (A true copy of that judgment is attached to this motion.)

2. The district court's judgment read in relevant part:

Mr. Brown's petition for a writ of habeas corpus is GRANTED. The State of Indiana shall vacate all criminal penalties stemming from Mr. Brown's murder conviction in Elkhart Circuit Court Case No. 20C01-0806-MR-00002 and release him from custody pursuant to that conviction unless the State of Indiana elects to retry Mr. Brown within 120 days of this Final Judgment.

(Emphasis in the original).

2. On August 7, 2020, the Respondent Superintendent filed his notice of appeal of that judgment. D.E. 111 (“Respondent Frank Vanihel gives notice of his appeal to the United States Court of Appeals for the Seventh Circuit of this Court’s July 9, 2020, order and judgment granting a conditional writ of habeas corpus to Petitioner Dentrell Brown.”)

3. The Respondent Superintendent did not file a request that the district court stay operation of its July 9, 2020, judgment pending his appeal.

4. On October 22, 2020, less than 120 days after the district court entered its judgment, the State of Indiana, by the Elkhart County Prosecutor, filed its Motion to Initiate Proceedings in State of Indiana v. Dentrell Brown, Case No. 20C01-0806-MR-00002. (A true copy of that motion is attached to this motion.)

5. The State’s motion read in relevant part:

COMES NOW the State of Indiana, by its Prosecuting Attorney for the 34th Judicial Circuit, Vicki Elaine Becker, and respectfully requests the Court to take judicial notice of the United States’ 7th Circuit Court of Appeals Opinion, filed contemporaneously herewith as “Exhibit A”, and initiate proceedings in conformance with said Opinion. Furthermore, the State requests the Court to transfer custody of the Defendant to Elkhart County, and set an initial hearing, at which time the Court may address the matter of counsel for Defendant and set future dates.

(Emphasis in the original).¹

6. On October 25, 2020, the Elkhart Circuit Court granted the State’s motion, scheduled an initial hearing for November 19, 2020, and issued an order to transport Dentrell to the Elkhart County Jail for the hearing. See docket entries for

¹ It was, of course, the district court’s opinion, D.E. 109, issued at the same time as the district court’s judgment, that the State attached as Exhibit A to its motion and not any order or other document from this Court.

October 26, 2020, on the attached true copy of the online docket for the state prosecution, which is current as of 9:40 p.m. EST, January 6, 2021. (The docket may be found online at: <https://tinyurl.com/y2gqc66w>. (Last visited January 6, 2021).)

7. On November 19, 2020, the Elkhart Circuit Court did, in fact, hold an initial hearing and set a trial date of May 17, 2021. See Hearing Journal Entry for November 19, 2020, on online docket.

8. By filing its Motion to Initiate Proceedings within 120 days of the district court's judgment and, thereafter, having a trial date set, the State of Indiana has, in the language of district court's judgment, "elect[ed] to retry Mr. Brown."

9. This Court therefore has no jurisdiction to consider the merits of the Respondent Superintendent's appeal of the merits of the district court's judgment. So says this Court's decision in *Jensen v. Pollard*, 924 F.3d 451 (2019), three times: 1): "Our jurisdiction is limited to assessing the State's compliance with the conditional writ. The State complied with the writ when it initiated proceedings for Jensen's retrial." *Id.* at 453; 2) "When a district court issues a conditional habeas writ, it retains jurisdiction to determine compliance. *See Hudson v. Lashbrook*, 863 F.3d 652, 656 (7th Cir. 2017). But once the State complies with the writ, the district court loses jurisdiction. *Id.* Accordingly, the only question properly before this court is whether the State complied with the writ." *Id.* at 454 (footnote omitted); and 3) "In this case the conditional writ required the State to either release Jensen or "initiate proceedings to retry him." The State did the latter, and at that moment the district court lost jurisdiction." *Id.* at 455.

10. In *Hudson v. Lashbrook*, 863 F. 3d 652 (2017), on which *Jensen* relied in part, the Court said: "The district judge in this case properly followed *Lafley* to the

letter, and directed the state prosecutors to reoffer a lower plea deal. Once the state reoffered the plea deal, the habeas writ was complied with, and the district court lost jurisdiction over the case.” *Id.* at 656; *see also Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006) (“If the state complies with its order, the petitioner will not be released” [W]hen a state meets the terms of the habeas court’s condition, . . . the habeas court does not retain any further jurisdiction over the matter.” (Quoting *Phifer v. Warden, U.S. Penitentiary*, 53 F.3d 859, 862 (7th Cir. 1995)).); *accord Rose v. Guyer*, 961 F.3d 1238, 1246 (9th Cir. 2020).

11. The Respondent Superintendent could have sought a stay of the district court’s judgment pending its appeal of that judgment. Counsel for the Respondent Superintendent in this case represented the Respondent Superintendent in *Myers v. Neal*, 975 F.3d 611 (2020), and did exactly that after Judge Sweeney issued a conditional writ of habeas corpus. But he did not do so in this case.

12. Because the State of Indiana complied with the district court’s conditional judgment and cured the constitutional violation found by the district court by electing to retry Dentrell in the Elkhart Circuit Court, the Respondent-Appellee’s appeal of the merits of the district court’s judgment has been rendered moot. This Court therefore has no jurisdiction to consider the Respondent Superintendent’s appeal. *See, e.g., Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC*, 950 F.3d 911, 914 (7th Cir. 2020) (“We may not pass on the merits of “moot questions or abstract propositions. (internal quotation marks omitted) (citation omitted); *Morales v. Barr*, 973 F.3d 656, 660 (7th Cir. 2020) (“If developments in a case make it impossible for a court to grant any effectual relief whatever to the prevailing party, then we must dismiss the appeal as moot.” (internal quotation marks omitted) citation omitted);

United States v. Heisler, 821 F. App'x 639, 641 (7th Cir. 2020) (“A controversy must remain live throughout all stages of litigation for a federal court to exercise jurisdiction. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013).” (Parallel citations omitted)).

13. Dentrell therefore requests that the Court dismiss the Respondent Superintendent's appeal in Case No. 20-2474.

14. If the Court dismisses the Respondent Superintendent's appeal in Case No. 20-2474, Dentrell requests, under Federal Rule of Appellate Procedure 42(b), that the Court enter a voluntary dismissal of his cross-appeal in Case No. 20-2473.

15. Finally, Dentrell requests that the Court suspend briefing pending disposition of this motion.

Conclusion

For the foregoing reasons, Dentrell respectfully requests that the Court dismiss the Respondent-Appellant's appeal in Case No. 2474. Additionally, if the Court dismisses the Respondent-Appellant's appeal in Case No. 20-2474, under Federal Rule of Appellate Procedure 42(b), Dentrell requests that the Court enter a voluntary dismissal of his cross appeal in Case No. 2473. Finally, Dentrell requests that the Court suspend briefing in this case pending disposition of this motion.

Respectfully submitted,

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I affirm under penalty for perjury that the foregoing representations are true.

/s Michael K. Ausbrook
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Certificate of Service

I hereby certify that on January 6, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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