In the

United States

Circuit Court of Appeals

For the Ninth Circuit

No. 11827

In the Matter of the Application for a Writ of Habeas Corpus of DONALD E. McDONALD,

Petitioner and Appellant,

v.

TOM SMITH, Superintendent of the Washington State Penitentiary at Walla Walla, Washington,

Respondent and Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE, TOM SMITH

Superintendent of the Washington State Penitentiary at Walla Walla, Washington

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COUNTERSTATEMENT OF THE CASE

This matter is before the court on appeal from an order entered by the Honorable Sam M. Driver, as a judge of the United States District Court for the Eastern

District of Washington, Southern Division, denying appellant's application to be permitted to file *in forma pauperis* a petition for writ of habeas corpus. The order, with the formal parts omitted, is as follows (Tr. 15):

> "This matter is before the Court on motion and affidavit of the above named petitioner for permission to file a petition for writ of habeas corpus in forma pauperis, and upon the reading and consideration of said petition, it appearing to the Court that the petitioner has not exhausted his legal remedies in the Courts of the State of Washington, and that this Court is without jurisdiction to entertain said petition,
>
> "IT IS, THEREFORE, ORDERED AND ADJUDGED that the application to be permitted to file said petition for writ of habeas corpus in forma pauperis is hereby denied.
>
> "DATED this 6th day of November, 1947."

The petition alleges that the judgment and sentence, pursuant to which the appellant is being detained, is defective in that (1) it is not complete on its face, (2) the crime of which the petitioner was convicted is not sufficiently described therein, and (3) only a maximum term is fixed when the statute provides that the penalty for the crime charged shall be for a term of "not less than one year nor more than ten years." (Sec. 16, chapter 172, Laws of 1935; Rem. Rev. Stat. Supp. 2516-16.) (Tr. 4.)

It further recites that a petition for habeas corpus was filed in the Supreme Court of the State of Washington, which court issued a show cause order setting the case for hearing before the Superior Court of Spokane County, Washington (Tr. 4, 5). As shown in the petition, the Superior Court of Spokane County denied the appli-

cation for a writ (Tr. 5) on May 26, 1947 (Tr. 12). The application to the state court was made prior to the effective date of Chapter 256, Laws of 1947, which greatly broaden the scope of habeas corpus in the State of Washington.

There is no indication in the present petition that the appellant availed himself of remedies in courts of Washington in either of the following ways: (1) by perfecting an appeal from the decision of the Spokane County Superior Court or (2) by applying for habeas corpus under Chapter 256, Laws of 1947.

The Federal District Court denied the present petition without a hearing because it indicates on its face "that the petitioner has not exhausted his legal remedies in the Courts of the State of Washington."

ARGUMENT

Throughout his argument, the appellant assumes that he has exhausted his state remedies, failure to show which was the basis for the order of the District Court. It is apparent from the petition for a writ of habeas corpus that no appeal was taken from the order of the Spokane County Superior Court denying an application for habeas corpus, nor has any petition for a writ of habeas corpus been submitted to the state courts since the effective date of Chapter 256, Laws of 1947 (Washington) which radically changes the scope of inquiry on application for the writ in the state courts. And there is no showing that he has attempted to present the Federal

question allegedly in his case, to the United States Supreme Court on appeal or certiorari from the state court.

It is incumbent upon one serving a sentence imposed by a state court to exhaust the remedies available to him under the law of the state before he is entitled to seek a writ of habeas corpus in the Federal courts. *Ex Parte Hawke,* 321 U. S. 114, 116-117, 64 S. Ct. 448, 88 L. Ed. 572; *Barton v. Smith,* 9 Cir., 162 F. (2d) 330, 331; *United States v. Ragen,* 7 Cir., 153 F. (2d) 600; *United States v. House,* 9 Cir., 110 F. (2d) 797; *Herzog v. Colpoys,* 79 U. S. App. D. C. 81, 143 F. (2d) 137.

In exceptional cases requiring prompt action, a Federal court may interfere by habeas corpus before remedies available in the state courts have been exhausted. *Urquhart v. Brown,* 205 U. S. 179, 182, 27 S. Ct. 459, 51 L. Ed. 760. However, the petition now under consideration is not based upon urgency, and does not qualify as being an exception to the regular rule.

The law requiring persons serving sentences imposed by state courts to exhaust legal remedies available in the courts of the sentencing state before seeking a writ of habeas corpus in the Federal courts is so well settled that the present petition could have been summarily denied. However, the order merely denied leave to file the petition without payment of fees. Manifestly, the order entered is correct as the appellant's petition did not make a prima facie showing of right to relief.

In *Johnson v. Hunter,* 10 Cir., 144 F. (2d) 565, the court denied leave to appeal in *forma pauperis* because

the petition for a writ of habeas corpus failed to disclose that the petitioner has a meritorious cause. The following language from that opinion expresses the view which is proper in this case:

> "The burden is upon the indigent litigant to allege facts which, if true, entitle him to relief. He may also be required to make a satisfactory showing that he can produce competent evidence in support of the allegations before he is entitled to proceed without payment of costs and at the expense of the government. Courts are and should be diligent to afford to indigent litigants with a meritorious cause the benefit of the statute. On the other hand, they are fully justified in being diligent in limiting such actions to those in which there is a showing of merit.
>
> "It may be that the petitioner, under the true facts, can file a petition which shows such merit that the trial court will permit him to proceed in forma pauperis. We think the trial court was well within his discretion in denying petitioner the right to proceed in forma pauperis on the petition which he filed. The denial of the appeal herein is without prejudice to the right of petitioner to file another petition." 144 F. (2d) at 567.

CONCLUSION

Since the District Court did not pass upon the merits, we do not believe it necessary to discuss the questions raised in the petition, although the appellant bases his appeal upon the matters relied upon as a basis for issuance of the writ rather than the order from which the appeal is taken.

We submit that the petition fails to demonstrate that the appellant has exhausted the remedies available to him in the courts of the State of Washington and consequently the Federal District Court correctly denied leave to file the petition without payment of fees.

The order of the District Court should be affirmed.

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