

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

JOSE NUNEZ,

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
OFFICE OF THE ATTORNEY GENERAL,
VIRGIN ISLANDS DEPARTMENT OF
CORRECTIONS, ET AL.,

Respondents,

CASE NO. ST-12-CV-621

MEMORANDUM OPINION

Pending before the Court is Jose Nunez's *pro se* Petition for Writ of Habeas Corpus. For the following reasons, Nunez's Petition is denied.

FACTUAL AND PROCEDURAL HISTORY

Following a trial from March 1, 2005, through March 3, 2005, a jury returned a verdict of guilty on Count I, rape in the first degree, and Count II, first degree assault (assault with intent to commit rape) of the Information, and acquitted Petitioner of Count III, possession of a dangerous weapon during the commission of a crime of violence, and Count IV, third degree assault. The Court entered judgment on the convictions and sentenced Petitioner to a term of imprisonment of twenty-five (25) years on Count I and ten (10) years on Count II, to run concurrently with the sentence on Count I.¹ Petitioner appealed his conviction, and the Appellate Division of the District Court of the Virgin Islands, Division of St. Thomas and St. John affirmed Petitioner's conviction on Count I, but reversed his conviction on Count II and remanded with instructions to vacate Petitioner's conviction on Count II because first degree assault (assault with intent to

¹ Judgment was entered on May 18, 2005, and was reduced to a written judgment signed November 30, 2005.

commit rape) constituted a lesser-included offense of Count I, rape in the first degree.² Accordingly, upon remand, in an August 5, 2010, Amended Judgment, the Court vacated Petitioner's conviction on Count II and sentenced Petitioner to a term of imprisonment of twenty-five (25) years on Count I and gave him credit for all time already served. Petitioner now argues in his October 26, 2012, Petition for Writ of Habeas Corpus that (1) he was not charged, and subsequently sentenced, under the appropriate statute, and that (2) he received ineffective assistance of counsel.³

STANDARD

Under 5 V.I.C. § 1301, “[e]very person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment. . . .” 5 V.I.C. § 1302 provides that,

. . . The petition shall comply with the following requirements:

(1) It shall specify that the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty and the officer or person by whom, and the place where, he is so confined or restrained, naming all the parties, if they are known, or describing them, if they are not known.

² *Nunez v. Gov't of Virgin Islands*, 2010 WL 2990130 (D.V.I. July 28, 2010) *aff'd sub nom. Gov't of the Virgin Islands v. Nunez*, 424 F. App'x 157 (3d Cir. 2011). Petitioner also raised several other arguments on appeal that were ultimately rejected by the District Court, including

- (1) Whether the trial court erred by failing to order the Government to choose between Counts I and II in the charging document . . .
- (2) Whether the trial court's comments about the cross examination of [a] defense witness warranted reversal,
- (3) Whether the court's handling of the Government's misstatement of the evidence during closing argument was error,
- (4) Whether the trial court's curative instruction regarding the Government's misstatement of the evidence was sufficient,
- (5) Whether the trial court erred by allowing the Government to present its rebuttal argument the day after the defense's closing argument, and
- (6) Whether the trial court insufficiently corrected the jury's lack of comprehension of the court's instruction.

Id.

³ The Petitioner submitted his brief in support of the Writ on December 4, 2012. The Government responded on January 11, 2013, and supplemented on February 1, 2013. Pursuant to an October 30, 2012, Order, the Petitioner had until January 31, 2013, to reply to the Government, but Petitioner did not respond.

- (2) If the imprisonment is alleged to be illegal, the petition shall state in what the alleged illegality consists.
- (3) The petition shall be verified by the oath of the party making the application.

The Superior Court has jurisdiction “to issue writs of habeas corpus with respect to prisoners sentenced and confined by that court” pursuant to 5 V.I.C. § 1303.⁴

ANALYSIS

Respondent argues that Petitioner has failed to obtain *in personam* jurisdiction because no service was issued on Respondent by Petitioner and Petitioner has failed to name the proper custodial party as a Respondent. The Court recognizes that Petitioner bears “the burden of proving all facts entitling him to a discharge from custody,” including not only “the substantive elements of a petitioner's claim,” but also “the procedural requisites that entitle him to relief as well.”⁵

Applying the procedural requirements of 5 V.I.C. § 1301, *et seq.*, and considering that *pro se* pleadings should be liberally construed,⁶ Petitioner has satisfactorily identified the proper custodial respondent. Specifically, while 5 V.I.C. § 1305 instructs that “[t]he writ shall be directed to the person having custody of or restraining the person on whose behalf the application is made,” 5 V.I.C. § 1302 also states that the writ should “name[sic] all the parties . . . or describe them, if they are not known.” Here, the Petitioner directed the Writ to “Government of the Virgin Islands; Officer of the Attorney General; Virgin Islands Bureau of Corrections; *et al.*” Thus, while the Petitioner should have specifically named the Warden of Golden Grove Adult Correctional Facility⁷ as a Respondent, Petitioner directed the Writ to the “Virgin Islands

⁴ *Joseph v. de Castro*, 27 V.I. 297 (D.C.V.I. 1992), *aff'd*, 28 V.I. 546, 995 F.2d 217. See *Parrott v. Gov't of the Virgin Islands*, 41 V.I. 188 (D.C.V.I. 1999).

⁵ *Brown v. Cuyler*, 669 F.2d 155, 158 (3d Cir. 1982).

⁶ *Boyd-Richards v. de Jongh*, 2012 WL 13682 (D.V.I. Jan. 4, 2012)

⁷ See *Rumsfeld v. Padilla*, 542 U.S. 426, 428 (2004).

Bureau of Corrections,” the overarching department which handles the management of Golden Grove Adult Correction Facility, and further indicated on the first page of the Writ that he is “currently imprisoned at the Golden Grove Adult Correction Facility.” The Court finds that this is a sufficient description, considering Petitioner’s *pro se* status, to unambiguously identify the custodial party respondent, the Warden of the Golden Grove Adult Correction Facility, an employee of the Virgin Islands Bureau of Corrections.⁸

However, Defendant has not perfected service of process pursuant to Super. Ct. R. 23, *et seq.* A petition for writ of habeas corpus is civil in nature brought pursuant to 5 V.I.C. § 1301, *et seq.* Thus, a petition for writ of habeas corpus must also comply with the applicable rules of civil procedure, including perfecting service of process pursuant to Super. Ct. R. 23, *et seq.*, insofar as the procedures are consistent with 5 V.I.C. § 1301, *et seq.* Here, there is no evidence that process was issued and served on Respondent.

While the Court need not address Petitioner’s other arguments because the matter is resolved on service grounds, the Court is compelled to address Petitioner’s mistaken allegation that he was charged and sentenced under the wrong statute, aggravated rape in the first degree under 14 V.I.C. § 1700(a), rather than rape in the first degree under 14 V.I.C. § 1701(2). The Court recognizes that a typographical error was made in the August 5, 2010, Amended Judgment which stated the following:

ORDERED, ADJUDGED, and DECREED that, the Defendant having been found GUILTY by a jury of Count I of the Information, rape in the first degree in violation of 14 V.I.C. § 1700(a), 1701(2), the Court entered JUDGEMENT OF CONVICTION on the jury’s verdict of GUILTY; and it is

⁸ See *cf. People v. Calyer*, 736 F.2d 1204, 1208 (Colo. 1987).

ORDERED that Defendant is sentenced to incarceration with the Bureau of Corrections for a period of twenty-five (25) years on his conviction on Count I and given credit for all incarceration already served . . .⁹

However, despite the typographical error of including 14 V.I.C. § 1700(a) in the Amended Judgment, Defendant was clearly found guilty of rape in the first degree and accordingly sentenced under 14 V.I.C. § 1701(2), not aggravated rape under 14 V.I.C. § 1700(a). Specifically, the jury verdict form, signed by all members of the jury states:

“We the jury, impaneled and sworn to try the GUILT or INNOCENCE of the above-named, find the DEFENDANT, JOSE NUNEZ, GUILTY of the crime charged; to wit: Count I, First Degree Rape.”

Further, at the May 18, 2005, sentencing hearing, the government requested that the maximum sentence of thirty (30) years be imposed for Count I, and subsequently the Hon. Ive. A Swan stated, “I’m going to impose a sentence of [twenty-five] 25 years on the first degree rape . . .”¹⁰ Because 14 V.I.C. § 1700(a) carries a maximum penalty of life imprisonment, not thirty (30) years, Petitioner was sentenced under the correct statute, 14 V.I.C. § 1701(2). The August 5, 2010, Amended Judgment, did not change the statute under which Petitioner was originally sentenced on Count I, but simply vacated Petitioner’s sentence on Count II, assault in the first degree, and re-imposed the same sentence on Count I.

⁹ This typographical error also occurred in Petitioner’s original November 30, 2005, Judgment which was subsequently vacated by the August 5, 2010, Amended Judgment.

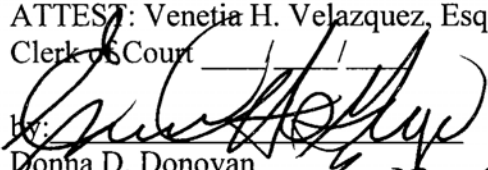
¹⁰ Transcript, Sentencing Hearing, May 18, 2005.

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For the foregoing reasons, Nunez's Petition for Writ of Habeas Corpus shall be denied.
An Order consistent with this Memorandum Opinion shall follow.

Dated: March 6, 2013

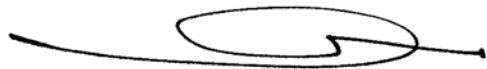
ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

By: 

Donna D. Donovan

Court Clerk Supervisor

6/7/2013



HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS