

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. PARKER

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STATE OF NEBRASKA, APPELLEE,
V.
MARK PARKER, APPELLANT.

Filed May 8, 2012. No. A-11-556.

Appeal from the District Court for Thurston County: JOHN E. SAMSON, Judge. Appeal dismissed.

Paul W. Madgett for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

MOORE, CASSEL, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Mark Parker appeals from an order of the district court for Thurston County affirming the Thurston County Court's denial of his motion for postconviction relief. Because Parker has served his sentence and is no longer in custody for purposes of the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008), his appeal is dismissed as moot.

BACKGROUND

On March 13, 2008, pursuant to a plea agreement with the State, Parker pled guilty to driving under the influence of alcohol, first offense. In exchange for Parker's guilty plea, the State dismissed an open container charge. On May 1, the county court sentenced Parker to a term of 9 months' probation.

On February 13, 2009, the State filed a motion to revoke Parker's probation, alleging that Parker had violated numerous conditions of the probation order. On October 4, 2010, while the motion to revoke probation was still pending, Parker filed a motion for postconviction relief. On December 13, following a hearing on the postconviction motion, the county court entered an order denying Parker's motion for postconviction relief. Parker appealed to the district court, which affirmed the county court's decision in an order filed June 1, 2011.

On March 31, 2011, while the postconviction appeal was pending in the district court, the county court revoked Parker's probation and sentenced him to 30 days in jail.

ASSIGNMENT OF ERROR

Parker assigns, restated, that the district court erred in affirming the county court's denial of his motion for postconviction relief for numerous reasons.

STANDARD OF REVIEW

One seeking postconviction relief has the burden of establishing a basis for such relief. *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009).

Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, we have reviewed mootness determinations under the same standard of review as other jurisdictional questions. A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State v. York, supra*.

ANALYSIS

The Nebraska Postconviction Act provides that postconviction relief is available to "[a] prisoner *in custody under sentence*" who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. See § 28-3001 (emphasis supplied). Parker has the burden of establishing a basis for such relief. See *State v. York, supra*.

The Nebraska Postconviction Act affords relief to prisoners who are in custody, on parole, or on probation in Nebraska under a Nebraska sentence. *State v. York, supra*. As noted above, Parker was originally sentenced to 9 months' probation. After Parker's sentence of probation was revoked, he was sentenced on March 31, 2011, to serve 30 days in jail. Parker admits in his brief on appeal that he has served his sentence. Thus, it is undisputed that Parker is out of jail and no longer serving any term of probation or parole.

In *State v. York, supra*, the Nebraska Supreme Court was faced with a situation similar to the one at hand. The defendant appealed from a denial of his request for postconviction relief, and the court dismissed his appeal as moot because he was no longer incarcerated, on parole, or on probation. In that case, the defendant argued that he was still "in custody under sentence," because he was required to register as a sex offender pursuant to Nebraska's Sex Offender Registration Act and thus, permitted to seek relief under the Nebraska Postconviction Act. *State v. York*, 278 Neb. at 310, 770 N.W.2d at 618. The court concluded that the registration

requirement did not render the defendant in custody in Nebraska under a Nebraska sentence for purposes of the Nebraska Postconviction Act and that therefore, his appeal was moot.

In the present case, although Parker does not dispute that he is out of jail and not subject to parole or probation, he argues in his “Opposition to Appellee’s Suggestion of Mootness” that certain exceptions to the mootness doctrine are applicable to his appeal. He contends that the public interest exception applies because the State violated his right to a speedy trial and the right to a speedy trial is a matter of public interest. He also argues that the collateral consequences exception applies to his appeal because a conviction affects future employability, military services, et cetera. However, as previously stated, the Nebraska Postconviction Act provides relief only to a person “in custody under sentence.” Parker, like the defendant in *State v. York, supra*, is not “in custody under sentence,” because he is no longer incarcerated, on parole, or on probation.

A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation’s outcome. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). We conclude that because Parker is no longer in custody in Nebraska under a Nebraska sentence, he is not permitted to seek relief under the Nebraska Postconviction Act and his appeal is moot.

CONCLUSION

Because postconviction relief is available only to a prisoner in custody, on parole, or on probation in Nebraska under a Nebraska sentence and Parker is no longer in custody, on parole, or on probation, his appeal is dismissed as moot.

APPEAL DISMISSED.