

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33083
W/kmb

_____AD3d_____

REINALDO E. RIVERA, J.P.
ARIEL E. BELEN
LEONARD B. AUSTIN
SHERI S. ROMAN, JJ.

2011-06842

DECISION & JUDGMENT

In the Matter of Kevin Langston, petitioner, v
Albert Tomei, etc., et al., respondents.

Lynn W. L. Fahey, New York, N.Y. (Warren S. Landau of counsel), for petitioner.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Morgan J. Dennehy of counsel), respondent pro se.

Proceeding pursuant to CPLR article 78 in the nature of prohibition to prohibit the respondent, Albert Tomei, a Justice of the Supreme Court, Kings County, from enforcing an order dated March 29, 2011, and entered in a criminal action entitled *People v Langston*, pending in the Supreme Court, Kings County, under Indictment No. 3508/02.

ADJUDGED that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

“Because of its extraordinary nature, prohibition is available only where there is a clear legal right, and then only when a court—in cases where judicial authority is challenged—acts or threatens to act either without jurisdiction or in excess of its authorized powers” (*Matter of Holtzman v Goldman*, 71 NY2d 564, 569; see *Matter of Rush v Mordue*, 68 NY2d 348, 352). Here, the People moved to resettle the transcript of the sentencing proceedings in an underlying criminal action entitled *People v Langston*, pending in the Supreme Court, Kings County, under Indictment No. 3508/02, to reflect that the correct sentence that was to have been imposed upon the petitioner upon his conviction of criminal possession of a weapon in the second degree was a determinate term of incarceration of 15 years, rather than 5 years. In an order dated March 29, 2011, the respondent Albert Tomei, a Justice of the Supreme Court, granted the People’s motion. On May 16, 2011, Justice Tomei resentenced the petitioner in accordance with the order. The petitioner appealed from the resentence.

December 6, 2011

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The petitioner's remedy is to raise his claims concerning the alleged impropriety of the procedures employed in resentencing him, or the term of imprisonment imposed after resentencing, on his appeal from the resentence (*see* CPL 450.10[2], 450.30[3], 470.15[1]).

Accordingly, the petitioner failed to demonstrate a clear legal right to the relief sought (*see generally Matter of Randall v McGann*, 76 AD3d 713).

RIVERA, J.P., BELEN, AUSTIN and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court