No. 51

In the Matter of Edwin Lopez,
Respondent,
v.
Andrea Evans, &c.,
Appellant.

Steven C. Wu, for appellant.
Elon Harpaz, for respondent.
Fortune Society; Association of the Bar of the City of New York; Mental Hygiene Legal Service, amici curiae.

PIGOTT, J.:

We hold that when a parolee lacks mental competency to stand trial, it is a violation of his or her due process rights to conduct a parole revocation hearing. In light of our concerns about the application of the pertinent statutes to such individuals, we urge the Legislature to address the issues raised by the parties to this litigation.

I.

In 1999, petitioner Edwin Lopez, who had been convicted of murder and was serving a sentence of 15 years to life in prison, was released on lifetime parole supervision. Four years later, he was charged with misdemeanor assault. He was found to be unfit to stand trial under CPL 730.40 (1), which governs proceedings related to a criminal defendant's fitness to proceed to trial. Lopez was committed to the custody of the Office of Mental Health (OMH), under CPL 730.40 (2). The assault charge was dismissed pursuant to the same subsection, which provides that when a defendant who has been charged with a misdemeanor is found to be unfit to stand trial and committed to OMH's custody, the criminal court is required to dismiss the accusatory instrument. Lopez was admitted to a psychiatric center and, subsequently, OMH retained custody by a series of retention orders and voluntary admissions under Mental Hygiene Law article 9 (Hospitalization of the mentally ill).

On August 11, 2008, while still committed, Lopez attacked a fellow patient, resulting in assault and harassment charges. Criminal Court ordered a psychiatric examination pursuant to CPL article 730 to determine his fitness to stand trial. The two psychologists who examined him opined that Lopez was not competent to stand trial. They found that Lopez likely suffered from dementia, which "would prevent [him] from constructing a rational defense and collaboratively working with his attorney." He was "unable to talk about his case in any

intelligent fashion." Criminal Court adopted the psychologists' findings and the charges were dismissed. Lopez was again committed to the custody of OMH pursuant to CPL 730.40 (2).

Meanwhile, the New York State Department of Corrections and Community Supervision (DOCCS) commenced parole revocation proceedings against Lopez, based on the August 11 incident, charging him with violating a condition of his parole, 9 NYCRR 8003.2 (h) ("A releasee will not behave in such manner as to violate the provisions of any law to which he is subject which provides for penalty of imprisonment, nor will his behavior threaten the safety or well-being of himself or others").

As a result, Lopez was transferred from the custody of OMH to that of DOCCS. At the start of the final revocation hearings, Lopez's appointed counsel requested an adjournment stating that she needed time to assess Lopez's mental condition. Counsel contended that the revocation hearing was being held in violation of her client's due process rights. The Administrative Law Judge (ALJ) denied counsel's request. Testimony was heard regarding the alleged assault, and the ALJ found that Lopez had violated 9 NYCRR 8003.2 (h).

During the dispositional phase of the parole revocation hearings, Lopez's counsel offered the testimony of a social worker who opined that "the best thing" for Lopez would be for

him to be restored to parole and returned to OMH's custody.[1] The ALJ, however, recommended parole revocation, determining that reincarceration was appropriate, with a 24-month time assessment. Lopez was "a violent offender," the ALJ wrote. "He assaulted another patient at the hospital. Given his past criminal history this action . . . is especially serious. He is not currently amenable to parole supervision. Alternatives to incarceration were considered but are not appropriate."

The Division of Parole adopted the ALJ's recommendation on December 12, 2008, and Lopez was incarcerated.[2] His administrative appeal was denied.[3]

II.

In August 2010, while incarcerated, Lopez, represented by counsel, commenced this CPLR article 78 proceeding, seeking to

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[1] At the time, an OMH detainer, requiring that Lopez be returned to OMH's custody if released from the custody of DOCCS, was in effect. Counsel and the social worker interpreted this to mean that Lopez would return to OMH's custody if restored to parole and would only remain in the custody of DOCCS if parole were revoked. However, a parolee remains in the custody of the Division of Parole of DOCCS in both scenarios (see 9 NYCRR 8003.1 [a]).

[2] The OMH detainer, which provided that it "expires should the named party become incarcerated," duly expired.

[3] In October 2012, the Parole Board granted an application by Lopez for discretionary release. Lopez was discharged from prison and restored to parole supervision on January 9, 2013. We agree with the Appellate Division, however, that "this appeal comes within the exception to the mootness doctrine for orders raising novel and substantial issues that are likely to recur but to evade appellate review" (104 AD3d 105, 108 [1st Dept 2012]).

annul the determination of the Division of Parole, vacate the parole revocation, and obtain release from custody. Counsel contended that due process prohibits the Division of Parole from proceeding with a revocation hearing against a person who has been deemed mentally unfit to proceed to trial. The Division of Parole moved to deny Lopez's petition.

Supreme Court granted the motion and dismissed the proceeding, holding that an assertion of incompetency does not bar parole revocation proceedings. The court cited People ex rel. Newcomb v Metz (64 AD2d 219 [3d Dept 1978]) and Matter of Newcomb v New York State Bd. of Parole (88 AD2d 1098 [3d Dept 1982], lv denied 57 NY2d 605 [1982], cert denied 459 US 1176 [1983]). Those decisions held that the Parole Board must consider a parolee's lack of mental competency as a mitigating factor when considering alleged parole violations, but "a determination of this question is not a condition precedent to the parole revocation proceeding" (Metz, 64 AD2d at 223; see New York State Bd. of Parole, 88 AD2d at 1098-1099; accord People ex rel. Porter v Smith, 71 AD2d 1056 [4th Dept 1979]).

The Appellate Division reversed, granted Lopez's petition, and reinstated Lopez to parole, holding that "the basic requirements of due process applicable to a parole revocation proceeding should now be construed to preclude going forward with such a proceeding in the event it is determined that the parolee is not mentally competent to participate in the hearing or to

assist his counsel in doing so" (104 AD3d 105, 108 [1st Dept 2012] [citation omitted]). In dicta, the Appellate Division took the position, over a single-Justice concurrence, that "the statute authorizing the Parole Board to determine whether a parolee has violated parole necessarily confers upon the Board authority to determine whether the parolee possesses the mental competence required for such a determination to be rendered in accordance with due process" (104 AD3d at 110-111).

The Division of Parole appeals as of right under CPLR 5601 (b) (1). We now affirm.

III.

In People ex rel. Menechino v Warden, Green Haven State Prison (27 NY2d 376 [1971]), this Court held that the demands of due process require that a parolee be represented by a lawyer and entitled to introduce testimony, in a parole revocation hearing, if he or she so chooses. We observed that "a proceeding to revoke parole involves the right of an individual to continue at liberty or to be imprisoned. It involves a deprivation of liberty . . . and falls within the due process provision of section 6 of article I of our State Constitution" (id. at 382 [internal quotation marks and ellipses omitted]). We concluded that this constitutional guarantee demands representation by counsel "if the search for truth is not to be sacrificed to administrative speed and convenience" (id. at 383).

Here, once again, the constitutional question

implicates the balance between the government's interest in efficient administration of parole and the parolee's right to defend himself or herself (see id. at 382-384; see generally Mathews v Eldridge, 424 US 319, 335 [1976]). In this calculus, truth cannot give way to efficiency. In the present case, as in most others, it is only the parolee himself who is in a position to know the facts and assist in his or her defense. When the parolee, by reason of mental incapacity, is unable to understand, recall, or express such vital information, it is inconsistent with due process for a parole board to proceed with a revocation hearing.

It is, of course, well established – as a matter of common law and also of due process – that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial" (Drope v Missouri, 420 US 162, 171 [1975]). The State contends that parole revocation proceedings do not raise the same concerns because parole revocation is not part of a criminal prosecution.

It is true that parole revocation deprives an individual only of "a restricted form of liberty" and thus implicates "some form of due process [but] not the full panoply of rights due a defendant in a criminal proceeding" (People ex rel. Matthews v New York State Div. of Parole, 58 NY2d 196, 204

[1983], citing Morrissey v Brewer, 408 US 471, 480-484 [1972]). Just as due process requires us to safeguard the liberty of parolees, we must also recognize the state's strong interest in effectively managing parolees without unduly burdensome procedural restraints (see Morrissey, 408 US at 483). However, in balancing these competing interests, we conclude that several of the reasons underlying the bar against prosecuting a mentally incompetent defendant apply also to parole revocation hearings. Clearly salient are constitutional concerns about the fundamental fairness of a proceeding in which a defendant who is unable to make decisions about his defense may be returned to prison. But foremost is the concern already mentioned, about the accuracy of the proceedings. An incompetent parolee is not in a position to exercise rights, such as the right to testify and the opportunity to confront adverse witnesses (see 9 NYCRR 8005.18 [b] [2], [4]), that are directly related to ensuring the accuracy of fact-finding. It is true, as the State emphasizes, that the parolee is guaranteed a right to representation by counsel at the revocation hearing. But representation is not enough. A parolee must be able to provide the factual underpinnings of the presentation.

We conclude, therefore, that holding a parole revocation hearing after a court has deemed the parolee to be mentally incompetent violates the due process provision in our State Constitution. We agree with the Appellate Division that

the Newcomb decisions, relied upon by Supreme Court, should no longer be followed.

However, the State raises certain practical objections to an affirmance, which give us pause. In particular, the State points out that the Division of Parole is not authorized to commit a mentally incompetent parolee to the custody of OMH under CPL article 730, which governs the process whereby a person who has been charged with a criminal offense and found to be incompetent to stand trial, is committed (see CPL § 730.30; see also CPL § 1.20 [16]). A parolee, by contrast, has already been convicted of a criminal offense and sentenced. Nor does the Board of Parole or the ALJs have authority to seek commitment under Mental Hygiene Law article 9. In any case, a person who is incapacitated under CPL 730.40 (1) is not necessarily mentally ill within the meaning of article 9.

The result is that, as matters stand, a parolee who has been found mentally incompetent, and therefore unfit to proceed to a parole revocation hearing under our holding today, will likely be released into the community.[4] As the State points out in its brief,

> "the Parole Board's only option would seemingly be to restore the mentally incompetent person to parole, even if in its

[4] It seems probable, however, that parole boards, mindful of our holding, will become reluctant to grant parole to otherwise eligible prisoners with any history of mental illness or mental disability in the first place.

> judgment the person could not successfully comply with his parole conditions and would pose a risk to public safety. While the Parole Board could theoretically impose additional special parole conditions to address the parolee's mental condition, such conditions would serve no meaningful purpose if the Board would likely be unable to revoke parole for any subsequent violation."

In circumstances such as those presented here, the parolee falls between the cracks. He will remain in the custody of DOCCS, and therefore will not receive mental health treatment in a psychiatric facility as he would if in the custody of OMH. And, because he is no longer incarcerated, he will obviously not receive treatment in a controlled correctional setting either. Lopez himself may be receiving outpatient mental health treatment, as a special condition of parole (see 9 NYCRR 8003.3 ["A special condition may be imposed upon a releasee either prior or subsequent to release. The releasee shall be provided with a written copy of each special condition imposed. . ."). But the State is justified in pointing out the concern that other defendants who violate parole must be released, under the law, when they are deemed mentally incompetent, with no guarantee that they will receive treatment. It is up to the Legislature to address this disparity whereby a mentally incompetent defendant who has been charged with, but not convicted of, a crime may be committed to a psychiatric facility in the custody of OMH, but a parole violator who developed mental incapacity after conviction and release may not be confined at all.

A related question is whether the Division of Parole may make determinations regarding mental competency, when it reasonably appears that the parolee may be incompetent. Federal regulations assume that a federal hearing examiner may determine whether or not a parolee is mentally incompetent (see 28 CFR 2.8 [c]; [e] [2]).[5] These rulings occur in the context of a regulatory framework in which the examiner still conducts the revocation hearing, irrespective of the mental competence determination, but "shall take into full account the parolee's mental condition in determining the facts and recommending a decision as to revocation and reparole" (28 CFR 2.8 [e] [2]). The process whereby the Division of Parole decides whether or not a parolee is mentally incompetent necessarily carries more significance when it may mean that he or she is released into the community despite a history of crime combined with mental incapacity.

The Appellate Division suggested, in dicta, that the Parole Board can assess a parolee's competency in order to determine whether it has jurisdiction to proceed with the parole revocation proceeding. Amicus Mental Hygiene Legal Service proposes that the Parole Board apply an analog to the procedures set forth under CPL article 730 for an incapacitated defendant charged with a felony to an incapacitated parolee charged with a

[5] For reasons not pertinent to this case, there are still offenders on federal parole, notwithstanding the abolition of parole in the federal system.

parole violation amounting to felonious conduct, and that the Parole Board apply something similar to the procedures set forth under CPL article 730 for an incapacitated defendant charged with a misdemeanor to an incapacitated parolee charged with a parole violation equivalent to a misdemeanor. In the present case, this issue was not directly raised because the determination that Lopez was incapacitated had already been made in the recent criminal action arising out of the same conduct. Because the issue is not presented in this case, we express no view on the Parole Board's authority to make competency determinations in cases unlike this one where there has not been a recent judicial determination of incompetency. We note only that it seems clear that there are statutory concerns that the Legislature should address.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

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Order affirmed, without costs. Opinion by Judge Pigott. Chief Judge Lippman and Judges Read, Rivera, Abdus-Salaam, Stein and Fahey concur.

Decided April 7, 2015