

Matter of Wallman v Travis

2005 NY Slip Op 30019(U)

March 8, 2005

Supreme Court, New York County

Docket Number: 9_30012/1582

Judge: Joan A. Madden

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 3/17/2005
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. McDevitt

PART 11

0121582/2003

WALLMAN, JAY A.

VS

TRAVIS, BRION

SEQ 2

REARGUMENT/RECONSIDERATION

INDEX NO. _____

FILED DATE 10-21-04

FILED SEQ. NO. _____

FILED CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

with the annexed memorandum

is decided in accordance
Decision and Order.

FILED

MAR 17 2005

NEW YORK
CLERK OF SUPREME COURT

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: March 8, 2005

Check one: FINAL DISPOSITION

~~NON-FINAL DISPOSITION~~

Check if appropriate: DO NOT POST

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
In the Matter of the Application of DECISION ORDER & JUDGMENT

JAY W. WALLMAN,

Index No. 121582/03

Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

- against -

BRION TRAVIS, Chairman,
NEW YORK STATE OF DIVISION OF PAROLE,

Respondent.

-----X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
In the Matter of the Application of
JAY W. WALLMAN, Index No. 0100138/04

Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

- against -

DEBRA JOY, Director of the Temporary
Release Program of the New York State
Department of Correctional Services,

Respondent.

-----X

JOAN A. MADDEN, J.

Petitioner Jay Wallman ("Petitioner") moves for leave to reargue this court's decision, order and judgment of July 12, 2004, which denied his Article 78 proceeding, under index number 121582/03, seeking to annul the determination of the New York

Division of Parole ("Parole Board") denying his application for release from prison to parole supervision or, in the alternative, for a *de novo* hearing. Petitioner also moves for leave to renew this court's decision, order and judgment of July 12, 2004, which denied his Article 78 proceeding, under index number 100138/04, seeking to annul the determination of the Director of the Temporary Release Program, New York State Department of Correctional Services ("TRP"), denying his application to participate in a temporary work release program or in the alternative, for a *de novo* hearing.

Petitioner, who was admitted to practice law in the State of New York in 1964, pleaded guilty to one count of grand larceny in the first degree and two counts of grand larceny in the second degree, arising out of Petitioner's and his law partner's misappropriation of approximately \$4.7 million belonging to clients which was placed in the lawyer's escrow accounts established to hold such funds. The misappropriate funds generally came from amounts recovered in settlements of personal injury and/or medical malpractice actions.

Petitioner was sentenced, on June 29, 2000, to an indeterminate term of 3 1/3 years to 10 years on each count, to run concurrently.

As to the motion seeking reargument, the Petitioner argues that this court misapprehended the similarity of the facts and

issues between his denial for parole and the case of *Marino v Travis*, 289 AD2d 493 (2d Dept 2001), wherein, the Appellate Division, Second Department, affirmed the order of the Supreme Court, Queens County (Weiss, J.), which found that the Parole Board's denial for parole to Marino was irrational bordering on impropriety.

This court in its prior decision noted that while Marino and Petitioner were both attorneys who defrauded their clients by withdrawing funds from escrow accounts, there existed differences in their relative age and health; in the amount of funds misappropriated; and the number of victims involved.

Petitioner maintains that this court misapprehended certain facts based upon incorrect assertions made in the opposition papers submitted by the Office of the Attorney General of the State of New York on behalf of the Parole Board. While the opposition papers alleged that Petitioner was in good health and that Marino suffered poor health, Petitioner submitted a letter from his physician that he suffers from dilated cardiomyopathy, which he alleges is life threatening.

Additionally, the opposition papers alleged that Marino and his wife, who was also his law partner, misappropriated \$50,000, while, in fact, they stole millions of dollars as the Attorneys' Security Fund has reimbursed Marino's clients approximately \$3 million.

Finally, the opposition papers alleged that Marino defrauded only two victims, while in fact the number of victims defrauded by Marino was approximately two dozen over a ten-year span.

Based upon the above, this court grants reargument, however, it adheres to its prior decision denying Petitioner's Article 78 proceeding challenging the Parole Board's determination denying him release from prison to parole supervision.

While the underlying facts may be more similar than previously indicated by this court, Petitioner's argument that this court is bound by the decision of the Appellate Division, Second Department in the Marino case is incorrect. Clearly, the doctrine of *stare decisis* requires trial courts to follow precedents set by the Appellate Division of another department until either the Court of Appeals or the Appellate Division of this department pronounces a contrary rule. However, there was no principle of law decided in Marino. Rather, the Second Department found that based on unique facts peculiar to that case, that the Parole Board's determination was irrational bordering on impropriety. This is consistent with the fact that parole release is a discretionary function of the Parole Board and every hearing before the Parole Board is *sui generis* based upon the facts and circumstances of that particular inmate.

In any event, neither Wallman's health nor the fact that Marino's theft amounted to approximately \$3 million mandate a

different result. While suffering from a medical condition, Wallman fails to submit any proof that due to such a condition, he is in imminent danger. As to the \$3 million, the fact that Marino's theft was a significant amount, as is the \$4.7 million that Petitioner and his partner stole, does not provide a rationale for paroling Petitioner.

Furthermore, as Marino was 82 years-old and Petitioner 63 years-old at the time in issue, there is a nineteen year difference in age. Given Marino's age, it is highly improbable that if released, Marino would be dangerous to the community. Petitioner, on the other hand, based upon his age, will be more likely to continue working posing a greater risk that he would be in a position to again deceive innocent people for his own benefit. That Petitioner indicated at his Parole Hearing that he would take a position as a paralegal in a medical malpractice firm, eliminating any access to clients' escrow accounts, standing alone, does not negate the risk to the community.

A review of Petitioner's testimony before the Parole Board indicates that as the Parole Board found, Petitioner did not accept accountability for, nor acknowledge, the reasons for his crimes. He stated that the bulk of the \$4.7 million stolen was "for business expenses" during a three year period, and that his partner was responsible for \$2 million that may have been taken from an estate. Notwithstanding the cost of operating a law

practice or the expenses involved in prosecuting a medical malpractice actions, Petitioner's contention that most of the \$4.7 million was used for such costs and expenses strains credibility.

Moreover, in connection with its determination, the Parole Board considered a letter from the sentencing court in which the court spoke to the relative leniency of the sentence based upon the severity of the crime and its intent that Petitioner serves the entire sentence as well as a belief that Petitioner remained

As to Petitioner's argument that he has obtained an earned eligibility certificate, as previously stated in this court's original decision, this creates only a rebuttable presumption favoring release (Correction Law §805, 9 NYCRR §8002.3), and does not preclude the Parole Board from denying discretionary parole release when to do so would be contrary to the standards for such release as provided under Executive Law §259-i(2)(c), which states in part:

parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law.

The factors to be considered in exercising this discretion are,

inter alia, the institutional record of the inmate; the release plans of the inmate and the written statement of the crime victim or his representative. Id. In addition, since the sentencing court has set the minimum sentence of imprisonment, the Parole Board must also consider the seriousness of the offense and the inmate's prior criminal record (Executive Law §§259-i[1][a], 2[c]).

Under this standard, given the seriousness of the crime, theft of clients' escrow funds, many of whom relied upon these monies to help pay medical expenses and/or to support themselves; the breach of trust he owed his clients; the substantial sum involved, approximately \$4.7 million; the number of victims; the deception after theft; the lack of remorse, Petitioner's attempts to mitigate his responsibility; the lack of acknowledgment of the extent and impact of his crimes and the lack of restitution, *in toto*, evidenced the Parole Board's determination, that there exists a reasonable probability that Petitioner will violate the law, was not irrational bordering on impropriety.

Accordingly, the motion for reargument is granted and, upon reargument, the prior decision, order and judgment of this court is adhered to.

Petitioner's motion seeking leave to renew concerns this court's denial of his Article 78 proceeding, under Index number 100138/94, which sought to annul the determination of TRP,

denying his application to participate in a temporary work release program. The basis of this motion is allegedly newly discovered evidence that of work release granted to Victor Barron. The fact that another inmate was granted temporary work release is not newly discovered evidence as it does not constitute material facts or evidence which, had it been presented earlier, would have changed the outcome rendered (*In the Matter of Saxton*, 245 AD2d 733 [3d Dept 1997]).

This court also finds no showing Petitioner has been denied equal protection. To the extent that Petitioner is seeking leave to reargue, such motion is defective as Petitioner has failed to separately identify and separately support relief for leave to reargue (CPLR 2221(3)[f]). In any event, the claim that this court misapprehended the facts in *Marino*, is not relevant to this petition seeking temporary work release, as the *Marino* case involved supervised parole, and even if it was, this court has already addressed such in the Petitioner's other proceeding seeking parole release.

Accordingly, the motion for leave to renew is denied and even if this court had granted renewal, it would have adhered to its prior decision.

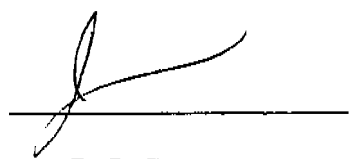
In view of the above, it is

ORDERED THAT Petitioner's motion to reargue this court's decision, order and judgment dated July 12, 2004, which denied

his Article 78 proceeding brought under index number 121582/03, seeking to annul the determination of the New York Division of Parole, is granted, and upon reargument, the court adheres to its July 12, 2004 decision, order and judgment; and it is further

ORDERED THAT Petitioner's motion for leave to renew this court's decision, order and judgment dated July 12, 2004, which denied his Article 78 proceeding, under index number 100138/04, seeking to annul the determination of the Director of the Temporary Release Program, New York State Department of Correctional Services, is denied.

DATED: March 8, 2005



J.S.C.

FILED

MAR 17 2005

NEW YORK
COUNTY CLERK'S OFFICE