

Matter of Gill v Goldscmid

2007 NY Slip Op 31316(U)

May 10, 2007

Supreme Court, New York County

Docket Number: 0403304/2006

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK / NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN
Justice

PART 6

GILL, JOSEPH
Petitioner,

- v -

GOLDSCMID, et al.,
Respondents.

INDEX NO. 403304/06
MOTION DATE 3/13/07
MOTION SEQ. NO. 01

The following papers, numbered 1 to 2 were read on this petition to vacate determination.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this petition

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be entered based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

**IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION**

Dated: 5-10-07 Eileen Bransten
EILEEN BRANSTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN
Justice

PART 6

GILL, JOSEPH
Petitioner,

INDEX NO. 403304/06

MOTION DATE 3/13/07

- v -

MOTION SEQ. NO. 02

GOLDSCMID, et al.,
Respondents.

The following papers, numbered 1 to 1 were read on this motion to dismiss.

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION**

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5-10-07


EILEEN BRANSTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X

In the Matter of the Application of JOSEPH GILL,

Petitioner,

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

Index No.:403304/06
Motions' Date: 3/13/07
Mot. Seq. Nos.: 01, 02

-against-

MICHAEL GOLDSCHMID, Admin. Law Judge;
DEBRAH GULLY, Parole Revocation Specialist;
GEORGE GABRILE, ESQ., Legal Aid Society
ROBERT DENNISON, Chairman, N.Y.S.
Division of Parole,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Respondent.

-----X

P R E S E N T: EILEEN BRANSTEN, J.

In this Article 78 proceeding, petitioner Joseph Gill ("Mr. Gill") challenges the September 18, 2006 determination of the New York State Division of Parole ("Division"), which affirmed the imposition of a 24-month delinquent time assessment. Respondents Michael Goldschmind (listed in the caption as "Goldscmid"), Administrative Law Judge, Deborah (listed in the caption as "Debrah") Gully, Parole Revocation Specialist and Robert Dennison, Chairman, New York State Division of Parole (collectively the "State Respondents") oppose the petition.

In motion sequence number 02, respondent George Gabriel, Esq. ("Mr. Gabriel") (listed in the caption as "George Gabriele, Esq., Legal Aid Society"), moves for dismissal of the petition because he is not a "body or officer" subject to CPLR Article 78 challenges.

Background

In 1985, Mr. Gill was sentenced to an indeterminate prison term of 12½ to 25 years after his conviction of Manslaughter in the First Degree for stabbing and beating his grandfather to death. State Respondents' Verified Answer ("Answer"), at ¶ 8; *see also*, Ex. D. On November 26, 2004, Mr. Gill was released to parole supervision. *Id.*, at ¶ 13. As a condition of his release, Mr. Gill was required to reside at Project Renewal and to report to his parole officer within twenty-four hours of his release. Answer, Ex. B.

Mr. Gill neither reported to his parole officer nor resided at Project Renewal. He was declared delinquent (an "absconder") as of November 29, 2004. Answer, at ¶ 15.

While on parole, Mr. Gill was arrested and was ultimately convicted of misdemeanor narcotics charges. Answer, Ex. C.

On January 11, 2005, the Division issued a Violation of Release Report that contained five charges. Charge number one set forth:

"Joseph Gill violated Rule #1 of the conditions of his release in that he failed to make his arrival report on 11-29-04 after his release[] from Queensboro Correctional Facility on 11-26-04."

Answer, Ex. D. The report further explained that this was "Mr. Gill's second violation in connection with [parole release for] the instant offense. On the first violation he [pleaded]

guilty to forgery and was also charged with leaving his residence without notifying his parole officer and failing to make his office report.” Answer, Ex. D.

On August 31, 2005, Administrative Law Judge Michael Goldschmid (“ALJ”) conducted a final revocation hearing. Mr. Gill appeared with George Gabriel, Esq., an attorney from the Legal Aid Society. Deborah Gully represented the Division.

At the hearing, Mr. Gill agreed to plead guilty to charge number one in exchange for a recommendation of a period of 24 months confinement. Answer, at ¶ 19. The ALJ asked Mr. Gill directly whether he wished to plead guilty. Mr. Gill responded: “Yes, sir.” The Division then withdrew charges two through five. Answer, Ex. E, at 6. Mr. Gill stated on the record:

“I would just like for you to take into account the things that I was positive that I was doing while I wasn’t reporting to parole [receiving treatment for mental illness and volunteering at the Gay Men of African Descent Program] and also, take into account that I take full responsibilities for my actions and I put no blame on no one else for the actions that I took by not reporting to parole and if I give -- if given the opportunity once again, I will comply with the necessary conditions * * *put upon me and try to be a more productive citizen out in society.”

Id., at 8. The ALJ informed Mr. Gill that he would get a final decision in two or three weeks.

On September 7, 2005, the Division adopted the ALJ’s recommendation that Mr. Gill be assessed 24 months. Mr. Gill’s scheduled reconsideration date is “May 2007.” Answer, Ex. G.

On September 29, 2005, Mr. Gill appealed the determination. He submitted a brief months later--on February 27, 2006--arguing that he is mentally ill and that he was denied effective assistance of counsel. Answer, Ex. H.

On September 8, 2006, the Division affirmed the parole-revocation determination, concluding that the "appeal is without merit. The record supports the disposition imposed and the findings of fact made." Answer, Ex. I. The decision points out that there was no evidence of ineffective assistance of counsel and that hindsight disagreement with an attorney's tactics "do not render counsel ineffective." *Id.* The decision further sets forth that "the knowing and voluntary plea of guilty by petitioner precludes his present challenge to the sufficiency of the evidence of guilt." *Id.*

Earlier--on July 21, 2006--having heard nothing about resolution of his appeal, Mr. Gill commenced this Article 78 proceeding against the State Respondents and Mr. Gabriel seeking, among other things, a Judgment reversing the Division's determination "which denied release to parole supervision at a final parole revocation hearing held on August 31, 2005," ordering his release from custody and restoring his parole supervision. Petition, at 4.

The State Respondents oppose the petition on the grounds that Mr. Gill never raised mental incompetence as an excuse for violation of his parole. They assert, moreover, that mental competency is not a precondition to conducting a parole violation proceeding and that

Mr. Gill failed to establish that his counsel was ineffective. The State Respondents urge that Mr. Gill wished to plead guilty, readily admitted violating his parole and took responsibility for his conduct.

Mr. Gabriel moves for dismissal of the petition on the ground that it does not set forth a claim or seek relief available pursuant to CPLR Article 78 as against him. Mr. Gabriel further points out that he did not participate in the Division's decision to revoke Mr. Gill's parole. Affirmation in Support of Mr. Gabriel's Motion to Dismiss ("Dismiss"), at ¶ 14.

Because Mr. Gill has not met the very high threshold required to establish ineffective assistance of counsel nor has he demonstrated any other basis for relief, his petition is denied and this proceeding is dismissed.

Analysis

The State Respondents

At the outset, a determination of mental competency is not a condition precedent to a parole revocation proceeding, but rather, is "merely a factor to be considered in mitigation of, or as an excuse for, charged violations of parole." *Matter of Newcomb v. Metz*, 64 A.D.2d 219 (3d Dept. 1978). Here, the record reflects that Mr. Gill voluntarily, intelligently and knowingly agreed to plead guilty to charge number one of his Violation of Release

Report and that in exchange the remaining charges against him would be dropped. Mr. Gill did not hesitate in accepting the plea and volunteered that he took full responsibility for “his actions.” Answer, Ex. E, at 8. He did not attempt to defend his conduct on the grounds of mental incompetency, but rather, only raised his mental issues hoping that the Division would “take [it] into consideration in * * * determining ultimately what they are going to do with this case.” Answer, Ex. E, at 7.

Additionally, Mr. Gill did not demonstrate ineffective assistance of counsel. He did not establish that “his attorney failed to provide meaningful representation” or any “error * * * sufficiently egregious and prejudicial as to compromise [his] right to a fair [hearing].” *See, People v. Caban*, 5 N.Y.3d 143, 152 (2005). In fact, Mr. Gill wanted to plead guilty and in doing so avoided potential negative findings with respect to the four other charges.

Mr. Gill’s citation to Corrections Law § 402(10) is entirely unavailing since that provision simply deals with the continued commitment of a mentally ill inmate.

Mr. Gabriel’s Motion to Dismiss

Mr. Gabriel’s unopposed motion to dismiss is granted. Mr. Gabriel, a legal aid attorney, did not make the complained-of determination. The Legal Aid Society, moreover, is a private, not-for-profit corporation “not a body or officer against whom an Article 78

proceeding can be maintained.” *Matter of Ivey v. Coughlin*, 111 A.D.2d 648 (1st Dept. 1985), *appeal dismissed* 66 N.Y.2d 1035 (1985).

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed as against the State Respondents; and it is further

ORDERED and ADJUDGED that Mr. Gabriel’s motion to dismiss is granted and the proceeding is dismissed as to him as well.

This constitutes the Decision and Judgment of the Court.

Dated: New York, New York
May 10, 2007

ENTER:



Hon. Eileen Bransten

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).