Matter of Chestnut v Donelli
2007 NY Slip Op 32025(U)
July 2, 2007
Supreme Court, Franklin County
Docket Number: 0001192/2006
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

In the Matter of the Application of
JAMES CHESTNUT, #02-R-6106,
Petitioner,

For a Judgment Pursuant to Article 70
Of the Civil Practice Law and Rules

-against-

DECISION AND JUDGMENT
RJI #16-1-2006-0437.050
INDEX # 2006-1192
ORI # NY016015J

JOHN DONELLI, Superintendent,
Bare Hill Correctional Facility, and
ROBERT DENNISON, Chairman,
New York State Board of Parole,
Respondents.

This is a habeas corpus proceeding that was originated by the petition of James Chestnut, verified on November 15, 2006, and stamped as filed in the Franklin County Clerk's office on November 24, 2006. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Correctional Services. The Court issued an Order to Show Cause on November 28, 2006, and has received and reviewed respondents' Return, dated January 12, 2007, as well as petitioner's Reply thereto, filed in the Franklin County Clerk's office on January 29, 2007.

According to the sentence and commitment order annexed to the respondents' Return as part of their Exhibit A, on November 18, 2002, the petitioner was sentenced in Rensselaer County Court, as a second felony offender, to a determinate term of three years with five years of post-release supervision upon his conviction of the crime of Attempted Burglary 2°. In May of 2005 that sentence was affirmed, on direct appeal to the Appellate Division, Third Department, who rejected the argument of the defendant (petitioner) that

the period of post-release supervision must be limited to three years. *People v. Chestnut*, 18 AD3d 965. Notwithstanding the foregoing, Exhibit A, attached to the respondents' Return, also includes an amended commitment order sentencing the petitioner to a determinate sentence of three years with three years of post-release supervision. Although this Court does not understand the reason or reasons behind the issuance of the amended commitment order, the discrepancy is not relevant to this proceeding. The petitioner was received into DOCS custody on November 27, 2002, and conditionally released to parole supervision on June 28, 2004. On June 6, 2005, however, the petitioner was issued a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in two separate respects. Parole Violation Charge #1 alleged that the petitioner ". . . violated Rule #8 of the conditions of his release when he behaved in such a manner as to violate the provisions of law which provide for a period of imprisonment in that on 1/25/05 he admittedly possessed a firearm in the vicinity of the Capital District Area, NY while having previously been convicted of a crime." Parole Violation Charge #2 alleged that petitioner ". . . violated Rule #9 of the conditions of his release in that on 1/25/05 he possessed a firearm in the vicinity of the Capital District Area, NY without the written permission of his parole officer." Following a June 23, 2005, preliminary parole revocation hearing, probable cause was found with respect to parole violation charge #2. A final parole revocation hearing was conducted at the Albany County Jail on October 17, 2005. At the conclusion of the hearing the ALJ sustained Parole Violation Charge #2 but found Parole Violation Charge #1 had not been proven by a preponderance of legally sufficient evidence. The petitioner's parole was revoked with the delinquency date modified from January 25, 2005, to March 31, 2005, and a 34-month delinquent time

assessment was imposed. On November 29, 2006, the results and disposition of the final parole revocation hearing were affirmed on administrative appeal. This proceeding ensued.

A central feature of the parole violation case against the petitioner was a written statement allegedly given by the petitioner to a parole officer, a state police investigator and a federal agent on June 16, 2005. The statement, which was admitted into evidence at petitioner's final parole revocation hearing, reads, in relevant part, as follows:

> "During the winter of 2005 I spoke to Oscar aka OJ regarding making some money. OJ and I then had a conversation where OJ said that he had a gun at Kris' house. Kris is a female that used to work with me at Sealy Mattress. OJ told me that I could go over Kris' house and pick up the gun and deliver it to a black male I know as Bam. Bam is currently on parole.
>
> Following our conversation I agreed to go and pick up the gun and deliver it to Bam. I believe it was the following day I went to Kris' house and told her I was here to pick up something. Kris stated that she was not aware of why I was there. Kris then called someone on the phone. (I believe it was OJ) as I waited on the porch. Kris came back to the door and opened it. Kris had a bag in her hand. She then handed me the bag. I opened the bag and saw a black semiautomatic handgun.
>
> I then left and went to Troy, N.Y. I then met Bam at White's Place. At White's Place I opened the bag and saw two clips containing bullets, one blue vest, and the black semiautomatic handgun. Bam looked at the contents of the bag with me. Bam then took the bag containing the gun, vest and bullets. Bam then handed me $200.00."

Only two witnesses were called at petitioner's October 17, 2005, final parole revocation hearing. Parole Officer McHale, who had been supervising the petitioner since September of 2004, testified that in March of 2005 he received a telephone call from Chris Gilroy, a New York State Police Investigator, who related general details with regard to a federal investigation which included a wire tap indicating that a gun had been passed to the petitioner. According to P.O. McHale, on June 13, 2005, he, accompanied by Parole Officer Georgia, met with Investigator Gilroy, Tim McDermott, a federal Drug

Enforcement Administration (DEA) agent and an unidentified confidential source at the DEA headquarters building. At that time, according to P.O. McHale, the confidential source stated that she had passed a gun to the petitioner. P.O. McHale next testified that on June 16, 2005, when the petitioner appeared for a parole office report, he was taken to DEA headquarters by the witness and P.O. Georgia. At DEA headquarters, according to P.O. McHale, the petitioner was questioned by Special Agent McDermott and gave an oral statement that was later reduced to writing. P.O. McHale testified that he was present when the petitioner was questioned and when the statement was written. P.O. McHale acknowledged that the text of the statement was written out by Special Agent McDermott, rather than the petitioner. P.O. McHale later took a "step back" and stated that he did not recall if he was present when Special Agent McDermott wrote out the statement. In addition, P.O. McHale could not recall whether or not he saw any witnesses sign the statement. When asked to relate what the petitioner had said to Special Agent McDermott on June 16, 2005, P.O. McHale testified as follows: "Mr. Chestnut stated that he went over to the confidential source's house, and at that time she gave him a bag. Inside the bag was a gun, a vest. Mr. Chestnut stated that he took that bag and gave that bag to --he gave the gun to a person known as Bam." P.O. McHale acknowledged, however, that he never had an opportunity to examine the gun in question. In addition, P.O. McHale acknowledged that when he brought the petitioner to DEA headquarters on June 16, 2005, the petitioner was in handcuffs and not free to leave, although not under arrest. P.O. McHale also testified that he did not give the petitioner any Miranda warnings at DEA headquarters nor did he hear any other person provide such warnings. Finally, P.O. McHale testified

that he believed he was present when the petitioner was shown the statement, crossed some material out and initialed the same.

Special Agent McDermott testified, generally, with respect to the background of the investigation, which included wire taps, that led law enforcement officials to the individual described in this proceeding as the confidential informant. According to Special Agent McDermott, the confidential informant cooperated in the investigation and identified the petitioner, from a photograph, as the individual who received the gun. The confidential informant, according to Special Agent McDermott, only knew the individual who received the gun as "JJ." The confidential informant, according to Special Agent McDermott, stated she was not aware why JJ had come to her house. At that time, again according to Special Agent McDermott, the confidential informant called Oscar Hassal and confirmed that it was Oscar who had sent "JJ" to pick up the gun.

Special Agent McDermott went on to testify that when the petitioner was brought to DEA headquarters on June 16, 2005, several wire tap conversations were played for him and, at that time, Special Agent McDermott advised the petitioner of his Miranda rights. Officer McDermott then described a conversation with the petitioner wherein he advised petitioner that DEA's interest was in getting the gun off the streets and that if petitioner cooperated in the investigation there would be no federal or state prosecutions. According to the testimony of Special Agent McDermott, the petitioner was advised that if he cooperated his "only problem" would be with parole. Special Agent McDermott went on to testify that the petitioner ". . . eventually provided a full detailed statement which we have, in which I wrote it out. He read it. Actually I read it to him. He read it. He initialed and signed as to what happened that day, and it corroborated not only the wire tap

investigation that we had, he corroborated the statement of the confidential informant . . ." Special Agent McDermott identified the initials in the body of the written statement, as well as the signature at the end thereof, as petitioner's.

Special Agent McDermott testified that the petitioner was in handcuffs when he arrived at DEA headquarters on June 16, 2005, and although petitioner was not free to go he had not been placed under arrest. It was conceded on cross-examination that Special Agent McDermott had no knowledge as to whether or not the handgun in question was operable. Special Agent McDermott also conceded on cross-examination that neither petitioner's given name nor his voice can be heard on any wire tap. Finally, Special Agent McDermott testified that the petitioner never requested an attorney while at DEA headquarters on June 16, 2005.

The petitioner advances a variety of arguments in support of his ultimate claim of entitlement to immediate release from DOCS custody. Before considering the merits, or lack thereof, of any of the arguments advanced by the petitioner, the Court must first address a threshold objection that the respondents have interposed. The respondents appear to suggest that habeas corpus relief is unavailable since the petitioner could have challenged the revocation of his parole in the context of a proceeding for judgment pursuant to Article 78 of the CPLR. The Court, however, does not agree. A habeas corpus proceeding is an appropriate vehicle by which to challenge a parole revocation where the only basis for the inmate's continued incarceration is the parole board's determination. *See People ex rel Smith v. Mantello*, 167 AD2d 912 and *People ex rel Bayham v. Meloni*, 182 Misc 2d 831. Rather than finding that a habeas corpus proceeding must somehow take a back seat to an Article 78 proceeding in cases such as this one, the Appellate

Division, Fourth Department in *Zientek v. Herbert,* 199 AD2d 1075, held that the "Supreme Court should have converted the petition in this CPLR Article 78 proceeding into a petition for a writ of habeas corpus because the sole basis for petitioner's continued incarceration is the determination of the Parole Board to revoke petitioner's parole . . ." *Id* at 1076 (citations omitted). It is also worth noting that the New York State Court of Appeals addressed the merits of an inmate's habeas corpus proceeding challenging the revocation of his parole notwithstanding the fact that such inmate's prior CPLR Article 78 proceeding was dismissed as time barred. *See People ex rel Menechino v. Warden*, 27 NY2d 376. None of the cases cited by the respondents in paragraph 22 of their Return, moreover, involved a habeas corpus proceeding challenging the revocation of parole where such revocation was the sole basis for continued incarceration.

Since it is beyond dispute that the Division was unable to prove that the handgun allegedly possessed by the petitioner was operable, the Court will first consider petitioner's argument that proof of operability was required in order to Sustain Parole Violation Charge #2. Although operability is not a component of the statutory definition of a "firearm" (Penal Law §265.00(3)), it has been accepted through case law that in order to establish criminal possession of a firearm, such as a handgun, the People must prove that the weapon in question was operable. *See People v. Longshore*, 86 NY2d 851. Thus, Parole Violation Charge #1, which alleged that the petitioner possessed a firearm and, in doing so, "violated Rule #8 of the conditions of his release when he behaved in such a manner as to violate the provisions of law which provide for a period of imprisonment," was properly dismissed based upon the Division's failure to prove operability. Parole Violation Charge #2, however, simply alleged that petitioner's possession of a firearm

without the permission of his parole officer violated Rule #9 of the conditions of his release. Rule #9 provides, in relevant part, that "I [petitioner] will not . . . possess . . . any . . . firearm of any type without the written permission of my Parole Officer." Unlike Rule #8, there is no Penal Law component to the condition and this Court therefore concludes that the division did not need to prove operability in order to prevail on Parole Violation Charge #2. *See McWhinney v. Russi*, 228 AD2d 980, *Bush v. New York State Board of Parole*, 223 AD2d 806 and *People ex rel Branch v. Barnes*, 199 AD2d 726.

The petitioner also argues that the division failed to sustain its burden of proving that Parole Violation Charge #2 was violated since the only probative evidence adduced consisted of hearsay. The Court, however, finds this argument to be patently without merit. In addition to hearsay the petitioner's written admission was received into evidence at the final parole revocation hearing and the ALJ expressly relied upon that admission in sustaining Parole Violation Charge #2. *See People v. Provost*, 35 AD3d 899, *People v. Spady*, 25 AD3d 881, *People v. Bower*, 9 AD3d 603 and *People v. Rushin*, 196 AD2d 835, *lv den* 82 NY2d 808.

With respect to petitioner's argument that no weapon was produced, the Court simply finds that his written admission was sufficient to sustain Parole Violation Charge #2 and the failure to produce the handgun was readily explained by the fact that it was never in the possession of law enforcement personnel. The fact that petitioner was never arrested or criminally charged with possessing the handgun is irrelevant to the parole violation charges. *See People ex rel Pastore v. Dalsheim*, 88 AD2d 665. The Court, moreover, notes that the inability to prove the operability of the handgun would have precluded criminal prosecution.

The petitioner next contends that at his final parole revocation hearing he was denied the right to confront and cross-examine the confidential informant since that informant never testified or submitted a written statement. The petitioner also contends that he was denied the right to respond to the wire taps since they were never admitted into evidence at the final hearing. The Court, however, is simply not persuaded that the hearsay statements of the confidential informant and/or the hearsay contents of the wire taps, both received through the testimonies of P.O. McHale and Special Agent McDermott, played any direct role in the ALJ's determination sustaining Parole Violation Charge #2. Although the statements of the confidential informant and contents of the wire taps were helpful in understanding the investigatory process that ultimately led to the petitioner's written admission of June 16, 2005, it was that written admission, as noted previously, that the ALJ relied upon in sustaining Parole Violation Charge #2.

As far as the modification of the delinquency date from January 25, 2005, to March 31, 2005, the Court finds the record pertaining that modification to be unclear. Although Parole Violation Charge #2 alleges that the petitioner possessed the handgun in question on January 25, 2005, his written statement imprecisely acknowledged such possession "[d]uring the winter of 2005 . . ." P.O. McHale did, however, testify that the initial telephone call from New York State Police Investigator Gilroy was received in March of 2005. Presumably, the revised March 31, 2005, delinquency date was intended to correspond to the date petitioner's supervising parole officer first learned of the potential violation. In any event, the Court agrees with the respondents that the amendment of the delinquency date worked to the benefit of the petitioner since it

effectively provided him with more than two months additional credit for time served on his underlying sentence of imprisonment.

Finally, to the extent petitioner appears to argue that his written statement was involuntarily given or otherwise illegally obtained, and therefore should be suppressed, there is nothing in the record to suggest that he ever sought an adjournment of the final parole revocation hearing in order to obtain a judicial ruling with respect to the admissibility of his written statement. Although no criminal charges were pending and, therefore, such ruling could not have been obtained in the context of a suppression motion in criminal court, the petitioner could have sought an adjournment of his final parole revocation hearing, following the preliminary parole revocation hearing, in order to obtain a judicial ruling on the admissibility of the statement. *See People ex rel Johnson v. New York State Division of Parole*, 299 AD2d 832, *lv den* 99 NY2d 508, *People ex rel Victory v. Travis*, 288 AD2d 932, *lv den* 97 NY2d 611 and *People ex rel Coldwell v. New York State Division of Parole*, 123 AD2d 458.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

DATED: July 2 , 2007 at
Indian Lake, New York

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S. Peter Feldstein
Acting Supreme Court Judge