

**Terrance v Piscioti**

2007 NY Slip Op 33560(U)

October 31, 2007

Supreme Court, Wayne County

Docket Number: 0061820/2007

Judge: John B. Nesbitt

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

**ORIGINAL**

DANNY TERRANCE,

Petitioner

-vs-

Index No. 61820

RICHARD J. PISCIOTTI,  
*Sheriff of Wayne County*

2007

Respondent.

APPEARANCES: WAYNE COUNTY PUBLIC DEFENDER  
By: JAMES S. KERNAN, ESQ.  
and GREGORY J. POWER, ESQ.  
*AttorneyS for Petitioner*

ANDREW M. CUOMO, NEW YORK STATE ATTORNEY GENERAL  
J. RICHARD BENITEZ, of counsel  
*Attorney for Respondent*

**MEMORANDUM - DECISION**

JOHN B. NESBITT, J

This matter is before the Court on a petition for Writ of Habeas Corpus. The Court also has before it, the Return submitted by the New York State Attorney General’s Office on behalf of Respondent, as well as the Reply from the Wayne County Public Defender’s Office.

The petition herein indicates that Mr. Terrance is currently detained at the Wayne County Jail based on a warrant issued by the New York State Division of Parole.

It may be beneficial and perhaps necessary for the Court to set out the time line as to events which have occurred herein. Petitioner, Danny Terrance, was incarcerated for a violation of parole January 22, 2007, and served with a notice of violation and violation of release report on January 23, 2007. At that time, he waived his right to a preliminary hearing. The final revocation hearing was set for March 13, 2007. On that date, the matter was adjourned and rescheduled for April 10, 2007. The matter was again rescheduled because the parole revocation specialist and the necessary parole officer were unavailable on that date. It was rescheduled to May 15, 2007. The Writ of Habeas

Corpus herein was filed May 1, 2007, and was returnable May 11, 2007. At that time, Petitioner and his attorney were present. The Attorney General's office appeared on behalf of Respondent and the Division of Parole. The Court reserved decision at that time and scheduled a date at which time testimony on the petition could be taken. This was done June 8, 2007. These facts are undisputed.

By statute, revocation hearings shall be held within ninety (90) days of the probable cause determination. Executive Law §259-i(3)(f)(i). A waiver of the preliminary hearing is equivalent to a probable cause determination for purposes of the statute. *People ex rel. Gray v. Campbell*, 241 AD2d 723 (3<sup>rd</sup> Dept., 1997).

As is clear from an examination of the chronology herein, ninety (90) days elapsed prior to Petitioner receiving his final revocation hearing. The requirement that parole revocation hearings be held timely must be strictly construed. *People ex rel. Murphy v. Warden, Adolescent Reception and Detention Ctr.*, 17 AD3d 236 (1<sup>st</sup> Dept., 2005). However, while the final revocation hearing must be held within ninety (90) days, this time limit may be extended where the Petitioner requests postponement of the hearing. *People ex rel. Lewis v. Meloni*, 233 AD2d 947 (4<sup>th</sup> Dept., 1996); *People ex rel. Williams v. Allard*, 19 AD3d 890 (3<sup>rd</sup> Dept., 2005). The outcome of this pending Habeas Corpus petition will hinge on determination as to which entity time periods shall be charged. Petitioner asserts that all time periods following adjournments herein are chargeable to the Division of Parole. The Division of Parole concedes that the time period from April 10<sup>th</sup> to May 15<sup>th</sup> 2007 is chargeable to it, but contends that the March 13<sup>th</sup> - April 10<sup>th</sup> time period is chargeable to Petitioner, Danny Terrance. Thus, the decision of this Court as to the instant proceeding rests on its determination as to the March 13<sup>th</sup> - April 10<sup>th</sup> time period.

Testimony indicates that the final revocation hearing was scheduled for March 13, 2007. At that time, there was a pretrial conference at which time possible resolution was discussed by Petitioner's counsel and the parole revocation specialist. No resolution was reached and Petitioner requested a hearing. The Administrative Law Judge adjourned the matter until April 10, 2007. The Division of Parole asserts that this March 13<sup>th</sup> - April 10<sup>th</sup> period should be charged to Mr. Terrance and the testimony of the Administrative Law Judge before whom this appearance was made echoes this assertion. This is based on the claim that counsel for Mr. Terrance requested an opportunity to review the evidence and material that were involved in the matter and upon which Parole's case was based. Counsel for Petitioner acknowledges making such request.

It is uncontroverted that at the time of the appearance for the final revocation hearing to be held on March 13, 2007, the parole revocation specialist did not have the materials/evidence present upon which the Division of Parole would rely. Mr. Terrance had a right to review these materials. Further, the parole officer who was to serve as the division's witness in the matter was also not present. In effect, the Division of Parole was not prepared to go forward with the final revocation hearing on March 13, 2007.

The position advocated by the Division of Parole in the instant proceeding is that because counsel for Mr. Terrance wished to view material that the division would rely on at the hearing, material which the division failed to have available at the time scheduled for the hearing, that petitioner should be charged with the time following the adjournment which occurred on March 13<sup>th</sup>. Thus, despite the fact that the Division of Parole had neither their evidence nor witness present at the time of the hearing, it is argued that the Petitioner should be charged with the time between the March 13<sup>th</sup> adjournment and the next scheduled date of April 10, 2007.

The statutorily directed time parameters on final revocation hearings must be strictly adhered to. The ninety (90) day time limit can only be extended where Petitioner seeks the adjournment. In the instant case, Petitioner's request to review materials that form the basis of the division's case and which the division representative failed to bring to the hearing cannot properly be deemed the cause of the adjournment. To do so would be tantamount to holding Petitioner accountable for the division's failure to have its witness and evidence present at the scheduled time for the hearing. Therefore, this time period from March 13, 2007 - April 10, 2007 is chargeable to the Division of Parole and not the Petitioner. Since the only time period in question was this said block of time, the final revocation hearing held on May 15, 2007, was not timely.

Respondent also argues that Petitioner failed to raise the issue of timeliness at the May 15<sup>th</sup> hearing and that therefore cannot now do so. This argument is without merit. Petitioner did raise the timeliness issue prior to the May 15<sup>th</sup> hearing by commencement of the within habeas corpus proceeding. The Writ of Habeas Corpus was filed May 1, 2007, and was returnable May 11, 2007. Counsel for Respondent was present at the appearance. Even if Petitioner had not raised the issue on May 15<sup>th</sup>, it had already been raised prior to that in the within proceeding and Respondent had notice that the timeliness of the final revocation hearing was at issue.

Therefore, the petition herein is granted and the Court directs that Petitioner be released from jail and restored to his pre violation legal status. This decision shall constitute the Order of the Court.

DATED: October 31, 2007  
Lyons, New York



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John B. Nesbitt  
Acting Supreme Court Justice