

Matter of Guerrier v New York State Div. of Parole

2007 NY Slip Op 33788(U)

November 21, 2007

Supreme Court, Franklin County

Docket Number: 0000700/2007

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

X

In the Matter of the Application of
JOSEPH GUERRIER, #77-A-2138,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules

**DECISION AND JUDGMENT
RJI #16-1-2007-0289.069
INDEX # 2007-0700
ORI #NY016015J**

-against-

NEW YORK STATE DIVISION OF PAROLE,
Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Joseph Guerrier, verified on May 1, 2007, and stamped as filed in the Franklin County Clerk's office on May 22, 2007. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the modification of the delinquent time assessment imposed following a final parole revocation hearing from 15 months to 30 months. The Court issued an Order to Show Cause on May 31, 2007, and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on July 13, 2007, as well as respondent's Letter Memorandum of July 13, 2007. The court has also received and reviewed petitioner's Reply thereto filed in the Franklin County Clerk's office on August 2, 2007.

On May 19, 1977, the petitioner was sentenced in Supreme Court, Suffolk County, to an indeterminate sentence of imprisonment of 15 years to life upon his conviction of the crime of Murder 2°. He was received into DOCS custody on May 26, 1977. The petitioner was released to parole supervision on three occasions between May of 1995 and July of 2002. On each occasion the petitioner ultimately violated the conditions of release and was returned to DOCS custody. The petitioner was released to parole

supervision for a fourth time on September 14, 2004. On March 14, 2006, however, the petitioner was issued a Notice of Violation/Violation of Release Report charging him violating the conditions of his release in five separate respects. Parole violation charge number four alleges, in relevant part, as follows: “Joseph Guerrier violated Rule #13 of the rules governing his parole, in that on 3/11/06 . . . he was observed by Saratoga Sheriff’s Deputy Margan operating . . . a motor vehicle at 9:04 PM, which is past his established curfew of 9:00 PM.” The remaining four charges all involve allegations that the petitioner was intoxicated at the time of the incident described in parole violation charge number four.

The petitioner waived a preliminary parole revocation hearing and a final hearing was commenced at the Saratoga County Jail on May 9, 2006. After two witnesses testified the division rested and the hearing was adjourned. The final parole revocation hearing recommenced on July 25, 2006, at which time the petitioner entered a plea of guilty to parole violation charge number four and all remaining charges were withdrawn. The petitioner’s parole was revoked with a sustained delinquency date of March 11, 2006, and the ALJ recommended a 15-month delinquent time assessment. On August 9, 2006, that recommendation was initially modified by a single parole commissioner who directed that petitioner be held to the maximum expiration date of his sentence. According to the parole commissioner, “[p]arolee’s cont’d abuse of alcohol, multiple violations and ongoing refusal to abide by the rules of society warrants a longer hold.” On October 17, 2006, the same parole commissioner again modified the delinquent time assessment to 30 months, citing the “[n]ature of the violation in conjunction with past violations and seriousness of the I.O. [Instant Offense].”

The petitioner's administrative appeal was perfected on December 15, 2006. The Division of Parole Appeals Unit failed to issue its findings and recommendations within the four-month time period specified in 9 NYCRR §8006.4(c). This proceeding ensued.

The petitioner purports to challenge the August 9, 2006, determination imposing a delinquent time assessment to the maximum expiration date of his sentence as well as the October 17, 2006, determination amending the August 9, 2006, determination by reducing the delinquent time assessment to 30 months. In this regard the petitioner notes that all alcohol-related parole violation charges were withdrawn at the final parole revocation hearing on July 25, 2006, and that the single parole commissioner's findings with respect to petitioner's "... con't abuse of alcohol and ongoing refusal to abide by the rules of society . . ." were simply not applicable to the curfew violation that was the subject of his guilty plea at the final parole revocation hearing. The Court observes, however, that such findings only served as the basis for directing that petitioner be held to the maximum expiration date of his sentence, as set forth in the August 9, 2006, determination. That determination, however, was superceded by the October 17, 2006, determination reducing the delinquent time assessment to 30 months. The October 17, 2006, determination, which stands as the only delinquent time assessment determination subject to review in this proceeding, contains no reference to either alcohol abuse or the refusal to abide by the rules of society. Rather, as noted previously, the October 17, 2006, determination was based upon the "[n]ature of the violation in conjunction with past violations and seriousness of the I.O. [Instant Offense]."

The petitioner also challenges the imposition of any delinquent time assessment in excess of the 15 months originally recommended by the ALJ by noting that at the time of the violative behavior he was driving a company work van only four minutes beyond his specified curfew. In this regard the petitioner further notes that his curfew

restrictions were waived by the supervising parole officer when petitioner was working or traveling to and from work. To the extent petitioner implies that the delinquent time assessment should be limited to 15 months because his presence on the road after 9:00 PM may have been work-related or merely a *de minimis* curfew violation, the Court simply observes that the petitioner, rather than presenting any evidence on his own behalf at the final parole revocation hearing, pled guilty to parole violation charge number four with the specific understanding that such violation constituted a violation of parole in an important respect. In any event, judicial review of dispositive parole board action following an established or admitted violation is extremely limited. *See Fryar v. Travis*, 11 AD3d 761. In the absence of any indication that the October 17, 2006, determination imposing a 30-month delinquent time assessment was based, in whole or in part, upon an inaccurate factual statement (*see Williams v. Travis*, 20 AD3d 622), the Court, in view of the horrific nature of the crime for which petitioner is incarcerated as well as his history of multiple parole violations, finds no basis to disturb the October 17, 2006, determination. *See Wilkerson v. Travis*, 25 AD3d 835, *Holloway v. Travis*, 289 AD2d 821 and *People ex rel Tyler v. Travis*, 269 AD2d 636.

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: November 21, 2007, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice