Matter of Bowden v Santor
2007 NY Slip Op 33791(U)
October 23, 2007
Supreme Court, Franklin County
Docket Number: 0000753/2007
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

In the Matter of the Application of
DONALD BOWDEN, #00-A-3792,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2007-0314.077
INDEX # 2007-0753
ORI # NY016015J

RALPH SANTOR, Superintendent,
Chateaugay Correctional Facility, and
NEW YORK STATE DIVISION OF PAROLE,
Respondents.

This habeas corpus proceeding was originated in Bronx County by the filing of petitioner's *pro se* petition. That original petition was apparently superceded by the Amended Petition for a Writ of Habeas Corpus of Osvaldo Caban, Jr., Esq., on behalf of Donald Bowden. Mr. Bowden is hereinafter referred to as the petitioner. By order dated April 25, 2007, the Supreme Court, Bronx County transferred venue from Bronx County to Ulster County. By transfer order dated May 18, 2007, the Supreme Court, Ulster County transferred venue from Ulster County to Franklin County. Petitioner, who is an inmate at the Chateaugay 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 June 18, 2007. As part of the Order to Show Cause the respondents were directed to serve a copy of their Return on the petitioner on or before July 27, 2007, to simultaneously mail their original Return to the Court Clerk's office for filing and to mail a further copy of their Return to chambers. On July 30, 2007, chambers received a copy of the respondents' Return, dated July 27, 2007, along with cover letters indicating that the original Return was mailed to the Franklin County Clerk's office on

July 27, 2007, and that a copy thereof was mailed to the Franklin County Public Defender's office on that same date. The respondents' papers, however, included no explanation as to why a copy of the Return was mailed to the public defender, rather than the petitioner. In any event, by letter dated August 1, 2007, petitioner informed chambers that respondents had failed to "submit" their Return on or before July 27, 2007. In response thereto counsel for the respondents advised the Court, apparently erroneously, by letter dated August 6, 2007, that the Plattsburgh Regional Office of the New York State Attorney General ". . . was served with the Order to Show Cause and Petition by the Franklin County Public Defender's Office and subsequently confirmed via telephone that that office is representing Petitioner in this matter . . ." By letter dated August 9, 2007, chambers sought clarification from the Franklin County Public Defender's office as to their involvement in this proceeding. By letter dated September 4, 2007, counsel for the respondents notified the Court as follows: "We have . . . looked into this matter and consulted the Public Defender . . . [T]he error has proven to be inexplicable, but it is clearly ours alone. We are providing Mr. Bowden with a copy of our Return along with his copy of this letter. It was timely filed, but provided to the attorney we mistakenly thought was representing him. We apologize to Your Honor and to him [petitioner] for the error." By Letter Order dated September 12, 2007, the Court denied petitioner's informal application for judgment on default and directed him ". . . to mail his original Reply to the respondents' Return, in accordance with the provisions of the Order to Show Cause of June 18, 2007, on or before September 28, 2007." By letter dated September 18, 2007, however, the petitioner advised chambers that he would not submit a Reply to the respondents' "late return."

On May 30, 2000, the petitioner was sentenced in Supreme Court, New York county, as a second felony offender, to an indeterminate sentence of imprisonment of 6 to 12 years upon his conviction of the crime of Criminal Sale of Controlled Substance 3°. The petitioner was most recently released from DOCS custody to parole supervision on November 7, 2006. At this juncture certain aspects of the record get a bit murky. The petitioner was taken into custody in connection with parole violation charges on December 13 or 14, 2006. He was served with a Notice of Violation/Violation of Release Report on December 15, 2006. According to the allegations set forth in the amended petition, the Violation of Release Report "... contained two charges, a rule 2 violation which alleged that relator failed to make an office report as of November 15, 2006 and thereafter and a rule 4 violation that relator changed his place of residence without the knowledge of his parole officer on November 16, 2006." The Violation of Release Report described by the petitioner corresponds to the typed report annexed to the respondents' Return as part of Exhibit C. The petitioner signed a waiver of preliminary hearing on December 15, 2006. In paragraph six of the Return, however, the respondents initially refer to the arrest of petitioner on December 14, 2006, and then go on to describe the circumstances following that arrest by referring to the final parole revocation hearing testimony of P.O. Fernandez (petitioner's supervising parole officer) as follows: "According to his final hearing testimony, Officer Fernandez hand-wrote a Violation of Release Report (containing three charges, failure to report on December 6, 2006, possession of drug paraphernalia, and violation of curfew), and it was served on Petitioner at 'the precinct' police station to which he [petitioner] was taken that day. A copy of the handwritten Violation of Release Report is annexed hereto Exhibit F. As noted on the Notice of Violation dated December 15, 2006*, Petitioner waived his right to a preliminary

hearing." The respondents' Return, at paragraph six, also set forth the following note which corresponded to the asterisk in the above-quote: "As two of the charges in Exhibit F alleged violations occurring on December 14th at approximately 10:35 p.m., the Notice of Violation appears to have been served either after midnight at the precinct house or at Rikers Island. The Area/Bureau Analysis also bears the date of December 15th."

While it appears clear that the petitioner was served with a Notice of Violation/Violation of Release Report on December 15, 2006, and waived a preliminary hearing at that time, it is not clear whether the report received by the petitioner on December 15, 2006, was the two-charge, typewritten Violation of Release Report or the three-charge, handwritten Violation of Release of Report. The petitioner, for his part, alleges that he was not served with the three-charge, handwritten Violation of Release Report until December 27, 2006. According to the petitioner, the two parole violation charges alleged in the initial, typewritten Violation of Release Report were withdrawn when he was served with the three-charge, handwritten Violation of Release Report on December 27, 2006. The petitioner takes that position that the Division of Parole violated the provisions of Executive Law §259-i(3)(c)(iii) by failing to serve him with a notice of preliminary hearing with respect to the three-charge, handwritten Violation of Release Report within three days of the execution of the parole violation warrant. The petitioner also argues that the Division of Parole violated the provisions of Executive Law §259-i(3)(c)(i) by failing to conduct a preliminary hearing on the charges set forth in the three-charge, handwritten violation of Release Report within 15 days of the execution of the parole violation warrant.

A final parole revocation hearing was conducted at Rikers Island on March 16, 2007. Although the Administrative Law Judge initially referred to a Violation of Release

Report containing "three charges," he then noted that at a pre-hearing conference it was determined that petitioner intended ". . . to enter a plea of not guilty to charges one and two . . ." Counsel for the petitioner indicated her agreement with that statement. The Administrative Law Judge proceeded to read the two charges into the record as follows:

> "Charge one reads as follows. Donald Bowden violated rule number two of the rules governing parole and [in] that he failed to make his office report on November 15th, 2006 and thereafter as he was instructed to do so by Parole Officer Fernandez in an office report on November 7th, 2006 . . . Charge Number Two, Donald Bowden violated rule number four of the rules governing parole in that on November 16th, 2006 he changed his approved residence . . . without the knowledge of his Parole Officer."

Counsel for the petitioner proceeded to enter pleas of not guilty to the two parole violation charges identified by the Administrative Law Judge. A contested hearing was then conducted with respect to these charges. There was no discussion of the three charges set forth in the second, handwritten Violation of Release Report and no objections were interposed by petitioner's counsel. At the conclusion of the hearing the Administrative Law Judge sustained parole violation charge number one but found that the charges set forth in parole Violation charge number two were not proven by a preponderance of the legally sufficient evidence. The petitioner's parole was revoked with a sustained delinquency date of November 15, 2006, and a 12-month delinquent time assessment was imposed on the petitioner as a persistent violator. The petitioner's notice of administrative appeal was received by the Division of Parole Appeals Unit on May 3, 2007, and the petitioner was notified that the latest for submitting documents perfecting his administrative appeal was September 3, 2007.

Petitioner's original *pro se* petition for a writ of habeas corpus, which only set forth an evidentiary challenge to parole violation charge number one, as set forth in the original typewritten, Violation of Release Report, was apparently filed in Bronx County before the

final parole revocation hearing was conducted on March 16, 2007. The amended petition currently before this Court, however, is dated April 4, 2007, and this was obviously filed in Bronx County after the final parole revocation hearing.

Although there are, no doubt, some disturbing aspects to the clarity of the underlying record, the Court finds no basis to conclude that the two parole violation charges originally set forth in the typewritten Violation of Release Report were ever withdrawn. On the contrary, the record is absolutely clear that the contested final parole revocation hearing of March 16, 2007, was conducted solely on the basis of those two charges without any objection interposed on behalf of the petitioner. The Court therefore agrees with the respondents that petitioner's claims have not been preserved for review in this proceeding. *See People ex rel Williams v. Allard*, 19 AD3d 890 and *People ex rel Webster v. Travis*, 277 AD2d 546. In any event, to the extent petitioner challenges matters related to the preliminary parole revocation hearing process, the Court finds such challenge(s) to have been subsumed and rendered moot by the final parole revocation hearing determination. *See Nieblas v. New York State Board of Parole*, 28 AD3d 1017 and *People ex rel Ciccarelli v. Saxton*, 23 AD3d 1095, *lv den* 6 NY3d 708.

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: October 23 , 2007 at
Indian Lake, New York

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S. Peter Feldstein
Acting Supreme Court Judge