

Matter of Black v Dennison

2008 NY Slip Op 30664(U)

March 10, 2008

Supreme Court, Essex County

Docket Number: 0000769/2007

Judge: S. Peter Feldstein

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ESSEX
X

In the Matter of the Application of
ROBBIE BLACK, #05-A-2245,

Petitioner,

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

DECISION AND JUDGMENT
RJI #15-1-2007-0273.06
Index #769-07
ORI #NY015015J

-against-

ROBERT DENNISON, Chairman,
New York State Board of Parole,
KATHLEEN FORNIA, Senior Parole Officer,
STEPHEN DUPREE, Senior Parole Officer, and
KATHLEEN FLACK, Senior Parole Officer,
Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition (denominated “ARTICLE 78 PROCEEDING IN THE NATURE OF A MANDAMUS”) of Robbie Black, verified on August 22, 2007, and stamped as filed in the Essex County Clerk’s office on September 4, 2007. Petitioner, who is an inmate at the Adirondack Correctional Facility, is challenging the methodology whereby his parole eligibility date has been determined. The Court issued an Order to Show Cause on October 16, 2007, and has received and reviewed respondents’ Answer and Return, verified on November 30, 2007, as well as respondents’ Letter Memorandum of November 30, 2007. The Court has also received and reviewed petitioner’s letter to the Court, with exhibits, received directly in chambers on December 17, 2007.

On November 22, 1968, the petitioner was sentenced in Supreme Court, Queens County, to an indeterminate sentence of 15 to 25 years upon his conviction of the crime of Murder. On December 17, 1968, he was re-sentenced by that court to an indeterminate

sentence of 15 years to life. Petitioner's conviction and re-sentencing were affirmed on direct appeal. *People v. Black*, 34 AD2d 999, *aff'd* 30 NY2d 593. Following a parole violation and return to DOCS custody the petitioner was re-released to parole supervision on August 28, 1990. On June 15, 2004, however, the petitioner engaged in additional criminal activity while under parole supervision. As a result thereof, the petitioner was sentenced on December 14, 2004, in Supreme Court, Nassau County, to an indeterminate sentence of imprisonment of 2 to 6 years upon his conviction of the crime of Criminal Sale of a Controlled Substance 3^o. He was received back into DOCS custody on May 9, 2005, and on that same day the Division of Parole issued a Final Declaration of Delinquency revoking petitioner's parole, based upon his subsequent conviction and sentencing, and establishing a final delinquency date of June 15, 2004. *See* Executive Law §259-i(3)(d)(iii). *See* also 9 NYCRR §8004.3(g). According to the statute, "[t]he inmate's next appearance before the [parole] board shall be governed by the legal requirements of . . . [the] new indeterminate . . . sentence . . ." Executive Law §259-i(3)(d)(iii).

Since the Supreme Court, Nassau County did not specify whether petitioner's December 14, 2004, indeterminate sentence was to run concurrently or consecutively with respect to the undischarged term of petitioner's 1968 Queens County sentence, DOCS officials properly determined that the 2004 sentence should be calculated as running concurrently with respect to the undischarged term of the 1968 sentence. *See* Penal Law §70.25(1)(a). As a result, the time petitioner had served under imprisonment in connection with his 1968 sentence was credited against the minimum period of his 1994 sentence (*see* Penal Law §70.30(1)(a)) and DOCS determined that the petitioner

was immediately eligible for parole release upon his return to DOCS custody on May 9, 2005.

The record with respect to petitioner's first parole board appearance after his return to DOCS custody on May 9, 2005, is not quite clear. According to the respondents, the petitioner appeared before a parole board in August of 2005 and at that time it was directed that he be held for an additional 24 months calculated from May of 2005, the month he was returned to DOCS custody, with his next parole board appearance thus scheduled for May of 2007. This assertion finds some support in petitioner's February 27, 2007, letter to Senior Parole Officer Flack (petitioner's Exhibit B) wherein petitioner wrote that he ". . . didn't appear before the Board until 8/05 . . ." Notwithstanding the foregoing, Exhibit C, attached to the petition, consists of a November 9, 2005, Parole Board Release Decision Notice specifying petitioner's interview date as November 9, 2005. In any event, the November, 2005, parole denial determination directed that the petitioner be held for an additional 24 months but nevertheless specified that his next appearance date would be May of 2007.

The record indicates that the petitioner did, in fact, reappear before a parole board on May 16, 2007, and was again denied parole release and directed to held for an additional 24 months, with his next scheduled appearance date being May of 2009. Although petitioner's notice of administrative appeal was received by the Division of Parole Appeals Unit on May 25, 2007, he never perfected his appeal. This proceeding ensued.

Broadly speaking, the petitioner appears to assert two distinct challenges to the methodology whereby his parole eligibility date was calculated/implemented. He first

asserts that his status as immediately eligible for parole consideration upon his arrival at the Downstate Correctional Facility on May 9, 2005, was effectively frustrated when parole officials failed to schedule him for an appearance before a parole board at that facility in May, June or July of 2005. He next appears to assert that the 24-month hold imposed filing his parole board appearance at the Adirondack Correctional facility in August or November of 2005 should have been made retroactive to his delinquency date so as to entitle him to a reappearance in June of 2006 and, presumably, June of 2008.

Even if this court were to be persuaded that parole officials failed to promptly schedule petitioner's parole board appearance following his return to DOCS custody on May 9, 2005, the only available relief would have been a court order directing an immediate appearance. The Court therefore finds that petitioner's actual parole board appearance at the Adirondack Correctional Facility in August/November of 2005 rendered this challenge moot. *See McAllister v. New York State Division of Parole*, 28 AD3d 1046, *lv den* 7 NY3d 715. To the extent petitioner's papers are construed as challenging that aspect of the May, 2007, parole denial determination scheduling his next board appearance for May of 2009 rather than June of 2008, the Court agrees with the respondents that petitioner's failure to exhaust administrative remedies through the administrative appeals process set forth in 9 NYCRR Part 8006 bars judicial relief at this juncture. *See* CPLR §7801(1) and *Carter v. Division of Parole*, 95 NY2d 267. Petitioner's bald statement that he "... did not continue his [administrative] appeal, because, he felt, that his appeal would not have no chance of success," falls far short of establishing that the pursuant of an administrative appeal would have been an exercise in futility. *See Pfaff v. Columbia-Greene Community College*, 99 AD2d 887. In any event, even if the

Court were to reach the merits of petitioner's second claim, the Court is simply not persuaded that petitioner's initial 24 month hold should have been made retroactive to his delinquency date so as to have required reappearances in June of 2006 and June of 2008. The petitioner has not cited, nor is the Court aware, of any judicial, statutory or regulatory authority supporting his position on this point.

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: March 10 , 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice