

Matter of Germenis v New York State Division of Parole

2008 NY Slip Op 33483(U)

December 22, 2008

Supreme Court, Albany County

Docket Number: 3412-08

Judge: George B. Ceresia

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This opinion is uncorrected and not selected for official publication.

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Woodbourne Correctional Facility, has commenced the instant CPLR Article 78 proceeding to vacate the Court's prior Judgment dated June 28, 2007 pursuant to CPLR 5015 (a). That Judgment dismissed the petitioner's petition seeking review of a September 6, 2005 determination by the respondent denying the petitioner discretionary release on parole. In a pre-answer motion, the respondent moves, inter alia, pursuant to CPLR 3211(a) (7) to dismiss the petition as moot. Petitioner opposes the motion to dismiss.

By way of background, the petitioner is currently serving a prison term of 15 years to life for Murder in the second degree. In September 2005, the petitioner made his fifth appearance before the Parole Board seeking discretionary release. The Parole Board denied that request, after which the petitioner commenced a proceeding pursuant to CPLR article 78 for review of that determination. The Court dismissed the petition, which judgment the petitioner now seeks to vacate.¹ Petitioner claims that all the prior determinations of the Parole Board should be vacated since the Parole Board did not have the sentencing minutes before it when it rendered those determinations. Further, the petitioner contends that the Court's judgment should be vacated since the respondent supplied the Court false information in noting that the Parole Board reviewed the Sentencing Court's recommendation. The respondent moves to dismiss the instant petition, contending it is moot

¹ The facts underlying that determination and the Court's decision are included in the Court's prior judgment and will not be repeated here.

since the petitioner has appeared again before the Parole Board.

A court is precluded “from considering questions, which, although once live, have become moot by passage of time or change in circumstances” (Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714 [1980]). “[T]he mootness prohibition is subject to an exception, by which [a court has] discretion to review a case if the controversy or issue involved is likely to recur, typically evades review, and raises a substantial and novel question” (Saratoga County Chamber of Commerce, Inc. v Pataki, 100 NY2d 801, 811 [2003], cert denied 124 S. Ct. 570; see Matter of Hearst Corp., 50 NY2d at 714-715).

The Court agrees with the respondent that the petition should be dismissed as moot (Matter Hearst Corp., 50 NY2d at 714). Where a court determines that the Parole Board failed to properly consider the sentencing minutes in rendering a determination regarding an inmate’s request for discretionary parole release, the sole remedy afforded a petitioner is to have the matter “remitted to the [Parole] Board for a de novo hearing during which the sentencing minutes and recommendations of the sentencing court shall be considered by the [Parole] Board.” (Matter of Standley v New York State Div. of Parole, 34 AD3d 1169, 1170 [3d Dept 2006]; see Matter of Carter v Dennison, 42 AD3d 779, 779 [3d Dept 2007]; Matter of Lovell v New York State Div. of Parole, 40 AD3d 1166, 1167 [3d Dept 2007]). Here, the record establishes that, on December 11, 2007, the petitioner again appeared before the Parole Board for a de novo hearing at which his sentencing minutes were considered. Since petitioner has already received the only legal remedy available to him should he have

prevailed in this matter, the instant proceeding should be dismissed as moot (see Matter of Standley v Division of Parole, 40 AD3d 1344, 1345-1346 [3d Dept 2007]; accord Matter of Moore v Goord, 31 AD3d 1075, 1076 [3d Dept 2006], lv denied 7 NY3d 715 [2006]).

Furthermore, nothing in the record suggests that any exception to the mootness doctrine applies here (compare Matter of Standley, 40 AD3d at 1345-1346 with Matter of Standley, 34 AD3d at 1170). For instance, now that the sentencing minutes have been obtained by the respondent, this issue is not likely to recur in any future proceedings that the petitioner may bring for review of future Parole Board determinations. In addition, a petitioner who is aggrieved by a Parole Board determination has both administrative and judicial remedies available to him or her (accord Matter of Johnson v Goord, 289 AD2d 625, 625 [3d Dept 2001], lv denied 97 NY2d 723 [2002]). Moreover, a survey of recent case law reveals that issues regarding review of sentencing minutes during Parole Board appearances are neither novel nor have evaded judicial review (compare Matter of Standley, 40 AD3d at 1345-1346 with Matter of Standley, 34 AD3d at 1170).

Finally, the Court notes that, as petitioner claims, the Parole Board did not have the sentencing minutes before it prior to petitioner's most recent appearance in December 2007. This omission, however, at most constitutes harmless error on the part of the Parole Board since a review of the sentencing minutes reveals that Sentencing Court did not make any recommendations regarding the sentencing (see Matter of Schettino v New York State Div. of Parole, 45 AD3d 1086, 1087 [3d Dept 2007]). Rather, the Sentencing Court imposed the

sentence pursuant to the plea agreement entered into by the petitioner. Therefore, given that the omission of the sentencing minutes was harmless error, the petitioner's request to be reimbursed for expenses in bringing this and the former-CPLR article 78 proceedings is denied (cf Matter of Mathie v Selsky, 45 AD3d 1169, 1170 [3d Dept 2007]).

Otherwise, the Court has reviewed and considered the parties' remaining arguments and contentions and finds them to be without merit or unnecessary to reach given this Court's decision. Accordingly it is

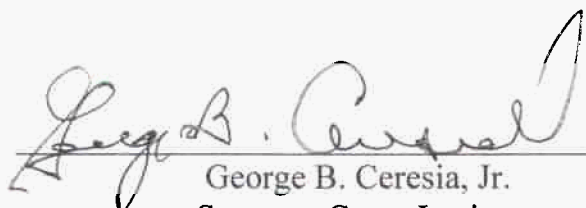
ORDERED and ADJUDGED that the respondent's motion to dismiss the petition is granted; and it is further

ORDERED and ADJUDGED, that the petition be and hereby is dismissed as moot.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the Respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: December 22, 2008
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order to Show Cause signed May 2, 2008;
2. Petition verified April 8, 2008;
3. Affidavit of Spyro Germetis sworn to April 8, 2008;
4. Exhibits A-E attached to Petitioner's Memorandum of Law;
5. Notice of Motion to Dismiss dated June 27, 2008;
6. Affirmation of C. Harris Dague, Esq., affirmed June 27, 2008, with accompanying Exhibits A-E;
7. Reply verified July 8, 2008, with accompanying attachments.