STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of KAI KIRBY, 95-R-6672

Petitioner,

-against-

BRIAN FISCHER, COMMISSIONER OF DOCS; ANTHONY ANNUCCI, DEPUTY COMMISSIONER AND COUNSEL, DOCS; DAVID NAPOLI, SUPERINTENDENT OF SOUTHPORT C.F.,

Respondents,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-08-ST8948 Index No. 1976-08

Appearances: Kai Kirby
Inmate No. 95-R-6672
Petitioner, Pro Se
Southport Correctional Facility
P.O. Box 2000
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Petitioner, an inmate at Southport Correctional Facility, has commenced the instant CPLR Article 78 proceeding for mandamus to compel his release from custody by the Department of Correctional Services (DOCS) to the custody of the Ulster County Sheriff pending the issuance of a Certificate of Conviction. Further, petitioner seeks to have four disciplinary proceedings expunged from his institutional record. Respondents oppose the petition, seeking its dismissal.

In 1994, petitioner was sentenced to two concurrent terms of 1 2/3 to 5 years as a juvenile offender for Attempted Murder, second degree, and Assault, first degree. In 1999, petitioner was sentenced as a second felony offender to concurrent terms ranging from 3 ½ years to 12 years on several counts of Criminal Possession of a Weapon and assault. These sentences were to run consecutive to the prior sentence. In 2000, petitioner was sentenced to a term of 1 ½ to 3 years as a second felony offender for Felony Escape, second degree, which was to be served consecutive to sentences petitioner was already serving. Sentence and Commitment orders exist for all of the above-discussed sentences.

In September 2007, petitioner requested a copy of his Certificate of Conviction from the Southport Correctional Facility. The facility advised him that "a Certificate of Conviction is a supplementary document provided by the court of conviction. In this instance, the document was not provided to us. Please write to your court of conviction if you wish to obtain this document" (Southport Correctional Facility Memorandum [dated 9-

26-07], Petition, Exhibit A). Thereafter, petitioner also inquired of respondent Fisher's office about the location of the Certificate of Conviction. That office informed him to make such an inquiry to the Inmate Records Coordinator at the facility in which he was housed, also forwarding his letter to the facility. Again, on January 24, 2008, the Inmate Records Coordinator at the Southport Correctional Facility advised petitioner to contact the Court of Conviction for a copy as the facility did not have one. In March 2008, petitioner commenced the instant proceeding, inter alia, for mandamus to compel respondents to transfer him to the custody of the Ulster County Sheriff's Department and for that department to comply with the Criminal Procedure Law by obtaining and transferring a Certificate of Conviction to DOCS. Respondents oppose the requested relief.

"Mandamus to compel is available 'only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law'" (Matter of Schmitt v Skovira, 53 AD3d 918, 920 [3d Dept 2008], quoting New York Civil Liberties Union v State of New York, 4 NY3d 175, 184 [2005]). Here, insofar as the petition seeks such relief it must be dismissed as mandamus to compel does not lie (see id.). As a threshold matter, petitioner has not established that he demanded DOCS to return him to the Ulster County Sheriff's Department and was refused such demand (see Matter of Vestal Teacher's Assn. v Vestal Central School Dist., 51 AD3d 922, 923 [3d Dept 2004]). Rather, petitioner merely sought to get a copy of the Certificate of Conviction from both the Southport Correctional Facility and from DOCS without any further action on his part.

More significantly, respondents have no obligation to release petitioner from its custody because they lack a Certificate of Conviction. In pertinent part, CPL 380.60 provides:

> Except where a sentence of death is pronounced, a certificate of conviction showing the sentence pronounced by the court, or a certified copy thereof, constitutes the authority for execution of the sentence and serves as the order of commitment, and no other warrant, order of commitment or authority is necessary to justify or to require execution of the sentence.

Here, while respondents did not have a Certificate of Conviction, they have demonstrated that a Sentence and Commitment Order exists for plaintiff's various convictions. The Sentence and Commitment Orders fulfill the same purpose as a Certificate of Conviction (see generally Preiser, Practice Commentaries, McKinneey's Cons. Laws of NY, Book 11A, CPL 380.60 [2005], at 307-308 [noting that "[t]his section is vague and appears to leave the form of the certificate up to local court option. . . . Customarily where a term of imprisonment is imposed, an order of commitment will be issued."]; CPL 430.20). Further, CPL 380.70 provides, in relevant part:

> In any case where a person receives an indeterminate or determinate sentence of imprisonment, a certified copy of the stenographic minutes of the sentencing proceeding and a certificate of conviction specifying the section, and to the extent applicable, the subdivision, paragraph and subparagraph of the penal law or other statute under which the defendant was convicted, must be delivered to the person in charge of the institution to which the defendant has been delivered within thirty days from the date such sentence was imposed; provided, however, that a sentence or commitment is not defective by reason of a failure to comply with the provisions of this section (emphasis supplied).

Thus, under this provision, the failure to deliver a Certificate of Conviction does not render

the sentence or commitment defective. Thus, petitioner has failed to demonstrate that he has a clear legal right to relief he seeks. Similarly, the absence of a Certificate of Conviction does not provide a basis upon which to expunge any reference to disciplinary proceedings in petitioner's institutional record since he was not being detained illegally.

In addition, petitioner's reliance on Corrections Law § 601-a is unavailing. That provision provides a vehicle for the resentencing of an inmate where it appears that there is an error in the sentence (see Corrections Law § 601-a). That issue is not implicated in the instant proceeding.

Petitioner also seeks review of the various disciplinary proceedings. As to the disciplinary hearing that concluded on June 26, 2007 after which a final determination was issued on August 17, 2007, as respondents contend, any judicial review of the final determination is time barred. This proceeding was not commenced within four months of the final determination (see CPLR 217 [1]; Matter of Watson v Goord, 39 AD3d 1044, 1044 [3d Dept 2007]; Matter of Loper v Selsky, 26 AD3d 653, 654 [3d Dept 2006]).

Next, petitioner seeks review of a disciplinary proceeding that concluded on September 5, 2007, finding petitioner guilty of violating prison rules relating to unauthorized organizational activity (Rule 105.12) and facility correspondence regulations (Rule 180.11) and imposing concomitant penalties. Upon administrative appeal, in a determination issued February 11, 2008, the Hearing Officer's determination was affirmed. In this proceeding, petitioner argues that any reference to this disciplinary proceeding should be expunged from

his record since there was no written authorization by the facility's Superintendent permitting prison officials to open his outgoing mail, upon which the charges in the disciplinary proceeding rest.

The Court rejects this argument. Confidential testimony which the Court reviewed in camera establishes that the mail watch that led to the opening of petitioner's outgoing mail was authorized (Matter of Kornegay v Goord, 21 AD3d 1236, 1236 [3d Dept 2005]; see Matter of Knight v McGinnis, 10 AD3d 754, 755 [3d Dept 2004]). Therefore, the violation of prison rules regarding inmate mail as alleged by petitioner did not occur (see 7 NYCRR 720.3 [e] [1], [2]; cf Matter of Knight v Goord, 255 AD2d 930, 931 [4th Dept 1998]).

Petitioner also seeks review of another Tier III hearing that concluded on October 10, 2007, after which petitioner was found guilty of unauthorized organizational activity (Rule 105.12) and was issued concomitant penalties. Upon administrative appeal in a determination issued December 26, 2007, the Hearing Officer's determination was confirmed. In this proceeding, petitioner claims that he was not properly advised of the consequences of his failure to refuse to attend the hearing on the last day. This argument is belied by the transcript of the hearing in which Correctional Officers informed the Hearing Officer that they had notified petitioner of the hearing and that he refused to attend. Given this testimony, petitioner's argument that the Hearing Officer should have delayed the hearing is without merit (see 7 NYCRR 254.6 [b]). The Court further notes that petitioner had been involved in other disciplinary hearings and, therefore, should have known of the

consequences of not attending a hearing.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit. For the reasons discussed above, the Court concludes that part of the petition for mandamus to compel should be dismissed since mandamus does not lie under the circumstances presented here. Further, the Court finds that the disciplinary determinations were not made in violation of lawful procedure, are not affected by an error of law, and are not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

Accordingly it is

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

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the Respondents 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: January 2, 2009
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Amended Order to Show Cause signed June 27, 2008;

2. Petition signed by Kai Kirby but not dated [received by Clerk on March 10, 2008], with accompanying Exhibits;
3. Answer verified September 4, 2008, with accompanying Exhibits A-N;
4. Affirmation of C. Harris Dague, Esq., affirmed September 4, 2008;
5. Reply of Kai Kirby, undated [received by Clerk on September 15, 2008.