

**Matter of Platten v New York State Div. of Parole**

2009 NY Slip Op 32634(U)

November 12, 2009

Supreme Court, Albany County

Docket Number: 6556-09

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of  
JOHN PLATTEN,

Petitioner,

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

**DECISION and ORDER**  
**INDEX NO. 6556-09**  
**RJI NO. 01-09-ST0664**

-against-

NEW YORK STATE DIVISION OF PAROLE,

Respondent.

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Supreme Court Albany County All Purpose Term, October 22, 2009  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Thomas Eoannou, Esq.  
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Andrew M. Cuomo, Esq.  
Attorney General of the State of New York  
*Attorneys for the Respondent*  
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**TERESI, J.:**

Petitioner is currently serving an indeterminate sentence of twenty years to life for his conviction of Murder in the Second Degree. Petitioner first appeared before the New York State Board of Parole (hereinafter the "Board") on June 11, 2008. The Board denied Petitioner parole, and Petitioner commenced this Article 78 proceeding claiming that the Board considered

erroneous information in making its determination. Respondent answered the petition, and seeks its dismissal. Because the Board's decision was based upon information specifically excluded from its consideration by prior Order of the Supreme Court - Erie County, it is annulled.

The Board's actions are judicial in nature and may not be reviewed if done in accordance with the law. (Executive Law § 259-i[5]). "[P]rovided the Board's determination is made in accordance with statutory requirements (see Executive Law § 259-i[2][c][A]), such determination will not be disturbed absent a showing of irrationality bordering on impropriety". (Romer v. Dennison, 24 AD3d 866 [2005] quoting Matter of Russo v. New York State Board of Parole, 50 NY2d 69 [1980]). However, where the Board "relie[s] upon erroneous information in denying parole release, this Court must annul [its] determination and remit for a new hearing." (Smith v. New York State Bd. of Parole, 34 AD3d 1156 [3d Dept. 2006]; Plevy v. Travis, 17 AD3d 879 [3d Dept. 2005]; Huges v. New York State Div. of Parole, 21 AD3d 1176 [3d Dept. 2005]). Likewise, a new hearing is required where the Board considers information "in violation of a prior court order." (Quartararo v. New York State Div. of Parole, 224 AD2d 266 [1<sup>st</sup> Dept. 1996]).

On September 7, 2001, the Hon. Michael D'Amico, Supreme Court - Erie County, Ordered that Petitioner's probation report, i.e. Pre-Sentence Investigation (hereinafter "PSI"), be amended by deleting from the "Legal History" section of the report the following entries: "Speeding, Speed in Zone, Speed in Zone, Criminal Possession of Dangerous Substance, Muffler, Speeding, No License, Following Too Closely Failed to Keep Right, No Protective Helmut, Driving while Lic. Suspended or Revoked, Speeding, Failure to Comply with Order, Aggravated Harassment, Unlawful Imprisonment, Violation of Probation, [and] Harassment".

Moreover, the above Order required the narrative portions of Petitioner's PSI to be amended to delete therefrom any mention of the above crimes and violations. Such amendments would result in Petitioner's PSI including a single prior conviction for "Driving While Intoxicated".

Thereafter, on March 15, 2006, the Hon. Michael D'Amico Ordered Petitioner's PSI to be "retyped to remove all the underlying facts and references to the entries set forth in this Court's original Order in this matter, dated and entered September 7, 2001." The Department of Correctional Services, by an Assistant Attorney General, approved this second Order "as to form and content". As part of this second Order, the Department of Corrections was ordered to "immediately remove the original probation report [PSI] from the Petitioner's file and either dispose of it accordingly or send the original report back to the Genesee County Probation Department." Petitioner also demonstrated, by submission of the Probation department's transmittal letter, that the Probation department had retyped the Petitioner's PSI and forwarded it to the Department of Corrections.

On this record, the Petitioner demonstrated that the Board failed to comply with the above Orders. The Board's written denial noted that Petitioner had "3 or more" misdemeanor convictions and that he served "4 or more" jail terms. Additionally, while interviewing Petitioner, the Board referenced an "order of protection". As set forth above, the only conviction that was properly included in the Petitioner's PSI for the Board to consider was the "Driving While Intoxicated" conviction. Additionally, the PSI submitted by Respondent in camera, as part of the Record Before the Agency Below, includes a "Legal History" which enumerates all of the crimes and violations specifically required to be deleted by Judge D'Amico's Orders. Moreover, the "Inmate Status Report for Parole Board Appearance", also submitted in camera, specifically

references and discuss the “Legal History” items required to be deleted and expunged from Petitioner’s record. As such, the Board’s decision is based upon erroneous information in violation of a court order.

Respondent’s contentions in opposition to the above are unavailing. Respondent alleges that Petitioner failed to exhaust his administrative remedies, on the “erroneous information” issue, by failing to include it in his administrative appeal. However, reviewing Petitioner’s administrative appeal attached to Respondent’s submissions, the issue is specifically raised and extensively argued. There is no merit in Respondent’s contention that Petitioner failed to exhaust his administrative remedies. Moreover, in making a “harmless error” argument, Respondent acknowledges that the Board considered a PSI which included information specifically Ordered by Judge D’Amico to be deleted therefrom. Rather than demonstrating “harmless error”, Respondent reinforces the plain fact that the Board relied upon information in violation of a court order. Nor does Respondent demonstrate, with any nonhearsay factual allegations, that they did not receive notice of Judge D’Amico’s Orders. Especially in light of the Department of Corrections explicit agreement to the “form and content” of Judge D’Amico’s second Order.

Accordingly, the petition is granted, the Board’s decision is annulled and the matter is remanded to Respondent for a de novo hearing, before a different panel of the Board. Such hearing shall be conducted within 60 days of the date of this order, and a decision thereon shall be made within 30 days of the date of the hearing. (Quartararo, supra). Respondent shall comply in all respects with the Hon. Michael D’Amico’s September 7, 2001 and March 15, 2006 Orders in conducting Petitioner’s de novo hearing, and shall delete and expunge from Petitioner’s

institutional record all information required to be expunged by such Orders.

The parties' remaining contentions have been examined, and in light of the above are either moot or lacking in merit.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
November 12, 2009

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause, dated August 25, 2009; Petition of Thomas Eoannou, dated July 20, 2009, with Exhibits "A"- "C";
2. Answer, dated October 9, 2009, Affirmation of Justin C. Levin, dated October 9, 2009, with attached Exhibits "A"- "H".
3. Reply of Thomas Eoannou, dated October 21, 2009.