

Matter of Young v New York State Bd. of Parole

2009 NY Slip Op 33149(U)

December 30, 2009

Supreme Court, St. Lawrence County

Docket Number: 129646

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE

X

In the Matter of the Application of
JAY YOUNG, #03-A-3746,

Petitioner,

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

**DECISION, ORDER AND
JUDGMENT**

RJI #44-1-2009-0036.03

INDEX #129646

ORI # NY044015J

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent,

X

This proceeding for judgment pursuant to Article 78 of the CPLR was originated by the Petition of Jay Young, verified on January 3, 2009, and filed in the St. Lawrence County Clerk's office on January 16, 2009. Petitioner, who is now an inmate at the Camp Georgetown Correctional Facility, challenged the revocation of his parole, his designation as a Category 1 parole violator and the imposition of a 48-month delinquent time assessment. The Court issued an Order to Show Cause on January 21, 2009, and received and reviewed respondent's Answer, verified on March 12, 2009, as well as petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on March 31, 2009. By Letter Order dated May 21, 2009, the Court directed counsel for the respondent to supplement the Answer in three separate respects. In response thereto, respondent filed Exhibit 1, Exhibit 2 and Confidential Exhibit 3 in the St. Lawrence County Clerk's office on June 1, 2009. Additional undated correspondence from the petitioner was filed in the St. Lawrence County Clerk's office on June 3, 2009.

By Decision and Judgment dated August 19, 2009, the petition was granted, without costs or disbursements, but only to the extent that the determination classifying

petitioner as a Category 1 parole violator was vacated and the matter remanded to the respondent for further proceedings not inconsistent with the Decision and Judgment. The respondent now moves for leave to reargue and its motion is opposed by petitioner.

On July 2, 2003, petitioner was sentenced in Westchester County Court, as a second felony offender, to an indeterminate sentence of 6 to 12 years upon his conviction of the crime of Criminal Possession of Controlled Substance 3^o, apparently committed while under parole supervision from a previously imposed indeterminate sentence. On May 4, 2006, petitioner was released from DOCS custody to parole supervision in North Carolina. He was subsequently charged, however, with violating the conditions of his release in six separate respects. Parole Violation Charge #1 alleged that the petitioner “. . . left the State of North Carolina on or about 2/16/2007 without permission of his North Carolina Parole Officer.” Parole Violation Charges #2, #3 and #6 alleged that on or about February 16, 2007, petitioner behaved in such a manner as to violate provisions of law which provide for a penalty of imprisonment in that he committed the acts of criminal conspiracy, armed robbery and the purchase of marijuana, respectively. Parole Violation Charge #4 alleged that petitioner possessed a rifle on or about February 16, 2007, and Parole Violation Charge #5 alleged that on or about that date petitioner behaved in such a manor as to threaten the safety and well being of himself or others in that he attempted to elude police.

In its Decision and Judgment of August 19, 2009, the Court made the following findings:

“Following waiver of a preliminary hearing, a final revocation hearing was conducted at Rikers Island on April 3, 2008. At the final hearing petitioner, who was represented by counsel, plead guilty to Parole Violation Charge #1 and the remaining

charges were withdrawn with prejudice.¹ Petitioner's parole was revoked with a sustained delinquency date of February 16, 2007, he was determined to be a Category 1 parole violator and a 48-month delinquent time assessment was imposed."

After rejecting petitioner's evidentiary challenge to the determination of the presiding Administrative Law Judge (ALJ) sustaining Parole Violation Charge #1, the Court proceeded to examine the ALJ's determination to classify petitioner as a Category 1 parole violator. 9 NYCRR §8005.20(c)(1)(vii) provides, in relevant part, for a Category 1 designation where ". . . the violator's criminal record includes . . . youthful offender adjudications, involving the use or threatened use of a deadly weapon or dangerous instrument . . ." Although neither the transcript of the final parole revocation hearing nor the ALJ's written Parole Revocation Decision Notice set forth the factual underpinning for the Category 1 designation, it was asserted in paragraph 15 of respondent's Answer that "[i]n this matter, petitioner had a youthful offender adjudication for weapons possession." After noting that petitioner's 1993 YO adjudication replaced a conviction of the crime of Criminal Possession of a Weapon 2^o (Penal Law §265.03), the Court observed that the statute, as it existed in 1993, merely provided that "[a] person is guilty of criminal possession of a weapon in the second degree when he possesses a machine-gun or loaded firearm with intent to use same unlawfully against another." The Court then concluded as follows:

"Although a loaded firearm might qualify as a "deadly weapon" under the provisions of Penal Law §10.00(12) (but an unloaded machine-gun would not), in order to serve as predicate for a Category 1 parole violator designation under the relevant provisions of 9 NYCRR §8005.20(c)(1)(vii), the

¹ The record indicates that on January 11, 2008, following a jury trial, petitioner was acquitted of the robbery charge and the conspiracy charge was dismissed. At that time there were no further criminal charges pending against petitioner.

YO adjudication must involve “. . . the use or threatened use of a deadly weapon . . .” Mere possession, regardless of intent, is not sufficient.

In the absence of any evidence in the record that petitioner’s 1993 YO adjudication involved the “use or threatened use of a deadly weapon or dangerous instrument,” the Court finds that the determination classifying him as a Category 1 parole violator must be vacated. In view of this finding, the Court declines to reach petitioner’s remaining contention that the 48-month delinquent time assessment was otherwise excessive.”

In its motion papers the respondent does not take issue with the Court’s finding that petitioner’s 1993 YO adjudication does not support the Category 1 designation. Rather, “. . . respondent respectfully submits that the Court overlooked the fact that the 48-month hold imposed on petitioner here was a **joint** recommendation of the parties at the final parole revocation hearing . . . [P]etitioner was present and represented by counsel at this hearing. The result of the pre-hearing conference was the agreement that petitioner ‘plead guilty to charge number one . . . parole violation in an important respect;’ that the Division of Parole withdraw with prejudice the remaining charges and petitioner’s parole be revoked; and that a 48 month delinquent time assessment be imposed. Petitioner has received exactly what he bargained for.” (Emphasis in original).

After careful consideration the Court agrees that the factual findings set forth in its Decision and Judgment of August 19, 2009, did not take into account the fact that the 48-month delinquent time assessment was an integral part of the plea agreement entered into at the final parole revocation hearing on April 3, 2008. Accordingly, respondent’s motion for leave to reargue is granted. Notwithstanding the foregoing, however, the Court does not agree with respondent that upon the reargument dismissal of the petition is warranted.

It is clear from the written Parole Revocation Decision Notice, as clarified in paragraph 15 of respondent's Answer, that the ALJ's determination to designate petitioner a Category 1 parole violator was based upon the 1993 YO adjudication. A review of the final parole revocation hearing transcript reveals that although the 48-month delinquent time assessment was, in fact, a part of the plea agreement, there was absolutely no discussion of whether or not petitioner's criminal/YO history, coupled with his plea of guilty to the relatively minor Parole Violation Charge #1, was sufficient to sustain a Category 1 designation. In the absence of the Category 1 designation, moreover, the maximum delinquent time assessment for a non-persistent parole violator would be revoke and restore to the Willard drug treatment program if a Category 2 designation applied (*see* 9 NYCRR §8005.20(c)(2)) or up to time served plus six months if a Category 3 designation applied (*see* 9 NYCRR §8005.20(c)(3)).

It appears to this Court that the plea agreement in the case at bar was based upon a mutual, erroneous assumption that petitioner's prior criminal/YO history rendered him a Category 1 parole violator, and thus subject to a delinquent time assessment, of up to the maximum expiration of his underlying sentence(s), even with the more serious parole violation charges withdrawn. Given the fact that petitioner, who was represented by counsel at the final hearing, did agree to the 48-month delinquent time assessment, which could only be imposed upon a Category 1 parole violator, the Court finds, upon reargument, that petitioner is not entitled to simply have the Category 1 parole violator designation vacated and the matter remanded for further proceedings at which a delinquent time assessment appropriate to a Category 2 or Category 3 designation would be imposed. Rather, the Court finds that the underlying determination revoking petitioner's parole, based upon the erroneous plea agreement, must be vacated and the

matter remanded for the purposes of conducting a new final parole revocation hearing with all six original parole violation charges pending.

In urging the Court, upon reargument, to dismiss the petition outright, respondent relies on *Ramos v. New York State Division of Parole*, 300 AD2d 852, wherein the Appellate Division, Third Department, held an adjudicated parole violator to the terms of his underlying plea agreement. This Court, however, finds *Ramos* distinguishable on its facts. There is nothing in *Ramos* to suggest that the agreed upon (or ultimately imposed) delinquent time assessment was in excess of the maximum time assessment that could be imposed under departmental regulation given Mr. Ramos' proper parole violator category designation.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that petitioner's motion for leave to reargue is granted; and it is further

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the determination revoking petitioner's parole, based upon the plea agreement reached at the April 3, 2008, final parole revocation hearing, is vacated and the matter remanded to the respondent for the purpose of conducting a new final parole revocation hearing, within 60 days, not inconsistent with the provisions of this Decision, Order and Judgment.

Dated: December 30, 2009, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice