

Matter of Pettijohn v Laclair

2010 NY Slip Op 30154(U)

January 13, 2010

Supreme Court, Franklin County

Docket Number: 2009-1233

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN
X

In the Matter of the Application of
JOHN PETTIJOHN, #89-B-1481,
Petitioner,

for Judgment Pursuant to Article 70
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #16-1-2009-0465.99
INDEX # 2009-1233
ORI # NY016015J

-against-

DARWIN E. LACLAIR, Superintendent,
Franklin Correctional Facility, and
ANDREA EVANS, Chief Executive Officer,
NYS Division of Parole and Chairwoman,
NYS Board of Parole

Respondents.

X

This proceeding was originated by the Petition for Writ of Habeas Corpus of John Pettijohn, verified on September 3, 2009, and filed in the Franklin County Clerk's office on September 9, 2009. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Correctional Services. The Court issued an Order to Show Cause on September 15, 2009, and has received and reviewed respondents' Return, dated October 30, 2009, as well as petitioner's Reply (Response) thereto, filed in the Franklin County Clerk's office on November 13, 2009.

On June 12, 1989, petitioner was sentenced in Dutchess County Court to a controlling, concurrent indeterminate sentence of 7 to 25 years upon his convictions of the crimes of Manslaughter 1^o and Attempted Robbery 2^o. He was released from DOCS custody to parole supervision on January 6, 2006, and parole supervision was transferred to Massachusetts pursuant to the Interstate Compact for Adult Offender Supervision (Executive Law §259-mm).

On April 15, 2008, and July 7, 2008, petitioner was arrested in Massachusetts and a preliminary parole revocation hearing was conducted by Massachusetts parole authorities on August 6, 2008. Five separate charges were to be considered at the preliminary hearing. The first two charges related to the alleged conduct underlying petitioner's two arrests. The third charge alleged that petitioner never notified parole authorities of the April 15, 2008, arrest and the fourth charge alleged that petitioner was in the company of an individual with a criminal record at the time of that arrest. The final charge alleged that petitioner had not paid parole supervision fees since 2007. The Massachusetts hearing examiner found grounds to believe that petitioner was in the company of an individual with a criminal record at the time of his April 15, 2008, arrest and that petitioner had not paid parole supervision fees since 2007. Although New York parole authorities issued a five-charge Violation of Release Report on August 15, 2008¹, it was determined that no delinquency action would be taken pending disposition of the outstanding Massachusetts criminal charges. Those criminal charges were apparently dismissed at a later date petitioner was released from Massachusetts criminal custody back to Massachusetts parole supervision.

On January 5, 2009, Massachusetts parole authorities issued an Offender Violation Report advising New York authorities, *inter alia*, that petitioner had absconded from Massachusetts parole supervision. New York Supplemental Violation of Release Report #1, containing two additional parole violation charges (#6 and 7), was issued on January 6, 2009. New York Parole Violation Charge #6 alleged as follows: "Subject violated Rule #2 of the Conditions Governing his Release in that on 12/2/2008 and

¹ The five parole violation charges set forth in the August 15, 2008, Violation of Release Report correspond, generally, to the charges considered at the Massachusetts preliminary hearing with the exception that the New York charges did not include petitioner's alleged failure to pay his Massachusetts parole supervision fees.

thereafter the subject failed to make his scheduled office report as instructed by his Massachusetts Parole Officer.” New York Parole Violation Charge #7 alleged as follows: “Subject violated Rule #4 of the Conditions Governing his Release in that on or before 12/23/2008, he change his approved [Massachusetts] residence . . . without notifying his Massachusetts Parole Officer.”

On February 24, 2009, petitioner was arrested in Massachusetts on a New York parole warrant. On March 12, 2009, he was extradited from Massachusetts and brought to the Dutchess County Jail. On that date, while still held in Massachusetts, petitioner was served with a Notice of Violation. In signing the Notice of Violation document petitioner acknowledged as follows: “Violation of Release Report received.” Petitioner also checked the box on the Notice of Violation document indicating that he did not wish to have a preliminary hearing. Notwithstanding the foregoing, the record before the Court is not clear as to what documents were received by petitioner on March 12, 2009. It is not disputed that on that date petitioner did, in fact, receive the Notice of Violation and the original Violation of Release Report containing the first five parole violation charges. In paragraph 8 of their Return respondents allege, in effect, that on March 12, 2009, petitioner received not only the original Violation of Release Report, but also the Supplemental Violation of Release Report #1, containing Parole Violation Charges #6 and 7. In paragraph 15 of the petition, however, it is alleged that petitioner was not served with a copy of Supplemental Violation of Release Report #1 until April 2, 2009, at a final parole revocation hearing appearance. The record before the Court does not include a transcript of the April 2, 2009, appearance. It is also noted that at the outset of the contested final parole revocation hearing on May 14, 2009, counsel for the petitioner stated that his client did not receive Supplemental Violation of Release Report #1,

containing Parole Violation Charges #6 and 7, until the final parole revocation hearing appearance of April 2, 2009.

A contested final parole revocation hearing was conducted at the Dutchess County Jail on May 14, 2009. At the conclusion of the hearing the presiding Administrative Law Judge sustained Parole Violation Charges #6 and 7 and the remaining charges were withdrawn. Petitioner's parole was revoked with a modified delinquency date of December 2, 2008, and it was recommended that petitioner be held until the maximum expiration of his underlying sentence. The ALJ's recommendation was affirmed by a single parole commissioner on June 22, 2009.

On July 16, 2009, initial administrative appeal documents were received from petitioner's counsel by the Division of Parole Appeals Unit. Counsel advised the Appeals Unit in his cover letter accompanying the initial administrative appeal documents that the petitioner might submit an addendum. In addition, counsel advised the Appeals Unit, by letter dated July 21, 2009, that after he received a transcript of the final parole revocation hearing supplemental administrative appeal documents would be submitted. Both petitioner and counsel were advised that they had until November 13, 2009, to perfect the administrative appeal. In paragraph 11 of respondents' Return, dated October 30, 2009, it is indicated that additional administrative appeal materials were, in fact, submitted to the Appeals Unit on or about October 26, 2009, but that the attorney general's office had not yet received a copy of the latest submissions. In the meantime, this *pro se* proceeding was commenced on September 9, 2009, when petitioner's Petition for Writ of Habeas Corpus was filed in the Franklin County Clerk's office.

Petitioner asserts that his statutory rights under Executive Law §259-i(3)(c)(iii) were violated when he was detained in Massachusetts, pursuant to a New York parole violation warrant, from February 24, 2009, to March 12, 2009, "... without being served

with Notice of Violation or Preliminary Hearing . . .” A habeas corpus proceeding brought by a parole violator to challenge one or more aspects of the underlying revocation process, however, is subject to dismissal where the violator fails to first exhaust administrative remedies by taking an administrative appeal pursuant to 9 NYCRR Part 8006. *See People ex rel Ariola v. Sears*, 53 AD3d 1001, *lv den* 11 NY 3d 710, *People ex rel DeMarta v. Sears*, 31 AD3d 918, *lv den* 7 NY3d 715 and *People ex rel Bariteau v. Donelli*, 24 AD3d 1065. At the time petitioner commenced this proceeding on September 9, 2009, his administrative appeal was pending, apparently un-perfected, and thus the four-month window for the Appeals Unit to issue its findings and recommendation, as set forth in 9 NYCRR §8006.4(c), had not yet opened, much less closed. Accordingly, the Court finds that petitioner’s challenge is precluded by his failure to exhaust administrative remedies. *See People ex rel Howe v. Travis*, 18 AD3d 1052.

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: January 13, 2010, at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge