Matter of Almeyda v NYS Parole Bd.
2010 NY Slip Op 30181(U)
January 25, 2010
Supreme Court, New York County
Docket Number: 401937/09
Judge: O. Peter Sherwood
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SCANNED ON 1/27/2010

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD, *Justice* — PART 61

In the Matter of the Application of,
RAFAEL ALMEYDA,
Petitioner,

-against-

NEW YORK STATE PAROLE BOARD,
Respondent.

INDEX NO. 401937/09
MOTION DATE Dec. 21, 2009
MOTION SEQ. NO. 001
MOTION CAL. NO. 5

The following papers, numbered 1 to 2 were read on this petition pursuant to CPLR Article 78

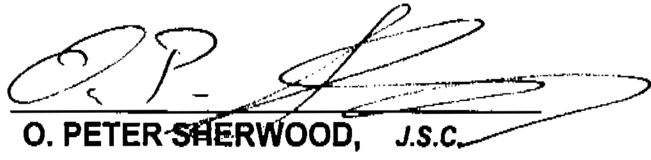
	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, the CPLR Article 78 petition for a judgment, *inter alia*, annulling respondent's determination to deny petitioner's application for parole release is decided in accordance with the accompanying decision and order.

FILED
JAN 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/25/10



O. PETER SHERWOOD, J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

---X

In the Matter of the Application of
RAFAEL ALMEYDA,

Petitioner,

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

NEW YORK STATE PAROLE BOARD,

Respondent.

---X

DECISION AND ORDER

Index No. 401937/2009

FILED
JAN 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

O. PETER SHERWOOD, J.:

This is a CPLR article 78 proceeding brought by petitioner Rafael Almeyda ("petitioner") seeking to annul as arbitrary and capricious the determination of respondent New York State Parole Board ("respondent") which denied his ninth application for parole release and to have the matter remanded to the trial court with directions to vacate his judgment of conviction and declare Executive Law § 259-i, which governs parole revocation procedures, unconstitutional (Motion Sequence No. 001). Respondent cross moves for an order changing venue and transferring the petition to Albany County pursuant to CPLR §§ 506 (b), 510 and 511 and for an extension of its time to file an answer (Motion Sequence No. 002). Motion Sequence Nos. 001 and 002 are consolidated for purposes of disposition.

Factual Background

Petitioner was convicted in 1979, following a jury trial, of murder in the second degree for the death of his infant son and sentenced to an indeterminate term of 15 years to life imprisonment (*People v Almeyda,* 90 AD2d 693 [1st Dept 1982], *lv denied* 58 NY2d 690 [1982]). Petitioner has served over 30 years of the sentence imposed. Petitioner appeared before the Board of Parole for the ninth time in April 2008 and was again denied parole release with a 24 month hold until April 2010. The decision of the Parole Board, dated April 17, 2008, reads as follows:

> After a careful review of the record and this interview, it is the determination of this panel that if released at this time there is a reasonable probability that you would not live and remain at liberty without violating the law and your release at this time is incompatible with the welfare and safety of the community. This decision is based on the following factors: The violent brutal nature of the instant offense involved your

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> striking, battering, burning and physically abusing the victim, your three (3) month old son, resulting in his demise. The senseless, heinous, cowardly act of your behavior caused the death of this innocent, vulnerable victim who was entrusted in your care and you violated that trust. This child was tortured and suffered a painful death. This is clearly an escalation of your criminality. You minimized your responsibility and show little insight or remorse. Note is made of your positive programming and disciplinary record. However, discretionary release at this time is not warranted.

Petitioner then brought this petition pursuant to CPLR Article 78.[1] Petitioner seeks to have this Court annul respondent's determination contending that he has been denied due process involving his liberty interest inasmuch as respondent has usurped the judgment of the sentencing court by repeatedly denying him parole release and, thereby, enhanced his sentence by "re-sentencing" him to serve a minimum sentence of 32 years. Petitioner also contends that the Parole Board has unlawfully used his lack of insight as a factor in denying him parole and failed to give sufficient recognition to his exceptional record demonstrating his rehabilitation. To the extent that Executive Law § 259-i permits the Parole Board to enhance the sentence imposed, petitioner contends that it is unconstitutional.

Respondent then served petitioner pursuant to CPLR § 511 (a) and (b) with a written demand for a change of venue to Albany County consistent with CPLR § 506 (b). Petitioner opposed the demand. He acknowledged that on an unsuccessful appeal to the Appellate Division, Third Department from the dismissal of his CPLR Article 78 petition challenging the denial of parole release for the seventh time he sought reversal of the Parole Board's determination on the ground, *inter alia,* that it violated his right to free speech by improperly considering his silence as a factor in denying parole (*Matter of Almeyda v Travis,* 21 AD3d 1200 [3d Dept 2005], *lv denied* 6 NY3d 703 [2005]). The Appellate Division found the foregoing argument to be lacking in merit.

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[1]Petitioner contends that the appeals unit of the Board of Parole has failed to answer or reply to his administrative appeal of the Board's denial of parole release. However, respondent contends that the challenged determination was denied on the administrative appeal (Resp's Aff. in Support of Cross Motion ¶ 12). Since respondent is not raising the issue of petitioner's failure to exhaust administrative remedies, the Court will assume even in the absence of any documentation in the record that such administrative appeal was filed and denied.

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Petitioner contended that a change of venue would force him to argue his constitutional claim before the same court. In this regard, petitioner also acknowledged his unsuccessful habeas corpus petitions raising this same argument in the United States District Court for the Southern District of New York (*Almeyda v Travis*, 2007 WL 1723719 [2007]), *affd* 326 Fed. Appx. 585 [C.A. 2 (N.Y.) 2009], *cert denied* 2010 WL 58779 [2010]).

The respondent then cross moved for a change of venue to Albany County on the ground that Albany is where the final determination which petitioner seeks to have reviewed was made and where respondent's principal office is located. Petitioner opposes the cross motion with essentially the same arguments as he raised in response to respondent's demand for a change of venue. Respondent replies that the relief petitioner seeks in terms of a declaration as to the unconstitutionality of Executive Law § 259-i is not available in an Article 78 proceeding. Therefore, petitioner's application is simply a challenge to respondent's decision denying parole which is properly venued in the County of Albany.

Discussion

Before reviewing the merits of petitioner's CPLR Article 78 petition, the issue of proper venue must be addressed. As the moving party, respondents bear the burden of demonstrating that petitioner's selection of venue is improper, warranting a change of venue to Albany County from New York County (*see*, *Castro v New York Hosp. Med. Ctr. of Queens*, 52 AD3d 251 [1st Dept 2008]; *Hernadez v Seminatore*, 48 AD3d 260 [1st Dept 2008]).

CPLR § 506 (b) is the statute governing venue in a proceeding against a body or officer and provides, in pertinent part, that: "A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated or where the material events otherwise took place, or where the principal office of the respondent is located." Although the statute contains four exceptions to its provisions, none of the exceptions is applicable to the case at bar.

The Appellate Division, First Department, has consistently held that under CPLR § 506 (b) venue is properly placed in the judicial district where the challenged parole determination was rendered and where the respondent's principal office is located (*see, e.g., Matter of Phillips v Dennison*, 41 AD3d 17, 23 [1st Dept 2007], *appeal dismissed* 9 NY3d 956 [2007]; *Matter of*

[* 5]

Grochulski v Dennison, 40 AD3d 413 [1st Dept 2007]; *Matter of Ramirez v Dennison,* 39 AD3d 310 [1st Dept 2007]). In this regard, such cases have interpreted the material events for venue purposes to be the decision-making process leading to the determination under review, rather than the location of the crime or the place where the sentence was imposed (*Phillips, supra; see also Matter of Vigilante v Dennison,* 36 AD3d 620 [2d Dept 2007]).

Here, it is undisputed that the Parole Board hearing and the determination to deny parole were made in Albany County which is where respondent has its principal office. Thus, the court finds that respondent has sustained its burden of showing that Albany is a proper venue for this proceeding. The fact that petitioner raises an issue as to the constitutionality of Executive Law § 256-i does not mandate a contrary result since reduced to their simplest terms the arguments raised are directed to respondent's determination denying petitioner's application for parole release. Moreover, the constitutional argument is not identical to that which was raised before the court on petitioner's prior petition challenging the denial of his seventh application for release on parole and, thus, there is nothing in the record to indicate that petitioner will not obtain a fair review of such arguments in Albany County, if, indeed, those arguments are properly raised in an Article 78 proceeding.

Accordingly, it is

ORDERED, that respondent's cross motion to change venue is granted; and it is further

ORDERED, that the venue of this action is changed from the Supreme Court, New York County, to the Supreme Court, Albany County and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Albany, upon service of a certified copy of this order and payment of the appropriate fee, if any; and it is further

ORDERED, that the Clerk of the Court, Albany County, upon service of a copy of this order with notice of entry, shall, without further fee, assign an Albany County index number to the file transferred pursuant to this order.

This constitutes the decision and order of the court.

DATED: 1/25/2010

FILED
JAN 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

ENTER,

O. PETER SHERWOOD
J.S.C.