

Matter of Rivers v Laclair

2010 NY Slip Op 30288(U)

February 1, 2010

Supreme Court, Franklin County

Docket Number: 2009-1190

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
WALTER RIVERS, #07-A-2771,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2009-0438.96
INDEX # 2009-1190
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 and Memorandum of Law of Walter Rivers, verified on August 21, 2009, and filed in the Franklin County Clerk's office on September 1, 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 11, 2009. As a part thereof petitioner was directed to serve a true copy of the Order to Show Cause, together with the petition and supporting documents, by ordinary first class mail to each of the respondents and to the Plattsburgh Regional Office of the New York State Attorney General on or before October 2, 2009. By letter to the Chief Clerk's office dated September 28, 2009, petitioner sought to obtain a copy of his Memorandum of Law and requested an extension of time to effect service by mail. On October 14, 2009, petitioner's Affidavit of Service was filed in the Franklin County Clerk's office. In that affidavit petitioner alleged that on October 6, 2009, certain unspecified "document(s) or

moving papers”were mailed to the respondents and to the Plattsburgh Regional Office of the New York State Attorney General. An Amended Order to Show Cause was issued on October 22, 2009, extending to November 6, 2009, the time for petitioner to effect service by mail on the respondents and the Plattsburgh Regional office of the New York State Attorney General.

There is nothing in the record before the Court to indicate that petitioner attempted to effect service by mail on the respondents and/or the Plattsburgh Regional Office of the New York State Attorney General after the Amended Order to Show Cause was issued. The Court, however, has received and reviewed respondents’ Return, dated October 23, 2009, as well as petitioner’s Reply thereto, filed in the Franklin County Clerk’s office on November 6, 2009. Finally, by letter dated December 6, 2009, filed in the Franklin County Clerk’s office on December 9, 2009, petitioner purported to move to preclude respondents from filing answer papers “. . . in that Respondent has failed to abide by the Court’s instructions per the [Amended] Order [to Show Cause] of the Court dated October 22, 2009 . . . directing Respondent to serve their Return on the Petitioner on or before November 27, 2009.”

On May 9, 2007, petitioner was sentenced in Rensselaer County Court, as a second felony offender, to a determinate term of 3 years, with 2 years post-release supervision, upon his conviction of the crime of Criminal Sale of a Controlled Substance 5°. County Court directed that its sentence be executed as a sentence of parole supervision pursuant to Criminal Procedure Law §410.91 and Penal Law §70.70(3)(d). Petitioner apparently completed the Willard Drug Treatment program and was released to community-based parole supervision on September 11, 2007. On June 18, 2008, however, petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in five separate respects. Parole Violation Charge #1 alleged

as follows: “Walter Rivers violated Rule #11 of the conditions of his release, in that on 6/16/08, the subject was found in possession of a clear plastic bag with a white powder substance that field-tested positive for cocaine.” Parole Violation Charge #3 alleged as follows: “Walter Rivers violated Rule #12 of the conditions of his release, in that on 6/16/08, the subject was discharged from the 820 River Street Program for non-compliance.” Parole Violation Charge #5 alleged as follows: “Walter Rivers violated Rule #8 of the conditions of his release, in that on 6/16/08, the subject . . . punched Samantha Riley in the face.” A preliminary hearing was waived and petitioner’s final parole revocation hearing was conducted at the Rensselaer County Jail on August 20, 2008, and August 27, 2009. At the conclusion of the contested final hearing the presiding Administrative Law Judge (ALJ) sustained Parole Violation Charges #1, 3 and 5 but found that the remaining two charges had not been proven by a preponderance of legally sufficient evidence. Petitioner’s parole was revoked with a sustained delinquency date of June 16, 2008, and the ALJ imposed a 24-month delinquent time assessment.

The document perfecting petitioner’s administrative appeal from the parole revocation determination was received by the Division fo Parole Appeals Unit on June 29, 2009. A little more than two months later, on September 1, 2009, this proceeding was commenced by the filing of the petition in the Franklin County Clerk’s office.

It is clear to the Court that the petitioner failed to meet the relaxed service requirements set forth in the Order to Show Cause of September 11, 2009, when he belatedly mailed the requisite documents to the respondents and the Plattsburgh Regional Office of the New York State Attorney General on October 6, 2009. Petitioner, moreover, failed to correct his deficient service by re-mailing the documents in accordance with the provisions of the Amended Order to Show Cause of October 22, 2009. Under similar circumstances, and particularly in view of the issuance of the

Amended Order to Show Cause, this Court might well be inclined to deny respondents' request to dismiss the petition for lack of personnel jurisdiction and issue a Second Amended Order to Show Cause allowing petitioner an additional opportunity to obtain personnel jurisdiction over the respondents. Under the facts and circumstances of this case, however, the Court finds that no useful purpose would be served by such a course of action because even if petitioner were to obtain personnel jurisdiction over the respondents this habeas corpus proceeding, commenced on September 1, 2009, must be dismissed as a result of petitioner's failure to exhaust administrative remedies.

A habeas corpus proceeding brought by a parole violator to challenge one or more aspects of the underlying revocation process is subject to dismissal where the violator fails to first exhaust administrative remedies by completing 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 NY 3d 715 and *People ex rel Bariteau v. Donelli*, 24 AD3d 1065. At the time petitioner commenced this proceeding his administrative appeal was pending, and the Division of Parole Appeals Unit had until October 29, 2009, to issue its findings and recommendation in accordance with the provisions of 9 NYCRR §8006.4(c). Accordingly, the Court finds that petitioner's challenge to the parole revocation determination is precluded by his failure to exhaust administrative remedies. *See People ex rel Howe v. Travis*, 18 AD3d 1052. Although the four-month time frame for the Appeals Unit to issue its findings and recommendations expired after this proceeding was commenced, apparently without the issuance of any findings and recommendation, such circumstances do not serve to validate the prematurely filed petition. *See West v. McGinnis*, 4 AD3d 654 and *Abdullah v. Girdich*, 297 AD2d 844.

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

ORDERED, that petitioner's application to preclude is denied; and it is further **ADJUDGED**, that the petition is dismissed.

DATED: February 1, 2010, at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge