

Matter of Santiago v Alexander

2010 NY Slip Op 30375(U)

February 24, 2010

Supreme Court, Franklin County

Docket Number: 2008/1957

Judge: S. Peter Feldstein

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN
X

In the Matter of the Application of
JOHN SANTIAGO, #07-A-1732,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2008-0735.218
INDEX # 2008-1957
ORI #NY016015J

-against-

GEORGE B. ALEXANDER, Chairman,
NYS Division of Parole,

Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of John Santiago, verified on December 23, 2008, and filed in the Franklin County Clerk's office on December 29, 2008. Petitioner, who is now an inmate at the Auburn Correctional Facility, is challenging the October 31/November 1, 2007 determination denying him parole, but only to the extent it was directed that he be held for an additional 24 months with a scheduled re-appearance in November of 2009. In this regard petitioner seeks a Court order directing respondent to conduct "... a final revocation hearing at the conclusion of petitioner's intervening [2007] sentence, in accordance with [Executive Law §259-i(3)(d)(iii)] ..."

The Court issued an Order to Show Cause on January 20, 2009, and received and reviewed respondent's Notice of Motion to dismiss, supported by the Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General, dated March 6, 2009. The Court also received and reviewed petitioner's opposing papers, filed in the Franklin County Clerk's office on March 24, 2009. By Decision and Order dated June 23, 2009, respondent's motion was denied and he was directed to serve answering papers. The Court next received and reviewed respondent's Answer, including Confidential Exhibits B and D,

verified on July 14, 2009, as well as petitioner's Reply thereto, dated July 28, 2009, and filed in the Franklin County Clerk's office on August 3, 2009.

By Letter Order dated November 4, 2009, the Court directed respondent to supplement his answering papers by specifically addressing the equal protection argument advanced by petitioner. The Court has since received and reviewed the Supplemental Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General, dated November 25, 2009, and the accompanying Affirmation of Elliott A. McIntosh, Esq., Assistant Counsel, New York State Division of Parole, also dated November 25, 2009. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on December 22, 2009.

On March 18, 1992, petitioner was sentenced in Supreme Court, Bronx County, to a controlling indeterminate sentence of 8 to 24 years upon his convictions of the crimes of Manslaughter 1^o, Criminal Possession of a Weapon 2^o and Assault 2^o. He was released from DOCS custody to parole supervision on September 6, 2000, but arrested on July 8, 2006, in connection with new criminal charges. On March 22, 2007, petitioner was sentenced in Rockland County Court, as a second felony offender, to an indeterminate sentence of 1 1/2 to 3 years upon his conviction of the crime of Attempted Criminal Possession of a Forged Instrument 2^o. There is nothing in the record to suggest that petitioner's parole was revoked following a final parole revocation hearing. Rather, it appears that petitioner's parole was revoked by operation of law as a result of his March 22, 2007, conviction and sentencing for a felony committed while at liberty under parole supervision. *See* Executive Law §259-i(3)(d)(iii).

Petitioner was received back into DOCS custody on March 29, 2007, certified as entitled to 264 days of jail time credit. At that time DOCS officials determined petitioner still owed 8 years, 2 months and 20 days against the undischarged maximum term of the

1992 indeterminate sentence. That undischarged term was aggregated with the maximum term of petitioner's 2007 indeterminate sentence pursuant to Penal Law §70.30(1)(b). *See People ex rel Gill v. Greene*, 12 NY3d 1. Accordingly, the maximum expiration, conditional release and parole eligibility dates with respect to petitioner's multiple sentences were calculated as September 24, 2017, December 27, 2015, and January 4, 2008, respectively.

On October 31, 2007, petitioner appeared before a three-member Parole Board in anticipation of his January 4, 2008 parole eligibility date. At the conclusion of the October 31, 2007 hearing parole was denied and it was directed that petitioner be held for an additional 24 months with his next Parole Board appearance scheduled for November 2009. The parole denial determination reads as follows:

“PAROLE IS DENIED. YOU CURRENTLY SERVE A 1 ½ TO 3 YEAR TERM FOR THE ATTEMPTED CPFI 2ND. YOU USED A FRAUDULENT GIFT CARD TO PURCHASE ITEMS AT VARIOUS RETAIL STORES. AT THE TIME OF THE OFFENSE YOU WERE ON PAROLE FROM A PRIOR CONVICTION FOR MANSLAUGHTER IN THE 1ST DEGREE. YOU HAVE DEMONSTRATED A NEGATIVE RESPONSE TO PAST CORRECTIONAL INFLUENCES AS THE PANEL NOTES THAT YOUR CRIMINAL HISTORY BEGAN WHEN YOU WERE A JUVENILE.

THEREFORE, WHILE THE PANEL NOTES THAT YOU HAVE RECEIVED AN EARNED ELIGIBILITY CERTIFICATE THE PANEL CONCLUDES THAT IF YOU ARE RELEASED AT THIS TIME THERE EXISTS A REASONABLE PROBABILITY THAT YOU WILL NOT LIVE AND REMAIN AT LIBERTY WITHOUT FURTHER VIOLATIONS OF THE LAW. ALL FACTORS CONSIDERED INCLUDING YOUR VIOLATION OF PAROLE YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF THE COMMUNITY.”

Petitioner's administrative appeal was received by the Division of Parole Appeals Unit on March 31, 2008. The Appeals Unit, however, failed to issue its findings and recommendation within the time frame specified in 9 NYCRR §8006.4(c). This proceeding ensued.

In his administrative appeal petitioner did not call into question the denial of parole. Rather, petitioner cited his alleged satisfactory adjustment to parole supervision from September 6, 2000 when he was released, until his July 8, 2006 arrest, as well as the alleged “mitigating” circumstances surrounding such arrest, and sought modification of the 24-month hold.

Petitioner’s application for a discretionary reduction in the 24-month hold, as advanced on administrative appeal, is not repeated in this proceeding. Instead, petitioner’s application for relief herein ultimately appears to be premised upon the assertion that his aggregate maximum term of imprisonment can be broken down into discrete segments corresponding to the maximum term of each underlying, consecutive indeterminate sentence. In this regard petitioner asserts that he would not commence serving the 8 years, 2 months and 20 days still owing against the 24-year maximum term of his 1992 indeterminate sentence until he first completed serving the 3-year maximum term of his consecutive, 2007 indeterminate sentence . Assuming the viability of this foundation argument, petitioner goes on to assert, in effect, that although his October 31, 2007 Parole Board appearance was properly scheduled to coincide with the expiration of the 1½-year minimum period of incarceration associated with his 2007 indeterminate sentence, his next scheduled appearance following the 24-month hold would not occur until November of 2009, approximately “. . . 6 months over the legal requirements of the new [2007] sentence and 6 months into the un-discharged term [of the 1992 sentence].” According to the petitioner, the respondent would not have statutory authority to consider him for discretionary parole release in November of 2009 “. . . because the fact of the matter is that the petitioner herein would have completed the legal requirements of the new [2007] sentence in accordance with [Executive Law §] 259-[i](3)(d)(iii) and would be detained on the sole premises of a parole violation.”(Emphasis in original).

Petitioner goes on to argue that when he completes service of the 2007 indeterminate sentence- presumably, according to his reasoning, on July 4, 2009 - his then continuing detention in DOCS custody would be based solely on the underlying parole violation with his custodial status subject to review at that time under the provisions of Executive Law §259-i(3)(f)(x).

Petitioner's request for relief in this proceeding is premised not only upon the statutory arguments, outlined above, but also upon an equal protection claim that parolees convicted/sentenced in other jurisdictions are entitled to final revocation hearings/custodial dispositions upon the expiration of their intervening, out-of-state sentences pursuant to Executive Law §259-i(3)(f)(x) whereas parole violators, like himself, convicted/sentenced in New York State only receive ongoing discretionary parole release consideration pursuant to the provisions of Executive Law §§259-i(3)(d)(iii) and 259-i(2).

In the Supplemental Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General, dated November 25, 2009, it was reported that on September 15, 2009, petitioner reappeared before a Parole Board for discretionary release consideration but that the Board again denied petitioner parole and directed that he be held for an additional 24 months with the next appearance date in September of 2011. Citing, *inter alia*, *LaSalle v. New York State Division of Parole*, 52 AD3d 1071, respondent asserts that the reappearance and new parole denial determination has rendered this proceeding moot. The Court disagrees.

The appropriate relief available to an inmate who successfully challenges a discretionary parole denial determination is a court order directing a *de novo* hearing. *See Lichtel v. Travis*, 287 AD2d 837. Therefore, in the absence of an exception to the mootness doctrine, when an inmate with a pending challenge to a discretionary parole

denial determination receives a new parole hearing and is again denied discretionary release the pending challenge is rendered moot since inmate has, in effect, already received the appropriate relief in the form of the new hearing. In the case at bar, however, the petitioner does not challenge the October/November 2007 discretionary parole denial determination. Rather, he asserts that upon completion of the maximum term of the 2007 indeterminate sentence (presumably on or about July 4, 2009) his then continuing detention in DOCS custody could no longer be based upon the 24-month hold imposed in connection with the October/November 2007 discretionary parole denial determination but, instead, must be based upon the revocation of his parole and imposition of a delinquent time assessment following a final parole revocation hearing. This proceeding, therefore, can in no sense be considered moot based upon petitioner's September, 2009 Parole Board reappearance and the ensuing denial of discretionary release with an additional 24-month hold.

Turning to the merits, or lack thereof, of the arguments advanced by petitioner in this proceeding, the Court finds that his statutory/regulatory claim of entitlement to formal parole revocation proceedings upon the expiration of the maximum term of his 2007 indeterminate sentence is based upon a fundamentally flawed premise and is therefore rejected. Where, as here, an individual is subject to multiple indeterminate sentences of imprisonment, running consecutively, the respective minimum periods and maximum terms are added pursuant to Penal Law §70.30(1)(b) to yield a single, aggregate indeterminate sentence. An inmate serving such a single, aggregate indeterminate sentence, moreover, remains subject to all of the component sentences for the duration of the aggregate maximum term of imprisonment. *See People v. Buss*, 11 NY3d 553 and *People v. Delk*, 59 AD3d 733. This Court therefore rejects petitioner's assertion that in July of 2009 he completed serving the 3-year maximum term of his

2007 indeterminate sentence and commenced serving the 8 years, 2 months and 20 days remaining against the undischarged maximum term of his 1992 indeterminate sentence.

Upon imposition of petitioner's 2007 indeterminate sentence his parole was revoked by operation of law without the necessity of a parole revocation hearing. *See* Executive Law §259-i(3)(d)(iii), *Meade v. Boucaud*, 67 AD3d 1263 and *Tineo v. New York State Division of Parole*, 14 AD3d 949. Petitioner's next appearance before a Parole Board for discretionary release consideration was governed by the legal requirements of the newly imposed 2007 indeterminate sentence. *See* Executive Law §259-i(3)(d)(iii). Thus petitioner's parole eligibility date was properly calculated as January 4, 2008 and, as acknowledged by petitioner, he properly appeared before a Parole Board in the anticipation of that parole eligibility date in October of 2007. After denying petitioner discretionary release the 2007 Parole Board acted within the limits of its statutory authority in specifying that petitioner would not be reconsidered for parole release for a period of 24 months. *See* Executive Law §259-i(2)(a)(i). Petitioner was not entitled to discretionary parole release consideration prior to the expiration of that 24-month period and, as noted previously, he was not entitled to a parole revocation hearing.

Having determined that petitioner is not entitled to the relief he seeks under the applicable statutory/regulatory scheme, it remains to be determined whether or not the application of that scheme to petitioner's situation constituted an equal protection violation. In this regard the Court initially observes that petitioner's challenge must be examined under the rational basis test since no suspect classification or fundamental right is implicated. "As traditionally formulated, this test requires that a governmental classification be based on some conceivable and valid State interest . . . Thus, the United States Supreme Court has indicated, '[a] statutory discrimination will not be set aside

if any state of facts reasonably may be conceived to justify it' (*McGowan v. Maryland*, 366 US 420, 426)." *People v. Drayton*, 39 NY2d 580, 585 (other citations omitted).

Executive Law §259-i(3)(d)(iii) provides, in relevant part, that "when a . . . parolee . . . has been convicted of a new felony committed while under such [parole] supervision and a new indeterminate . . . sentence has been imposed, the board's rules shall provide for a final declaration of delinquency. The inmate shall then be notified in writing that his release has been revoked and the basis of the new conviction . . . The inmate's next appearance before the [parole] board shall be governed by the legal requirements of said new indeterminate . . . sentence . . ." The New York Court of Appeals, however, has determined that the above-quoted parole revocation hearing exception does not apply to a New York parolee convicted of a felony and sentenced in another state. *People ex rel Harris v. Sullivan*, 74 NY2d 305. The Court of Appeals in *Harris* noted that where a parolee is convicted of a new felony and sentenced in New York " . . . a final parole revocation hearing would be a vain gesture because no fact finding by the Board of Parole would be necessary to ascertain that the parolee has in fact violated the conditions of his parole. The court of conviction and sentence would have already undisputably established that reality. Additionally, when a parolee is convicted of a new New York felony in a new indeterminate sentence is imposed, a final parole revocation hearing is not needed to fix the parolee's reappearance before the Board because the violator's reappearance date is automatically fixed by law at the time of sentencing for the new felony." *Id* at 310 (citations omitted). The *Harris* court, however, contrasted that scenario with the scenario where a New York parolee, convicted of a new felony and sentenced in another state, serves his out-of-state sentence and is returned to New York to continue serving his/her underlying New York sentence. The Court of Appeals noted that in such a situation the date for the parole violator's reappearance before the Parole

Board is not fixed by law and lies entirely in the discretion of the Board. “Thus,” according to the *Harris* court, “while a final revocation hearing is redundant under New York’s distinctive sentencing scheme for purposes of setting a reappearance date after a new New York ‘indeterminate’ sentence is imposed, there is no procedural surplusage where . . . [the parole violator] was sentenced to an out-of-State term which has no such consequence.” *Id* at 310. Accordingly, this Court finds no equal protection violation in the statutory scheme whereby a New York parolee convicted of a new felony and sentenced in this state has his/her parole revoked by operation of law without a final parole revocation hearing whereas a New York parolee convicted of a new felony and sentenced in the sister state is afforded such a hearing.

To the extent anything in petitioner’s papers may be construed as challenging the distinctions associated with the re-release to parole supervision procedures applicable after the revocation of parole by operation of law, as opposed to such procedures applicable after the revocation of parole following a final hearing, this Court ultimately concludes that such distinctions are not significant in that neither set of procedures affords any clear advantage over the other.

When parole is revoked by operation of law and the violator’s next appearance before the Board is governed by the legal requirements of his/her new New York sentence, a parole release interview must be conducted by a panel of at least two Parole Board members in anticipation of the parole eligibility date. *See* Executive Law §259-i(2)(a)(i) and 9 NYCRR §8002.2. At that interview/hearing the Board may, of course, direct the violator’s re-release to parole supervision. If, however, discretionary parole release is not granted the Board must specify a date for reconsideration within 24 months and the process repeats itself. *See* Executive Law §259-i(2)(a)(i) and 9 NYCRR §8002.3(d). The discretionary parole denial determination is deemed a judicial function

and is not reviewable if done in accordance with law (Executive Law §259-i(5)) unless it is demonstrated that the determination was affected by irrationality bordering on impropriety. *See Silmon v. Travis*, 95 NY2d 470.

When a parolee is convicted and sentenced in connection with a new, out-of-state felony and the parole revocation hearing exception of Executive Law §259-i(3)(d)(iii) is therefore not applicable, the revocation of parole must await a final hearing conducted after the accused violator completes the incarceration phase of his/her out-of-state sentence. *See People ex rel Harris v. Sullivan*, 74 NY2d 305 and *Barksdale v. Dennison*, 40 AD3d 1233. Presuming the parole violation charges are sustained, the administrative law judge presiding at the final hearing has the option of directing/recommending that the violator be restored to parole supervision (9 NYCRR §8005.20(c)(4)), that the violator be restored to the Willard Drug Treatment Campus Program (if the consent of the violator and the Division is obtained) (9 NYCRR §8005.20(c)(1)), that the violator be placed in an alternative to re-incarceration program (9 NYCRR §8005.20(g)), or that the violator be returned to DOCS custody for a specified period of time up to the maximum expiration of his/her underlying New York sentence (9 NYCRR §8005.20(c)). If the parole violator is returned to DOCS custody for a period of time less than the maximum expiration of his/her sentence, re-release consideration upon the expiration of the time assessment is controlled by the provisions of 9 NYCRR §8002.6. Upon completion of the delinquent time assessment “[a]ll parole violators . . . will be re-released to parole supervision,” without Board action, unless specific circumstances set forth in 9 NYCRR §8002.6(c)(1) are identified. If such circumstances are identified, one or more Board members, acting without a personal interview of the violator, may require that such an interview be conducted before a panel of two or more Board members. “When, after such interview, the Board again considers parole violator for a re-release,

there shall be no presumption, express or implied, favoring the violator's re-release." 9 NYCRR §8002.6(d)(2)(ii)(b).

Whether a parole violator appears before the Board after completing the legal requirements of his/her new New York sentence (Executive Law §259-i(3)(d)(iii)) or his/her New York parole is revoked following a final hearing conducted after serving the incarceration phase of an out-of-state sentence, re-release to parole supervision at that time, subject to conditions, is a potential outcome. Continuing incarceration or re-incarceration in DOCS custody is, of course, an alternative potential outcome. To the extent petitioner suggests that re-incarceration in DOCS custody following a final parole revocation hearing is implemented by way of a fixed delinquent time assessment with re-release to parole supervision automatic upon the expiration of such time assessment, whereas continuing incarceration following the denial of discretionary parole release is implemented by way of an ongoing hold order which carries with it only the promise of further reconsideration upon the expiration of such hold order, the Court first notes that re-release to parole supervision upon the expiration of a delinquent time assessment is not automatic. Such expiration merely determines the date upon which the parole violator will be eligible for re-release. *See* 9 NYCRR §8002.6(a) and *Poladian v. New York State Division of Parole*, 5 AD3d 824.

Even if the parole violator re-release provisions set forth in 9 NYCRR §8002.6, particularly the provision set forth in 9 NYCRR §8002.6(c)(1) that "[a]ll parole violators . . . will be re-released to parole supervision," without Board action, unless specific circumstances set forth in the regulation are identified, might be construed as offering an easier path to re-release, one must bear in mind that a delinquent time assessment imposed upon the revocation of parole at a final parole revocation hearing can be for a period of time up to the maximum expiration of the parole violator's underlying

sentence. Thus, an individual whose parole is revoked following a final parole revocation hearing is subject to reincarceration in DOCS custody for the remainder of his/her underlying sentence without any provision for reconsideration. Where an individual is denied discretionary parole release, on the other hand, reconsideration is statutorily mandated at least every 24 months.

It is interesting to note that the petitioner in *Barksdale v. Dennison*, 40 AD3d 1233, whose New York parole was revoked with a delinquent time assessment directing that he be held to his maximum expiration date following a final parole revocation hearing conducted after completion of an out-of-state sentence for a crime committed while under New York parole supervision, unsuccessfully argued that he was subject to the parole revocation hearing exception set forth in Executive Law §259-i(3)(d)(iii). Thus the *Barksdale* petitioner, unlike the petitioner in this proceeding, found it more advantageous to have his parole revoked by operation of law, thereby requiring his periodic appearance before the Board for re-release consideration, rather than to have his parole revoked following a final hearing with a delinquent time assessment directing that he be held to the maximum expiration of his underlying sentence with no opportunity for discretionary parole re-release consideration.

An equal protection challenge, to be successful, must at a minimum reflect disparate treatment between categories of individuals such that one group is receiving some advantage or benefit denied to the other; petitioner here can point to no such advantage or benefit inuring to the other class of individuals (those with out-of-state convictions). Advantages, and detriments (or risks) flow in both directions, as *Barksdale* makes clear, and under these circumstances, the underlying premise of an equal protection challenge simply does not exist.

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: February 24, 2010, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice