

Matter of Thezard v Shannon

2010 NY Slip Op 31781(U)

July 12, 2010

Supreme Court, St. Lawrence County

Docket Number: 133313

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE

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In the Matter of the Application of
DRAHCIR B. THEZARD, #09-R-1305,
Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2010-0202.14
INDEX #133313
ORI # NY044015J

-against-

MR. SHANNON, Medical Adm., Cape Vincent
Correctional Facility, **LESTER N. WRIGHT**,
Chief Medical Officer, DOCS, Albany, and
HEAD NURSE, Gouverneur Correctional
Facility - SHU 200,

Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Drahcir B. Thezard, verified on March 23, 2010 and filed in St. Lawrence County Clerk’s office on March 26, 2010. Petitioner’s additional Exhibit’s F, G and H were filed in the St. Lawrence County Clerk’s office on April 1, 2010. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging the adequacy of the medical care he has received in DOCS custody. The Court issued an Order to Show Cause on April 5, 2010 and an Amended Order to Show Cause on April 20, 2010. By Letter Order dated April 22, 2010 petitioner’s request for a preliminary injunction was denied. The Court has since received and reviewed respondents’ Answer/Return, verified on May 6, 2010, supported by the affidavit of respondent Lester N. Wright, MD, sworn to on May 6, 2010 (the “Wright Affidavit”) (Exhibit D, annexed to respondents’ Answer/Return). The Court has also received and reviewed petitioner’s Reply thereto

(denominated “Motion of Objection to the Respondents Answering Papers”), filed in the St. Lawrence County Clerk’s office on May 24, 2010.

This litigation centers around the application of DOCS Division of Health Services Policy Number 1.18 (hereinafter, “Policy 1.18”) (Exhibit C, annexed to respondents’ Answer/Return), relating to the containment and treatment of Tuberculosis (hereinafter TB) in the New York State prison system, to the petitioner. TB is caused by the *mycobacterium tuberculosis* bacteria, which can be present in any organ of the body. In its latent stage (before the TB bacteria has spread to the respiratory tract) the disease “. . . is not contagious to others simply because the bacteria has not damaged the lungs to the extent from which the bacteria can become airborne.” (Wright Affidavit, paragraph 14). In the absence of preventative prophylactic therapy, however, “. . . approximately five percent of the persons infected with latent TB develop the active disease within the first year after infection.” (Wright Affidavit, paragraph 15). “Active TB disease of the lung . . . is highly contagious. It is most commonly spread through the air through airborne particles called droplet nuclei, which are generated when a person with active contagious TB sneezes, coughs or speaks.” (Wright Affidavit, paragraph 14).

The DOCS Division of Health Services utilizes the Purified Protein Derivative (PPD) skin test (the medically accepted method) to screen inmates for the presence of the TB bacteria.

“A positive PPD test indicates only that the person is infected with the TB bacteria and nothing more; it does not indicate whether the person has active contagious TB. To determine whether the infected individual has active contagious tuberculosis disease, the medically indicated procedures are a chest x-ray, sputum analysis and a physical examination for specific symptoms of active TB disease. A chest x-ray or sputum analysis does not and cannot test for latent TB simply because the TB bacteria can be present

anywhere in the body other than the respiratory tract. Bacteria itself does not show up on an x-ray; only the damage it does to the lungs after it has converted into active contagious TB can be ascertained by an x-ray of the lung. Only the PPD test can establish whether the individual has been infected with the TB bacteria, i.e., that he/she has latent TB.” (Wright Affidavit, paragraph 25).

Generally speaking, an inmate who refuses the mandatory PPD screening test is placed on “Tuberculin Hold” status for a period of up to one year. Such status is defined in Policy 1.18(I)(H) as “[a] public health protective status where the inmate remains in their cell at all times except for one hour of recreation per day and three showers per week. Only legal visits are allowed.” Again speaking generally, inmates, like petitioner, with positive PPD screening test results but negative chest x-rays are offered the opportunity to receive preventative therapy through the administration of Isoniazid (INH) twice weekly for nine months (Policy 1.18 (VI)(B)(1)(a) and (VI)(B)(4)(a)). If such therapy is accepted, the inmate remains in general population. Otherwise, he or she is placed on Tuberculin Hold status.

In paragraphs three and four of the petition the following is alleged: “This petition challenges the medical negligence: the unnecessary issuance [sic] of INH [Isoniazid] drugs, and abuse of authority, placing the health and life of this plaintiff in jeopardy. . . . The within proceeding is brought pursuant to C.P.L.R. Article 78 to challenge the final determination of Commissioner’s response, dated 1-19-10 . . .” The petitioner alleges that between 2006 and 2009 he was subjected to multiple, unwarranted, PPD skin tests at various local and state DOCS facilities. Petitioner also alleges that numerous “negative” x-rays prove that he is not afflicted with active TB. Petitioner goes on to allege that he was nevertheless “forced” at the Cape Vincent Correctional Facility “to take INH from 7-13-09 to 1-8-10,” and, as a result, suffers from “. . . severe headaches, diarrhea, irregular heartbeats, fatigue, stomach pain, numbness of hands, feet, difficulty breathing, nausea

and constant spitting.” Petitioner seeks judgment pursuant to Article 78 of the CPLR “**DIRECTING** Respondent(s) to (1) Pay me\$350.00 per each individual day Quarantined on TB hold. (2) Pay Retribution of \$200 Million for the wrongs and violations of my private rights. (3) Cease and de cease [sic] this unnecessary and illegal testing process immediately.”

The petitioner apparently instituted an inmate grievance proceeding (CV-8781-09) by filing a complaint at the Cape Vincent Correctional Facility on November 16, 2009. Although a copy of the inmate grievance complaint has not been included as part of the record in this proceeding, the Court notes that petitioner’s grievance was given the title “Cease TB Medication.” By decision dated December 14, 2009 the facility superintendent effectively denied petitioner’s grievance as follows:

“The information obtained from the Nurse Administrator reveals that you were PPD tested at Ulster [Correctional Facility] on 4/15/09 and showed a positive result . . . On 6/30/09 you saw the Infection Control Nurse due to the positive PPD test and the fact that there is no record of you completing the [INH] drug treatment plan. The medical record states that the issues surrounding this matter were discussed with you and you verbalized understanding. You agreed to the [INH] treatment plan and were seen by Doctor on 7/1/09 and the [INH] treatment was ordered for a period of 7/13/09 to 4/3/10.

The Nurse Administer acknowledges that your record indicates you were vaccinated in the Caribbean with a TB shot as a child. The vaccine causes an antibody response in children which is the positive skin test. This response shows life long, but the protection against TB only lasts to the teen years. Therefore, even though you tested positive, the medical department cannot be certain if it is the vaccine response or TB exposure. The recommended treatment by the CDC [presumably, Center for Disease Control] is to take INH . . . for a period of 9 months.

In reference to the IGRC [Inmate Grievance Resolution Committee] recommendation, you did have a chest x-ray on 4/14/09 which was negative and a sputum is only recommended if an individual is symptomatic and you are not symptomatic.

You were afforded the recommended treatment in accordance with medical protocol. Any questions or concerns that you may have concerning this should be addressed to the medical department.”

7NYCRR §701.5(d)(1) provides for the administrative appeal of a superintendent’s decision in an inmate grievance proceeding to the Inmate Grievance Program Central Office Review Committee (CORC). According to the regulation in question, an inmate wishing to take an appeal to the CORC “. . . must complete and sign form #2133 and submit it to the grievance clerk within seven calendar days after receipt of the superintendent’s written response to the grievance . . . The grievance clerk shall transmit the signed appeal and any accompanying grievance papers to the IGP [Inmate Grievance Program] supervisor within one working day after receipt of the signed appeal statement. The supervisor must forward appeals within seven calendar days to the CORC.” 7NYCRR §701.5(d)(1)(i) and (ii). Although there is nothing in the record to suggest that the petitioner took an administrative appeal in the manner described above, it appears that he did write a letter dated December 17, 2009 to the DOCS Commissioner under the heading “Re; Grievance ‘Medical neglect.’” Petitioner’s letter read, in relevant part, as follows:

“Protocol was not followed according to policy 1.18, I was injected twice with T.B. virus before coming to the cape [presumably, Cape Vincent Correctional Facility], once at Rikers Is. March 8, 09 and at Ulster [Correctional Facility] April 15, 09. I pled with cape vincent administering nurse not to inject me with the virus because of my positive history, but she did not yield. X-rays from both Rikers and Ulster were negative.

Ulster and cape vincent [sic] both ignored medical documentation on my positive reaction from PPD testing sent from Rikers. Cape Vincent has been forcing me to take INH medication for the past six months, which I do not need nor was ever counseled on its side effects. Side effects are hepatitis with other associated symptoms particularly in those over the age of thirty-five.”

By letter dated January 19, 2010 respondent Lester N. Wright, M.D., DOCS Deputy Commissioner/Chief Medical Officer, responded to petitioner's letter as follows:

“The Division of Health Services has investigated your concerns with the Health Services staff at Gouverneur Correctional Facility. Per the facility's nursing staff, there is no documentation of TB test done at Rikers Island. Therefore, you received another TB test at Ulster . . . which is positive. It is in our Health Services Policy Manual . . . 1.18 that all persons with a positive skin test will be offered the opportunity to receive Latent Tuberculosis Infection [INH] . . . therapy unless written documentation is received to show that such therapy has been previously completed. Though you have the right to refuse care, a lack of treatment would necessitate you being placed on TB Hold for a pre-determined length of time.”

Although it is not clear that Dr. Wright's January 19, 2010 letter was in any way intended to constitute a final determination with respect to petitioner's inmate grievance proceeding CV-8781-09, the Court notes that the respondents in this proceeding have not interposed an exhaustion defense.

At least in the context of a CPLR Article 78 proceeding, a successful challenge by an inmate to the adequacy of medical received while in DOCS custody must be based upon a demonstration that DOCS officials acted in a manner “ ‘ sufficiently harmful to evidence deliberate indifference to serious medical needs.’ ” *Bryant v. Brunelle*, 284 AD2d 936, quoting *Estelle v. Gamble*, 429 US 97, 106, *reh den* 429 US 1066. See *Shomo v. Zon*, 35 AD3d 1227. “[D]eliberate indifference to serious medical needs of prisoners” constitutes a violation of the Eighth Amendment proscription against the infliction of cruel and unusual punishment. *Estelle v. Gamble*, 429 US 97 at 104. See *Shomo v. Zon*, 35 AD3d 1227. “. . . [T]he deliberate indifference standard embodies both an objective and a subjective prong. Objectively, the alleged deprivation must be ‘sufficiently serious,’ in the sense that ‘a condition of urgency, one that may produce death, degeneration, or extreme pain’ exists. Subjectively, the charged official must act with a sufficiently culpable state of mind . . . [T]he subjective element of deliberate indifference ‘entails something more

than mere negligence . . . [but] something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.’ The subjective element requires a state of mind that is the equivalent of criminal recklessness; namely, that the prison official ‘knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.’” *Hathaway v. Coughlin*, 99 F3d 550 at 553, *cert den sub nom, Foote v. Hathaway*, 513 US 1154 (citations omitted). The inadvertent failure to provide proper medical care or negligence in the diagnosis and/or treatment by a prison physician or other medical personnel are insufficient to support an eighth amendment claim. *See Ronson v. Commissioner of Correction*, 112 AD2d 488.

In paragraph 10 of respondents’ Answer/Return it is asserted that “[p]etitioner repeatedly alleges that the respondents are guilty of deliberate indifference with respect to his alleged serious medical conditions.” The Court’s review of the petition, however, reveals no reference whatsoever to either the “deliberate indifference” standard or the eighth amendment proscription against the infliction of cruel and unusual punishment. Rather, the petition is couched entirely in terms of alleged medical negligence/malpractice. To the extent petitioner seeks monetary damages based upon such allegations of medical negligence/malpractice on the part DOCS staff, this Court finds that such relief is unavailable in the context of a CPLR Article 78 proceeding and must be pursued in a plenary action.

The remaining relief sought by petitioner - that “this unnecessary and illegal testing process” be ceased immediately - leaves the Court somewhat perplexed. The only “testing process” referenced in the petition is the PPD skin test and there is no allegation or suggestion in the record that DOCS officials contemplate subjecting petitioner to any

additional PPD testing. To the extent petitioner's reference to a "testing process" might represent an inarticulate challenge to continued INH therapy, the Court finds nothing in the record to suggest that such therapy was scheduled to be ongoing after April 3, 2010. In this regard it is noted that in the December 14, 2009 decision of the Superintendent of the Cape Vincent Correctional Facility with respect to petitioner's grievance CV-8781-09, it is asserted that petitioner's INH "... treatment was ordered for a period of 7/13/09 to 4/3/10." In paragraph two of the Wright Affidavit, moreover, it is asserted that "[p]etitioner participated in the [INH] treatment plan order between the period July 13, 2009, and April 3, 2010." In any event, pursuant Policy 1.18 (VI)(B)(2), inmates may decline to receive INH therapy (although a refusing inmate's will be placed on TB hold status). Thus, in the absence of any indication in the record of a mandatory, ongoing "testing process" the Court finds no basis to even consider issuing an order directing the cessation of such process.

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: July 12, 2010 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court