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STATE OF NEW YORK
COUNTY COURT, SUFFOLK COUNTY

PRESENT: HON. EMILY PINES
Justice

Index Number 22698-2010

X

**THE STATE OF NEW YORK ex. rel.
CALEB CHRISTIANSEN,**

Plaintiff,

-against-

**CHARLES EWALD, Warden of the County of
Suffolk County Jail,**

Defendant.

X

This action is the result of a Petition for a Writ of Habeas Corpus brought on or about June 18, 2010.[1] The above named Petitioner sought a Writ of Habeas Corpus, asking the Court to release the Petitioner from the custody of the Suffolk County jail and not transfer the Petitioner to a drug treatment facility, known as the Willard program. Pursuant to the issuance of the Writ, the State of New York and all agents acting on its behalf were stayed from transferring Caleb Christiansen (hereinafter "Petitioner") out of the Suffolk County jail and into the Willard program, until such time as a hearing could be held determining the legality of his detention and whether he should have to enter and complete 90 days in the

[1] The Court wishes to acknowledge the valuable aid of Hayley Morgan and Michael Dombrowski, legal interns, for their assistance in drafting this Decision.

Willard program. (Emerson, J.)

The events leading up to the Writ follow a lengthy, somewhat entangled history. Petitioner was initially convicted of three felonies in Suffolk County Court, and sentenced on or about September 10, 2007 for the crimes. Petitioner was sentenced to 2 1/3- 7 years for Burglary 3, 1 ¼ - 4 years for Attempted Burglary, and 1 ¼ - 4 years as a youthful offender for Attempted Burglary. These concurrent sentences were indeterminate. Petitioner was released from prison on or about May 8, 2008 but still subject to parole; therefore, he was subject to the remainder of his undischarged indeterminate sentence. While Petitioner was on parole, he was arrested in East Hampton and charged with Driving While Intoxicated, and he was subsequently sentenced to probation for the DWI. Petitioner's parole was therefore also revoked, and subsequently restored on or about August 5, 2008. Thereafter, the Petitioner was found to be in violation of his parole a second time as an absconder and for a heroin possession arrest, which occurred on or about March 3, 2009. As a result of that arrest, Petitioner was deemed to be in violation of parole and sentenced by the Parole Board to the Willard program. On or about August 25, 2009 Petitioner was released from the Willard program.

On January 4, 2010 a bench warrant was issued for the Petitioner in East Hampton for a probation violation (VOP). On January 14, 2010 Petitioner was declared parole delinquent. On February 22, 2010 Petitioner was arrested and sentenced to 180 days incarceration for a DWI and VOP, for an incident occurring on February 18, 2010, as well as an additional ten days in jail which resulted from an arrest in Southampton for Aggravated Unlicensed Operation of a Motor Vehicle. Essentially, the arrests and subsequent sentences in East Hampton and Southampton Justice Courts were combined as part of a plea deal and were to run concurrently. On March 11, 2010, Petitioner underwent a parole hearing, during which

he was sentenced to incarceration (for a second time) in the Willard program. Petitioner has now served his 180 days in Suffolk County jail for the violation of probation and was scheduled to be released from County jail on June 18, 2010. However, at that time, the State indicated that the Petitioner would be released to the custody of the State, and would thereafter be transferred to the Willard program to serve his 90-day sentence there. The ensuing Writ is a result of the State's attempt to transfer Petitioner to the Willard program.

Petitioner was released from the custody of Suffolk County jail on or about June 23, 2010 (by Order of Emerson. J) pending the outcome of this Writ.

Petitioner argues that he was given reason to believe by the Justice Courts that his VOP incarceration time, and parole violation incarceration time would run concurrently. Petitioner refers to transcripts of both the East Hampton Town and Southampton Town Justice Court sentencing hearings, in which the Court refers to the sentences "running concurrent". Petitioner claims his understanding was that the concurrent sentence included the violation of parole, which resulted in the 90 day sentence to the Willard program, and that at no point did the Court, Assistant District Attorney, or the Assistant Attorney General indicate that he had to serve his local time for the violation of probation before being transferred to the Willard program for the parole violation. Thus, Petitioner now claims that at the conclusion of his 180 day incarceration in County jail, he is not now required to enter into the Willard program.

In addition, Petitioner argues that: (1) his detention in County jail was unlawful ab intitio because pursuant to PL §65.00(1)(b)(iv), the Courts may not impose a concurrent sentence of probation on a Defendant who has been sentenced on another charge to a prison term; and (2) PL §70.35 prohibits consecutive sentences where Defendant is sentenced first

to a definite term of imprisonment and then to an indeterminate term; therefore, any sentence for the DWI or VOP, should have merged with the felony undischarged indeterminate sentence. Thus, Petitioner claims the time he served in County jail for VOP was an illegal sentence, and at a minimum he should be given credit for time incarcerated since February 11, 2010 for the parole violation and, therefore, he should not have to serve the additional 90 days at Willard.

In opposition to Petitioner's claims, the District Attorney (hereinafter D.A.) argues that pursuant to C.P.L. §70.20(2) and C.P.L. §430.20(3), a misdemeanor sentence must be served in a local correctional facility. ***People ex rel. Salas v. Warden*, 16 Misc.3d 1110(A), (Supreme Ct. Bronx Co. 2007)**. Furthermore, although the D.A. concedes that the VOP sentence imposed on Petitioner may have been unauthorized pursuant to Penal Law § 65.00(1)(b)(iv), it argues this does not undermine the fact that there still existed a judgment by which Petitioner was bound to the custody of the Suffolk County Sheriff's Department and/or the Suffolk County Correctional Facility, pending completion of the 180 day sentence. Additionally, the D.A. asserts that the Petitioner's habeas application should have been dismissed, pursuant to C.P.L. §440.20, which provides the sole mechanism by which a petitioner can challenge the appropriateness of the sentences. The D.A. argues that if a petitioner claims an indictment was jurisdictionally defective, the petitioner could have raised the issue on direct appeal or by way of a CPL article 440 motion, and thus habeas corpus relief does not lie. ***Robinson v. Graham*, 68 A.D.3d 1706, 892 N.Y.S.2d 692 (4th Dept. 2009)**.

The Attorney General also opposes the claim that Petitioner should not have to complete the sentence imposed during the parole hearing. The Attorney General contends that although it is not in dispute that on March 11, 2010 the Petitioner had his parole revoked,

and simultaneously restored, he was given a time assessment of attendance at the Willard Drug Treatment Campus Program. Therefore, the Attorney General argues that attendance and successful completion of the Willard program became a mandatory condition of parole. The normal procedure at this point would be that once all local holds (if any exist) are satisfied, the local correctional facility will then notify the New York State Department of Corrections to come and take the inmate to the Willard program. Further, the Attorney General argues that petitioner's claim that his local jail sentence was illegal is immaterial; as credit for excess jail time served in connection with a prior sentence does not partake of the attributes of a tax-loss-carry-forward or a depreciating asset. ***Harris v. City of New York*, 44 F. Supp.2d 510, 512 (S.D.N.Y. 1999).**

In reply the Petitioner argues that the letter submitted to the Court by the D.A. should not be considered in the determination of this Writ because it is simply a letter, not an affidavit or affirmation. Furthermore, the Petitioner reiterates that he was never informed by the Courts of this "normal procedure" that the Attorney General referred to when describing the procedure which mandates that all local holds must be satisfied before being transferred to NYS Department of Corrections.

The first issue before the Court is the determination of whether Petitioner's objection to participation in a drug program gives rise to a habeas corpus application. It has been held that "[h]abeas corpus relief is not only available to one in prison but also to one "otherwise restrained in his liberty." ***People ex rel. Davis v. Superintendent of Willard drug Treatment Campus*, 11 Misc.3d 1072(A), 816 N.Y.S.2d 698 (Supreme Court, Seneca County, 2006).** The Court in the aforementioned decision found that although Willard is not defined as a "correctional facility" this is of no moment because Willard does sufficiently restrain the liberty of people subject to a term at Willard, and therefore such Petitioners are entitled to

habeas corpus relief. Accordingly, this Court determines that the Petitioner has correctly brought this Writ before the Court.

However, with regard to petitioner's claim that his Town Justice Court sentences were unlawful under Penal Law §65.00, such issue could have been raised on direct appeal or by way of a CPL §440 motion, and thus habeas corpus relief does not lie. ***People ex rel Lewis v Graham*, 57AD34 1508, 870 NYS2d 665 (4th Dep't 2008),** *lv. den.* **12NY3d 705, 879 NYS 2d 51, 906 NE 2d 1085 (2008); *see, Robinson v Graham*, 68 AD 3d 1706, 892 NYS 2d 692 (4th Dep't 2009).**

The third issue before the Court is whether or not the Petitioner must complete the 90 day sentence at Willard pursuant to the violation of parole. The Court has determined that Petitioner's sentences for the violation of probation and violation of parole were separate and distinct. A careful reading of the East Hampton Town and Southampton Town Justice Court transcripts furthers the Court's determination that the only concurrent sentences imposed upon the Petitioner were those handed down by the East Hampton and Southampton Courts. The violation of parole hearing and subsequent sentence to the Willard program were separate and distinct. Therefore, the Petitioner's Writ of Habeas Corpus is denied as the attendance and successful completion of the Willard program is a mandatory condition of his parole.

Finally, Petitioner's claim that he should receive credit for time served in the County jail towards the Willard sentence must fail. New York Penal Law § 70.30(3) provides that the fixed minimum term "[o]f an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence *as a result of the charge that culminated in that sentence*."

(emphasis added) ***Harris v. The City of New York*, 44 F. Supp.2d 510 (S.D. New York 1999)**. However, in the instant action, Petitioner is not entitled to credit for time served in County jail; as his sentence to Willard was for an unrelated charge.

Based on the foregoing, the Writ of Habeas Corpus is denied, and Petitioner is required to serve the previously imposed sentence at the Willard program.

Petitioner is directed to surrender to the Suffolk County Department of Corrections, to be transferred immediately to the Willard Program.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: August 11, 2010
Riverhead, New York

HON. EMILY PINES
J. S. C.