Matter of Mallory v Evans

2010 NY Slip Op 32827(U)

September 30, 2010

Sup Ct, Albany County

Docket Number: 1406-10

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JAMES MALLORY, 07-B-1282,

Petitioner,

-against-

ANDREA W. EVANS, AS CHAIRWOMAN AND CHIEF EXECUTIVE OFFICER OF THE NEW YORK STATE BOARD AND DIVISION OF PAROLE,

Respondents,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-10-ST1317 Index No. 1406-10

Appearances:

James Mallory
Inmate No. 07-B-1282
Petitioner, Pro Se
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Oneida Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a final parole revocation determination dated May 28, 2009 in which he claims he was erroneously classified as a Category 1 offender under § 8005.20 of the Rules of the Division of Parole (see 9 NYCRR 8005.20 [c] [1]) and that the Administrative Law Judge failed to grant a mitigating reduction of up to three months and/or restore him to parole supervision (see 9 NYCRR 8005.20 [c] [1], [4]). Respondent has served an answer in opposition to the petition, which includes a request that the matter be transferred to the Appellate Division pursuant to CPLR § 7804 (g).

With respect to a threshold issue, the petitioner maintains that respondent's answering papers, served on May 14, 2010, were untimely. The Court observes that under CPLR 7804 (c) answering papers must be served at least five days before the return date. The return date was Friday, May 21, 2010. Inasmuch respondent's papers were served seven days before the return date, they were timely served. The Court finds that petitioner's argument has no merit.

Turning to the respondent's request that the proceeding be transferred to the Appellate Division, the petitioner has taken the position that he has not raised an issue under CPLR § 7803 (4). The Court observes that no hearing was conducted and no evidence (other than the violation documents) was presented during proceedings before the Administrative Law Judge on May 28, 2009. Rather, petitioner entered a plea of guilty to charges three and six, with all other charges being withdrawn. A review of the petition reveals that the petitioner, rather

than raising an issue of substantial evidence under CPLR § 7803 (4), is raising issues under CPLR § 7803 (3). The Court therefore declines to transfer the proceeding to the Appellate Division, and retains the matter for disposition as set forth herein.

Turning to the merits, the petitioner argues that the Administrative Law Judge erred in finding him to be a Category 1 violator, and therefore erred in imposing a fifteen month hold under 9 NYCRR § 8005.20(c)(1). Notably, during the proceedings of May 28, 2009, the following colloquy took place:

> "Judge: The plea is being entered with split recommendations. Is that how you wish to plead, Mr. Mallory, guilty to charges 3 and 6?
> Inmate: Yes.
> Judge: Do you want me to read the charges to you or do you waive them?
> Inmate: I'll waive it.
> Judge: I want to make sure you do understand by pleading guilty in regard to these particular charges that you're admitting that the facts in the charges are true and you're acknowledging that the Division of Parole would not be required to go forth with any evidence to prove those facts because of your plea. Do you understand that?
> Inmate: Yes.
> Judge: Also, as far as disposition, I have indicated that based upon my review of the record, I thought a hold of 15 months was appropriate. It's my understanding that at this point you're in agreement with that, is that correct?
> Inmate: Yes.
> Judge: Mr. Mallory, after being advised of all of these factors, do you still wish to plead guilty as indicated?
> Inmate: Yes."

From the foregoing, it is evident that the petitioner consented on the record to the Category

1 classification (in exchange for withdrawal of the remaining thirteen charges).

Apart from the foregoing, the Court observes that the definition of Category 1 violators includes those individuals whose criminal record includes "violent felony offense convictions...involving the use...of a deadly weapon...which occurred not more than 10 years before the commission of the felony on which the current sentence is based except that in calculating the 10-year period any period of time during which the person was incarcerated shall be excluded" (9 NYCRR § 8005.20[c][1][vii]).

With respect to the instant matter, the petitioner was convicted of robbery in the second degree, under Penal Law § 160.10 (a Class C violent felony[1]) on December 15, 1995. He was released on parole for that crime on July 12, 2002. He was convicted of the current offense, attempted criminal possession of a controlled substance in the fifth degree (see Penal Law §§ 110.05, 220.06) on November 9, 2006. Thus, excluding the periods of petitioner's incarceration, petitioner's 1995 robbery conviction is well within ten years of his 2006 conviction for attempted criminal possession of a controlled substance fifth degree (see 9 NYCRR § 8005.20[c][1][vii]). In addition, petitioner's pre-sentence investigation report for his 1995 conviction indicates that during the course of the robbery, one of the participants displayed a gun. The Administrative Law Judge specifically predicated petitioner's Category 1 classification upon petitioner's conviction of robbery in the 2nd degree. Accordingly, even if the petitioner had not consented on the record to the Category 1 classification, the Court

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[1] See Penal Law § 70.02 (1) (b).

finds that the classification was lawful and had a rational basis by reason that the robbery conviction, a violent felony, involved the use of a deadly weapon was committed within ten years of his conviction for criminal possession of a controlled substance in the fifth degree (excluding periods of incarceration).

Lastly, the petitioner also argues that the Administrative Law Judge improperly failed to grant a mitigating reduction of up to three months (permitted in situations where a violator accepts responsibility for his or her conduct, see 9 NYCRR 8005.20 [c] [1]); and that he improperly failed to restore the petitioner to parole supervision by reason of exceptional mitigating circumstances (see 9 NYCRR 8005.20 [c] [4]). The latter section recites, in part, as follows:

> "For the following violators, after making a finding that the releasee's program needs could be appropriately addressed in the community with parole supervision and that restoration to supervision would not have an adverse effect on public safety or public confidence in the integrity of the criminal justice system, the hearing officer may order, or in the case of a violator serving a sentence for a felony offense under articles 125, 130, 135 or 263 of the Penal Law or section 255.25 thereof, may recommend to the board of parole that the violator should be restored to supervision with appropriate special conditions. [] (ii) a violator whose parole supervision prior to the behavior which resulted in issuance of the warrant is deemed acceptable by the division, who has a stable residence and prior employment []"

As noted, the petitioner, during the May 28, 2009 appearance, unconditionally consented to a fifteen month hold. Neither he nor his attorney raised any issue with regard to a mitigating reduction under 9 NYCRR §8005.20 (c) (1), or restoration to supervision

under 9 NYCRR §8005.20 (c) (4) (ii). In addition, the petitioner has not, in this proceeding, satisfied his burden of demonstrating his entitlement to either form of relief. Specifically, he has failed to demonstrate what exceptional mitigating circumstances exist to warrant a three month reduction in the time assessment (see 9 NYCRR 8005.20 [a] [1]); and he has failed to present any evidence with regard to the factors under 9 NYCRR 8005.20 (c) (4) (ii). This is particularly so with regard to whether the Division of Parole deems his prior behavior to be acceptable, and with regard to facts related to his employment (see 9 NYCRR 8005 [c] [4] [ii]). Under all of the circumstances, the Court finds that there was no factual basis in the record to grant either form of relief.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original

decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: September 30, 2010
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated March 11, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer filed May 14, 2010, Supporting Papers and Exhibits
3. Petitioner's letter dated May 17, 2010
4. Petitioner's Verified Response dated May 20, 2010

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SEALING ORDER

The following document having been filed by the respondent with the Court for *in camera review* in connection with the above matter, respondent's Exhibit L, Pre-Sentence Investigation Reports. For good cause shown, it is hereby

ORDERED, that the foregoing designated document, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: September 30, 2010
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice