

Matter of Sanchez v Rabsatt
2011 NY Slip Op 30035(U)
January 3, 2011
Supreme Court, St. Lawrence County
Docket Number: 132962
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
EDDIE SANCHEZ, #92-A-9992,

Petitioner,

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

**DECISION AND JUDGMENT
RJI #44-1-2010-0082.09
INDEX #132962
ORI # NY044015J**

-against-

CALVIN O. RABSATT, Superintendent,
Riverview Correctional Facility, and
NEW YORK STATE DIVISION OF PAROLE,
Respondents.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of Eddie Sanchez, verified on February 8, 2010, and filed in the St. Lawrence County Clerk's office on February 10, 2010. Petitioner, who is now an inmate at the Mid-State 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 February 17, 2010 and received and reviewed respondents' initial Return, dated April 2, 2010, as well as petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on April 19, 2010. By Letter Order dated April 28, 2010 the respondents were directed to supplement their Return. The Court next received and reviewed respondents' Supplemental Return, dated May 11, 2010, as well as petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on May 24, 2010. Additional correspondence from petitioner was filed in the St. Lawrence County Clerk's office on May 25, 2010.

By Letter Order dated August 3, 2010 the respondents were directed to further supplement their Return. In response thereto the Court received and reviewed an

August 18, 2010 letter from counsel for the respondents, with exhibits, filed in the St. Lawrence County Clerk's office on August 23, 2010. By letter dated August 19, 2010 chambers was advised that Prisoners Legal Services would be representing petitioner in this proceeding.

Oral argument was conducted via teleconference on September 9, 2010. Following oral argument, and as discussed at oral argument, counsel for the petitioner filed a Supplemental Petition, verified on September 20, 2010, and a memorandum in support thereof, also dated September 20, 2010, in the St. Lawrence County Clerk's office on September 22, 2010. The petitioner's (*pro se*) "SUPPLEMENT THAT'S TO BE ANNEXED TO HIS ATTORNEY'S SUPPLEMENTAL PETITION" was filed in the St. Lawrence County Clerk's office on September 29, 2010. The Court next received and reviewed respondents' Second Supplemental Return, dated October 4, 2010 and filed in the Franklin County Clerk's office on October 5, 2010, as well as counsel for petitioner's Reply thereto, dated October 8, 2010 and filed in the St. Lawrence County Clerk's office on October 12, 2010. Petitioner's "PRO-SE LETTER of RESPONSE to RESPONDENT'S 2ND SUPPLEMENTAL RETURN (that's to be annexed to Reply done by PLS Attorney)" sworn to on October 8, 2010, was filed in the St. Lawrence County Clerk's office on October 19, 2010.

On November 23, 1992 petitioner was sentenced in Supreme Court, Kings County, to an indeterminate sentence of 8 $\frac{1}{3}$ to 25 years upon his conviction of the crime of Attempted Murder 2^o. He was conditionally released from DOCS custody to parole supervision on January 11, 2008. On May 27, 2009, however, petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in two separate respects. He waived preliminary hearing on that date and ultimately pled guilty to one parole violation charge at a final hearing conducted

on November 13, 2009. Petitioner's parole was revoked with a sustained delinquency date of May 20, 2009 and the presiding Administrative Law Judge (ALJ) recommended a 12-month delinquent time assessment. That recommendation, however, was modified by a parole commissioner to 24 months on November 18, 2009. This proceeding ensued.

Petitioner contends that he was denied a timely final parole revocation hearing within 90 days of his May 27, 2009 waiver of preliminary hearing, in violation of the provisions of Executive Law §259-i(3)(f)(i). That statute provides as follows:

“Revocation hearings shall be scheduled to be held within ninety days of the probable cause determination. However, if an alleged violator requests and receives any postponement of his revocation hearing, or consents to a postponed revocation proceeding initiated by the board, or if the alleged violator, by his actions otherwise precludes the prompt conduct of such proceedings, the time limit maybe extended.”

In support of his contention petitioner asserts that his final parole revocation hearing was originally scheduled for June 8, 2009, but adjourned for notice to June 22, 2009. Petitioner further asserts that at the June 8, 2009 appearance, upon consent of all parties, the parole revocation proceeding was placed on the “K Calendar” and thus adjourned pending disposition of a criminal action related to one of the parole violation charges.¹ According to petitioner, as set forth in paragraph six of the Supplemental Petition, “[t]he adjournment to the K Calendar was given effect after the proper notice time expired on June 22, 2009. The Division's record of adjournments confirms that the June 8th adjournment was by the Division, and thus that time is chargeable to the Division toward the 90-day limit. The Division's record also confirms that the June 22 adjournment was at the request of petitioner, and thus any time that elapsed between

¹ The K Calendar “. . . is an administrative device that ‘serves to not prejudice parolees who have pending criminal matters by indefinitely adjourning their parole revocation hearings’ pending resolution of the underlying criminal matter . . . To have a final parole hearing, a parolee must request that his matter be taken off the . . . [K] Calendar.” *People ex rel Banks v. Warden*, 16 Misc 3d 1111(A), 2007 NY Slip Op 51380(U). (Citations to internal exhibits omitted).

June 22 and the date he later requested to be taken off the K calendar is chargeable to petitioner.” (References to exhibits omitted).

At the initial final parole revocation hearing appearance on June 8, 2009 Carl Spector, Esq., appeared on behalf of the petitioner accompanied by Angelo Santana, a paralegal in Mr. Spector’s office. While it is clear that counsel for the petitioner requested that the parole revocation proceedings be placed on the K Calendar at the June 8, 2009 appearance, it is equally clear that the presiding ALJ adjourned the proceedings to June 22, 2009 in order to comply with the 14-day notice requirement set forth in 9 NYCRR §8005.18(a). The ALJ, moreover, clearly stated that the adjournment to June 22, 2009 would be charge against the Division. The record before this Court does not include any hearing minutes for June 22, 2009 and indeed it is not altogether clear that the parties re-appeared before the ALJ on that date. Under such circumstances the Court finds that the adjournment from June 8, 2009 to June 22, 2009 was for notice purposes only and that the placement of the revocation proceedings on the K Calendar, although requested and agreed to on June 8, 2009, only became effective as of June 22, 2009. Thus, the 25-day period from petitioner’s May 27, 2009 preliminary hearing waiver to June 22, 2009 is chargeable against the Division for the purposes of the 90-day hearing deadline set forth in Executive Law §259-i(3)(f)(i). It is also noted by the Court that when the K Calendar placement was discussed on June 8, 2009, the ALJ advised counsel for the petitioner that it was his responsibility to “. . . notify the Division when the [criminal] case is either completed or when the case is completed off the K calendar.” Attorney Spector responded “[y]es, absolutely . . .”

In paragraphs eight and nine of the Supplemental Petition, the following is alleged:

“8. On July 29, 2009, Angelo Santana, the paralegal for both Carl Spector and co-counsel Vincent Scala (attorneys for petitioner), notified the Division by placing three calls to the Riker’s Island Judicial Center (wherein

the Division has an office for its revocation specialists), and one call to the personal office of the assigned revocation specialist Maria Burgess . . . Mr. Santana left messages at both offices, indicating that petitioner's criminal matter was resolved, and requested that Petitioner be taken off the K Calendar and immediately scheduled for a final revocation hearing. Although he expected the Division to return his call, it was Mr. Santana's impression that proper notice had been tendered at that time. **See Exhibit D - Phone Record of Angelo Santana**

9. Mr. Santana's phone calls were not returned. Not having heard anything from the Division after nearly four weeks, on August 31, 2009, attorney Carl Spector called the Riker's Island Judicial [Center?] in order to confirm that petitioner had been removed from the K Calendar and scheduled for a timely revocation hearing. Mr. Spector spoke with an employee ("Leona") of the Division. It was Mr. Spector's impression that his message would be given to the revocation specialist Maria Burgess, and that if petitioner had not already been removed from the K Calendar, he promptly would be. This call lasted 5 minutes, and appears on Mr. Spector's phone bill . . . **See Exhibit E - Phone Record of Carl Spector.**" (Emphasis in original)

The Court notes that petitioner does not allege that any written notification that petitioner's underlying criminal action had been resolved and that the parole revocation proceeding should therefore be removed from the K Calendar was ever provided to any representative of the Division of Parole. In addition, Exhibits D and E annexed to the Supplemental Petition consists merely of telephone logs indicating telephone calls placed to specified telephone numbers on specified dates. Neither petitioner nor his PLS counsel purport to have been privy to any conversation associated with any of the phone calls noted on the logs. No affidavit or any other written statement from any individual claiming to have been privy to any such conversation(s) is included with the Supplemental Petition or, for that matter, anywhere else in the record of this proceeding.

Notwithstanding the foregoing, the next session of petitioner's final parole revocation hearing did not take place until October 28, 2009 and on that date petitioner appeared without counsel. The presiding ALJ referenced the K Calendar placement and

asked Parole Revocation Specialist Maria Burgess “[w]hen did he [Attorney Spector] call you?” The following colloquy occurred:

“MS. MARIA BURGESS: I received a message from Ms. Johnson about a month ago and the message was basically a printout with Mr. Sanchez’s name and the name of the attorney. There was no telephone number. I said to her, where is the telephone number and she said he forgot to leave the number. Last week, I got a message from my office that an attorney called stating that I never return my calls and that he was upset with me. He wants Mr. Sanchez off it [presumably the K Calendar]. He left a message in my office in Long Island. Someone sat at my desk and walked away with the message. By the time I got them and they called me back and I got . . . the number they gave me, I called it. It was disconnected . . .

THE COURT: So, you’re going to do a search for an attorney?

MS. MARIA BURGESS: I will definitely do that, Judge . . .

THE COURT: So, the case is going to be adjourned until November 13th of 09. It’s going to be . . . chargeable to you [presumably, the Division] for attorney prep. But he’s [presumably attorney Spector] not here. Why is he not here, because we couldn’t locate him?

MS. MARIA BURGESS: I could not locate him. He didn’t leave the number the first time and the second time the number that was left was a number that’s not workable. So, I placed Mr. Sanchez on - - I took him off the [K] calendar to see whether or not today he could have a number and I could have called the attorney today but he [presumably petitioner] doesn’t have any way to contact him [presumably attorney Spector].

THE COURT: And the attorney [Spector] basically told you that you better take him off the K calendar, is that right?

MS. MARIA BURGESS: Yeah, he wanted him off the K calendar, yes, Judge.

THE COURT: But - - and he never contacted you after that?

MS. MARIA BURGESS: No, because he left a message and the - -

THE COURT: But he never contacted you after - -

MS. MARIA BURGESS: No, no.”

The failure of parole authorities to provide a final parole revocation hearing within the 90-day time frame set forth in Executive Law §259-i(3)(f)(i) results in extremely serious consequences. A convicted felon who has been released from DOCS custody to parole supervision but charged with violating the conditions of his/her release, and who has either waived a preliminary parole revocation hearing or participated in a preliminary hearing where probable cause was found, must be returned to community-based parole supervision without any further opportunity for prosecution of the parole violation charge(s). When an accused parole violator requests an adjournment of his/her final hearing for a fixed duration (i.e. a two-week adjournment) the interruption of the running of the 90-day deadline period may be calculated in a straightforward manner - the interruption ends and the 90-day period re-commences running at the end of the fixed period of the adjournment. Where, as in the case at bar, however, the accused parole violator requests and is granted the benefits of an indefinite K Calendar adjournment, the date as of which the all-important 90-day final hearing deadline re-commences running cannot be ascertained at the time of the adjournment. Instead, the determination of such date is wholly dependant upon the accused parole violator’s/counsel’s notification to the Division of Parole that the removal of the parole revocation proceedings from the K Calendar is desired.

The Court finds that when an accused parole violator/counsel notifies the Division of Parole that the removal of parole revocation proceedings from the K Calendar is desired, the accused parole violator/counsel is under an obligation to provide such notice in a clear, unambiguous and memorialized manner. The Court further finds that such obligation is not met where, as here, the purported K Calendar removal notification takes the form of telephone messages from the alleged parole violator's counsel left with office staff at the Riker's Island Judicial Center and/or the personal office of the assigned parole revocation specialist, notwithstanding counsel's "impression" that his message would be forwarded to the assigned specialist.

The findings of the Court, as set forth in the preceding paragraph, places no undue burden on an alleged parole violator or his/her counsel. A K Calendar removal notification can simply be memorialized in the form of a letter from the alleged parole violator or his/her counsel to the assigned parole revocation specialist. In this regard the Court notes that Division of Parole regulations generally require that a request to adjourn a previously scheduled final revocation hearing must be in writing (unless "exceptional circumstances are alleged to exist") 9 NYCRR §8005.17(c). This Court perceives no reason to apply a lesser standard where an alleged parole violator, who has availed himself/herself of an indefinite K Calendar adjournment, notifies the Division that removal from the K Calendar, and thus re-commencement of the 90-day final hearing deadline clock, is desired.

Accordingly, the Court finds that the time period from the commencement of the K Calendar adjournment on June 22, 2009 until October 28, 2009 is properly chargeable to the petitioner, rather than the Division of Parole. With the 25 days previously found chargeable against the Division (May 27, 2009 to June 22, 2009) added to the 16 days chargeable to the Division from the October 28, 2009 final hearing appearance to

November 13, 2009, the Court finds that only 42 days against the 90-day limit were properly chargeable to the Division. Therefore, the Court further finds that petitioner's final parole revocation hearing was conducted in a timely manner on November 13, 2009.

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: January 3, 2011 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court