

**Matter of Cannon v New York State Bd. of Parole**

2011 NY Slip Op 31141(U)

March 22, 2011

Supreme Court, St. Lawrence County

Docket Number: 134734

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  
**MICHAEL CANNON, #05-B-1817,**

Petitioner,

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

**DECISION AND JUDGMENT  
RJI #44-1-2010-0693.31  
INDEX #134734  
ORI # NY044015J**

-against-

**NEW YORK STATE BOARD OF PAROLE,**

Respondent.

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This proceeding was originated by the Petition for a Writ of Habeas Corpus of Michael Cannon, verified on September 27, 2010 and filed in the St. Lawrence County Clerk’s office on October 18, 2010. Petitioner, who is an inmate at the Gouverneur 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 October 25, 2010 and has received and reviewed respondent’s Answer/Return, including Confidential Exhibit B, dated December 1, 2010. The Court has also received and reviewed petitioner’s Reply thereto, filed in the St. Lawrence County Clerk’s office on December 17, 2010.

On June 16, 2005 petitioner was sentenced in Monroe County Court, as a second violent felony offender, to a determinate term of 5 years, with 5 years post-release supervision, upon his conviction of the crime of Assault 2°. He was conditionally released from DOCS custody to post-release parole supervision on June 17, 2009 but was subsequently charged with violating the conditions of his release in three separate respects. Parole Violation Charge #1 alleged that “Michael Cannon violated Rule #13-K of the conditions governing his release to parole supervision, in that, on or about 3/25/10, the subject used and possessed an alcoholic beverage, without permission from his Parole Officer.” Parole Violation Charge #2 alleged that “Michael Cannon violated Rule #5 of the

conditions governing his release to parole supervision, in that, on 3/25/10, he failed to reply truthfully to an inquiry by this Parole Officer when he denied using alcohol.” Parole Violation Charge #3 alleged that “Michael Cannon violated Rule #5 of the conditions governing his release to parole supervision, in that, on 3/31/10, he failed to reply truthfully to an inquiry by this Parole Officer when he denied using alcohol on or about 3/25/10.”

Probable cause was found with respect to Parole Violation Charge #1 following a preliminary parole revocation hearing on April 27, 2010. A contested final parole revocation hearing was conducted at the Monroe County Jail concluding on June 9, 2010. The presiding Administrative Law Judge (ALJ) sustained Parole Violation Charges #2 and #3 but found that Parole Violation Charge #1 had not been proven by preponderance of legally sufficient evidence. Petitioner’s parole was revoked and the ALJ imposed a 15-month delinquent time assessment. The documents perfecting petitioner’s administrative appeal were received by the Division of Parole Appeals Unit on October 21, 2010 and November 1, 2010. In the meantime, this proceeding was commenced by the filing of the Petition for a Writ of Habeas Corpus in the St. Lawrence County Clerk’s office on October 18, 2010.

P.O. Diamond, petitioner’s supervising parole officer, testified at the final hearing that at 1:00 AM on March 25, 2010 petitioner left a “mostly incoherent” voice mail message on his cell phone. According to P.O. Diamond, petitioner sounded “like an intoxicated person.” The supervising parole officer further testified that when petitioner appeared for his regulatory scheduled office visit at approximately 11:00 AM on March 25, 2010 he denied any prior consumption of alcohol. P.O. Diamond next testified that although an “intoxilyzer” test administered at that time showed a .02 reading, petitioner continued to deny that he consumed alcohol. The petitioner provided P.O. Diamond with

a urine sample on March 25, 2010 and the sample was forwarded to an outside lab for analysis. According to P.O. Diamond, during the course of the subsequent home visit on March 30, 2010 petitioner again denied consuming alcohol prior to the March 25, 2010 office visit. The results of the outside analysis of petitioner's urine sample, which were received into evidence at the final parole revocation hearing, also indicated a .02 reading. The supervising parole officer further testified that petitioner provided no explanation for the discrepancy between the positive test results and the denial of alcohol use until the preliminary parole revocation hearing on April 27, 2010 when petitioner allegedly testified that "... he consumed some quantity, to him unknown quantity, of cough syrup that may have contained alcohol, although he did not testified [sic] as to when he had taken it or how much he had taken it [sic] prior to that administration of that test."

Although he did not testify at the final parole revocation hearing, petitioner produced several witnesses, including his brother, mother and employer, who all testified that he was ill in the days leading up to March 25, 2010. While petitioner's brother testified that he purchased a bottle of Nyquil and gave it to petitioner prior to March 25, 2010, he also testified that he was not with petitioner on the night/morning of March 24/25, 2010 and never observed petitioner ingesting any Nyquil. Petitioner's mother also testified that she purchased a bottle of Nyquil and gave it to petitioner but it appears from her testimony that the purchase did not take place until after March 25, 2010. In any event, petitioner's mother offered no testimony that she was with petitioner on the night/morning of March 24/25, 2010 or that she ever observed him ingesting any Nyquil.

In dismissing Parole Violation Charge #1, but sustaining Parole Violation Charges #2 and #3, the ALJ drew a distinction between the use of "an alcoholic beverage," as proscribed in Parole Violation Charge #1, and the use of "alcohol," as referenced in Parole

Violation Charges #2 and #3. Thus, in the “ANALYSIS” portion of the written Parole Revocation Decision Notice, the ALJ concludes, in relevant part, as follows:

“I cannot sustain charge #1 because there is no evidence that subject [petitioner] consumed an alcoholic beverage, i.e.- beer, wine, whisky. Nyquil is alcohol but not an alcoholic beverage.

Subject is responsible for what he puts into his body. He clearly knew he consumed Nyquil before 3/25 and violated Rule 5 by denying the consumption of alcohol to his P.O.

I cannot believe that if he tasted it he did not know it had alcohol in it.”

Citing, *inter alia*, Executive Law §259-i(3)(f)(vi) and 9 NYCRR §8005.3, “[p]etitioner contends that he was not provided notice of an alleged violation of parole on the grounds that Petitioner consumed an ‘**OVER-THE-COUNTER**,’ non-prescription, cough syrup, to wit: ‘**NYQUIL**.’ Petitioner contends that Nyquil, is an over-the-counter, non-prescription, cough syrup, that incidentally has a very minute alcohol content and to hold that consuming Nyquil for the flu or cold systems [sic] requires prior . . . approval, is preposterous.” (Emphasis in original). Obviously, however, it would have been impossible for parole officials to provide petitioner with specific advanced notice as to the ultimate source of the alcohol detected in his system. Petitioner, after all, denied consuming any alcohol prior to March 25, 2010 incident and it was not until the April 27, 2010 preliminary parole revocation hearing that he first mentioned the consumption of Nyquil. The Court therefore finds that petitioner was adequately notified with respect to Parole Violation Charges #2 and #3 since such charges generically referenced the use of alcohol, without specifying the specific source thereof.

To the extent anything in the petition might be construed as constituting a challenge to the determination that petitioner violated the conditions of his release in an important respect, the Court rejects such challenge. As noted previously, the ALJ

determined that there was no evidence petitioner consumed an “alcoholic beverage,” as opposed to “alcohol,” as alleged in Parole Violation Charge #1. Although the ALJ appeared to accept, at least for argument sake, the proposition that petitioner’s alcohol-positive urine test results were the result of his ingestion of Nyquil, the Court notes that there was no direct testimony at the final parole revocation hearing to indicate that petitioner consumed any Nyquil. The petitioner never testified at the final hearing and none of his witnesses purported to observe Nyquil consumption on his part. There is nothing in the final hearing record, therefore, to indicate when petitioner claims to have consumed Nyquil or the alleged quantity of such consumption. Thus, even if the “Nyquil defense” was properly before the ALJ based upon P.O. Diamond’s recounting of petitioner’s preliminary parole revocation hearing testimony and the final hearing testimony of petitioner’s witnesses, the ALJ would have had no basis to assess the plausibility of the “Nyquil defense” in the face of the uncontradicted evidence that the urine sample drawn from petitioner during the middle of the day on March 25, 2010 produced a .02 reading. In any event, the Court agrees with the finding that the petitioner was ultimately responsible for what he put into his body.

Based upon on all the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

**Dated:** March 22, 2011 at  
Indian Lake, New York

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S. Peter Feldstein  
Acting Justice, Supreme Court