

Matter of Johnson v Kelly

2012 NY Slip Op 30193(U)

January 23, 2012

Supreme Court, New York County

Docket Number: 402082/11

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

*In the Matter of the Application of
LAMONTE JOHNSON,*

INDEX No. 402082/11

Petitioner,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

RAYMOND W. KELLY, COMMISSIONER,
NEW YORK CITY POLICE DEPARTMENT, CHARLES
S. HIRSCH, CHIEF MEDICAL EXAMINER OF NEW
YORK CITY,

Respondents.

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion for Article 78 relief.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

~~UNFILED JUDGMENT~~

Answering Affidavits- Exhibits _____

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Replying Affidavits _____

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is decided as follows:

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM
DECISION.

Dated: 1/23/12

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----X
In the Matter of Application of

LAMONTE JOHNSON,

Petitioner,

Index No.

For a Judgment under Article 7800 of the Civil Practice Law
and Rules

402082/11

-against-

RAYMOND W. KELLY, COMMISSIONER, NEW YORK
CITY POLICE DEPARTMENT, CHARLES S. HIRSCH, JR.,
CHIEF MEDICAL EXAMINER, CHIEF MEDICAL
EXAMINER OF NEW YORK CITY,

UNFILED JUDGMENT
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Respondent.

-----X
DONNA MILLS, J.:

In this Article 78 proceeding, petitioner seeks the reversal of the determination of the Office of the Chief Medical Examiner of New York City (OCME) denying a Freedom of Information Law (FOIL) request. Petitioner also seeks the vacatur of prior proceedings of the New York City Police Department (NYPD); a declaration that OCME's policies and practices under section 557 (g) of the New York City Charter are unconstitutional; and a jury trial pursuant to CPLR 7804 (h) and section 2-b-3 of the Judiciary Law. Respondent Raymond W. Kelly, Commissioner, NYPD (Kelly), cross-moves for dismissal.

Petitioner is presently an inmate of Ossining Correctional Facility in Ossining, New York (Ossining), having been convicted for the killings of two men in 1986. He petitions this court, pro se, after an unsuccessful attempt to obtain certain documents via a FOIL request, dated November 26, 2010, and served on OCME's Records Access Officer. He specifically requested:

(1) all tracking data and chain of custody information related to the two killings; (2) names of all personnel from the NYPD and Kings County District Attorney's Office who requested the files; (3) all kodachromes of the deceased; (4) all tests results from autopsy and any other evidentiary analysis; (5) all serology reports; (6) all correspondence related to the killings; (7) a list of all information related to the killings; and (8) all correspondence and information requested by ADA Joyce Slevin in relation to the killings. By letter dated December 3, 2010, OCME denied petitioner's request on the ground that the records were specifically exempted from disclosure pursuant to section 87 (2) (a) of the Public Officers Law and section 557 (g) of the New York City Charter (Charter). Subsequently, petitioner commenced this Article 78 proceeding against respondent Charles S. Hirsch, Chief Medical Examiner (Hirsch), as well as Kelly.

Petitioner seeks a reversal of the OCME decision. He asserts that he is not guilty of the crimes of which he has been convicted. He claims that certain exculpatory evidence, such as that which he seeks, had been suppressed by police and other state authorities, and that this evidence will or might exonerate him. He states that he has a right to know if his trial and conviction were fair and just. He also states that section 557 (g) of the Charter is unconstitutional and violates principles of due process and equal protection. According to petitioner, section 677 of the New York County Law, which in effect applies to all counties outside New York City, allows access to medical examiners' records upon a showing of good cause, whereas section 557 (g) does not allow access to records relating to deaths where there is an indication of criminality for any reason.

Petitioner requests that this court conduct an in-camera review of the evidence sought by him. According to petitioner, upon review, the court can decide whether the evidence to which

respondent and the NYPD were privy was exculpatory. Petitioner asserts that OCME had disclosed the evidence to the District Attorney's Office and that, through its actions, functions almost as an agent of the District Attorney's Office. He claims that this alleged agency relationship would subject OCME to the standards pursuant to those upheld in *Brady v State of Maryland*, (373 US 83 [1963]) (*Brady*) with respect to the withholding of criminal-related evidence.

In opposition, OCME argues that it had the legal authority to deny petitioner's FOIL request. OCME states that, pursuant to section 87 (2) (a) of the Public Officers Law, an agency may properly deny access to records that are specifically exempt from disclosure by state or federal statute. Relying on the Charter, OCME contends that the requested records were not open to public inspection because they were indicative of criminality. Section 557 (g) has been challenged on constitutional grounds in a First Amendment case, *Matter of Lovacco v Ilirsch* (250 AD2d 416 [1st Dept 1998]), and the statute was upheld as constitutional.

To the extent that petitioner appears to claim that he has rights to the requested documents independent of FOIL, that is, based upon standards set by *Brady*, OCME argues that such claims are not properly before this court. Although petitioner was a criminal defendant, OCME claims that, since it is not a law enforcement agency, it is not subject to the aforesaid standards.

Kelly cross-moves for dismissal from this proceeding, claiming that petitioner failed to obtain personal jurisdiction over him, and that the claims against him are now time-barred. Kelly states that, to date, petitioner has not served him with an order to show cause or a verified petition. Thus, Kelly contends that the court has no personal jurisdiction over him.

Kelly cites CPLR 217 (1), which requires that an Article 78 proceeding be commenced within four months of the day the determination had become final or after the respondent has refused to perform a duty imposed by law. According to Kelly, the final determination of the OCME officer was rendered by letter dated December 3, 2010. If that date is applicable, in order to have been timely, the filing of the present petition would have to have occurred by April 3, 2011. Kelly avers that the petition was filed on August 2, 2011, after the four-month period, making the procedure untimely.

In reply to the cross motion, petitioner states that he did mail the appropriate papers to Kelly as well as the Corporation Counsel. He attributes any problems of delivery to problems at Ossining, including possible tampering. Petitioner asserts that Kelly would not be prejudiced by the failure of service of process.

Petitioner claims that the statute of limitations should begin to run on March 14, 2011, when he received a letter from the Records Access Appeals Officer (RAAO) of the NYPD in response to his letter seeking reconsideration of the December 3, 2010 letter. This letter allegedly represented the date of final determination, when petitioner allegedly exhausted his administrative remedies. Therefore, he claims that he was allowed up to July 14, 2011 to file this petition. Petitioner states that he filed his petition to the court on July 6, 2011, making this procedure timely.

Alternatively, petitioner argues that he is challenging two previous Article 78 orders on the grounds of fraud and misrepresentation, by way of a motion to renew and vacate, which he claims has no time limitations.

Kelly's cross motion relates to petitioner's attempt to uncover information from NYPD,

via a FOIL request, dated May 12, 2010, served upon the Records Access Officer (RAO). The information sought was similar, in part, to that sought from OCME. By letter dated September 27, 2010, the RAO issued a determination granting the FOIL request in part, and provided access to 12 pages of records. Petitioner was informed that he could appeal the determination to the RAAO within 30 days of the date of the RAO's letter. By letter dated October 5, 2010, petitioner sent the RAAO an appeal of that determination. The RAAO, by letter dated December 3, 2010, denied the appeal on the grounds that the FOIL request was duplicative of prior requests dated November 1993 and April 1994; that the request was barred by *res judicata* because petitioner had two previous Article 78 proceedings regarding the earlier FOIL requests for the same documents, both of which were dismissed; and the records were exempt under section 87 (2) (e) (i) of Public Officers Law, in that disclosure of the requested records would interfere with a pending judicial proceeding.

The court finds that the four-month statute of limitations for filing an Article 78 proceeding began to run on December 3, 2010. That was the date of the letter from the RAAO, denying the appeal. This would constitute the final agency determination with respect to the FOIL request. Petitioner's request for reconsideration did not toll the statute of limitations. *See Matter of Moskowitz v New York City Police Pension Fund*, 82 AD3d 473 (1st Dept 2011). The proceeding brought against Kelly is untimely. The last date for filing this petition would have been April 3, 2012. The alternative argument, that this is a motion for renewal and vacatur, is without merit. The cross motion is granted and Kelly is dismissed as a respondent.

As for the claim brought against OCME, petitioner challenges the constitutionality of Section 557 (g) of the Charter. As OCME has asserted, that specific statute has been previously

challenged. In *Matter of Mitchell v Borakove* (225 AD2d 435 [1st Dept 1996]), the Appellate Division, First Department, held that the distinctions in the City law and the law of the non-New York City counties, though significant, was not in violation of principles of due process or an aberration of legislative authority. It was decided that the County Law had no application to New York City, whose counties were wholly contained within the city, and the city was exempt from county law. Accordingly, the Legislature intended to defer to the City Charter the regulation of records within its jurisdictional bounds. This decision was relied upon in *Lovacco v Hirsch* (250 AD2d 416, *supra*). The constitutionality of section 557 (g) has been upheld.

The other legal issue raised by petitioner is whether OCME can be held to the standards of *Brady*, which are independent of the standards of FOIL. “To establish a *Brady* violation, a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material.” *People v Fuentes*, 12 NY3d 259, 263 (2009); *see also Strickler v Greene*, 527 US 263, 281-282 (1999). “Absent a specific request by defendant for the document, materiality can only be demonstrated by a showing that there is a ‘reasonable probability’ that it would have changed the outcome of the proceedings [citations omitted].” *People v Salton*, 74 AD3d 997, 998-9 (2d Dept 2010).

Petitioner is aware that these standards primarily apply to law enforcement agencies, like the NYPD and the District Attorneys’ Office. He claims that, through its conduct in relation to his trial, OCME acted as an agent of the District Attorney’s Office and is implicated in the suppression of the allegedly exculpatory information. Therefore, OCME should be as accountable under *Brady* as any other law enforcement entity.

Most court decisions dealing with similar matters have tended to exclude OCME from the standards imposed on such agencies as the District Attorney's Office. In *People v Nova* (206 AD2d 132 [1st Dept 1994]), the court concluded that OCME was neither an agency of law enforcement nor in the control of prosecutors' offices.

"Pursuant to New York City Charter 557 (a) and (c), the OCME was created as an independent agency affiliated for administrative purposes with the Department of Health of the City of New York. The Medical Examiners who staff OCME are doctors who are qualified as pathologists and microscopists. Unlike the officers of the State Division of Parole, they are not peace officers and do not have any of the powers of peace officers." *Id.* at 135.

Although the Charter required OCME to provide information like autopsy reports to the District Attorney's Office, it was held that OCME was not under the control of the prosecutor's office under any circumstances. *Id.*

In reviewing the evidence in this case, the court does not find any issues indicating that OCME could be regarded as serving as an agent of any law enforcement agency. OCME is not subject to *Brady* standards.

The court finds that OCME has not violated any rules in denying petitioner the information he seeks. The petition is, therefore, denied.

Accordingly, it is

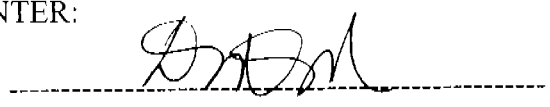
ADJUDGED that the petition is denied and the proceeding is dismissed, as to respondent Charles S. Hirsch, Chief Medical Examiner of New York City; and it is further

ORDERED that the cross motion of respondent Raymond W. Kelly, Commissioner, New York City Police Department to dismiss the petition herein is granted; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed in its entirety as against said respondent.

DATED: 1/23/12

ENTER:



J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).