Matter of Ashley v Fischer

2012 NY Slip Op 31333(U)

May 14, 2012

Supreme Court, Franklin County

Docket Number: 2011-772

Judge: S. Peter Feldstein

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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

In the Matter of the Application of
PATRICK R. ASHLEY, #08-A-1195,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

BRIAN FISCHER, Commissioner,
NYS Department of Corrections and
Community Supervision,
Respondent.

DECISION AND JUDGMENT
RJI #16-1-2011-0346.72
INDEX # 2011-772
ORI #NY016015J

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Patrick R. Ashley, verified on July 26, 2011 and filed in the Franklin County Clerk's office on August 1, 2011. Petitioner, who is an inmate at the Bare Hill Correctional Facility, seeks a judgment of this Court directing " . . .the Respondent to seal or expunge all parole/penal entries made to Petitioner's criminal history report by the New York State Department of Correctional Services after October 9, 2003 . . ."

The Court issued an Order to Show Cause on August 10, 2011 and received and reviewed respondent's Notice of Motion to Dismiss supported by the Affirmation of Cathy Y. Sheehan, Esq., Assistant Attorney General, dated October 4, 2011. The Court also received and reviewed petitioner's numerous submissions in opposition to the motion to dismiss as follows: letter dated October 6, 2011, filed in the Franklin County Clerk's office on October 11, 2011; petitioner's Affidavit sworn to on October 14, 2011 and received directly in chambers on October 19, 2011; petitioner's Affidavit sworn to on December 18, 2011 and filed in the Franklin County Clerk's office on December 20, 2011; petitioner's

letter dated December 22, 2011 and filed in the Franklin County Clerk's office on December 29, 2011; petitioner's letter dated January 5, 2012, filed in the Franklin County Clerk's office on January 9, 2012; and petitioner's letter dated January 9, 2012, filed in the Franklin County Clerk's office on January 12, 2012. By Decision and Order dated January 20, 2012 respondent's motion to dismiss was denied and he was directed to serve answering papers. The Court has since received and reviewed respondent's Answer, verified on February 7, 2012 and supported by the Affirmation of Cathy Y. Sheehan, Esq., Assistant Attorney General, dated February 7, 2012, as well as petitioner's Reply thereto, sworn to on February 10, 2012 and filed in the Franklin County Clerk's office on February 14, 2012.

The facts underlying this proceeding are not in dispute. On August 2, 1999 petitioner was sentenced in St. Lawrence County Court to a controlling determinate term of 5 years upon his convictions of two counts of the crime of Robbery 2°. No period of post-release supervision was imposed by the sentencing court. After petitioner was received into DOCCS custody, however, a period of post-release supervision was administratively imposed. Petitioner was conditionally released from DOCCS custody to the administratively-imposed period of post-release supervision on multiple occasions but was returned to DOCCS custody, as a post-supervision release violator, as many as four times between 2004 and 2008.

On February 6, 2009 the Supreme Court, Wyoming County (Hon. Mark H. Dadd) (Wyoming County Index Number 20,736-08) issued a Memorandum and Judgment vacating the administratively imposed period of post-release supervision and directing DOCCS officials to re-compute petitioner's 1999 sentence without reference to any period of post-release supervision. Upon such re-computation the maximum expiration date

thereof was determined to fall on October 9, 2003.[1] On March 1, 2010 petitioner was re-sentenced in St. Lawrence County Court in connection with his 1999 conviction to the same controlling determinate term of 5 years without any period of post-release supervision. *See* Correction Law §601-d.

On February 25, 2011 petitioner commenced an inmate grievance proceeding (BRL-11999-11) wherein he alleged, in relevant part, as follows:

> "On 02/17/11 I reviewed my criminal history report held by the New York State Division of Criminal Justice Services ('DJCS'). Upon review, I learned that there are several Parole/Penal data entries made in connection with my prior [1999 sentence] that must be sealed or expunged from my criminal history report. DCJS informed me that the entries were made by DOCS [now DOCCS] by means of an electronic computer interface. DCJS further informed me that DOCS must request that the data be sealed or expunged, since DOCS made the data entries.
>
> In short, all Parole/Penal data entered in connection with [the 1999 sentence] after 10/09/03 [maximum expiration date of 1999 sentence] must be sealed or expunged from my criminal history report because my lawful sentences fully expired on 10/09/03."

Petitioner's inmate grievance complaint specifically requested " . . . that DOCS notify DCJS to seal or expunge all Parole/Penal data entered in connection with [the 1999 sentence] after 10/09/03 from my criminal history report. All references relating to the vacated PRS [post-release supervision] period should be sealed or expunged from my criminal history report."

On July 6, 2011 petitioner's inmate grievance complaint was denied by the Inmate Grievance Program Central Office Review Committee (CORC) as follows:

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[1] Notwithstanding the re-computation of the maximum expiration date of petitioner's 1999 sentence, he remained/remains confined in DOCCS custody as a result of an unrelated February 28, 2008 determinate sentence of 9 years, with 5 years post-release supervision, imposed by the St. Lawrence County Court upon a conviction of the crime of Attempted Robbery 1 °. *See People v. Ashley*, 71 AD3d 1286, *aff'd* 16 NY3d 725. *See also People v. Ashley*, 89 AD3d 1283.

> "CORC advises the grievant that, in accordance with Directive #4040, Inmate Grievance Program, an individual decision or disposition of any current or subsequent program or procedure having a written appeal mechanism which extends review outside the facility shall be considered non-grievable. CORC notes that, while the Department of Correctional Services and the Division of Parole have effectively been merged into the Department of Corrections and Community Supervision, until the merger is complete the grievant is advised to send his request regarding his Parole records to the Division of Parole."

In the meantime, petitioner had apparently already written a letter, dated February 8, 2011, to Andrea Evans, Chairwoman, New York State Board of Parole, with regard to this situation. In response thereto, Terrence X. Tracy, Counsel, New York State Board of Parole, wrote a May 16, 2011 letter to a parole officer at the Bare Hill Correctional Facility stating, in relevant part, as follows:

> "As Mr. Ashley correctly notes, there was no period of post-release supervision imposed as part of his [1999] sentence . . . If there are any documents, e.g., *Violation of Release Report; Notice Violation, Preliminary Hearing Decision Notice; Area/Bureau Analysis Parole Revocation Decision Notice,* etc., in Mr. Ashley's case record that relate to violations of release for the period between 2004 and 2008, would you kindly remove them from the case record and send them to my attention." (Emphasis in original).

Attorney Tracy's directive was apparently followed, with the offending paper records physically removed (expunged) from the facility parole records and mailed to Mr. Tracy to be archived in the event of future litigation. Notwithstanding the foregoing, DCJS records apparently continue to show petitioner's four post-release supervision violations/returns to DOCCS custody, each of which occurred <u>after</u> the recomputed maximum expiration date of the 1999 sentence had been reached. There is nothing in the

record before this Court to indicate that DOCCS officials have initiated any contact with DCJS for the purpose of having the references to the post-release violations removed.[2]

The respondent maintains that DOCCS fully complied with all mandates set forth in the February 6, 2009 judgment of the Supreme Court, Wyoming County, vacating the administratively imposed period of post-release supervision and directing DOCCS officials to re-compute petitioner's sentence without reference to any period of post-release supervision. According to the respondent, "[n]othing in the 2009 order directed DOCS [now DOCCS] to seal all references to petitioner's incarceration history pursuant to the PRS [post-release supervision] in question, and nothing in Correction Law §601-d Penal Law §70.85, CPL §160.50 or any other statute would have authorized the Court to grant such relief."

In its February 6, 2009 Memorandum and Judgment the Supreme Court, Wyoming County, found the administratively imposed period of post-release supervision to be of "no effect." Citing, *inter alia*, *State of New York v. Randy M.,* 57 AD3d 1157, *lv den* 11 NY3d 921 and *People ex rel Benton v. Warden*, 20 Misc 3d 516, the Supreme Court, Wyoming County, was " . . . of the further opinion that even re-sentencing to a new period of post-release supervision would not validate any prior revocation of an invalid term of post-release supervision."

It appears from the intervention of Mr. Tracy, as detailed previously, that DOCCS officials have already expunged any physical documentation of petitioner's "violations" of the administratively-imposed period of post-release supervision between 2004 and 2008. This Court, however, is troubled by the fact that either the old Division of Parole

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[2] Although DCJS is not a party to this proceeding it appears that their records with respect to petitioner's post-release supervision violations were created solely upon input from the Division of Parole (now part of DOCCS).

or Department of Correctional Services (now merged into DOCCS) electronically transmitted data with respect to petitioner's "violations" of the administratively-imposed period of post-release supervision to DCJS, where information pertaining to such "violations" remains part of petitioner's record.[3] Since DCJS is not a party to this proceeding the Court can not direct that entity to take any action with respect to their records showing petitioner's four "violations" of post-release supervision. Under the facts and circumstances of this case, however, the Court finds it appropriate to direct the respondent to notify DCJS that petitioner's four "violations" of the administratively-imposed period of post-release supervision, as previously reported to DCJS and as currently appear in DCJS records, are invalid and that all reference to such "violations" have been expunged from DOCCS's own records.

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the respondent is directed to notify DCJS that petitioner's four "violations" of the administratively-imposed period of post-release supervision are invalid and that all reference to such "violations" have been expunged from DOCCS's own records.

Dated: May 14, 2012 at
Indian Lake, New York.

____
S. Peter Feldstein
Acting Supreme Court Justice

[3] This statement of concern should not be construed as indicating that the Court finds anything improper with regard to the original transmission of data with respect to petitioner's post-release supervision "violations." The last delinquency date with respect to any of petitioner's "violations" of post-release supervision was November 15, 2007 and the issue of the validity of an administratively imposed periods of post-release supervision was not finally laid to rest, particularly in the Third Department, until April 29, 2008 when the Court of Appeals issued its decision in *Garner v. New York State Department of Correctional Services*, 10 NY3d 358, *rev'g* 39 AD3d 1019.