

Matter of Simon v NYS Div. of Parole

2012 NY Slip Op 32340(U)

August 29, 2012

Supreme Court, St. Lawrence County

Docket Number: 138525

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE
X

In the Matter of the Application of
STEVEN SIMON, #08-R-1125,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #44-1-2012-0262.11
INDEX # 138525
ORI # NY044015J

NYS DIVISION OF PAROLE, and
CALVIN A. RABSATT, Superintendent,
Riverview Correctional Facility,
Respondents.

X

This proceeding was originated by the Petition for Writ of Habeas Corpus of Steven Simon, verified on March 31, 2012 and filed in the St. Lawrence County Clerk's Office on April 11, 2012. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging his continued incarceration in the custody of New York State Department of Corrections and Community Supervision. The Court issued an Order to Show Cause on April 17, 2012 and received and reviewed respondents' Return, dated June 1, 2012. The Court also received and reviewed petitioner's Reply thereto, dated June 11, 2012 and filed in the St. Lawrence County Clerk's office on June 14, 2012, as well as petitioner's additional correspondence, dated June 28, 2012 and received directly in chambers on July 2, 2012.

By Decision and Order dated July 17, 2012 the Court severed and dismissed all causes of action asserted by petitioner except the cause of action asserting a challenge to his notice of the maximum expiration date of the period of post-release supervision. With respect to the surviving cause of action, respondents were directed to submit a

Supplemental Return. The Court has since received and reviewed petitioner's memorandum of July 28, 2012, received directly in chambers on August 1, 2012. The Court has also received and reviewed respondents' supplemental Letter Memorandum of July 31, 2012, with Supplemental Exhibits A and B, as well as petitioner's additional correspondence dated July 31, 2012 and received directly in chambers on August 6, 2012.

On March 20, 2008 petitioner was sentenced in Supreme Court, Kings County, to a determinate term of 2 years, with 2 years post-release supervision, upon his conviction of the crime of Criminal Sale of a Controlled Substance 3°. He was received into DOCCS custody on March 27, 2008 certified as entitled to 124 days of jail time credit. At that time the maximum expiration date of the determinate term was apparently calculated by DOCCS officials as November 22, 2009.

Petitioner was released from DOCCS custody to post-release supervision on October 23, 2008. As of that date the running of petitioner's 2-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the maximum expiration date thereof calculated as October 23, 2010. Also as of October 23, 2008 the running of the underlying 2-year determinate term was interrupted with the remaining 1 year and 29 days owed to the originally calculated November 22, 2009 maximum expiration date thereof held in abeyance pending petitioner's successful completion of the period of post-release supervision or return to DOCCS custody. *See* Penal Law §70.45(5)(a). On or about the time of his October 23, 2008 release from DOCCS custody to post-release parole supervision petitioner signed a document, entitled Certificate of Release to Parole Supervision Determinate - Post-Release Supervision, specifying the maximum expiration date of the period of post-release supervision as October 23, 2010 and setting forth 11

separately enumerated conditions of release as well as a group of special conditions listed under condition of release #12.

Petitioner's post-release supervision was first revoked with a delinquency date of April 30, 2010. As of that delinquency date the running of the period of post-release supervision was interrupted (*see* Penal Law §70.45(5)(d)(i)) with 5 months and 23 days still owing to the originally calculated October 23, 2010 maximum expiration date thereof. Petitioner was apparently restored to post-release supervision on July 27, 2010 certified as entitled to 77 days of parole jail time credit. The parole jail time credit was applied against the interrupted 2008 determinate term (*see* Penal Law §70.45(5)(d)(iii)), reducing the time previously held in abeyance against such term from 1 year and 29 days to 10 months and 12 days.

When petitioner was restored to post-release supervision on July 27, 2010 the running of the 5 months and 23 days still owing against the period of post-release supervision re-commenced running and should have produced a re-calculated post-release supervision maximum expiration date of January 20, 2011. It is not disputed, however, that on July 29, 2010, upon his restoration to post-release parole supervision, petitioner signed a document entitled Supplement to Conditions of Release informing him that the Board of Parole had affirmed the recommendation to restore him to post-release parole supervision but that the April 30, 2010 delinquency date had caused an interruption the running of his "sentence." According to the Supplement to Conditions of Release document, "[y]our [petitioner's] sentence has been recomputed, and the maximum expiration date of your sentence is 12/3/2011 PRS . . . You are being restored

to parole supervision under the same Conditions of Release as existed at the time of your violation.” (Emphasis in original).¹

On August 3, 2010 - approximately one week after his restoration to post-release parole supervision - petitioner met with his supervising parole officer (P.O. Allen) and signed a document entitled Special Conditions of Release to Parole Supervision, which set forth additional enumerated special conditions of release. The Special Conditions of Release to Parole Supervision document also included the notation “Supervision Maximum: 10-23-2010.”

On August 17, 2011 petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his post-release parole supervision in seven separate respects. Charge #5 alleged, in relevant part, as follows:

¹ The Supplement to Conditions of Release document is problematic in a number of respects. First of all, the copy of the document annexed to respondents’ supplemental Letter Memorandum of July 31, 2012, as part of Supplemental Exhibit A, is difficult to read. The legibility issue, however, is apparently not limited to this copy of the document in question. The ALJ presiding at petitioner’s November 28, 2011 final parole revocation hearing obviously had difficulty deciphering the recomputed “maximum expiration date” set forth on the document. Based upon its examination of the document, as well as the testimony adduced at the final parole revocation hearing, it ultimately appears to this Court that the recomputed “maximum expiration date” set forth on the July 29, 2010 Supplement to Conditions of Release document is, in fact, December 3, 2011. It remains uncertain, however, how that date was computed and what that date represents. As noted previously, when petitioner was restored to post-release supervision on July 27, 2010 the 5 months and 23 days he still owed against the period of post-release supervision recommenced running and should have produced a re-calculated post-release supervision maximum expiration date of January 20, 2011. Also as of July 27, 2010 (after the application of 77 days of parole jail time credit) petitioner still owed 10 months and 12 days against the underlying term of his determinate sentence. If those 10 months and 12 days were to be tacked on following the January 20, 2011 maximum expiration date of the period of post-release supervision, the December 3, 2011 date would be produced. Although there is nothing in the record before the Court to suggest that the December 3, 2011 “maximum expiration” date was completed in this fashion, the coincidence is striking. In any event, even if the December 3, 2011 “maximum expiration date” was so calculated, its significance is questionable. Had petitioner completed the remaining portion of his two-year period of post-release supervision without violation, he presumably would have been entitled to have the remaining 10 months and 12 days held in abeyance against the underlying determinate term “credited with and diminished by” the 2-year period of post-release supervision. See Penal Law §70.45(5)(b). Thus, if petitioner successfully completed the remaining portion of the period of post-release supervision without violation, it does not appear that he would have been subject to further supervision after reaching the maximum expiration date of the period of post-release supervision.

“Steven Simon violated Rule #2 of the conditions governing his release in that on 11/2/10 and thereafter he failed to make his office report . . . as instructed by parole officer during a telephone call on 10/28/10.” A final parole revocation hearing was conducted on November 28, 2011. At the conclusion of the hearing Parole Violation Charge #5 was sustained with a modified delinquency date of November 2, 2010. The presiding Administrative Law Judge revoked petitioner’s post-release supervision and imposed a delinquent time assessment holding petitioner to his maximum expiration date.

As of the November 2, 2010 delinquency date the running of petitioner’s period of post-release supervision was interrupted (*see* Penal Law §70.45(5)(d)(i)) with 2 months and 18 days still owing to the apparent January 20, 2011 adjusted maximum expiration date thereof. Petitioner was returned to DOCCS custody, as a post-release supervision violator, on December 9, 2011 certified as entitled to 114 days of parole jail time credit. The parole jail time credit was applied against the interrupted 2008 determinate term (*see* Penal Law §70.45(5)(d)(iii)), reducing the time previously held in abeyance against such term from 10 months and 12 days to 6 months and 18 days. The 6 months and 18 days still held in abeyance against petitioner’s 2008 determinate term re-commenced running upon his December 9, 2011 return to DOCCS custody. *See* Penal Law §70.45(5)(a). Only after petitioner completed serving those 6 months and 18 days would the running of the 2 months and 18 days still owing to the adjusted maximum expiration date of the 2-year period of post-release supervision re-commence, with petitioner remaining in DOCCS custody pursuant to the delinquent time assessment imposed following the final revocation hearing. *See* Penal Law §70.45(5)(d)(iv).

DOCCS officials have determined the current maximum expiration date of petitioner's 2008 determinate sentence, including the 2-year period of post-release supervision, as September 15, 2012 (6 months and 18 days owed against the 2-year determinate term plus 2 months and 18 days owed against the 2-year period of post-release supervision running, in sequence, from petitioner's December 9, 2011 return to DOCCS custody).

Petitioner's only remaining claim of entitlement to immediate release from DOCCS custody is based upon his assertion that there was insufficient evidence adduced at the final hearing that he had been made aware that his period of post-release supervision extended beyond October 23, 2010. In support of this assertion petitioner annexed to the petition a copy of the Special Conditions of Release to Parole Supervision that he signed on August 3, 2010. As noted previously, that document, prepared by P.O. Allen and executed approximately one week after petitioner's restoration to post-release supervision, specified "Supervision Maximum: 10-23-2010."

P.O. Allen testified at the November 28, 2011 final parole revocation hearing that when she met with petitioner on August 3, 2010 he showed her a copy of the July 29, 2010 Supplement to Conditions of Release document indicating the "maximum expiration date" of his sentence as December 3, 2011. P.O. Allen also testified that on August 3, 2010 she imposed additional written special release conditions in the document (Special Conditions of Release to Parole Supervision) specifying "Supervision Maximum; 10-23-2010." According to the testimony of P.O. Allen, the October 23, 2010 date was utilized because that was the date still shown on the parole computer for the expiration of petitioner's period of post-release supervision. Although P.O. Allen acknowledged that she discussed

the October 23, 2010 post-release supervision maximum expiration date with the petitioner on August 3, 2010, she also testified that she advised him that the date might subsequently be changed. P.O. Allen next testified that when she met with petitioner one week later, on August 10, 2010, the parole computer displayed an unspecified changed maximum expiration date for petitioner's period of post-release supervision and that the new date - again unspecified - was orally conveyed to petitioner. P.O. Allen, however, conceded that no notation of her conversation with respect to the change in petitioner's post-release supervision maximum expiration date was entered in her written chronological records and that she did not amend the August 3, 2010 written Special Conditions of Release to Parole Supervision document to reflect the revised post-release supervision maximum expiration date. P.O. Allen later testified that she spoke to petitioner, via telephone, on October 28, 2010 and directed him to report to her on November 2, 2010. According to P.O. Allen's testimony, petitioner failed to make that report.

Petitioner's final parole revocation hearing testimony was starkly at odds with that of P.O. Allen. Petitioner testified that when he met with P.O. Allen on August 3, 2010 he showed her the July 29, 2010 Supplement to Conditions of Release document, which included a reference to the recomputed maximum expiration date of December 3, 2011, and asked P.O. Allen why the maximum expiration date had been extended. According to petitioner's hearing testimony, P.O. Allen responded " . . . don't worry about that paperwork right there because there's no possible way that they can change your maximum expiration date because you did not run from, from from parole. She [P.O. Allen] took the paper into her possession and then she gave me a next piece of paper, she

looked it up on her computer first and she say your maximum expiration date is still October 23rd, 2010.” Petitioner went on to testify then he then signed the August 3, 2010 Special Conditions of Release to Parole Supervision document, which included the notation “Supervision Maximum: 10-23-2010.” Petitioner went on to testify that he had no further discussion with P.O. Allen regarding the maximum expiration of his period of post-release supervision, either on August 3, 2010 or at any other time. Petitioner did testify, however, that he met with P.O. Allen on October 26, 2010 (October 23, 2010 fell on a Saturday and he was allegedly told by P.O. Allen to report on the 26th). At that meeting, according to petitioner’s testimony, P.O. Allen “. . . said that whatever discharge papers was no there and whatever and that was it, that’s the only time we talked about it, that’s it.” Petitioner also testified that he never spoke to P.O. Allen after October 26, 2010 “[b]ecause that was the date after I spoke to her about the discharge, she said the papers weren’t there and she was gonna mail me the discharge papers and not to report back, that was it.”

In considering the disparity between the testimonies of P.O. Allen and petitioner, it is noted a court reviewing a determination to revoke parole, in the context of a habeas corpus proceeding, may not make its own determination based upon its own assessment of the credibility of witnesses. Rather, the reviewing court is limited to an examination of the record to determine if required procedural rules were followed and to determine if there is any evidence which, if credited, would support the revocation determination. *See People ex rel Crespo v. Yelich*, 71 AD3d 1214, *People ex rel Gonzalez v. LaClair*, 63 AD3d 1493, *lv den* 13 NY3d 705, and *People ex rel Brazeau v. McLaughlin*, 233 AD2d 724, *lv den* 89 NY2d 810. To the extent the above standard of review is determinative,

this Court finds no basis vacate the determination of the ALJ to credit the testimony of P.O. Allen over that of petitioner. There remains, however, a broader question of whether or not any regulatory, statutory or judicial authority mandates that a parolee be advised, in writing, as to the date his/her supervision terminates.

Although there are statutory/regulatory mandates that parolees be provided copies of their conditions of release (*see* Executive Law §259-i(2)(a)(i) and 9 NYCRR §§8003.2 and 8003.3) the Court is unaware of any statute or regulation mandating that a parolee be notified, in writing, as to the expiration date of his/her parole supervision. The Court is also unaware of any judicial authority addressing this point. Notwithstanding the foregoing, it is clear to the Court that notice to a parolee of the maximum expiration date of his/her period of supervision can be viewed as a fundamental component of parolee's obligation to comply with the conditions of release. Under the unique facts and circumstances of this case, however, the Court finds no reason to resolve the ultimate question of whether or not a parolee has a constitutional due process right to written notification of the maximum expiration date of his/her period of parole supervision.

While there is no doubt that petitioner never received written notification that his obligation to comply with the special conditions imposed by P.O. Allen on August 3, 2010 extended beyond October 23, 2010, Parole Violation Charge #5 - the only sustained charge - did not allege that petitioner violated any of those special conditions. Rather, Parole Violation Charge #5 charged petitioner with violating "Rule #2 of the conditions governing his release" by failing to make an office report as instructed by his parole officer in an October 28, 2010 telephone call. Rule #2 of the conditions of petitioner's release, as set forth in the original Certificate of Release to Parole Supervision signed by petitioner

on October 21, 2008, provided that “I [petitioner] will make office and/or written reports as directed.” At or about the time he was re-released to parole supervision on July 27, 2010, moreover, petitioner was notified in writing (July 29, 2010 Supplement to Conditions of Release) that he was being restored to parole supervision under the same conditions of release that existed at the time of his April 30, 2010 parole violation. The Supplement to Conditions of Release document, signed by petitioner on July 29, 2010, also stated in writing that the maximum expiration date of petitioner’s sentences extended well beyond the November 2, 2010 delinquency date associated with the parole violation determination at issue in this proceeding. The Court therefore finds no due process considerations in play. If Parole Violation Charge #5 had alleged that petitioner violated one of the special conditions imposed by P.O. Allen on August 3, 2010, however, a different result might have been reached.

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: August 29, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge