Matter of Frain v Yelich
2012 NY Slip Op 33051(U)
December 14, 2012
Supreme Court, Franklin County
Docket Number: 2012-479
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

In the Matter of the Application of
BARRY FRAIN,#01-B-1945,
Petitioner,

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

-against-

BRUCE YELICH, Superintendent,
Bare Hill Correctional Facility, and **ANDREA EVANS**, Chairwoman, NYS Board of Parole,
Respondents.

DECISION AND JUDGMENT
RJI #16-1-2012-0235.55
INDEX # 2012-479
ORI # NY016015J

This proceeding was originated by the Petition for Writ of Habeas Corpus of Barry Frain, verified on June 4, 2012 and filed in the Franklin County Clerk's office on June 7, 2012. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. The Court issued an Order to Show Cause on June 12, 2012 and has received and reviewed respondents' Return, dated July 25, 2012, as well as petitioner's Reply thereto, verified on August 8, 2012 and filed in the Franklin County Clerk's office on August 10, 2012.

On December 15, 2011 petitioner was most recently released from DOCCS custody to parole supervision. At that time the maximum expiration date of his underlying sentence(s) was calculated as July 3, 2014. On March 1, 2012, however, petitioner was served with a Notice of Violation/Violation of Release Report, as well as Supplementary Violation of Parole Report #1, together charging him with violating the conditions of his release in five separate respects. Parole Violation Charge #1 alleged that petitioner

violated his daily curfew on December 28, 2011. Parole Violation Charge #2 alleged that petitioner possessed and/or used marijuana on December 29, 2011. Parole Violation Charge #3 alleged that petitioner was discharged as unsuccessful from a substance abuse treatment program on January 4, 2012. Parole Violation Charge #4 alleged that petitioner changed his approved residence without the knowledge and/or permission of his parole officer on or before January 3, 2012. Parole Violation Charge #5 alleged that petitioner failed to report on January 9, 2012. On March 1, 2012, apparently at the same time he was served with the Notice of Violation/Violation of Release Report and Supplementary Violation of Parole Report #1, petitioner waived a preliminary hearing.

Supplementary Violation of Parole Report #2, issued on or about March 13, 2012, set forth one additional parole violation charge. Parole Violation Charge #6 alleged that petitioner threatened the safety and well being of himself and various parole officers by failing to comply with verbal directives when such parole officers were attempting to effectuate his arrest on March 1, 2012. Obviously, Supplementary Violation of Parole Report #2 was not served on petitioner on March 1, 2012. According to petitioner, he received Supplementary Violation of Parole Report #2 in the mail several weeks after his arrest.

A final parole revocation hearing was conducted at the Niagara County Jail with respect to all six parole violation charges on March 22, 2012. At the outset of the final hearing petitioner, who was represented by counsel, advised the presiding Administrative Law Judge (ALJ) that he had not been served with Supplementary Violation of Parole Report #2 (containing Parole Violation Charge #6) as of March 1, 2012, when he waived a preliminary hearing. Petitioner took the position that his waiver of a preliminary

hearing pertained only to Parole Violation Charges #1 through #5. The ALJ then stated, in effect, that if petitioner was challenging the timeliness of notice of the final hearing with respect to Parole Violation Charge #6 (*see* 9 NYCRR §8005.18(a)) she would adjourn the hearing for notice, with such adjournment chargeable "to the Division [of Parole]." The petitioner did not request such an adjournment . The Parole Revocation Specialist then put on the record an offer whereby petitioner would plead guilty to Parole Violation Charge #1 with an amended delinquency date of March 1, 2012 and a recommended 16-month delinquent time assessment to be imposed upon petitioner as a Category 1 parole violator. After consulting with counsel off the record petitioner, speaking for himself, asserted a general argument that his statutory/constitutional rights have been violated. The ALJ then advised petitioner, in effect, that due process arguments could not be addressed in the context of the final parole revocation hearing but, rather, would have to be separately addressed in a judicial forum. In this regard, the ALJ stated as follows:

> "What I'm saying to you is this. My job is really very limited. My job is to determine whether or not the Division of Parole presents enough evidence to sustain an important parole violation. Often times, a parolee will raise an issue of notice or timeliness.
>
> It has been the long time practice of the Division of Parole to allow parolees to enter into a plea agreement that is fair and reasonable under all of the circumstances and yet still allow them to preserve an argument about due process in another form [fourm?].
>
> So what I'm telling you is that when you raise an issue about due process, your argument is preserved on the record and you can proceed in another form [fourm?] where they have the authority or the jurisdiction to address the matter.
>
> I can't solve a due process problem for you unless of course the Division is going to agree and withdraw all the charges. What it means is that your right to address the due process issue is protected by the law and by the practice of the Division of Parole.

> So if for example, you wanted the best of both worlds, you could really have it here. By that, I mean you can negotiate an agreement with the Division of Parole regarding these charges and obtain a benefit of delinquent time returned to you. You can walk away with the decision in hand. You can then file the necessary paperwork with the court and ask them to review the procedural and due process issues.
>
> If you are not successful in the court case regarding your due process issues, then you have essentially cut your losses here by controlling your delinquent time and having input into the decision.
>
> If you are successful in court regarding your due process issue, then that court decision is controlling over anything that we do here. That is a fair way of giving a parolee a remedy in court. So what I think that you have due process issue, you have to take it up in another court. You can't do it here. You raise the issue and then you move on to the hearing.
>
> If you want to resolve this case today with the plea agreement, you can do that and still take your due process case up to the court. If you don't want to resolve this case today with a plea agreement, then I would set it down for a contested hearing."

Petitioner ultimately entered into an agreement whereby he pled guilty to Parole Violation Charge #1, with a modified delinquency date of March 1, 2012 and a 12-month delinquent time assessment imposed upon him as a persistent parole violator. The remaining parole violation charges (#2 through #6) were withdrawn. As part of the plea agreement petitioner's right to pursue his due process argument was purportedly preserved for review in a subsequent judicial proceeding, such as this one.

Relying on the unreported May 24, 2011 decision of the Supreme Court, Bronx County, in *People ex rel Davis v. Warden*, 2011 NY Slip Op 50911(U), "[p]etitioner contends that based upon the failure of the respondent to provide Notice of all the charges within 3 days of the execution of the warrant, and [failure] to provide him with a preliminary hearing based upon the violation of release report #2, and because Petitioner did not waive his right to a preliminary hearing in regard to the notice, that his continued

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detention is unlawful based upon the violation of the U.S. Constitutional right to due process . . ." (other citation omitted). For the reasons set forth below, however, this Court rejects petitioner's contentions.

The primary consideration underlying the due process requirement that a prompt preliminary hearing must be conducted to determine whether there is probable cause to believe that an arrested, accused parole violator has committed acts constituting a violation of parole condition(s) is that "[t]here is typically a substantial time lag between the arrest [on the parole warrant] and the eventual determination by the parole board whether parole should be revoked." *Morrissey v. Brewer*, 408 U.S. 471, 485. Due process does not require that an accused parole violator be afforded a preliminary (probable cause) hearing with respect to each pending parole violation charge. Thus, where multiple parole violation charges are pending and a determination is made, following a preliminary hearing, that there is probable cause to believe that a parole violation occurred with respect to one of the charges, the fact that other pending charges were not addressed at the preliminary hearing does not preclude such other charges from being pursued at the final hearing. *See Poladian v. Travis*, 8 AD3d 770 and *People ex rel Kinzer v. Williams*, 256 AD2d 1240.

At approximately 6:45 AM on March 1, 2012, when various parole officers including an officer from the Absconder Search Unit, attempted to take petitioner into custody pursuant to an outstanding parole warrant, petitioner allegedly threatened the safety and well being of himself and the parole officers by failing to comply with verbal directives. Also on March 1, 2012, after petitioner's arrest had been effectuated, he was served with the Notice of Violation/Violation of Release Report/Supplementary Violation of Parole Report #1, together setting forth Parole Violation Charges #1 through #5. It is

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not disputed that at that time petitioner knowingly, intelligently and voluntarily waived his right to a preliminary hearing with respect to such charges.

As alluded to previously, it is obvious that petitioner could not have been served with a copy of Parole Violation Charge #6 on March 1, 2012 since the alleged conduct underlying the issuance of such charge occurred on that date when petitioner was being taken into custody on a previously-issued parole warrant. This Court finds that when, approximetly two weeks later, petitioner was served by mail with a copy of Supplementary Violation of Parole Report #2, setting forth Parole Violation Charge #6, he was not entitled to a preliminary hearing with respect to such charge since he had already waived his right to preliminary hearing after being duly served with Parole Violation Charges #1 through #5. Although petitioner was nevertheless entitled to 14 days notice of Parole Violation Charge #6 prior to the scheduled date of his final parole revocation hearing (*see* Executive Law §259-i(3)(f)(iii)), the Court notes that the Administrative Law Judge presiding at petitioner's March 22, 2012 final parole revocation hearing stated on the record that she " . . . would be more than happy to give you [petitioner] additional time that you are allowed under the law, technically 14 days, and charge the time to the Division." Petitioner, who was represented by counsel, did not avail himself of such an adjournment but, instead, ultimately plead guilty to Parole Violation Charge #1, with the remaining charges withdrawn.

Upon the record herein, this Court is simply not persuaded that any basis exists to vacate the underlying parole violation warrant and direct petitioner's immediate restoration to parole supervision. To the extent that *People ex rel Davis v. Warden*, 2011 NY Slip Op 50911(U), suggests that the Supreme Court, Bronx County, might reach a different conclusion, this Court respectfully disagrees with the that court's analysis.

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: December 14, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge