

<b>Matter of Archer v NYS Dept. of Corr. &amp; Community Supervision</b>
2012 NY Slip Op 33142(U)
December 31, 2012
Sup Ct, St. Lawrence County
Docket Number: 139012
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  
**COREY ARCHER, #02-A-3958,**  
Petitioner,

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

**DECISION AND JUDGMENT**  
**RJI #44-1-2012-0384.16**  
**INDEX # 139012**  
**ORI # NY044015J**

-against-

**NYS DEPARTMENT OF CORRECTIONS  
AND COMMUNITY SUPERVISION, and  
CALVIN A. RABSATT, Superintendent,**  
Riverview Correctional Facility,

Respondents.

**X**

This proceeding was commenced by the Petition for a Writ of Habeas Corpus of Edward R. Hammock, Esq. on behalf of Corey Archer, verified on May 24, 2012 and filed in the St. Lawrence County Clerk's office on May 30, 2012. Mr. Archer, who is an inmate at the Riverview Correctional Facility and who will hereinafter be referred to as the petitioner, 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 June 5, 2012 and has received and reviewed respondent's Return, verified on June 20, 2012, as well as petitioner's Reply thereto, dated July 27, 2012.

On July 1, 2002 petitioner was initially sentenced in Supreme Court, Kings County, as a second felony offender, to a determinate term of 10 years, with 5 years post-release supervision, upon his conviction of the crime of Manslaughter 1°. Such sentence was amended on August 31, 2007 by the removal of the second felony offender designation and the substitution of an indeterminate sentence of 6¾ to 13½ years.

Petitioner was released from DOCCS custody to parole supervision on April 13, 2009. On April 8, 2011, however, he was served with a Notice of Violation/Violation of

Release Report charging him with violating the conditions of his release in six respects. Parole Violation Charge #1 alleged that petitioner violated Rule #8 of the rules governing parole in that on March 15, 2011 he “. . . threatened the safety and well-being of Police Officer McCullough by punching him with a closed fist to his eye, causing a hemorrhage.” Parole Violation Charge #2 alleged that petitioner violated Rule #8 of the rules governing parole in that on March 15, 2011 he “. . . threatened the safety and well-being of Police Officer McCullough by punching him with a closed fist to his eye, causing swelling and bruising.” Parole Violation Charge #3 alleged that petitioner violated Rule #8 of the rules governing parole in that on March 15, 2011 he “. . . punched Police Officer McCullough with a close [sic] fist to his eye, causing a hemorrhage [sic].” Parole Violation Charge #4 alleged that petitioner violated Rule #8 of the rules governing parole that on March 15, 2011 he “. . . punched police officer McCullough with a close [sic] fist to his eye, causing swelling and bruising.” Parole Violation Charge #6 alleged that petitioner violated Rule #8 of the rules governing parole in that on March 15, 2011 he “. . . threatened the safety and well-being of Police Officers as he resisted arrest by struggling and refusing to put his hands behind his back.” Rule #8 of the rules governing parole states that “I [petitioner] will not behave in such manner as to violate the provisions of any law to which I am subject which provide for a penalty of imprisonment, nor will my behavior threaten the safety or well-being of myself or others.” (Emphasis added).

Probable cause with respect to Parole Violation Charge #1 was found following a preliminary parole violation hearing held on May 5, 2011. A final hearing was conducted on August 9, 2011. By Parole Revocation Decision Notice dated August 17, 2011 the presiding Administrative Law Judge (ALJ) sustained Parole Violation Charges #1, #2, #3,

#4 and #6<sup>1</sup>. Petitioner's parole was revoked with a sustained delinquency date of March 15, 2011 and it was recommended that he be held to the maximum expiration date of his sentence. The ALJ's recommendation was affirmed by a parole commissioner on August 24, 2011. The maximum expiration date of petitioner's sentence is currently calculated by DOCCS officials as October 28, 2013.

Counsel timely notified the DOCCS parole Appeals Unit of petitioner's intent to take an administrative appeal from the parole revocation determination. By letter dated September 20, 2011 counsel for the petitioner was notified by the Appeals Unit that the notice of appeal had been received and that “. . . the document that perfects the [administrative] appeal must be received by this office by [January 18, 2012] . . .” The September 20, 2011 letter/notification, which was on the letterhead of the Department of Corrections and Community Supervision, Board of Parole, 97 Central Avenue, Albany, NY 12206 and signed as “Appeals Unit,” included the statement that “[a]ny correspondence relating to this administrative appeal should be addressed to the Appeals Unit at the above address.”

After September 20, 2011 counsel for the petitioner wrote a series of letters to Steve Philbrick, Esq., Parole Counsel's Office, NYS Department of Corrections and Community Supervision, 97 Central Avenue, Albany, NY 12206. These letters were dated November 28, 2011, December 29, 2011, February 3, 2012 and March 26, 2012.<sup>2</sup> Although the revocation of petitioner's parole was the subject of all four letters, the December 29, 2011 correspondence, in particular, constituted the type of submission one might utilize to

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<sup>1</sup> The ALJ found that Parole Violation Charge #5 had not been proven by a preponderance of legally sufficient evidence.

<sup>2</sup> In addition, the November 28, 2011 letter referenced a “phone conversation” between counsel for the petitioner and Mr. Philbrick and the March 26, 2012 letter referenced an additional “conversation” between these two individuals.

perfect an administrative appeal. Counsel for the petitioner concluded his December 29, 2011 letter to Mr. Philbrick as follows: “In light of all that we have set forth above, we ask that this case be reviewed with the view toward the dismissal of the charges which Judge Cox [the presiding ALJ] found Mr. Archer guilty . . .” While counsel’s February 3, 2012 letter brought Mr. Philbrick up to date with respect to the post December 29, 2011 disposition of petitioner’s criminal case, such letter went on to address more substantive aspects of the parole revocation determination and concluded as follows: “For all the reasons we have set forth in our two submissions regarding this case [presumably, December 29, 2011 and February 3, 2012] Mr. Archer should be restored to supervision without further delay. We urge you to take the appropriate action to effect his release from custody.” Counsel’s March 26, 2011 letter again addressed substantive aspects of the parole revocation determination, this time in the context of a March 22, 2012 New York Times article regarding the New York City Police Department’s stop and frisk policy. Notwithstanding all of the foregoing, there is nothing in the record to suggest that counsel for the petitioner submitted any materials directly to the DOCCS Parole Appeals Unit after September 20, 2011. The November 28, 2011, December 29, 2011 and February 3, 2012 correspondence were each stamped as received by the Division of Parole Office of Counsel. The March 26, 2012 letter, however, was stamped as received by the Division of Parole Appeals Unit.<sup>3</sup> There is nothing in the record to suggest that the Appeals Unit issued written findings and/or a recommendation in accordance with the provisions of 9 NYCRR §8006.4(a)(2).

Respondents argue that the petition herein must be dismissed based upon petitioner’s failure to exhaust administrative remedies prior to the commencement of this

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<sup>3</sup> The circumstances under which counsel’s March 26, 2012 letter was stamped as received by the Appeals Unit rather than the Division of Parole Office of Counsel is not addressed in the record.

proceeding. In advancing this argument the respondents do not directly take issue with the fact that counsel for the petitioner directed his post-September 20, 2011 correspondence to Deputy Counsel Philbrick, rather than to the DOCCS Parole Appeals Unit. Rather, respondents assert, in effect, that petitioner's administrative appeal should not be deemed to have been perfected until March 29, 2012, when the March 26, 2012 letter from counsel for the petitioner to Deputy Counsel Philbrick was apparently received by the DOCCS Appeals Unit. If petitioner's administrative appeal was deemed to be perfected as of March 29, 2012, the Appeals Unit would have had until July 29, 2012 (four months from March 29, 2012) to issue its findings and recommendation (*see* 9 NYCRR §8006.4(c)) and the commencement of this proceeding on May 20, 2012 (*see* CPLR §304 (a)) would therefore have been premature. Thus, in paragraph 10 of their Return the respondents assert as follows: "After repeated communications and the commencement of this litigation, the respondents are now prepared to work on the assumption that there is an intention by Petitioner to have perfected the [administrative] appeal, and to give him the benefit of a March 29, 2012, perfection date. This, however, still means that petitioner failed to properly exhaust administrative remedies before the commencement of this proceeding."

This Court has serious concern with the practice of purporting to pursue a parole violator's administrative appeal through Parole Counsel's office, rather than the DOCCS Parole Appeals Unit. Notwithstanding such concern, in view of the position espoused by the respondents in this proceeding and in view of the fact that the March 26, 2012 letter from counsel for the petitioner to Mr. Philbrick obviously made its way to the DOCCS Parole Appeal Unit, the Court agrees that Petitioner's administrative appeal should be deemed to have been perfected on March 29, 2012, the date the March 26, 2012 letter was received by the Appeals Unit. Accordingly, the Court also agrees that this proceeding

should be dismissed as prematurely commenced prior to the exhaustion of administrative remedies. See *People ex rel Pettijohn v. LaClair*, 78 AD3d 1395, *People el rel Griffith v. New York State Division of Parole*, 68 AD3d 1390 and *People el rel Howe v. Travis*, 18 AD3d 1052. In any event, even if the Court were to consider the merits of the arguments advanced by petitioner, it would find no basis to overturn the results of the final parole revocation hearing.

The sustained parole violation charges stemmed from petitioner's interaction with police officers during the course of a coordinated street narcotics enforcement operation conducted along Marcus Garvey Boulevard in Brooklyn, New York on March 15, 2011. Police Officer Vargas testified that he observed an unidentified individual hand another individual, who he later identified as petitioner, a small ziplock bag of what Officer Vargas believed to be marijuana. At that point, according to the testimony of Officer Vargas, he contacted his field team by radio giving a "clear description" of the individual observed receiving the marijuana and specifying the direction that such individual was walking (north on Marcus Garvey Boulevard). According to Officer Vargas the description he radioed to the field team was of a "[m]ale black, tall male black with black hat, blue jacket, blue jeans."

The field team referenced by Officer Vargas consisted of Police Officers McCullough<sup>4</sup> and Russo. Officer McCullough testified that at the time of the incident he was located on Marcus Garvey Boulevard several blocks north of where Officer Vargas made his observation. Officer McCullough went on to testify that he received the radio transmission from Officer Vargas and soon observed an individual matching the "general description" provided by Officer Vargas. Officer McCullough then testified as follows:

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<sup>4</sup> Police Officer McCullough is referred to in the transcripts of the final parole revocation hearing as Police Officer McClougher.

“I exited my vehicle I approached the Defendant [petitioner], asked him to you know to hold up, he complied. I conducted my search. I came up with nothing at the time so I retraced the steps that he took to try to find anything that he might have dropped on the ground and at that point I hear my name being called by my partner Officer Russo. I turned to my side and I see him engaged with the Defendant in a bear hug. At that time I run back to my partner...to assist him. An additional car of Police Officers arrives on the scene, three, three additional Officers. We tell the Defendant to put his hands behind his back, tried to handcuff him. He refused both of those. We tried to bring him down to the ground to control his hands and handcuff him. We all go down to the ground. He lands on his back. At that point he, I get punched in the eye, my right eye by the Defendant. At that time I throw, I punch back at the Defendant and hit him. We were able to put him on his stomach in an attempt to control his hands. He’s still struggling refusing to be handcuffed. While we’re giving him verbal commands to put his hands behind his back. He continued to struggle. I remove my pepper spray from my utility belt and spray him in the face one time and he still continues to struggle, but we are able to forcibly put his hands behind his back and handcuff him. We bring him over to the vehicle. We try to put him in our vehicle to transport him back to the precinct. He’s still refusing, he was you know stiffening up and not going in the car. We tried to force him into the car, eventually we got him in and we transported him back to the precinct...I myself go to the hospital to receive treatment for punched in the eye.”

On cross examination Officer McCullough testified that to the best of his recollection the description received from Officer Vargas was of “...a male black with a black ski cap, blue jacket and blue jeans.” Officer McCullough, however, did not recall that the height of the suspect (petitioner is approximately 6'4" tall) was part of the description. Officer McCullough also acknowledged on cross-examination that the description did not indicate the shade of blue or the length of the jacket worn by the suspect. He further acknowledged that there were other people on the street at the time

of the incident and that the area where the incident took place was populated predominately by African Americans.

Police Officers Russo testified that after Officer McCullough initially searched petitioner and elected to retrace petitioner's steps to determine if anything had been dropped on the ground the following transpired:

“At that point I was watching his [petitioner's] hands, because we always watch hands, in his hand was a cell phone and behind his cell phone was a clear plastic bag with a green leafy substance right behind the cell phone. I asked him can I see your phone and he said no. I said can I see your phone, he said no it's my phone and that's when he tensed up, I went to grab it, and I put him in a bear hug and put him against the wall, called my partner. I think I yelled his name and then at that point the other vehicle they were right on the corner I believe it was my Lieutenant and two other Officers on my team and that's when the struggle ensued...During the struggle we told him [petitioner] to put his hands behind his back numerous times. He was resisting, and flailing his arms, you know we tried taking him to the ground. I believe he started trying to run. We did have him, like he wasn't free to run, but we had him by the arms and the body and he tried running. He fell on the ground with us on top of him. He was on his back. My partner got punched in the eye. My partner returned the punch back to him, still struggling the whole time. We took him over on his belly, still struggling without even getting the handcuffs on yet my partner went to his belt and sprayed him once and still after a decent amount of time after he was sprayed we were able to handcuff him.”

On cross examination Officer Russo was unable to recall any details of Officer Vargas' radio description other than “..male black, black hat, blue shirt, blue jeans walking north bound.” Officer Russo also acknowledged on cross examination that the area where the incident occurred was densely populated.

Petitioner testified at the final parole revocation hearing that although he was indeed walking northbound on Marcus Garvey Boulevard during the relevant time frame, no one gave him a ziplock bag or anything else during the course of his walk. Petitioner's

testimony with respect to the early stages of his encounter with Officer McCullough was consistent with the testimony of that officer. Petitioner's testimony with respect to what transpired after Officer McCullough left the scene of the initial encounter to retrace the petitioner's steps, however, differed sharply from the testimonies of Officers McCullough and Russo. In this regard, petitioner testified as follows:

“So the other Officer [Russo]...was standing there and then he asked my for my phone and I said for what. He said let me see your phone and I said no. So then he tried grab my, my arm, he actually tried to, he grabbed it but I snatched my arm out of his grasp and when I snatched my arm out of his grasp he punched me in the eye. After he punched me in eye I pushed him, I thought I was, I thought I was in danger so I pushed him, he grabbed me. Officer [McCullough] I didn't really hit him (inaudible) so he, the next thing I just see him coming and he grabbed me. So I'm thinking that they really trying to hurt me, so I'm pushing both of them and while wrestling with both of them they had my arms. Another car comes, three other Officers come out and I'm asking them, (inaudible) coming and I hear the Officer coming saying you're gonna lose, you're gonna loose and then they, they all converge on me, they pick me up and they slammed me on my face and I just felt, I just felt bodies on my back and one arm was going one way I don't know who was doing what, the other arm is doing another way and then I heard a female Officer say spray him with the mace. The next thing I know I was getting sprayed with mace. I was stood up, I got, I was cuffed, I was cuffed and then I stood up and then I was like you see what you all did to me, like and then I'm telling the people around me like they're trying to kill me and they was trying to put me in the car but I was, I was resisting everything because I, I felt like I was in danger and Officer, Officer Russo punched me in my stomach and when I bent they pushed me in the car.”

In a written submission to the ALJ following the close of testimony at the final parole revocation hearing counsel for the petitioner argued as follows: “Since they [the police officers] did not have probable cause to arrest Mr. Archer both because of the paucity of the information constituting the description of the subject and because of the incredibility

of the testimony of both Officers Vargas and Russo regarding their alleged observations of the non-produced zip-lock bag, Mr. Archer had the right to resist the actions of the police officers first to take his cell phone and then their efforts to continue this illegal detention and arrest.”

In sustaining Parole Violation Charges #1, #2, #3, #4, and #6 the ALJ found as follows: “The credible testimony of DOCCS’s witnesses establishes by a fair preponderance of evidence that on 3/15/11 releasee [petitioner] violated Rule 8 of the rules governing his supervision when he resisted arrest & injured a police officer by striking him in the eye. Issues concerning the propriety of the arrest, and the extent of force employed by police officers in subduing the releasee, are beyond the purview of this proceeding. Releasee’s behavior resulted in injuries to a police officer & to himself & cannot be condoned.”

Petitioner’s arguments to the contrary notwithstanding, the Court finds that even if the police officers involved in the March 15, 2011 incident did not have probable cause to arrest petitioner, such lack of probable cause would not constitute a defense to parole violation charges stemming from petitioner punching one of the arresting officers in the face. In this regard it is first noted that a court reviewing a determination to revoke parole, in the context of the 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 the required procedural rules were followed and to determine if there is any evidence in 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. Applying this standard, the Court finds no basis to overturn the ALJ’s determination to credit the

testimony of Officers McCullough and Russo and find, in effect, that petitioner punched Officer McCullough in the face with a closed fist.

As alluded to previously, Rule #8 of the rules governing parole proscribes not only behavior constituting a violation of the provisions of law to which a parolee is subject and which provides for a penalty of imprisonment, but also behavior on the part of the parolee that, although not necessarily constituting a criminal violation, threatens the safety or well-being of the parolee or others. *See* 9 NYCRR §8003.2(h). Thus, while a person is guilty of the misdemeanor offense of Resisting Arrest only when he/she “...prevents or attempts to prevent a police officer...from effecting an authorized arrest...” (Penal Law §205.30)(emphasis added), where such person is a parolee and his/her conduct in resisting arrest threatens the safety or well-being of such parolee or others, a parole violation can be found based upon the second prong of Rule #8. In any event, the Court notes that pursuant to Penal Law §35.27, “[a] person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a police officer or peace officer when it would reasonably appear that the latter is a police officer or peace officer.” (Emphasis added). Accordingly, this Court finds that a parolee, like petitioner, who punches a uniformed police officer in the face while resisting arrest cannot successfully defend against parole violation charges stemming from such conduct by asserting that the police officer did not have probable cause to effect the arrest.

Based upon all the above, it is, therefore, the decision of the Court and it is hereby **ADJUDGED**, that the petition is dismissed.

**DATED:** December 31, 2012 at  
Indian Lake, New York

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S. Peter Feldstein  
Acting Supreme Court Judge