

Matter of Michel v Warden, Chateaugay Corr. Facility
2013 NY Slip Op 30213(U)
January 24, 2013
Sup Ct, Franklin County
Docket Number: 2012-1006
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN
X

In the Matter of the Application of
JAMIL MICHEL, #11-R-0171,
Petitioner,

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

**DECISION, ORDER AND
JUDGMENT**
RJI #16-1-2012-0480.116
INDEX # 2012-1006
ORI #NY016015J

-against-

Warden, Chateaugay Correctional Facility,
Dep. Joseph Payton, Eric Schneiderman, Attorney
General of State of New York, Andrea Evans, Chairwoman
& CEO NYSW Div. of Parole, Dora B. Schriro, Comm. NYC, DOC,
Respondents.

X

On November 15, 2012 petitioner filed several documents in the Franklin County Clerk's office. This group of documents, however, did not include a habeas corpus petition or petition for judgment pursuant to Article 78 of the CPLR. By Letter Order dated November 28, 2012 the Court found as follows: "In the absence of the filing of a petition this Court has no basis to determine whether or not an order to show cause should be issued and poor person status granted. Unless a petition is filed on or before January 11, 2013, this proceeding will be dismissed." On December 17, 2012 the apparently original Petition for Writ of Habeas Corpus of Jamil Michel, verified on December 12, 2012, was received directly in chambers. When chambers staff contacted the Court Clerk's office to determine whether or not a duplicate original of that petition had been filed, they were advised that petitioner had mailed a different Petition for Writ of Habeas Corpus, verified

on December 19, 2012 and December 21, 2012, to the Court Clerk's office¹. Upon comparing the two petitions it became apparent that the same claim of entitlement to immediate release from DOCCS custody was advanced in each, but that the petition received in the Court Clerk's office, verified on December 19, 2012/December 21, 2012, represented a more detailed document and included exhibits that were not part of the petition received directly in chambers, verified on December 12, 2012. In view of the foregoing, the Court will deem the petition received directly in chambers to have been superceded by the petition received in the Court Clerk's office, verified on December 19, 2012/December 21, 2012.

Petitioner, who is an inmate at the Chateaugay Correctional Facility, purports to challenge his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. The papers before the Court, including the Petition for Writ of Habeas Corpus, verified on December 19, 2012/December 21, 2012, will be considered as an *ex parte* request for the issuance of a Writ of Habeas Corpus or Order to Show Cause in a habeas corpus proceeding. For the reasons set forth below, however, the Court declines to issue such a writ or order.

On June 14, 2012, while he was apparently at liberty under parole supervision, petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release. The Notice of Violation specified that

¹ The papers mailed to the Court Clerk's office actually included two separate documents labeled "Petition for Writ of Habeas Corpus," both different from the Petition for Writ of Habeas Corpus verified on December 12, 2012 and received directly in chambers. For the purposes of this Decision, Order and Judgment, however, the Court will collectively treat all of the documents mailed by petitioner to the Court Clerk's office as a single Petition for Writ of Habeas Corpus.

petitioner was not entitled to a preliminary parole revocation hearing² and that “. . . a final hearing on these charges will be held on 6/26/12 . . .” On June 26, 2012 petitioner, represented by counsel, appeared before Administrative Law Judge (ALJ) Beltrani. After the ALJ took appearances and introduced himself he stated as follows: “This is the arraignment part, we’re unable to resolve your case. The matter is being adjourned over to July 18th, 2012. The time will be charged to the Division for notice.”

When the final parole revocation hearing reconvened on July 18, 2012 petitioner’s attorney made the following statement: “Judge before I forget I should note that my client has a writ that he filed and any plea he enters today would not be waiving any issues in the writ, I believe it has to do with notice but our office did not file it and I’m just making a record that any plea today is not waiving his writ issues.” Moments later, when the ALJ asked if there was any issue with respect to notice, counsel for the petitioner stated as follows: “To the one that my client raised with the writ being filed. I believe it has to do with the notice of hearing and time in advance for the final but I again, we didn’t file the writ, so I’m simply preserving the issue.”

Shortly thereafter the ALJ made the following statement:

“Alright, Mr. Michel you’re on parole for attempted criminal possession of a forged instrument in the second degree, sentenced to one and a half to three years. You were afforded the opportunity to participate in the Shock Program, upon your release you are a Shock Releasee. This is your first violation on the instant offense. You did recently plead guilty to criminal possession of a forged instrument in the third. It’s basically the same exact thing you are on parole for and that’s possession of whatever, credit cards. You’ve agreed today to resolve your parole revocation process by pleading guilty to charge four rule eight that’s what you plead [pled ?] guilty to in Criminal Court. The delinquency date is going to go to June 14, 2012 and

² In any event, petitioner checked a box on the Notice of Violation form indicating that he did not wish to have a preliminary hearing.

you're gonna be held to your shock minimum. Is that everyone's understanding of the plea agreement?"

Petitioner's attorney responded in the affirmative and the petitioner himself entered a guilty plea to the one parole violation charge and the remaining charges were withdrawn with prejudice.

In this proceeding petitioner asserts that the original convening of the final parole revocation hearing on June 26, 2012 - 12 days after he was served with the Notice of Violation/Violation of Release Report - violated the 14-day notice provision set forth in Executive Law §259-i(3)(f)(iii). The statute provides that an alleged parole violator and his counsel " . . . shall be given written notice of the date, place and time of the [final] hearing as soon as possible [after a probable cause determination] but at least fourteen days prior to the scheduled date [of the final hearing]." *See also* 9 NYCRR §8005.17(b).

Although any attempt to conduct a contested final parole revocation hearing, over the objection of petitioner, at the initial June 26, 2012 final hearing appearance would have been a nullity (*see People ex rel Betancourt v. Warden of Rikers Island*, 149 AD2d 356), the final hearing was adjourned for notice to May 18, 2012, with the adjourned time chargeable to the Division of Parole (DOCCS). Such adjournment, announced in open session of the final hearing, had the effect of affording petitioner and his attorney the requisite time to prepare for a contested final hearing on May 18, 2012. Where, as here, the record clearly indicates that petitioner and his attorney were in possession of the Violation of Release Report more than 14 days in advanced of the May 18, 2012 adjourned date, and where such adjourned date was announced on June 26, 2012 in the presence of

petitioner and his counsel, there was no violation of the 14-day notice provision set forth in Executive Law §259-i(3)(f)(iii) and 9 NYCRR §8005.17(b).

To the extent petitioner relies upon *Amato v. New York State Board of Parole*, 96 AD2d 1098 (a case he claims is “almost entirely on point”), this Court finds such reliance to be misplaced. On July 29, 1981 the *Amato* petitioner was served with a notice of final parole revocation hearing to be held the next day, on July 30, 1981. Despite the fact that Mr. Amato refused to sign a waiver of the 14-day notice requirement, the final parole revocation hearing was nevertheless held on July 30, 1981 and Mr. Amato’s parole was revoked following such hearing. The lower court held that Mr. Amato, by attending the final parole revocation hearing on July 30, 1981, waived his right to the 14-day notice. The Appellate Division, Second Department, found no waiver and reversed. The Appellate Court noted that after Mr. Amato refused to sign the notice waiver, “. . .the scheduled hearing [should have been] adjourned to a later date upon requisite notice.” *Id* at 1099. In the case at bar, however, this Court does not find that petitioner waived his right to the 14-day notice by attending the final parole revocation hearing on July 18, 2012. Rather, it finds that the ALJ afforded petitioner and his counsel in excess of 14-days notice of the July 18, 2012 final parole revocation hearing by adjourning the hearing on June 26, 2012.

Citing *People ex rel Hawkins v. Meloni*, 149 Misc 2d 114, petitioner also asserts that he “. . .did not receive any list of witnesses or any other evidence which was to be used against him at his final hearing in contravention of 9 NYCRR 8005.18[c], which requires that the Parolee or his attorney receive such notice . . .” This Court finds, however, that although 9 NYCRR §8005.18(c) apparently once required that an accused parole violator be provided advanced notice of evidence and potential witnesses, the

regulation in question was amended in 1991 to eliminate such requirement. *See People ex rel Persing v. Lacy*, 276 AD2d 815. The current version of 9 NYCRR §8005.18(c) merely provides that “[t]he notice [of the final revocation hearing] to be served upon the alleged violator shall include a copy of the report of violation of parole.”

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

ORDERED, that petitioner’s request for the issuance of a Writ of Habeas Corpus or Order to Show Cause in a habeas corpus proceeding is denied; and it is further

ADJUDGED, that the petition is dismissed.

Dated: January 24, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice