Echevarria v Superintendent, Gouverneur Correctional Facility
2013 NY Slip Op 30423(U)
February 19, 2013
Supreme Court, St. Lawrence County
Docket Number: 139730
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
RICHARD ECHEVARRIA,#96-A-7383,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #44-1-2012-0617.24
INDEX # 139730
ORI # NY044015J

SUPERINTENDENT, Gouverneur Correctional Facility, and **NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,**
Respondents.

X

This proceeding was originated by the Petition for Writ of Habeas Corpus of Elon Harpaz, Esq., The Legal Aid Society, Parole Revocation Defense Unit, 199 Water Street, New York, NY 10038, as attorney for Richard Echevarria, verified on August 22, 2012 and filed in the St. Lawrence County Clerk's office on August 28, 2012. Mr. Echevarria, who was an inmate at the Gouverneur Correctional Facility but is now confined at the Fishkill Correctional Facility, and who will hereinafter be referred to as the petitioner, is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. An Order to Show Cause was issued on August 31, 2012. The Court has since received and reviewed respondents' Return, dated October 17, 2012, as well as the Reply Affirmation of Elon Harpaz, Esq., dated November 27, 2012, submitted on behalf of petitioner.

On November 4, 1996 petitioner was sentenced in Supreme Court, Bronx County, as a second felony offender, to an indeterminate sentence of 11 to 22 years upon his conviction of the crime of Manslaughter 1°. He was conditionally released from DOCCS custody to parole supervision on March 11, 2009. On March 22, 2012, however, petitioner

was issued a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in three respects. Parole Violation Charges #1 and #2 alleged, respectively, that on March 13, 2012 petitioner punched/pushed a woman in front of her 11-year-old daughter. Parole Violation Charge #3 alleged that petitioner failed to immediately notify his Parole Officer that he had been arrested on March 16, 2012 in connection with the March 13, 2012 incident.

Petitioner waived his right to a preliminary hearing on March 22, 2012. On April 6, 2012 petitioner's final parole revocation hearing was apparently adjourned to April 16, 2012. At the April 16, 2012 session of the final hearing the presiding Administrative Law Judge (ALJ), after taking appearances and introducing himself, stated as follows: "The matter is being adjourned to May 21st for trial. Is there anything else for the record?" Although the Parole Revocation Specialist answered in the negative, neither petitioner nor his counsel made any response.

The testimonial phase of the final parole revocation hearing commenced on May 21, 2012. On that date testimony was taken from a police officer who interviewed petitioner's alleged victim on March 15, 2012 (two days after the underlying incident). Upon cross examination, it also appeared that the witness had contact with the petitioner when he turned himself in and was arrested on March 16, 2012. After the one witness completed her testimony the following colloquy occurred:

"P.R.S. COE
[Parole Revocation Specialist]: . . . At this point the Division asks for a continuance. Officer Donaldson [who responded to a 911 call on March 13, 2012 and thus interacted with petitioner's alleged victim on the same day as the underlying incident], it's his regular day off today. I contacted his command to try to get him to come to no avail, so the Division will ask for a

	continuance for Mr. [Police Officer] Donaldson as well as in reference to charge number three as well.
JUDGE COX [ALJ]:	You know the outside date is June 17th, and the parties were advised before today that I would be on vacation subsequent to this week, so the next date that will be available to me, and the only date available to me in the week of June 25th would be June 26th, which is a Tuesday.
P.R.S. COE:	That's fine, Judge.
JUDGE COX:	So we'll stand adjourned to the 26th .
MR. DITCHEV [Attorney for petitioner]:	I thought you stated the outside date is the 17th?
JUDGE COX:	That's correct, but I'm not going to be able to do it on the 17th. If you want to file a writ making a 90 day argument, you are free to do so. They started their case today. Whether or not writ court would conclude that this was a good faith effort to start with in the time required is an issue for that court. I understand where you are coming from. Your objection is noted.
	Matter adjourned for a continuation when I get back from vacation, and that will be on June 26th. The record should also reflect that I'm back from vacation sooner than that, but I don't have any available dates or times to do it. On June 11th I return, but I'm in arraignments that day. On June 12th I have nine cases scheduled, three of them contested hearings. On the 13th I have 12 cases scheduled, three of them contested. On the 14 [sic] I'm in arraignments.

On the 15th I'm not assigned to Rikers Island. On the 18th I have nine cases scheduled, three contested. On the 19th I'm in arraignments. On the 20th I'm not assigned to Rikers Island. On the 21st and 22nd we will not be having court at all because we are expected in Albany. On the 25th I already have three contesteds scheduled. On the 26th I only have two contesteds, so this will be the third one.

I want this on the record because I think that the authorities need to understand that we are working with a reduced number of judges, and as a result we have more and more cases that have to be done among fewer judges, and this is the kind of scheduling problems problems that come up now as a result of that issue not being addressed.

Anything else for the record?

P.R.S. COE: No

MR. DITCHEV: No

JUDGE COX: That's it."

On the June 26, 2012 adjourned date the final parole revocation hearing was completed, over the objection of petitioner's attorney, with testimony taken from Police Officer Donaldson, who interviewed petitioner's alleged victim minutes after the March 13, 2012 incident and observed her physical condition at that time. Before the hearing concluded Parole Violation Specialist Coe withdrew Parole Violation Charge #3. A decision was rendered by the ALJ sustaining Parole Violation Charges #1 and #2 with a sustained delinquency date of March 13, 2012. The petitioner's parole was revoked and the ALJ imposed a 24-month delinquent time assessment. This proceeding ensued.

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The sole claim of entitlement to immediate release from DOCCS custody advanced by petitioner in this proceeding is that he was not afforded a final parole revocation hearing within the 90-day time period specified in Executive Law §259-i(3)(f)(i) and 9 NYCRR §8005.17(a). Citing, *inter alia*, *People ex rel Levy v. Dalsheim*, 48 NY2d 1019, petitioner asserts that he is therefore entitled to " . . . vacatur of the parole warrant, dismissal of the charges and restoration to parole supervision."

An accused parole violator has a due process right to a final parole revocation hearing within a reasonable time after he or she is taken into custody. *See Morrissey v. Brewer*, 408 US 471 at 488. Under the provisions of Executive Law §259-i(3)(f)(i) final parole "[r]evocation hearings shall be scheduled to be held within ninety days of the probable cause determination." In the absence of a statutory exception, as discussed below, a delay in holding a final parole revocation hearing beyond the 90-day statutory time frame is deemed unreasonable *per se*, with vacatur of the underlying parole violation warrant and reinstatement to parole the only appropriate remedy. *See People ex rel Levy v. Dalsheim*, 48 NY2d 1019, *aff'g* 66 AD2d 827.

The petitioner's March 22, 2012 waiver of his right to a preliminary hearing was equivalent to a probable cause determination for Executive Law §259-i(3)(f)(i) purposes. *See People ex rel Gray v. Campbell*, 241 AD2d 723. Thus, the originally-calculated outside date for conducting petitioner's final parole revocation hearing was June 20, 2012[1]. Executive Law §259-i(3)(f)(i), however, goes on to provide that ". . . if an alleged violator requests and receives any postponement of his [final] revocation hearing, or consents to a postponed [final] revocation proceeding initiated by the board, or if an

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1. As alluded to previously, the ALJ apparently calculated the "outside date" for petitioner's final parole revocation hearing as June 17, 2012. While the Court is unable to explain the three-day discrepancy between its calculation and that of the ALJ, such discrepancy is irrelevant to the disposition of this proceeding.

alleged violator, by his actions otherwise precludes the prompt conduct of such proceedings, the [90-day] time limit may be extended." DOCCS bears the burden of demonstrating that the failure to conduct the hearing within the 90-day time frame was attributable to one or more of the exceptions set forth in Executive Law §259-i(3)(f)(i). *See People ex rel Brown v. New York State Division of Parole*, 70 NY2d 391 at 399-400, *Hirniak v. Sheriff of Dutchess County*, 174 AD2d 619 and *Oquendo v. Hammock*, 155 AD2d 959.

To the extent respondents assert that the April 16, 2012 adjournment of the final parole revocation hearing to May 21, 2012 was implemented with the consent of the petitioner and therefore served to extend the 90-day time frame, the Court rejects such assertion. As noted previously, neither petitioner nor his counsel made any response when the ALJ announced on April 16, 2012 that the hearing " . . . is being adjourned to May 21st for trial." This Court will not infer petitioner's consent to such adjournment from his, and counsel's, failure to interpose an objection. *See People v. Liotta*, 79 NY2d 841.

Respondents also argue, in effect, that in any event there was no violation of the 90-day final parole revocation hearing deadline. In this regard, they assert as follows: "Regulations and case law confirm that the final revocation hearing does not need to be *completed* within 90 days of the probable cause determination/preliminary hearing waiver, but rather commencement within that period suffices as compliance with Executive Law §259-i(3)(f)(i) and 9 NYCRR §8005.17(a) and thus makes the final hearing timely." (citations omitted)(emphasis in original). There is no appellate-level authority, however, squarely addressing the issue of whether commencement - but not completion - of the final parole revocation hearing within 90 days of the probable cause determination/waiver of preliminary hearing satisfies the statutory mandate and the due process requirement embodied therein.

Statutory and regulatory provisions pertaining to the timeliness of preliminary parole revocation hearings are remarkably similar to those associated with the timeliness of final parole revocation hearings, with the exceptions of the length of the permissible time frame and the specific deliniation of statutory exceptions. Executive Law §259-i(3)(c)(iv) provides that "[t]he preliminary hearing shall be scheduled to take place no later than fifteen days from the date of execution of the [parole violation] warrant." 9 NYCRR §8005.6(a), provides that "[t]he preliminary hearing shall be scheduled to take place within 15 days of the date that a warrant for retaking and temporary detention is executed." The First and Fourth Departments have both found that if a preliminary parole revocation hearing is timely commenced but thereafter adjourned for legitimate reasons without prejudice to the accused parole violator, there is no violation of the 15-day requirement set forth in Executive Law §259-i(3)(c)(iv). *See People ex rel Chesner v. Warden*, 71 AD3d 499, *lv den* 15 NY3d 703 *and Emmick v. Enders,* 107 AD2d 1066.

As noted by repondents, various unreported cases out of Bronx County have cited *Emmick* in holding that Executive Law §259-i(3)(f)(i) only mandates that the final parole revocation hearing be commenced within the 90-day statutory time period but does not impose a time in which the final hearing must be completed. Other than these unreported cases, respondents cite no other judicial authority - reported or otherwise - adopting this position. Notwithstanding the foregoing, this Court is unaware of any judicial authority specifically rejecting this position.

In *People ex rel Ford v. LaPaglia* 176 Misc 2d 912, decided by the Ulster County Court on April 1, 1998, the 90-day statutory time frame expired on March 4, 1998. Prior to that date, on February 24, 1998, Mr. LaPaglia's final parole revocation hearing was commenced with testimony received from two witnesses called by the Division of Parole. Due to the lateness of the day, cross examination of one of the Division's witnesses could

not be conducted on February 24, 1998 and the hearing was adjourned to March 10, 1998. The witness in question, however, was not available on March 10 and, therefore, after a third witness testified, the matter was adjourned until March 17, 1998, at which time cross examination was completed and the Division introduced an unspecified document into evidence. The *LaPaglia* court, noted that the 90-day statutory/regulatory time frame must be "adhered to strictly," granted the petition for writ of habeas corpus without specifically discussing the impact of the commencement, but not conclusion, of the final hearing prior to the expiration of the 90-day time frame. According to the *LaPaglia* court, " . . . the 90-day time limit must be adhered to strictly, absent any of the statutory exceptions." *Id.* at 914 (citations omitted). The conclusion of the Ulster County Court in *LaPaglia* is obviously inconsistent with the previously-referenced unreported decisions of the Supreme Court, Bronx County.

The issue that is the primary focus herein was previously considered by this Court in *Washington v. Superintendent* (St. Lawrence County Index No. 130421, August 28, 2009). The 90-day statutory time frame in *Washington* was determined to expire on January 5, 2009. The final parole revocation hearing was originally commenced on December 5, 2008 with ALJ Beltrani presiding. On that date Parole Violation Charge #5 was withdrawn and Mr. Washington plead guilty to Parole Violation Charge #2 but not to the remaining three charges (1,3 and 4). Following the testimony of one parole officer, the hearing was adjourned to December 17, 2008 for an additional witness. On that date ALJ Cox appeared and announced that ALJ Beltrani had taken ill and would otherwise be unavailable until after the 90-day statutory time frame expired. Since the parties were unable to agree to an extension of the 90-day time frame, ALJ Cox re-commenced the final parole revocation hearing *de novo* over Mr. Washington's objection. The parole revocation specialist elected to proceed on all five charges, including the previously

withdrawn Parole Violation Charge #5. Mr. Washington plead not guilty to all five charges, including Parole Violation Charge #2 to which he had plead guilty on December 5, 2008. Testimony was taken from a police officer and at the conclusion thereof the parole revocation specialist sought an adjournment to obtain testimony from the parole officer who had previously completed testifying on December 5, 2008 when Parole Violation Charge #2 and #5 were effectively off the table. On January 2, 2009 the parole revocation specialist required an additional adjournment due to the unavailability of the parole officer. An adjournment was granted to February 5, 2009 - the next available date - without the consent of Mr. Washington. The final parole revocation hearing concluded on February 5, 2009. By Decision and Judgment dated August 28, 2009 this Court dismissed Mr. Washington's petition for writ of habeas corpus as follows:

> ". . . [G]iven the unusual set of circumstances leading to the adjournment of petitioner's final parole revocation hearing beyond January 5, 2009, this Court finds no violation of the 90-day statutory/regulatory timeliness provisions, set forth in Executive Law §259-i(3)(f)(i) and 9NYCRR §8005.17(a). The respondents are cautioned, however, that the Court does not lightly find legitimate reasons for the adjournment of an already commenced final parole revocation hearing beyond the 90-day statutory/regulatory framework. In the case at bar, however, testimony with respect to Parole Violation Charge #1 was completed at the *de novo* final parole revocation hearing on December 17, 2008, and the only apparent reason for the adjournment of the *de novo* hearing at that time stemmed from petitioner's entry of a plea of not guilty to Parole Violation Charge #2 when he had already plead guilty to that charge at the original hearing on December 5, 2008. This development necessitated that Parole Officer Titus be re-called to testify at the adjourned *de novo* hearing even though it appeared that she had already completed her testimony at the original hearing on December 5, 2008. Under these circumstances, the Court finds that petitioner was not unduly prejudiced by completion of the DeNovo hearing of February 5, 2009."

At this time the Court finds it appropriate to re-affirm the position taken in *Washington*. Absent specific appellate-level authority to the contrary, this Court is not prepared to hold that a final parole revocation hearing - meaningfully commenced within the 90-day time frame set forth in Executive Law §259-i(3)(f)(i) - must, without exception, be concluded within that statutory time frame in order to pass muster. Nevertheless, as noted in *Washington*, this Court will not lightly find legitimate reasons for the adjournment of the final parole revocation hearing beyond the statutory time frame. Where, however, compelling circumstances substantially beyond the control of prosecuting parole authorities support such an adjournment, and the alleged parole violator is not unduly prejudiced, the final hearing may be adjourned and lawfully completed after the expiration of the 90-day time frame.

Applying the above-referenced standards to the facts and circumstances in the case at bar, the Court is unable to conclude that compelling circumstances substantially beyond the control of prosecuting parole authorities supported the completion of petitioner's final parole revocation hearing after the expiration of the 90-day statutory time frame set forth in Executive Law § 259-i(3)(f)(i). In this regard the Court notes that there is nothing in the record to suggest that prosecuting parole authorities brought Police Officer Donaldson's unavailability to appear on May 21, 2012 to the attention of the ALJ and/or counsel for the petitioner during the five week period between the April 16, 2012 session of the final parole revocation hearing (when the May 21, 2012 adjourned date was established) and the actual appearance on May 21, 2012. In addition, the record does not reflect any compelling reason for Police Officer Donaldson's unavailability on May 21, 2012. As noted by Parole Revocation Specialist Coe during the May 21, 2012 session of petitioner's final parole revocation hearing, such date was simply Police Officer Donaldson's "regular day off" and that the officer's command was

contacted in an attempt to secure his testimony on that date "to no avail." This Court thus finds that the failure to complete the final parole revocation hearing within the 90-day statutory time frame was not the result of any compelling set of circumstances substantially beyond the control of prosecuting parole authorities but, rather, a matter of routine witness management that simply cannot trump petitioner's due process right to a final parole revocation hearing within a reasonable time after he was taken into custody, as embodied in the 90-day time frame set forth in Executive Law §259-i(3)(f)(i).

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 of disbursements, and the respondents are directed to promptly re-release petitioner to parole supervision subject to such conditions of release as are deemed advisable.

DATED: February 19, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge