STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of KAREEM DOUGLAS,

Petitioner,

-against-

BRIAN FISCHER, COMMISSIONER OF DEPARTMENT OF CORRECTIONAL SERVICES, JOHN K. DESMOND, DIRECTOR OF THE DEPARTMENT OF PROBATION,

Respondents,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-12-ST3872 Index No. 4016-12

Appearances: Kareem Douglas
Petitioner, Pro Se
Suffolk County Correctional Facility
110 Center Drive
Riverhead, NY 11901

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State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Kevin P. Hickey,
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of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

On May 6, 2003 the petitioner entered a plea of guilty in Suffolk County Court to charges of kidnaping in the second degree, burglary in the first degree, robbery in the first

degree, criminal use of a firearm in the first degree, assault in the second degree (two counts) and unlawful imprisonment in the first degree (four counts). The criminal charges arose out of home invasion committed by the petitioner and others, during which the mother of two young children was sexually assaulted. The petitioner maintains that he was not involved in the sexual assault which, he asserts, was carried out by one or more of his accomplices. He has served his sentence and was recently released. He commenced the instant CPLR Article 78 proceeding to challenge references in the presentence investigation report to the sexual assault, and his classification as a sex offender. Respondent Fischer has made a motion to dismiss the petition. Respondent Desmond (the former Director of Suffolk County Department of Probation) has served an answer.

Respondent Fisher argues that the instant proceeding is barred under principles of collateral estoppel. He points out that in 2008 the petitioner filed a grievance in which he argued that the Department of Corrections and Community Service ("DOCCS") had improperly placed him in the sex offender counseling and treatment program by reason that he was not convicted of a sex offense. The grievance was denied, and in a subsequent CPLR Article 78 proceeding Supreme Court upheld denial of the grievance, finding that the determination to require the petitioner to participate in sex offender counseling and treatment was not irrational, arbitrary and capricious (see Douglas v Fischer, Sup. Ct., Ulster Co., Index No. 08-4917, March 27, 2009, Hon. Gerald W. Connolly, unpublished). There is no evidence that the petitioner appealed the Supreme Court determination.

Collateral estoppel or issue preclusion bars re-litigation of issues that have necessarily been determined in a prior proceeding (ABN AMRO Bank, N.V. / Barclays Bank PLC v

MBIA Inc., 17 NY3d 208 [2011] at ; Gramatan Home v Lopez, 46 NY2d 481, 485 [1979]; Kaufman v Lilly & Co., 65 NY2d 449, 455 [1985]; D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]; Gadani v DeBrino Caulking Associates, Inc, 86 AD3d 689, 691 [3d Dept., 2011]; New York State Higher Education Services Corporation v Adeniyi, 72 AD3d 1387 [3rd Dept., 2010]; Matter of Benedictine Hospital v Glessing, 47 AD3d 1184 [3rd Dept., 2008]). As to parties in litigation and those in privity with them, a judgment on the merits is conclusive with regard to the issues decided (see, Gramatan Home v Lopez, supra; Ryan v New York Tel. Co., 62 NY2d 494 [1984], at p. 500). There are two general requirements for the doctrine of collateral estoppel to apply. The first is that the party seeking to benefit from the doctrine must demonstrate that the identical issue was necessarily decided in the prior action and is decisive in the present one (see, D'Arata v NY Cent Fire Ins., supra, at p. 664; Matter of Juan C. v Cortines, 89 NY2d 659 [1997], at p. 667). The second is that the party to be precluded must have had a full and fair opportunity to litigate the issue (see, Kaufman v Lilly & Co., supra, at p. 455; Matter of Juan C. v Cortines, supra; D'Arata v NY Cent. Fire Ins., supra).

The Court finds that the petitioner is precluded, under the doctrine of collateral estoppel, from re-litigating issues concerning the DOCCS classification of the petitioner as a sex offender, and/or the requirement that he participate in the sex offender counseling and treatment program. That has already been decided through the decision-order of Acting Supreme Court Justice Connolly in Douglas v Fischer (supra).

In addition, to the extent that the petitioner seeks to correct and/or expunge information in his presentence investigation report, the Court agrees with respondent that he

has no authority to change it. In fact, DOCCS is bound by the contents of the presentence investigation report (see Matter of Williams v Travis, 11 AD3d 788, 789-790 [3rd Dept., 2004]; Matter of Cox v New York State Division of Parole, 11 AD3d 766, 767-768 [3rd Dept., 2004]). In this respect, the Court further finds that the petition fails to state a cause of action as against respondent Fischer. The Court also agrees with respondent's argument that any such challenge should have been made prior to sentencing in County Court, and is therefore untimely (see Gayle v Lewis, 212 AD2d 919 [3d Dept., 1995]; Salahuddin v. Mitchell, 232 AD2d 903 [3d Dept., 1996]; Cox v NY State Div. of Parole, 11 AD3d 766 [3d Dept., 2004])

Turning to the answer of respondent Desmond, he too argues that the proceeding is untimely commenced. He points out that by letter dated September 11, 2008, Thomas J. Porter, Deputy Director of the Suffolk County Department of Probation denied petitioner's request to make changes to his pre-sentence investigation report. It is well settled that an administrative determination becomes final and binding, and the applicable statute of limitations begins to run, when the administrative action has its impact upon a party and it is clear that the party is aggrieved thereby (see Matter of Edmead v McGuire, 67 NY2d 714, 716; Matter of Biondo v State Bd. of Parole, 60 NY2d 832, 834; Mundy v Nassau County Civ. Serv. Comm., 44 NY2d 352, 357; Matter of Dugan v Liggan, 90 AD3d 1445, 1446-1447 [3d Dept., 2011]; Matter of Adams v Carrion, 85 AD3d 1517, 1518 [3d Dept., 2011]; Matter of Ragi v Servis, 91 AD3d 1169, 1179 [3d Dept., 2012]; Matter of Matter of North Dock Tin Boat Assn., Inc. v New York State Off. of Gen. Servs., 96 AD3d 1186, 1187 [3d Dept., 2012]). In other words, the statute of limitations does not commence to run until the

aggrieved party is notified of an administrative determination that is unambiguous and certain in its effect (see, Matter of Edmead v McGuire, supra, at 716; Singer v New York State and Local Employees' Retirement System, 69 AD3d 1037, 1038 [3rd Dept., 2010]; Matter of Hunt Brothers Contractors v Glennon, supra, at p. 819; Matter of New York State Radiological Society v Wing, 244 AD2d 823, 666 NYS2d 285 [3d Dept., , 1997], mot for lv to app denied, 92 NY2d 802 [1998]). Finality does not occur until the administrative agency has arrived at a definitive position on the issue which inflicts actual concrete injury (see, Matter of Ward v Bennett, 79 NY2d 394, 400; Matter of McDonald v Board of the Hudson River-Black River Regulating District, 86 AD3d 844, 846 [3d Dept., 2011]).

Requests for reconsideration do not, ordinarily, toll or revive the statute of limitations (see, Lubin v. Board of Educ. of City of New York, 60 NY2d 974; Matter of Yarbough v Franco, 95 NY2d 342, 347-348 [2000]; Matter of Finger Lakes Racing Association, Inc. v State of New York Racing and Wagering Board, 34 AD3d 895, 896-897 [3rd Dept., 2006]). "The statute of limitations runs from the initial determination 'unless the agency conducts a fresh and complete examination of the matter based on newly presented evidence'" (Matter of Finger Lakes Racing Association, Inc. v State of New York Racing and Wagering Board, supra, at 897, quoting Matter of Quantum Health Resources v DeBuono, 273 AD2d 730, 732 [2000], lv dismissed 95 NY2d 927 [2000]).

The petitioner has acknowledged receipt of the letter dated September 11, 2008 of Suffolk County Department of Probation Deputy Director Porter. The Court finds that the instant proceeding is untimely commenced as against respondent Desmond (see Jackson v Fischer, 78 AD3d 1335 [3d Dept., 2010]; Gayle v Lewis, supra; Salahuddin v. Mitchell,

supra; Cox v NY State Div. of Parole, supra).

In addition, the Court observes that a challenge to the accuracy of information contained in the pre-sentence investigation report must be made in a timely manner to the original sentencing court (see Matter of Champion v Dennison, 40 AD3d 1181 [3rd Dept., 2007]; Salahuddin v Mitchell, supra; Matter of Vigliotti v State of N.Y. Exec. Div. of Parole, 98 AD3d 789 [3d Dept., 2012). In this respect, it appears that the petitioner is seeking relief from the wrong party, the Suffolk County Department of Probation. The petition fails to state a cause of action against respondent Desmond.

Although the petitioner attempts to couch his petition in terms which raise an issue of constitutional due process, the Court is of the view that he possessed several potential procedural avenues which he could have followed in pursuing the relief which he seeks. These include (1) a challenge to the content of the pre-sentence investigation report through a timely application to the Judge who sentenced him; (2) an appeal to the Appellate Division of the determination of Justice Gerald W. Connolly in Douglas v Fischer (supra); and possibly (3) a proceeding seeking review of his classification as a sex offender under the Sex Offender Registration Act (CPL § 168 et seq.).[1]

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[1]The Court must also note that it is possible for a defendant who has not been found guilty of a sex offense to be classified as a sex offender under the Sex Offender Registration Act. This is precisely what occurred in People v Knox (12 NY3d 60 [2009]). There, the defendants were convicted of charges of kidnaping and unlawful imprisonment, which involved (as here), an infant victim. As is the case here, the defendants in Knox argued that "the State [] denied them substantive due process by officially attaching to them a label [as a sex offender] that is false or misleading" (id., at 66). The Court there held that the defendants had properly been classified as sex offenders under the Sex Offender Registration Act (see Correction Law § 168-a, et seq.) "even though there was no proof that their crimes involved any sexual act or sexual motive" (id., at 64). The Court of Appeals held that the classification as a sex offender did not violate defendants' constitutional right to due process, finding that Correction Law § 168-a, et seq. did

For the foregoing reasons, the Court concludes that the petition must be dismissed as to respondent Desmond.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

Accordingly it is

ORDERED, that the motion of respondent Brian Fischer to dismiss the petition is granted; and it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed as to both respondents.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: April 4, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

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not implicate a fundamental right, and that it had a rational basis. As such, there was no violation of defendants' constitutional rights.

Papers Considered:

1. Order To Show Cause dated July 25, 2012, Petition, Supporting Papers and Exhibits
2. Notice of Motion of respondent Brian Fischer dated November 16, 2012, Supporting Papers and Exhibits
3. Answer of respondent John K. Desmond dated November 9, 2012, Supporting Papers and Exhibits
4. Affirmation in Opposition of Christopher M. Gatto, Esq., dated November 9, 2012