Matter of Gonzalez v Rabsatt
2013 NY Slip Op 32581(U)
October 21, 2013
Sup Ct, St. Lawrence County
Docket Number: 141680
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

In the Matter of the Application of
JASON GONZALEZ,#04-A-0558,
Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2013-0487.30
INDEX # 141680
ORI # NY044015J

-against-

CALVIN RABSATT, Superintendent, Riverview Correctional Facility,
Respondent.

This proceeding was originated by the Petition for a Writ of Habeas Corpus of Jason Gonzalez, verified on May 28, 2013 and originally filed in Bronx County. By Order dated July 3, 2013 the Supreme Court, Bronx County (Hon. Edward Davidowitz) directed that venue be changed to St. Lawrence County. The change in venue was apparently necessitated by the fact that petitioner was no longer held in local custody in Bronx County but, rather, had been transferred into the custody of the New York State Department of Corrections and Community Supervision at the Riverview Correctional Facility. Petitioner, who remains an inmate at the Riverview Correctional Facility, is challenging his continued incarceration in the custody of New York State Department of Corrections and Community Supervision. More specifically, petitioner asserts that DOCCS officials failed to timely place him in the Willard Drug Treatment Program. An Order to Show Cause was issued on July 23, 2013. The Court has since received and reviewed respondent's Answer/Return, verified on September 13, 2013. No Reply thereto has been received from petitioner.

On January 23, 2004 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 2 to 4 years upon his

conviction of the crime of Criminal Sale of a Controlled Substance 5°. He was conditionally released to parole supervision on October 10, 2007. Petitioner immediately absconded from parole supervision and was apparently later served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in two respects. Parole Violation Charge #1 alleged that "Jason Gonzalez violated Rule #1 of the Rules Governing Parole, in that on 10/11/07 and thereafter, he failed to make his arrival report." Parole Violation Charge #2 alleged, in relevant part, that "Jason Gonzalez Violated Rule #4 of the Rules Governing Parole, in that on 10/11/07 the subject changed his approved residence . . . without the knowledge or permission of his parole officer."

A final parole revocation hearing was ultimately conducted at Rikers Island on May 17, 2013. At the final hearing the presiding Administrative Law Judge (ALJ) initially noted for the record that "[t]here has been a pre-hearing conference in which it was determined that the Parole [sic] intends to enter a plea of guilty to charge one. In exchange the State will withdraw with prejudice charge number two. This will be twelve months with the ninety day Docs alternative. You are to enter a complete a ninety day drug treatment program offered by the New York State Department of Corrections and Community Supervision. This decision will be modified forthwith [presumably upon petitioner's successful completion of the ninety-day program] a revoke and restore time served and you'll be released from State custody and restored to supervision in the community." After petitioner entered a guilty plea with respect to Parole Violation Charge #1 and the remaining charge was withdrawn/dismissed with prejudice, the following colloquy occurred:

"THE COURT: Having entered a plea of guilty to charge one as set forth in the Violation of Release Report in exchanged [sic] for a

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requested disposition that imposes a time assessment that allows for your re-release from State Prison before the expiration of the time assessment (inaudible) to the ninety day drug treatment program offered by New York State Department of Corrections and Community Supervision I must determine if you understand certain aspect of this type of disposition before it can be imposed. I'm required to ask you three questions. If you need to you can consult with your Lawyer before you respond. First, do you understand that there's requirements to enter a Department of Corrections and Community Supervision commence a ninety day drug treatment program, do you understand that ?

MR. JASON GONZALEZ: Yes.

THE COURT: You cannot expect the ninety day drug treatment program to start in a particular time frame. Second, do you understand the Department of Corrections and Community Supervision can place you in a ninety day drug treatment facility at any facility within its jurisdiction that deems appropriate for this purpose.

MR. JASON GONZALEZ: Yes.

THE COURT: And third, do you understand that if you do not enter and complete the Department of Corrections and Community Supervision ninety day drug treatment program you'll have to serve the remaining portion of the time assessment before you are eligible for re-release. Do you understand that?

MR. JASON GONZALEZ: Yes."

Petitioner was ultimately determined to be a persistent parole violator, his parole was revoked with a delinquency date of October 11, 2007 and a delinquent time assessment was imposed subject to "Alternate 90 day drug treatment program." Petitioner was received back into DOCCS custody at the Ulster Reception Center on May 31, 2013. On June 11, 2013 he was transferred to, and received at, the Willard Drug Treatment facility. Petitioner, however, refused to enter the 90-day Willard program and he was ultimately returned to the Riverview Correctional Facility pending the expiration of the delinquent time assessment.

Citing Criminal Procedure Law §410.91(1), petitioner argues, in effect, that the failure of DOCCS officials to transfer him to Willard within 10 days constitutes a statutory violation mandating his immediate release from DOCCS custody to community-based parole supervision. The Court, however, rejects petitioner's implicit assertion that the 10-day time frame set forth in Criminal Procedure Law §410.91(1) is applicable to parole violators such as himself. The statue in question deals exclusively with judicially-imposed sentences directed to be executed as sentences of parole supervision. *See Ayala v. Williams*, 7 Misc 3rd 1025(A), 2005 N.Y. Slip Op 50733(U)).

Since petitioner was found to be a persistent parole violator he was not subject to a mandatory "revoke and restore to Willard" disposition under 9 NYCRR §8005.20(c)(2). *See* 9 NYCRR §8005.20(c)(5). This Court notes that where a mandatory "revoke and restore to Willard" disposition is imposed the adjudicated parole violator, while not entitled to benefit from the strict time constraints set forth in Criminal Procedure Law §410.91(1), it is entitled to a reasonably prompt transfer to Willard. As part of the plea bargain agreement underlying the disposition of petitioner's final parole revocation hearing, however, the ALJ specifically advised petitioner that he could not " . . . expect the ninety day drug treatment program [in this case, Willard] to start in a particular time

frame." In any event, even if the Court were to apply the "reasonably prompt transfer to Willard" standard applicable to mandatory "revoke and restore to Willard" dispositions, petitioner's arrival at Willard 25 days after the close of his final parole revocation hearing (11 days after he was received back into DOCCS custody) would, in this Court's opinion, constitute reasonably prompt transferred to Willard. Petitioner's decision not to enter the Willard program was made at his own peril.

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: October 21, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge