

Matter of Rush v Yelich
2013 NY Slip Op 32919(U)
November 12, 2013
Sup Ct, Franklin County
Docket Number: 2013-581
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
RODNEY RUSH, #98-A-4378,
Petitioner,

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

-against-

**DECISION, ORDER AND
JUDGMENT**
RJI#16-1-2013-0281.77
INDEX #2013-581
ORI #NY016015J

BRUCE S. YELICH, Superintendent,
Bare Hill Correctional Facility, and **TINA
STANFORD**, Chairwoman, NYS Board of Parole,
Respondents.

X

This proceeding was originated by the Petition for a Writ of Habeas Corpus of Rodney Rush, sworn to on April 7, 2013 and originally filed in Bronx County. By Order dated June 12, 2013 the Supreme Court, Bronx County (Hon. Edward Davidowitz), directed that venue be changed to Franklin County. The change in venue was apparently necessitated by the fact that petitioner was no longer held in local custody in Bronx County, having been transferred into State DOCCS custody at the Bare Hill Correctional Facility in Franklin County. The papers originally filed in Bronx County were received in the Franklin County Clerk's office on July 5, 2013 and in chambers on July 9, 2013. Petitioner, who remains an inmate at the Bare Hill Correctional Facility, 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 July 10, 2013 and an Amended Order to Show Cause was issued on August 16, 2013. The Court has since received an reviewed

respondents' Notice of Motion to Dismiss, supported by the Affirmation of Hilary D. Rogers, Esq., Assistant Attorney General, dated September 20, 2013. The Court has also received and reviewed petitioner's opposing papers ("Affirmation in Support of Verified Reply"), dated October 3, 2013 and filed in the Franklin County Clerk's office on October 8, 2013.

On January 26, 2012 petitioner was released from DOCCS custody to a 5-year period of post-release supervision. He was declared delinquent as of January 27, 2012, however, and was subsequently served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of release in numerous respects. An initial preliminary hearing was conducted on May 8, 2012. At the conclusion of that preliminary hearing a probable cause determination was issued. The petitioner ultimately pled guilty to one or more parole violations at a final hearing conducted on December 13, 2012. In the meantime, however, following the preliminary hearing petitioner commenced a habeas corpus proceeding in Bronx County. Although that court initially dismissed the habeas corpus proceeding on September 10, 2012, petitioner, through counsel, moved to reargue. By Decision and Order dated December 17, 2012 the Supreme Court Bronx County granted petitioner's application to reargue and directed that a new preliminary hearing be held.¹

The new preliminary hearing was held on February 26, 2013 and a probable cause determination was again issued. A new final hearing was, in turn, conducted on April 18, 2013. Petitioner, who was represented by counsel at the final hearing, entered into an

¹ Although the December 17, 2012 Bronx County Decision and Order made no mention of the final parole revocation hearing conducted on December 13, 2012, it appears that parole authorities have treated the results and disposition of the December 13, 2012 final hearing as having been effectively vacated by the Decision and Order of December 17, 2012.

agreement whereby he pled guilty to one parole violation charge, with the remaining charges withdrawn, his parole was revoked with a modified delinquency date of April 27, 2012 and a delinquent time assessment was imposed directing that he be held until the maximum expiration date of his period of post-release supervision.

In this proceeding petitioner first argues that his due process and statutory/regulatory rights (Executive Law § 259-i (3)(c)(iii) and NYCRR § 8005.3) were violated when parole officials failed to re-serve him with a copy of the Notice of Violation/ Violation of Release Report within 48 hours prior to the commencement of the new preliminary hearing. According to petitioner, “[i]t can’t be assumed that petitioner and his lawyer are in possession of his former violation papers. Almost a year has elapsed since the previous preliminary hearing was held. Neither petitioner nor his lawyer was given a notice of violation report, thus depriving petitioner of procedural due process.” Petitioner also argues that the new preliminary hearing was not held in a timely fashion inasmuch as it was conducted on February 26, 2013, more than two months after the December 17, 2012 decision of the Supreme Court, Bronx County, in the original habeas corpus proceeding.

In their motion to dismiss, respondents first assert that although petitioner’s Notice of (Administrative) Appeal was received by the DOCCS Parole Appeals Unit on December 31, 2012 and the Appeals Unit notified him that he had until June 18, 2013 to perfected the appeal, petitioner never perfected his administrative appeal. Accordingly, respondents argue that the petition should be dismissed for failure to exhaust administrative remedies. Respondents’ motion to dismiss is also premised on assertion that “[p]etitioner waived all of his claims as a matter of law when he pleaded guilty at the

[April 18, 2013] final hearing. A guilty plea at the final parole revocation hearing operates as a waiver of any antecedent claims and acts in the same way as a criminal defendant's waiver of various rights after pleading guilty to a crime . . . Petitioner received the benefit of the plea bargain with the Division's withdrawal of all other parole violation charges and the ALJ's modification of his date of delinquency by three months in exchange for his guilty plea." (Citations omitted).

In this proceeding petitioner is challenging the adequacy of notice with respect to his February 26, 2013 *de novo* preliminary hearing as well as the timeliness of that preliminary hearing. Since administrative appeals pursuant to 9 NYCRR Part 8006 are only authorized with respect final determination of the Board of Parole (*see* 9 NYCRR § 8006.1(a)), the Court agrees with petitioner that this proceeding is not subject to dismissal for failure to exhaust administrative remedies.² While a challenge to the preliminary parole revocation process may therefore be immediately brought in the context of a habeas corpus proceeding, such habeas corpus proceeding must ordinarily be brought and resolved prior to disposition of the final hearing since any challenge to a preliminary parole revocation hearing is rendered moot by a determination revoking parole following a final hearing. *See Nieblas v. New York State Board of Parole*, 28 AD3d 1017, *People ex rel Ciccarelli v. Saxton*, 23 AD3d 1095, *lv den* 6 NY3d 708, *People ex rel Falcon v. Warden*, 25 AD3d 500 and *People ex rel McCummings v. DeAngelo*, 259 AD2d 794, *lv den* 93 NY2d 810. This Court therefore finds that the revocation of petitioner's parole pursuant to the plea agreement entered into at the April 18, 2013 final parole

² Indeed, it is clear that the Notice of Appeal received by the DOCCS Parole Appeals Unit on December 31, 2012 was submitted with respect to the results and disposition of the original final parole revocation hearing of December 13, 2012 rather than the final re-hearing conducted on April 18, 2013.

revocation hearing, wherein he was represented by counsel, has rendered any notice/timeliness challenge to the February 27, 2013 preliminary parole revocation hearing moot.

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

ORDERED, that respondent's motion to dismiss is granted; and it is further

ADJUDGED, that the petition is dismissed.

DATED: November 12, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge