

**People ex rel. Rivers v Warden, George Motchan
Detention Ctr.**

2013 NY Slip Op 33879(U)

April 16, 2013

Supreme Court, Bronx County

Docket Number: 250024-13

Judge: Efrain L. Alvarado

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4/19/13

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART T-17

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. **BRUCE RIVERS,**

Petitioner,

DECISION and ORDER
Index No. 250024-13

-against-

**WARDEN, GEORGE MOTCHAN DETENTION CENTER,
NEW YORK STATE DIVISION
OF PAROLE,**

Respondents.

ALVARADO, J.:

FACTS AND BACKGROUND

Petitioner was convicted of Criminal Sale of a Controlled Substance in the Third Degree and Attempted Robbery in the First Degree. On February 26, 2003 he was sentenced to an indeterminate sentence of incarceration of four and a half to nine years on the Criminal Sale of a Controlled Substance in the Third Degree conviction (Ind. No. 5812/99) to run concurrently with a determinate sentence of incarceration of five years and five years of post release supervision on Ind. No. 3916/01. Thereafter, (probably as a result of moving for Drug Law Reform Act relief) on May 14, 2008, Petitioner was resentenced to a determinate term of incarceration of five years and a term of post-release supervision on Ind No. 58912/99.

Petitioner was released to parole supervision on February 14, 2012 with a maximum expiration date of March 30, 2013.

On November 14, 2012 Petitioner was arrested in New York County and initially charged with Criminal Sale of a Controlled Substance in the Third Degree [P.L. Sec. 220.39(1) and Criminal Possession of a Controlled Substance in the Third Degree [P.L. Sec. 220.39(1)] .

Petitioner is currently incarcerated at the George Motchan Detention Center on Rikers Island on a parole violation warrant lodged against Petitioner by the NYS Department of Corrections and Community Supervision .

This warrant was executed on November 14, 2012 while Petitioner was incarcerated at the Otis Bantum Detention Center. It is uncontroverted that on November 21, 2012, he was served with a Notice of Violation form as well as a Violation of Release Report. It is also uncontroverted that after being served with these documents, Petitioner signed the portion of the Notice of Violation form which indicated that he did not desire a preliminary hearing. This first Violation of Release Report alleges that defendant violated the conditions of his parole in that

- on 11/14/12 he was in possession of a controlled substance, heroin;as evidenced by the subject being arrested on 11/14/12 and
- on 11/14/12 he exchanged United States currency for heroin, was arrested and charged with Criminal Sale of a Controlled Substance in the Fourth Degree¹.

Petitioner avers that on December 12, 2013 he was brought to his final parole

¹ Both Violation of Release Reports contain a reference to "Fourth" Degree, however, the underlying criminal court complaint, Dkt. No. 2012NY086561 supplied at the request of the court, references "third" degree.

revocation hearing where he was served with another Violation of Release Report. This Report alleges that Petitioner violated the conditions of his parole in that

- on 11/13/12 he was in possession of a controlled substance, heroin; and
- on 11/13/12 he exchanged United States currency for heroin, was arrested on 11/14/12 and charged with Criminal Sale of a Controlled Substance in the Fourth Degree²; and

- on 11/13/12 he possessed eight glassines of heroin, was arrested on 11/14/12 and charged with Criminal Possession of a Controlled Substance.³

Petitioner's Position

Petitioner contends a) that his waiver of the preliminary hearing was invalid because it was not *knowing* waiver in that the first Violation of Release Report contained only two charges as compared to the Second Violation of Release Report which contained three charges. Furthermore, the first Violation of Release Report had an incorrect date of occurrence and therefore b) Petitioner, upon receiving the Second Violation of Release Report (on November 21, 2012) which corrected the date and contained an additional charge, did not have timely notice of the preliminary hearing and had not knowingly waived the right to a preliminary hearing.

ANALYSIS

Executive Law § 259-i(3)(c)(iii) provides:

...the alleged violator shall, within three days of the execution of the warrant, be

² See Footnote 1.

³ The second Violation of Release Report does not indicate the degree of this crime. See Footnote 1.

given written notice of the time, place and purpose of the [preliminary] hearing ... [which] shall state what conditions of presumptive release, parole, conditional release or post-release supervision are alleged to have been violated, and in what manner". 259-i[3][c][iii]). The purpose of this requirement is to give an alleged parole violator adequate notice of the time, date and place of the preliminary parole revocation hearing, *inform the parolee of the basis for the violation, and enable him/her to adequately prepare* (*People ex rel. Williams v. Walsh*, 241 A.D.2d 979, 661 N.Y.S.2d 371 [4th Dept.], *lv. denied* 90 N.Y.2d 809, 664 N.Y.S.2d 271, 686 N.E.2d 1366 [1997]).

People ex rel. Edwards v. New York State Div. of Parole, 37 Misc.3d 469 (Sup. Ct., Bronx Co., 2012)(emphasis added).

A parolee such as Petitioner is entitled to not only *timely* notice, but also *informative* notice, detailing the charges against him. *People ex rel. Levy v. Walters*, 87 A.D.2d 620 (2nd Dept. 1982).

This Court rejects Petitioner's contention that the date discrepancy referred to above deprived him of due process. The discrepancy was minimal and consisted of only one day. There is no averment by Petitioner that he was involved in or accused of another violation of parole in temporal proximity to the one at issue such that Petitioner would be confused regarding the basis for the violation of parole.⁴ *See Matter of*

⁴ "...we reject petitioner's contention that the determination must be annulled because the time of the incident listed in the misbehavior report was inconsistent with the time set forth in the unusual incident report. Given that the misbehavior report contained adequate detail to provide petitioner with notice of the charge against him, we conclude that the minor time discrepancy was a harmless technical defect "

Compare with People ex rel. Plock v. Warden, Rikers Island Corr. Facility, Index No. 75160-07 (Sup.Ct., Bronx Co. November 16, 2007), at p. 3 (alleged parole violator served with first notice that violator had possessed heroin at a specific time and place related to *previous violation incident* . Second notice concerned different occurrence and *qualitatively* different charges such as failure to report to parole officer and notify parole officer of an arrest.)

Alvarado v. Goord, 252 A.D.2d 650, 651 (3rd Dept. 1998). The logical conclusion to be drawn by anyone is the reality that the original violation was based on the underlying facts of the case for which defendant had just been arrested (and arraigned) in New York County.

The merit of Petitioner's second argument turns on whether or not the parole violation charges contained in the second Violation of Release Report are so "materially different"⁵ that Petitioner did not have informative notice and consequently timely notice of the bases of the violations. See e.g. *People ex rel. Levy v. Walters*, 87 A.D. 2d 620, 620 (2nd Dept. 1982) ("petitioner could not deny the fact that some of the charges were based on two new criminal convictions").

The two charges contained in the original Violation of Release Report were both brought under Rule # 8 and, as repeated in the Second Violation of Release Report, remain virtually the same except for the date change (one day) as noted above. The additional charge contained in the Second Violation of Release Report contains specific allegations of the possession of eight (8) glassines of heroin on *November 14, 2012*. These allegations are brought under rule #011 which prohibits the possession of any controlled substance without proper medical authorization. While this court is comfortable with an amendment of one day to a date so long as the allegations and incident remain the same, the further the state goes from that principle, the greater the

⁵ See e.g. *People ex rel. Davis v. Warden, Anna M. Kross Center New York State Div. of Parole*, 31 Misc.3d 1230(A) (Sup.Ct., Bronx Co. 2011) (Duffy, J.).

likelihood that the change will be considered material. The third charge in this case is an additional charge brought under a different rule. Under these circumstances as to the third charge, the court declines to find that defendant's waiver of the preliminary hearing was effective.

Consequently, the Court holds that Petitioner was given informative notice by the *timely* first Violation of Release report with regard to the charges contained therein, but not with regard to the third charge later added and served. The waiver of preliminary hearing can not be found valid as to this charge.

Accordingly, Petitioner's waiver of a preliminary hearing was knowing, intelligent and voluntary only with regard to the charges contained in the first Violation of Release Report. Accordingly, Petitioner's writ is denied in part and granted in part.

This constitutes the Decision and Order of the Court.

Dated: April 16, 2013
Bronx, N.Y.



EFRAIN ALVARADO, A.J.S.C.