

People ex rel. Davis v Warden, Vernon C. Bain Ctr.

2013 NY Slip Op 33880(U)

November 14, 2013

Supreme Court, Bronx County

Docket Number: 251126/2013

Judge: Patricia Anne Williams

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: CRIMINAL TERM: PART T31

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THE PEOPLE OF THE STATE OF NEW YORK
ex rel. EDWARD DAVIS

WARRANT # 668931
B&C # 241-13-06384
NYSID # 04404539H

Index No. 251126/2013

Decision & Order

Petitioner,

- against -

WARDEN, VERNON C. BAIN CENTER,
and NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION

Respondents.

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PATRICIA ANNE WILLIAMS, J.:

The Petitioner Edward Davis has filed the instant Writ of Habeas Corpus alleging that his previously executed waiver of a preliminary hearing was invalid because said waiver was not knowingly, intelligently, and voluntarily made. Petitioner Davis argues that his prior waiver lacked the necessary mental state upon execution because the his notice of violation did not include additional charges filed by the Respondent, the New York State Department of Corrections and Community Supervision (Department of Corrections). The Department of Corrections has responded in opposition to the instant motion. The Department of Corrections argues that they have the right to bring additional charges at any time prior to the completion of the final hearing. Having considered the papers submitted by the parties this Court grants the Petitioner's application to the extent that the supplemental charges are dismissed.

Background Facts

Petitioner Davis was convicted of Manslaughter in the First Degree and was sentenced to an indeterminate term of eleven to twenty-two years on April 1, 1998 by the Honorable Justice Randall Eng in Queens County. The Petitioner was released to the Division of Parole on or about April 21, 2010. As a condition of his release the petitioner agreed to various terms and conditions instituted by the Department of Corrections such as regularly reporting to his parole officer and notifying his parole officer of any change of address. . Petitioner Davis was advised that any violation of these terms and conditions could result in his parole being revoked. Provided that the petitioner complied with the terms of his parole he would be under parole supervision until August 21, 2017.

Pursuant to the Violation of Release Report, Petitioner Davis was declared delinquent on May 23, 2013. Two charges were filed against him. They were as follows:

CHARGE #1. Edward Davis violated rule #2 of the rules governing parole, in that he failed to make his office report on 6/13/13 and thereafter, as directed instructed to do by PO Hogan, during an office report on 4/25/13.

CHARGE #2. Edward Davis violated rule #4 of the rules governing parole, in that on or before 5/23/23 [sic] subject changed his approved residence located at 410 East 156th street, Bronx, NY, without prior discussion with, or notification to his parole officer.

Based on these violations parole warrant # 668931 was issued against the Petitioner on June 17, 2013. The warrant was executed on June 26, 2013, against the Petitioner while he was being held in custody on an unrelated matter. On June 25, 2013, Petitioner Davis was arrested in Bronx County and charged with Assault in the Third

Degree and other related charges. Bail was set on the pending criminal charges which the Petitioner was unable to make.

Petitioner Davis was served with parole warrant # 668931 on June 26, 2013. Said warrant contained only two charges; *i.e.*, failure to report and failure to notify of a change of address. On June 29, 2013, Davis elected to waive his right to a preliminary hearing by signing the appropriate box in the Notice of Violation with which he was served. Pursuant to the Notice of Violation, a hearing was scheduled for July 11, 2013. On that date, Petitioner Davis was produced at the Rikers Island Judicial Center for his parole arraignment. However, the matter was adjourned to August 6, 2013 by the Department of Corrections.

In the interim the Department of Corrections prepared a Supplemental Parole Violation Report on July 17, 2013. That supplemental report charged Petitioner with seven new additional charges. These charges stem from the Petitioner's June 25, 2013 arrest for Assault in the Third Degree. On August 6, 2013, the Petitioner was served with the Supplemental Violation of Release Report. The Petitioner argues that his previous waiver of a preliminary hearing is now invalid because it was based on two charges wholly separate and apart from, and in no way related to the seven additional charges filed by the Department of Corrections. Indeed, petitioner argues that since he was arrested on June 25, 2013 the Department of Corrections was well aware of the pending criminal charges against him and could have included the additional seven charges in the initial violation report.

Legal Discussion

Executive Law § 259-1 requires that an alleged parole violator be given notice of the alleged parole violations and the date of the scheduled preliminary hearing within three days of the execution of the warrant. Executive Law § 259-i(3)(c)(iii). Once the parolee has requested a preliminary hearing, Executive Law § 259-i(3)(c)(iv) states that “the preliminary hearing shall be scheduled to take place no later than fifteen days from the date of execution of the warrant. . . .” Executive Law § 259-1(3)(c)(iii) further states that the alleged parole violator “shall have the right to appear and speak in his or her own behalf” at the preliminary hearing. An alleged parole violator may waive his or her right to attend the preliminary revocation hearing. “Although the alleged parole violator may waive his right to the preliminary hearing, any such waiver must be knowingly, voluntarily and intelligently made.” *People ex rel Davis v. Warden, Anna M. Kross Center*, 31 Misc. 3d 1230(A), 929 N.Y.S.2d 201 (Sup. Ct. Bx. Cty 2011), *citing*, *White v. New York State Division of Parole*, 60 N.Y.2d 920, 922, 458 N.E.2d 1258 (1983).

Not only is the parolee entitled to timely notice, but he is also entitled to informative notice which details the charges against him. *People ex rel. Levy v. Walters*, 87 A.D.2d 620, 448 N.Y.S.2d 23 (2nd Dept. 1982). The Petitioner argues that he did not have informative notice upon which to make an knowing, voluntary and intelligent waiver of his right to a preliminary revocation hearing. The facts in this case are quite similar to those in the cases relied upon by the Petitioner; specifically *People ex rel Davis v. Warden, Anna M. Kross Center*, 31 Misc. 3d 1230(A), 929 N.Y.S.2d 201 (Sup. Ct. Bx. Cty. 2011); and *People ex rel Crowley v. New York State Department of*

Corrections, Index No. 340133-13 (Sup. Ct. Bx. Cty June 24, 2013) (Villegas, J).

In both of these cases the petitioner was alleged to violate one or more of the conditions of his parole. A parole warrant was issued against the parolee and executed together with the Notice of Violation and First Violation Report. Based on the charges contained in the Violation Report the petitioners elected to waive their rights to a preliminary parole hearing. Only after this waiver was executed were the petitioners served with supplemental charges. In *People ex rel. Davis*, the court held that although the majority of the charges contained in the Second Violation Report were substantially the same as those contained in the First Violation Report; there were however two new charges. The court found that these two new charges in the Second Violation Report resulted in a material and substantive change and not a mere correction of a technical defect. *People ex rel Davis v. Warden, Anna M. Kross Center*, 31 Misc. 3d 1230(A), 929 N.Y.S.2d 201 (Sup. Ct. Bx. Cty. 2011).

Similarly in *People ex rel Crowley*, the court found that the additional charges were not just amendments or corrections. The court held that the additional charges were materially different in that they were not related to the prior charges for which the petitioner previously received notice. The additional charges occurred on different days and were alleged to have affected different people. *People ex rel Crowley v. New York State Department of Corrections*, Index No. 340133-13 (Sup. Ct. Bx. Cty June 24, 2013) (Villegas, J).

This Court is in agreement with the Petitioner's argument that the issue is not whether the Respondent may elect to add additional charges to their violation of parole


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prior to the final revocation hearing; but rather whether the Petitioner was afforded informative and timely notice. This Court finds that the seven additional charges contained in the Supplemental Violation Report were so materially different from the two original charges the Petitioner was not permitted an opportunity to make a knowing, voluntary and informative waiver of his right to a preliminary hearing. This is even more so because Respondent was aware of the Petitioner's arrest and pending criminal charges prior to executing the warrant. There was nothing to prevent Respondent including the additional seven charges in their Notice of Violation. Accordingly, having found that the additional charges are so materially different from those which the Petitioner was previously given notice, this court dismisses the additional seven charges (#3 to #9) contained in the Supplemental Violation of Release Report alleging violations based on criminal conduct which is alleged to have occurred on June 25, 2013. The prior two charges; however remain. Given that the Petitioner has a pending criminal court matter for which he has yet to post bail he is not entitled to immediate release.

CONCLUSION

The foregoing constitutes the decision and order of this Court.

DATED: NOVEMBER 14, 2013


PATRICIA ANNE WILLIAMS
ACTING JUSTICE OF THE
SUPREME COURT