

Matter of Moore v Evans
2014 NY Slip Op 30794(U)
April 1, 2014
Sup Ct, Albany County
Docket Number: 6049-13
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
STANLEY MOORE, # 83-A-1335,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

DECISION and ORDER
RJI NO.: 01-13-ST5314
INDEX NO.: 6049-13

ANDREA D. EVANS, Chairwoman, NYS Department
of Corrections and Community Supervision,

Respondent.

Supreme Court Albany County All Purpose Term, February 7, 2014
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Stanley Moore

Petitioner, Pro Se

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Attorney General of New York State

Attorneys for the Respondent

Kristen Quaresimo, AAG

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TERESI, J.:

Petitioner, a Level 2 Sex Offender, commenced this CPLR Article 78 proceeding challenging the Respondent's determination to revoke Petitioner's parole and hold him for 15 months based on Petitioner's violating the special sex offender conditions of his parole by possessing sex toys. Petitioner challenges the determination on the grounds that Petitioner had ineffective assistance of counsel and that he was denied a fair and impartial hearing.

Respondent urges that Petitioner is barred by the doctrines of res judicata and collateral estoppel from litigating the alleged denial of a fair and impartial hearing because Petitioner raised the issue in his prior writ of habeas corpus, which was dismissed. Res judicata (claim preclusion) is part of a larger family of kindred concepts, which includes collateral estoppel (issue preclusion) and law of the case doctrine. Each of these doctrines limits relitigation of issues. The doctrine of res judicata or claim preclusion bars not only those claims actually litigated previously in an action between the parties, but also those issues which might have been raised in the former action provided they arise from the same transaction or series of transactions (Landau, PC v LaRossa, Mitchell & Ross, 11 NY3d 8, 12 [2008]; Parker v Blauvelt Volunteer Fire Co., Inc., 93 NY2d 343, 347 [1999]; Lake George Park Commission v Salvador, 245 AD2d 605, 606-607 [3d Dept 1997]). Thus, under New York's transactional approach to res judicata issues, once a claim between parties is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (Landau, PC v LaRossa, Mitchell & Ross, 11 NY3d 8, 12 [2008]; Parker v Blauvelt Volunteer Fire Co., Inc., 93 NY2d 343, 347 [1999]; O'Brien v City of Syracuse, 54 NY2d 353, 357 [1981]; Kinsman v Turetsky, 21 AD3d 1246, 1247 [3d Dept 2005]; Whitman v Mastrodonato, 11 AD3d 796, 797 [3d Dept 2004]). Under principles of collateral estoppel or issue preclusion, a party, or one in privity with a party, should not be permitted to relitigate an issue previously litigated and decided against the party in another action whether or not the tribunals or causes of action are the same (D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]; Zinter Handling, Inc. v Britton, 46 AD3d 998, 1000 [3d Dept 2007]). The Court finds that the issue of the alleged denial of a fair

and impartial hearing was one of the many issues raise in Petitioner's prior habeas corpus proceeding, the prior court rejected all of Petitioner's many arguments, and accepted Respondent's position in all regards. Petitioner is therefore barred from raising the issue again in this proceeding. Petitioner is not entitled to relitigate the issue based on the prior court's failure to specifically acknowledge the argument and specifically reject it.

Returning to Petitioner's remaining claim that he was denied effective assistance of counsel at the revocation hearing, the Court begins by recognizing that the right to effective assistance of counsel is guaranteed by the Federal and State Constitutions (US Const 6th Amend; NY Const, art I, § 6)(People v Rivera, 71 NY2d 705, 708 [1988]). What constitutes effective assistance is not and cannot be fixed with precision, but varies according to the particular circumstances of each case (People v Rivera, 71 NY2d 705, 708 [1988]). Legal tactics which terminate unsuccessfully do not establish counsel's ineffectiveness (People v Rivera, 71 NY2d 705, 708 [1988]). To succeed, a claim of ineffective assistance of counsel must be supported by proof that the representation was "less than meaningful," rather than mere disagreement with strategies and tactics (People v Rivera, 71 NY2d 705, 708-709 [1988]; People v Benn, 68 NY2d 941[1986]; Matter of Ordmandy v Travis, 300 AD2d 713, 714 [3d Dept 2002]). So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met (People v Baldi, 54 NY2d 137, 146-147 [1981]; Matter of James v Chairman of the N.Y. State Bd. of Parole, 106 AD3d 1300, 1300 [3d Dept 2013]).

Petitioner has failed to demonstrate that his counsel's failure to elicit testimony from him and/or his wife regarding the sex toys rendered counsel's representation less than meaningful. Petitioner, armed only with his loss at the hearing, the benefit of hindsight, and the impossibility of knowing what would have happened had his counsel taken the alternate approach, now asserts that counsel should have put Petitioner and his wife on the stand. The mere fact that counsel could have followed another approach does not demonstrate that the alternate approach was even a reasonable course much less that the failure to take it rendered the representation ineffective.

In this case it appears that counsel had legitimate grounds for not following the course advocated by Petitioner. The Court notes that counsel's decision not to elicit testimony from Petitioner or his wife was reasonable given inconsistencies between Petitioner's various stories regarding how the sex toys came to be in his possession. Even assuming for the purposes of the argument that Petitioner had not previously given another contradictory explanation for the toys' presence, Petitioner's and his wife's testimony that the toys were being used by them would incriminate Petitioner, who was prohibited as a condition of his parole from possessing them.

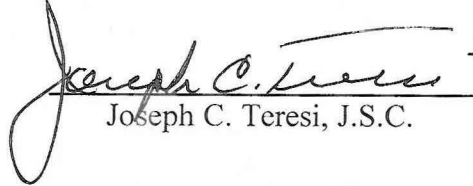
Accordingly, Petitioner's petition is denied.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall

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.

So Ordered.

Dated: Albany, New York
April / , 2014



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated November 19, 2013; Petition dated October 14, 2013, with attached exhibits A-C.
2. Answer dated January 27, 2014; Affirmation of Kristen Quaresimo, AAG dated January 27, 2014, with attached exhibits A-H.
3. Affidavit of Stanley Moore dated February 11, 2014, with attached exhibits A-D.