

**People ex rel. Reyes v Warden, Rikers Is.  
Corr. Facility**

2014 NY Slip Op 33497(U)

February 4, 2014

Supreme Court, Bronx County

Docket Number: 251571-13

Judge: Seth L. Marvin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:CRIMINAL DIVISION:PART 27

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PEOPLE OF THE STATE OF NEW YORK,  
ex rel: Angel Reyes,

Petitioner,

Index # 251571-13

- against-  


Decision and Order

Warrant # 674206  
NYSID # 06862572-P  
B&C # 241-13-10321

WARDEN, RIKERS ISLAND CORRECTIONAL  
FACILITY and NEW YORK STATE DEPARTMENT  
OF CORRECTIONS AND COMMUNITY SUPERVISION

Respondents.

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SETH L. MARVIN, A.J.S.C.

On November 8, 2013, Angel Reyes, through his attorney, Elon Harpaz, of The Legal Aid Society, filed a petition for a *writ of habeas corpus*, seeking to vacate parole warrant # 674206 ("Warrant"). Petitioner claims that the waiver of his preliminary parole revocation hearing was invalid because it was not knowing, intelligent and voluntary since it did not apply to the supplemental charge contained in the amended report that respondents subsequently served. In an affirmation dated December 6, 2013, respondents opposed the petition claiming that he was not entitled to a new notice of violation or another chance at a preliminary hearing just because he was served with a supplementary charge. In an affirmation dated December 11, 2013, petitioner points out that Charge Number 3 in the amended report replaced Charge Number 3 in the original report. In the original report, petitioner was charged with selling a controlled substance to an undercover police officer. In the amended report, however, petitioner was charged with possessing a controlled substance.

**Procedural History**

On January 26, 2010, a judgment was rendered in the Supreme Court of the State of New York, Queens County (Melendez, J.), convicting petitioner of second-degree attempted burglary. He was sentenced to a determinate term of imprisonment of three and one half years to be followed by five years of post-release supervision (respondent's affirmation in opposition, Exhibit A: petitioner's certificate of release to parole supervision). Petitioner was released to parole supervision on March 1, 2013, at which time he agreed to adhere to the conditions set forth in the certificate of release to parole supervision. Petitioner acknowledged that a violation of any of the conditions set forth in the certificate might result in the revocation of his parole. Petitioner was to be supervised by the Division of Parole ("Division") until March 1, 2018, barring any violation of the conditions of his release (*Id.*).

On October 5, 2013, petitioner was arrested in The Bronx for allegedly committing various offenses on September 23 and October 5, 2013 (*Id.* at Exhibit B: arrest notification). On October 5, 2013, the Division declared petitioner delinquent. The Division prepared a "violation of release report" charging petitioner with five violations (*Id.* at Exhibit C). Amongst other violations, Charge #3 charged petitioner with violating "Rule #8 of the Rules Governing Parole, in that on 10/05/13, at approximately 8:34PM, in the vicinity of 1022 Stebbins Avenue, Bronx, New York, the subject sold a Controlled Substance to an Undercover Police Officer" (*Id.*).

**The Warrant**

On October 17, 2013, the Warrant was lodged against petitioner. That day, petitioner received the Notice of Violation from the Division, and he waived his right to a preliminary hearing (*Id.* at Exhibit E: Notice of Violation). Subsequently, the Division filed an amended violation of

release report. This report included an additional charge (Charge #6) in which petitioner was charged with violating “Rule #8 of the Rules Governing Parole, in that on 9/23/13, at 8:00pm, at 450 Cross Bronx Expressway Ave. BX, NY, the subject assaulted complainant/victim.” (*Id.* at Exhibit G: Amended Violation of Release Report). Additionally, Charge #3 was amended to charge petitioner with possessing a controlled substance, as opposed to selling it as charged in the original report (*Id.*).

**Petitioner’s Claim**

Now, petitioner claims that his waiver of the preliminary hearing relating to the original charges was not knowing, intelligent and voluntary because he was not afforded proper and accurate notice of all the parole violation charges against him. Therefore, petitioner contends that he must be released and restored to parole supervision. In the alternative, petitioner contends that because he was not served with timely notice of all the charges against him at the time he waived his right to a preliminary hearing, the waiver did not encompass the Charges #3 and # 6 in the amended report. Therefore, petitioner claims that those two charges shall be dismissed.

Respondents contend that petitioner is not entitled to a new notice of violation or another chance at a preliminary hearing just because he was served with supplementary charges since they have the right to bring such charges at any time prior to the completion of the final hearing. To support their contention, respondents rely on *People ex rel. Kinzer v. Williams*, 256 A.D.2d 1240 (4th Dept. 1998) and *Matter of Poladian v. Travis*, 8 A.D.3d 770 (3d Dept. 2004).

**The Legal Analysis**

New York Executive Law § 259-i(3)(c)(iii) states:

The alleged violator shall, within three days of the execution of the warrant, be given written notice of the time, place and purpose of the hearing . . . . The notice shall state what conditions of presumptive release, parole, conditional release or pose-release supervision are alleged to have been violated, and in what manner; that such person shall have the right to appear and speak in his . . . on behalf; that he

. . . shall have the right to introduce letters and documents; that he . . . may present witnesses who can give relevant information to the hearing officer; that he . . . has the right to confront the witnesses against him . . . .

The only issue here is whether petitioner's waiver extends to Charges #3 and #6 in the amended report. There is no question that these charges are materially different from the charges contained in the initial report. Indeed, the amended report contains a new charge (Charge #6) that is completely unrelated to any of the charges contained in the initial report. That charge occurred on a different date and location and involved a different victim. Additionally, Charge #3 in the amended report alleges that petitioner possessed a controlled substance while the initial report states that he sold a controlled substance.

Respondents have the initial burden of establishing that the waiver was in fact made. *See People ex rel. Melendez v. Warden*, 214 A.D.2d 301, 302 (1st Dept. 1995). The burden then shifts to the petitioner to demonstrate that the purported waiver was "defective because it was uninformed, unintelligent and/or involuntary." *Id.*

Here, respondents have failed to meet their burden. Since Charges #3 is materially different from the one contained in the initial report, and Charge #6 was not even included in the initial report, petitioner did not waive his rights to a preliminary hearing as to these two charges.

Respondents' reliance on *Kinzer* and *Poladian* to support their contention that petitioner is not entitled to a new notice of violation or another chance at a preliminary hearing just because he was served with supplementary charges, since they have the right to bring such charges at any time prior to the completion of the final hearing, is misplaced. While it is true that respondents may bring such charges at any time prior to the completion of the final hearing (*see* Executive Law §§ 259-i[3][f][iii] and [iv]), the issue here is not whether petitioner had notice of the supplemental and amended charges before the final hearing.

In *Kinzer*, 256 A.D.2d at 1240, the Fourth Department held that the petitioner was not deprived of his due process rights when, at the final parole revocation hearing, the Hearing Officer heard proof and revoked the petitioner's parole based on two charges that did not result initially in a declaration of delinquency and were not the basis for the finding of probable cause at the preliminary hearing. The petitioner was informed that those charges could be presented at the final hearing, and the Hearing Officer was not precluded from considering those charges or revoking the petitioner's parole based on them. In *Poladian*, 8 A.D.3d at 771, the Third Department held that the failure of an administrative law judge to address one of the charges at the preliminary hearing did not preclude it from being raised at the final revocation hearing, particularly given that the petitioner had notice that all charges could be raised at the final hearing. In neither cases, however, did the Court address the issue raised in this case – whether petitioner's waiver extends to the supplemental and amended charges.

**Conclusion**

Since petitioner never waived his right to a preliminary hearing as to Charges #3 and #6 in the amended report, these two charges are dismissed. As to Charges 1, 2, 4 and 5 in the amended

report, there is no dispute that petitioner received notice and that he validly waived his right to a preliminary hearing as to those charges.

This constitutes the Decision and Order of the Court.

Date: February 4, 2014  
Bronx, New York



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SETH L. MARVIN, A.J.S.C.