

People v Superintendent, Hudson Corr. Facility

2015 NY Slip Op 30248(U)

February 18, 2015

Supreme Court, Columbia County

Docket Number: 8291-14

Judge: Richard M. Koweeck

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF COLUMBIA

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. TONY SIMMONS, DIN 11-A-0596,

Index No. 8291-14
RJI No. 10-14-0698

Petitioner,

-against-

DECISION AND ORDER

SUPERINTENDENT, Hudson Correctional
Facility, NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

This is a return of a Writ of Habeas Corpus signed by this Court on December 30, 2014. The Petitioner appeared personally and by counsel, The Center for Appellate Litigation, Leticia M. Olivera, Esq., of counsel. The Respondent also appeared through the Attorney General, Louis Jim, Esq., of counsel, and submitted, on the return date of the Petition, a Return, an Affirmation of Terrence X. Tracy, Counsel to the New York State Board of Parole, with Exhibits and an Affidavit of Allegra Mussen, a Supervising Offender Rehabilitation Coordinator located at the Hudson Correctional Facility, also with Exhibits.

The Court heard oral argument from Petitioner and Respondent and reserved decision. Thereafter, at the Court's prompting, Petitioner's counsel caused to be served

upon the District Attorney of New York County and the District Attorney of Columbia County, a copy of the Writ of Habeas Corpus in order to comply with the notice requirements contained in CPLR §7009(a)(3). In subsequent correspondence, the Court advised both offices that they had until February 13, 2015, within which to state a position. No writing was received from the Columbia County District Attorney and the New York County District Attorney specifically took no position to supplement the arguments previously made by the Attorney General's Office and Counsel for the New York State Department of Corrections and Community Supervision.

FACTS

Tony Simmons (hereinafter "RELATOR") was convicted of two counts of Sexual Act in the Third Degree, in violation of Penal Law §130.40; five counts of Sexual Abuse in the Second Degree 130.60(1) and five counts of Sexual Act in the Third Degree, in violation of section 130.55(1) of the Penal Law. He was sentenced to a term of 4 years with 10 years of post-release supervision. The date of his sentence was February 1, 2011.

The Relator completed his sentence and reached his maximum expiration date, on November 24, 2014. However, because he was classified as a Level II Sex Offender pursuant to Correction Law Article 6-c, he is subject to the residency restriction codified

in Section 259-c (14) of the Executive Law and of the rules and regulations promulgated thereafter.¹

Upon the completion of his sentence, the Relator was transferred from the Clinton Correctional Facility to the Hudson Correctional Facility on November 24, 2014. The Commissioner had, by designation, designated the Hudson Correctional Facility as a residential treatment facility.² The Relator is housed in protective custody, together with other inmates who have not yet reached their conditional release date or their maximum release date. He is being kept in the Hudson Correctional Facility because, according to the Respondents, of his inability to satisfy the Parole Board's special condition that he supply to them, in accordance with Section 259-c (14) of the Executive Law, a residence located outside the Penal Law definition of school grounds.³ The Relator is from Bronx County and seeks to return there. Bronx County is approximately 100 miles away from

¹NYCRR §8002.7

²NYCRR §100.75

³Penal Law §220.00 (14) defines school grounds to mean: in or on, or with in any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within 1000 feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within 1000 feet of the real property boundary line comprising any such. For the purposes of this section, an "area accessible to the public" shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants.

the Hudson Correctional Facility.

ARGUMENT

The Petitioner argues that the New York State Department of Correction and Community Services (DOCCS) is unlawfully incarcerating the Relator under the false pretext of claiming to house him in a Residential Treatment Facility (RTF). They contend that Hudson Correctional Facility (HCF) does not comply with the statutory definition of a Residential Treatment Facility.⁴ They argue as follows:

1. HCF is not in or near Bronx County, but rather more than 100 miles away. They argue further that the Department of Parole has assigned the Relator a parole officer from the Bronx II area office, thus recognizing the Relator's intent to return to Bronx County. Because it is a significant distance away from the Bronx, one of the goals of social reintegration is being thwarted. It is, therefore, in violation of Corrections Law Section 2 (6) and Section 73. The latter Section contains ten subparagraphs that further define the characteristics of a Residential Treatment Facility.

⁴Corrections Law §2 (6) defines an RTF as: "a correctional facility consisting of a community-based residence in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release and for persons who are or will soon be eligible for release on parole who intend to reside in or near that community when released".

2. The Relator is being treated like all other inmates, other than the fact that he is in protective custody and is, therefore, in a separate building on the grounds of HCF.

3. The Relator is not receiving services that are supposed to characterize a legitimate RTF program, including “programs directed towards the rehabilitation and total reintegration into the community of a person transferred to an RTF”. These are supposed to include the securing of appropriate education, on-the-job training and employment.⁵

4. In the event that the Court determines that the form of the proceeding is inappropriate, it requests that the Court convert the action to a Petition pursuant to Article 78 of the CPLR and find that DOCCS failed to perform a duty enjoined upon it by law.

The Respondent argues that the Writ of Habeas Corpus should be denied because the Petitioner is not entitled to immediate release. They contend that the placement of the Relator in HCF is lawful because:

1. The Hudson Correctional Facility has been lawfully designated as a Residential Treatment Facility; (see fn. 2, supra).

⁵Corrections Law §73(2), (3).

2. The Relator was convicted of one or more of offenses that obligate the Board of Parole to impose a mandatory condition of parole release preventing that individual from residing anywhere in the community that might violate Penal Law Section 220.00 (14). (See fn. 3, supra). Such limitations were imposed upon the Relator under the authority of the Executive Law §259-c (14).⁶

3. They concede, that due to “security concerns”, because he is in protective custody, the Relator has been “unable to participate in the RTF therapeutic group and/or RTF Community Project.”⁷ He has only been afforded a nine module workbook, which she describes as a “self driven workbook program.”⁸

4. The Relator has the burden of providing a residence in the community in compliance with the foregoing Section, and because of his failure to do so, he is properly

⁶This Section provides that “where a person serving a sentence for an offense defined in Article 130...of the Penal Law, and the victim of such offense was under the age of 18 at the time of such offense or such person has been designated a Level III Sex Offender...is released...pursuant to subdivision 1 or 2 of this Section, the board of parole shall require, as a mandatory condition of such release that such...offender shall refrain from knowingly entering into or upon any school grounds...or any other facility or institution primarily used for the care and treatment of persons under the age of 18 while one or more of such persons under the age of 18 are present....”

⁷Affidavit of Allegra Mussen, Supervising Offender Rehabilitation Coordinator, sworn to January 12, 2015, at paragraph 11.

⁸Mussen Affidavit, at paragraph 12.

held in the aforesaid RTF. Therefore, they argue, his confinement is neither unlawful nor improper. Accordingly, his current confinement is in full compliance with Penal Law §70.45(3), and the Petition for a Writ of Habeas Corpus should be denied.

5. They reject the notion that any portion of the law imposes upon the Board of Parole a duty to affirmatively identify or secure a residence in the community for an offender and cite several cases that they believe support this proposition.

DISCUSSION

There has been an ongoing problem, in the court's experience, with the ability of the Department of Corrections and Community Services in placing convicted sex offenders in the community after they have achieved their maximum release date to comply with Executive Law 259-c (14) and Corrections Law Sections 2(6) and 73. These latter Sections define and describe the characteristics of a Residential Treatment Facility.

It is undisputed that DOCCS, through the Division of Parole, has a right, or, the duty, to impose an additional condition on prospective parolees who are Level I, II or III Sex Offenders relative to their living arrangements. It is likewise undisputed that the Commissioner may, and in this case, has, designated HCF as a RFT. Finally, the Division

of Parole has the authority to retain designated sex offenders for an additional six months in such RFTs for such education and treatment that these programs may afford. The problem lies in their inability to persuade this court that the Hudson Correctional Facility has, in fact, established a RTF that meets the requirements of Correction Law §73 as it relates to Mr. Simmons. For the reasons set forth hereafter, this Court concludes that it has not.

As mentioned earlier, Corrections Law §2 (6) states, in its definition, that an RTF is “[a] facility consisting of a community-based residence in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release and for persons who are or who will soon be eligible for release on parole who intend to reside in or near that community when released.”

(Emphasis supplied.)

Similarly, §73 (1) of the Corrections Law states that an inmate transferred to a residential treatment facility

may be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation and in accordance with the program established for him or her. While outside the facility he or she shall be at all times in the custody of the department and under its supervision.

Subdivision 2 of the same Section states that

the department shall be responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities. The department also shall supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility.

Finally, subdivision 3 of this Section provides that the Commissioner shall establish

programs directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility... Each inmate shall be assigned a specific program by the superintendent of the facility and a written memorandum of such program shall be delivered to him or her.

In this case, the Relator testified, and the Commissioner, through its papers conceded, that the only "program" that has been established for this particular inmate has been the "residential treatment facility program participant workbook".⁹ While she suggests that there exists a "therapeutic group and/or RTF Community Project" she concedes that he has not participated in it. Nor does the Commissioner supply any information regarding an attempt to involve the Relator in on-the-job training or employment outside of that facility.

Most significantly, the Respondent does not suggest that HCF is located "in or

⁹Exhibit "A" to Affidavit of Allegra Mussen.

near the community” where the Relator will reside when released. Indeed, Respondents avoid the subject of proximity entirely. At least one Court has held that this defect alone is enough to declare the inmates incarceration illegal.¹⁰

This Court is aware of the physical layout of the Hudson Correctional Facility, having inspected the same pursuant to its duties as a Superior Court Judge. The location of the wing in which inmates receiving protective custody are housed is close to the wing that houses other inmates not so protected. It is difficult to understand the explanation offered by the Respondents regarding their failure to include inmates in the protective custody wing in such programs developed by the Superintendent regarding the securing of appropriate education, on-the-job training and employment. All it would take is for the counselor to walk through the parking lot. Nor do they offer evidence of a memorandum of such program for that particular inmate. Finally, nothing has been suggested that the Relator has absconded from this facility, or that any programs that might have been assigned to him are inconsistent with the welfare or safety of the community or the facility or its inmates such as to require suspension and restrict the inmate’s activities in any manner that might be necessary or appropriate.¹¹

¹⁰Muniz v. Uhler, 2014 WL 699, 1640 (N.Y.S.) 2014 N.Y. Slip Op 33 3134 (Sup. Ct. Franklin County).

¹¹Corrections Law, §73 (4).

Based upon the evidence before it, this Court is left to conclude, once again,¹² that the Hudson Correctional Facility does not comply with its own statutory requirements as it relates to this particular inmate and that, therefore, Tony Simmons, is not being properly held pursuant to the authority of Penal Law §70.45 (3).

The use of a Writ of Habeas Corpus pursuant to Article 70 of the CPLR to inquire into the cause of the Relator's detention is deemed appropriate. Although not raised by any of the parties, the Court required attorneys for both sides to state a position with regard to the applicability of and compliance with CPLR §7009(a)(3). In response, the Petitioner supplied proof, after the fact, of service of the Petition for Writ of Habeas Corpus and the papers upon which it was based upon the District Attorney of Columbia County and the District Attorney of New York County. Neither District Attorney's Office has offered any arguments to supplement those advanced by the Attorney General and Counsel for DOCCS. The Respondents have not challenged the use of a Writ of Habeas Corpus nor raised any issue concerning the late compliance with CPLR §7009(a)(3). Accordingly, the Court concludes that jurisdiction over all of the parties is completed.

The Writ of Habeas Corpus is granted and the Petitioner is ordered to be placed

¹²See People ex rel. Kahn v. Superintendent Hudson Correctional Facility New York State Department of Corrections and Community Supervision, Index #7925 – 14, Columbia County Supreme Court, unreported.

from Hudson Correctional Facility to an RTF that is in compliance with the mandates of Correction Law Section 2 (6) (“in or near Bronx County”) and Section 73. In the alternative, they are directed to see to it that the Petitioner is promptly placed in housing in compliance with Executive Law Section 259-c (14), or housing that is otherwise appropriate in the estimation of department staff.

This order shall take effect 10 days from the date it is served upon the Respondents with Notice of Entry.

The original Decision and Order is being mailed to Leticia M. Olivera, Esq. The original Motion papers are being sent to the Columbia County Clerk’s Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220.

Counsel is not relieved from the provision of that rule regarding the filing, entry, or notice of entry.

This is the Decision and Order of this Court.

DATED: February 18, 2015
Hudson, New York



RICHARD M. KOWEEK
Acting Supreme Court Judge

Papers Considered:

1. Verified Petition for Writ of Habeas Corpus dated December 19, 2014, together with Exhibits "A" through "E"; Writ of Habeas Corpus dated December 30, 2014,; Order to Produce dated December 30, 2014;
2. Return of Attorney General's Office by Louis Jim, Esq., dated January 14, 2015;
3. Affirmation of Terrence X. Tracy, Esq., dated January 12, 2015, together with Exhibits "A" through "E"; and
4. Affidavit of Allegra Mussen sworn to January 12, 2015, together with Exhibits "A" through "E".