Matter of Flinn v Annucci
2015 NY Slip Op 31824(U)
September 25, 2015
Supreme Court, Clinton County
Docket Number: 2015-589
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF CLINTON**

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In the Matter of the Application of
GUNTHER FLINN, #07-A-4329,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION, ORDER AND JUDGMENT
RJI #09-1-2015-0208.07
INDEX #2015-589
ORI #NY009013J

-against-

ANTHONY ANNUCCI, Acting Commissioner,
New York State DOCCS,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition (denominated Affidavit in Support of an Order to Show Cause) of Gunther Flinn, verified on April 8, 2015 and filed in the Clinton County Clerk's office on April 23, 2015. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the December 30, 2014 "Amended Decision" of the DOCCS Central Office denying his application to participate in the Family Reunion Program (FRP). The Court issued an Order to Show Cause on April 28, 2015 and has received and reviewed respondent's Notice of Motion to Dismiss, supported by the Affirmation of Christopher J. Fleury, Esq., Assistant Attorney General, dated June 8, 2015. The Court has also received and reviewed petitioner's Reply to Motion to Dismiss, sworn to on June 22, 2015 and filed in the Clinton County Clerk's office on June 25, 2015.

On November 30, 2009 petitioner was sentenced in Jefferson County Court, following a jury verdict, to controlling, consecutive determinate sentences of 13 years and 2 years, with 5 years post-release supervision, upon his convictions of the crimes of Attempted Murder 2°, Assault 1°, Intimidating a Victim or Witness 1° (two counts),

Assault 2°, Obstructing Governmental Administration 2° and Resisting Arrest[1]. The 2009 convictions/sentencing were affirmed on direct appeal to the Appellate Division, Fourth Department and the Court of Appeals. *People v. Flinn*, 98 AD3d 1262, *aff'd* 22 NY3d 599, *rearg denied*, 23 NY3d 940.

The record does not include (for *in camera* inspection) copies of any presentence reports and the Court is therefore not fully aware of the facts and circumstances surrounding the July 9, 2006 criminal offense. It is noted, however, that the sentencing judge made the following observations: "On July 9th, 2006 Mr. Flinn, you arrogantly came out of the bar, and without provocation, you attacked [the victim] in the street. At that time you brutally chose to pile drive [the victim's] skull into the pavement . . . This attack was not provoked. There was a history of arrogant bullying confrontation that you had with [the victim] . . . You were 100 pounds heavier and a head taller than [the victim]. He was never a physical threat to you. And there wasn't any evidence that he was a physical threat to anybody else in this world. [The victim] ended up as the fiancé of the girl who had earlier rejected your advances." This Court (Supreme Court, Clinton County) also gleans from the sentencing transcript that petitioner's victim sustained permanent brain damage as a result of the attack and subsequently committed suicide.

Petitioner first applied to participate in the FRP in November of 2011. On December 29, 2011 he was approved by the DOCCS Central Office for FRP visitation with his mother, father and two daughters notwithstanding the fact that the deputy

[1] Petitioner had previously been sentenced to an apparent determinate term of 6 years upon his conviction, following a plea, of the crime of Attempted Murder 2°. However, on March 20, 2009, on direct appeal to the Appellate Division Fourth Department, the previous judgement of conviction was reversed, petitioner's plea was vacated and the matter was remitted to the Jefferson County Court for further proceedings on the underlying indictment. *People v. Flinn*, 60 AD3d 1304.

superintendent for security (or his designee) at the facility level had recommended against approval based upon the violent nature of the offense underlying petitioner's incarceration. No visitation took place pursuant to the 2011 FRP approval and on June 23, 2013 petitioner again applied to participate in the FRP. In his 2013 application petitioner requested FRP visitation with his wife and two daughters, then ages six and five. There is no dispute that petitioner met the preconditions for eligibility to participate in the FRP (7 NYCRR §220.2(a)) and presented no disqualifying conditions (7 NYCRR §220.2(b)).

"The Family Reunion Program is designed to provide selected inmates and their families the opportunity to meet for an extended period of time in privacy. The goal of the program is to preserve, enhance and strengthen family ties that have been disrupted as a result of incarceration." 7 NYCRR §220.1. An inmate's participation in the FRP is a privilege, not a right. *See Rodriguez v. Morris,* 113 AD3d 1011, *Bierenbaum v. Goord*, 13 AD3d 945 and *Mercer v. Goord*, 258 AD2d 960, *lv denied* 93 NY2d 812. ". . . [T]he administrative decision process determining whether a particular prisoner shall be allowed to participate in the FRP is 'heavily discretionary' . . . and . . . the Department [of Corrections and Community Supervision] must consider and balance a number of delineated factors, including the prisoner's security classification, his behavioral history and the nature of his underlying conviction . . ." *Georgiou v. Daniel*, 21 AD3d 1230, 1231 (citations omitted). A decision denying an inmate's application to participate in the FRP will not be disturbed if supported by a rational basis. *See Philips v. Commissioner of Correctional Services,* 65 AD3d 1407 and *Williamson v. Nuttall*, 35 AD3d 926.

7 NYCRR §220.4 establishes a multi-layered procedure for determining whether an inmate's application to participate in the FRP should be approved. Upon the receipt of various facility-level recommendations (7 NYCRR §220.4(a) through (e)) the central office "Deputy commissioner for program services (or designee)" is empowered to make the final determination. 7 NYCRR §220.4(f). "A special review [of an FRP application] will be conducted which will include consideration of the specifics of the crime, the age of the inmate at the time of the offense, progress in programs, custodial adjustment, victim impact and the entire case record. A special review to determine if eligibility will be conducted if an inmate "has a history of domestic violence." 7 NYCRR §220.2(c)(1)(x). If the inmate's application is disapproved, the final determination ". . . must set forth the reason(s) therefore." 7 NYCRR §220.4(f)(2). An inmate whose FRP application has been disapproved may take an administrative appeal to the "deputy commissioner for program services" pursuant to 7 NYCRR §220.5(b). "

In the case at bar the facility-level Correction Counselor, Deputy Superintendent for Security designee, Family Services Counselor and Superintendent all recommended that petitioner's 2013 FRP application be approved. By decision dated April 26, 2014, however, the DOCCS Central Office disapproved the application. The Central Office determination specified that special review was required based upon "DV [presumably, Domestic Violence] - 7 Orders of Protection." The FRP denial determination also contained the following comment: "Heinous, vicious, unprovoked domestic nature of instant offense presents inmate a risk to the safety and security of others in a limited supervision setting. Inmate is not a suitable candidate for FRP. May utilize traditional modes of telephone, letters and regular visitation to maintain family ties." Petitioner took

an administrative appeal from the Central Office FRP denial determination but allegedly no response was forthcoming.

On August 12, 2014 petitioner commenced a CPLR Article 78 Proceeding (*Flinn v. Annucci*, Clinton County Index #2014-1229) challenging the April 26, 2014 denial of his 2013 FRP application. By Decision and Judgment dated December 11, 2014 this Court, drawing an analogy with discretionary parole denial determinations, found that the April 26, 2014 DOCCS Central Office FRP denial determination was predicated upon erroneous information and, therefore, had to be vacated. In this regard the Decision and Judgment of December 11, 2014 stated, in relevant part, as follows:

> "It is abundantly clear to the Court that the assault perpetrated by petitioner outside a bar - however else such assault might be characterized as - did not constitute an act of 'domestic violence,' as that term is commonly understood/utilized. In this regard it is noted that the orders of protection referenced in the Central Office FRP denial determination were apparently issued to protect potential witnesses of the July 9, 2006 assault rather than potential victims of domestic violence. Accordingly, the Court finds that the April 26, 2014 FRP denial determination must be vacated and the matter remanded to the DOCCS Central Office for *de novo* FRP consideration. Nothing herein should be construed as precluding the Central Office from considering the actual facts and circumstances of the July 9, 2006 criminal offense underlying petitioner's incarceration upon *de novo* review."

Apparently in response to the Court's Decision and Judgment of December 11, 2014 (Index #2014-1229) the DOCCS Central Office issued an "Amended Decision," dated December 30, 2014, again disapproving petitioner's 2013 FRP application. As part of the Amended Decision Central Office indicated that special review was required based upon the following reasons: "OOP [presumably, Order(s) of Protection] - 7 Orders of Protection - Special review required, in accordance with [DOCCS] Directive 4500, III., C., (7[ )]." The Court notes that the above-referenced provision of DOCCS Directive 4500 mandates special

review by Central Office where the inmate applying to participate in the FRP program "[h]as a history of domestic violence or order of protection . . ." The Amended Decision of December 30, 2014 reads as follows:

> "Due to the nature of the instant offense whereby inmate on 7/9/06 arrogantly came out of a bar and without provocation attacked the victim. Inmate brutally chose to pile drive the victim's skull into the pavement. This attack was not provoked. There was a history of arrogant bullying confrontation inmate had with victim. Inmate was 100 pounds heavier and a head taller than the victim. Victim was not a physical threat to inmate. The victim sustained permanent brain damage as a result of attack and subsequently committed suicide. Due to the heinous, vicious, unprovoked nature of crime, inmate presents a risk to the safety and security of others in a limited supervision setting. Inmate is not a suitable candidate for FRP participation."

According to petitioner an administrative appeal was taken from the Amended Decision of December 30, 2014 but no response thereto was forthcoming. This proceeding was commenced on April 23, 2015 when the Petition, verified on April 8, 2015, was filed in the Clinton County Clerk's office. *See* CPLR §304(a).

Petitioner first argues that the Amended Decision of December 30, 2014 is ultimately predicated upon the same erroneous information underlying the vacated April 26, 2014 FRP denial determination. In this regard petitioner, alluding to the Decision and Judgment of December 11, 2014, asserts that "[t]his Court has already determined the orders of protection listed in Directive 4500 are for victims of domestic violence, and the petitioner has not committed an act of domestic violence." Petitioner also argues - as he did in the prior proceeding - that any FRP denial determination with respect to his 2013 application is inherently irrational where no reason is cited as to why his original (2011) application for FRP visitation with his parents and daughters was approved but his 2013 application for FRP visitation with his wife and daughters was denied. Finally, petitioner argues that the reference to the victim's suicide was improperly incorporated into the Amended Decision of December 30, 2014. According to petitioner, it was stipulated at trial that the cause of

the victim's death was not relevant to the criminal proceedings but the Amended Decision of December 30, 2014 " . . . makes mention of the victim's death as if the petitioner was the casue [sic]."

Respondent's motion to dismiss is predicated upon the assertion after this proceeding was commenced the Amended Decision of December 30, 2014 was administratively vacated[2], that a *de novo* review of Petitioner's 2013 FRP application was conducted by the DOCCS Central Office and that on June 5, 2015 such application was again denied. Accordingly, respondent asserts that petitioner has received all of the relief to which he would be entitled and, therefore, that this proceeding must be dismissed as moot.

As part of the June 5, 2015 Central Office FRP denial determination it is indicated that special review is required based upon "[h]einous nature of the Instant Offense." In this regard the Court notes that even where there is no domestic violence/order of protection component to the underlying conviction of an FRP applicant, special review is mandated where the inmate/applicant " . . . has been convicted of heinous or unusual crimes . . ." *See* 7 NYCRR §220.2(c)(iii). The June 5, 2015 FRP denial determination reads as follows:

> "The inmate's Instant Offense involved him grabbing the victim by his neck and throwing him against a nearby vehicle. The inmate held the victim bent over backwards against the car, choking him. The inmate was heard to have said in sum and substance, 'why you got to call the cops motherfucker' and 'go limp motherfucker'. At this time, the victim's face had started to turn blue and his arms where shaking. The inmate was heard to say in sum and substance, 'This time I'm going to kill you!' The inmate grabbed the victim with both hands, lifted the victim in the air, and slammed the victim into the sidewalk. This act caused the victim's head to strike the pavement, resulting

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[2] In his supporting Affirmation of June 8, 2015 Assistant Attorney General Fleury states that upon review of the Central Office Amended Decision of December 30, 2014 his office contacted the DOCCS Central Office and " . . . discussed with Central Office its erroneous reliance upon the orders of protection issued in the underlying case as its basis for special review . . . Respondent agreed to administratively vacate the December 30, 2014 Central Office decision [the Amended Decision] and conduct a proper *de novo* review of Petitioner's [2013] FRP application consistent with this Court's December 11, 2014 Decision and Order." (Footnote reference omitted).

> in a significant head and brain injury. Witnesses observed the victim's eyes rolled back into his head, his body shaking, and he was talking gibberish. 911 was called. The inmate returned to the victim. The victim's fiancée got between the inmate and the victim. The inmate attempted to kick the victim while incapacitated, but the victim's fiancée was able to get in his way. The fiancée stated that if the inmate wanted to hit someone, to hit her. The inmate reportedly stepped back and raised his hand as if he was going to hit her, but stopped when other males stood next to her.
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> These circumstances show the inmate's depraved indifference to human life by recklessly engaging in conduct which created a grave risk of death to the victim by choking the victim and slamming him into the ground causing him to sustain trauma to his brain, including internal bleeding and swelling, resulting in a coma, protracted loss and impairment of the victim's brain function, and requiring extensive medical treatment, thereby creating a substantial risk of death to the victim.
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> According to police statements, when attempting to interview the inmate, an officer placed his hand on the inmate's right shoulder and said, 'come over here with me.' The inmate then shoved the officer and stated 'Get your fucking hands off me!' It was noted by an officer that the inmate stated several time[s], 'Your [sic] going to arrest me for that!?' As the officer attempted to place the inmate under arrest, pepper spray was used in an attempt to gain compliance. The inmate fled from police and cause a short foot chase before being apprehended.
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> The inmate's completion of ASAT [Alcohol and Substance Abuse Treatment] and ART [Aggression Replacement Training], as well as his lack of discipline is noted. The proposed participants' acceptable visiting pattern is taken into consideration. Despite the accomplishments the inmate has had while incarcerated, they do not out weigh his conduct with regards to the Instant Offense. The inmate's criminal acts are considered heinous and brutal. The inmate presently has 7 active Orders of Protection for the witnesses of the Instant Offense. When considering and balancing a number of delineated factors, participation in limited supervised visits is not warranted. The inmate can use traditional methods of telephone calls, letters and regular visits."

The record is not clear as to whether or not petitioner took an administrative appeal from the June 5, 2015 Central Office FRP denial determination.

While it is certainly arguable that the DOCCS Central Office exceeded its authority when, acting *sua sponte,* it vacated the Amended Decision of December 30, 2014 and issued the determination of June 5, 2015 after this proceeding, challenging the Amended Decision,

was commenced by filing on April 23, 2015. This Court nevertheless finds that the issuance of judgment vacating the Amended Decision of December 30, 2014 and remanding the matter to the DOCCS Central Office for *de novo* FRP consideration was the only relief to which petitioner would have been entitled upon judicial annulment of the Amended Decision of December 30, 2014. Since petitioner has been afforded this relief, the Court finds that the petition should be dismissed as moot (*see Moore v. Goord*, 31 AD3d 1075), subject to petitioner's right to judicial review with respect to the DOCCS Central Office decision of June 5, 2015 after administrative remedies with respect thereto been exhausted.

In view of the unusual procedural path petitioner's 2013 FRP application has taken - including the questionable *sua sponte* issuance of the DOCCS Central Office determination of June 5, 2015 after the commencement of this proceeding - the Court finds that petitioner's right to take an administrative appeal from the June 5, 2015 determination should be extended for 30 days from the date of this Decision, Order and Judgment (if petitioner has not already taken an administrative appeal).

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that respondent's motion to dismiss is granted; and it is further

ADJUDGED, that the petition is dismissed; and it is further

ADJUDGED, that petitioner is granted judicial leave to take an administrative appeal from the DOCCS Central Office decision of June 5, 2015 within 30 days from the date of the Decision, Order and Judgment.

Dated: September 25, 2015 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice