Matter of Velazquez v LaClair
2015 NY Slip Op 31996(U)
October 9, 2015
Supreme Court, Franklin County
Docket Number: 2015-632
Judge: S. Peter Feldstein

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

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In the Matter of the Application of
ORLANDO VELAZQUEZ,#12-A-3725,
Petitioner,

for Judgment Pursuant to Article 70
of the Civil Practice Law and Rules

-against-

DECISION AND JUDGMENT
RJI #16-1-2015-0347.49
INDEX # 2015-632
ORI # NY016015J

DARWIN E. LaCLAIR, Superintendent,
Franklin Correctional Facility,
Respondent.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of Paul D. Petrus, Jr., Esq., on behalf of Orlando Velazquez, verified on July 21, 2015 and filed in the Franklin County Clerk's office on July 30, 2015. Orlando Velazquez, who will hereinafter be referred to as the petitioner, is an inmate at the Franklin Correctional Facility. Petitioner is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. The Court issued an Order to Show Cause on August 6, 2015 and has received and reviewed respondent's Answer and Return, verified on August 28, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated August 28, 2015. The Court has also received and reviewed Petitioner's Reply in Further Support of Writ of Habeas Corpus, submitted by counsel, dated September 1, 2015 and filed in the Franklin County Clerk's office on September 10, 2015.

On August 1, 2012 petitioner was sentenced in Supreme Court, New York County, to a determinate term of 2 years, with 3 years post-release supervision, upon his conviction of the crime of Sexual Abuse 1°. Following at least one previous parole (post-release supervision) delinquency, petitioner was again released from DOCCS custody to

post-release parole supervision on November 10, 2014. On March 4, 2015, however, petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in two separate respects. Parole Violation Charge #1 alleged that petitioner used a controlled substance (PCP) without proper medical authorization and Parole Violation Charge #2 alleged that petitioner used a controlled substance (THC) without proper medical authorization.

A preliminary hearing was waived and petitioner appeared, with counsel, at a final parole revocation hearing on June 1, 2015. Following a pre-hearing conference the presiding Administrative Law Judge (ALJ) noted that petitioner's crime of conviction would render him a Category 1 parole violator and then placed the following on the record:

> "The Division[1], the Attorney [for petitioner] and myself concur in a twelve month time assessment with the alternative sanction of the regimented ninety seven day substance abuse treatment program administered by the New York State Department of [Corrections and Community Supervision] . . . It's at [DOCCS] discretion where it would be. There is no specific time constraint under which [DOCCS] has to bring you into the program. In the event that you are found eligible and suitable by the [DOCCS] Personal[sic] for their program and you successfully complete the [DOCCS] Program then the decision of a twelve month time assessment is converted to revoke and restore time served and you're restored forthwith the parole supervision in the community. If for whatever reason you are not found eligible and suitable for the [DOCCS] Program or if found eligible and suitable and you do not successfully complete the [DOCCS] Program then the decision of a twelve month time assessment as measured from the warrant lodge date of 3/4/2015 remains."

Counsel subsequently entered a plea of guilty to Parole Violation Charge #2 on behalf of the petitioner and Parole Violation Charge #1 was withdrawn with prejudice. When

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[1] The ALJ's reference to the "Division" presumably represents an out-of-date reference to the New York State Division of Parole. The New York State Division of Parole and the New York State Department of Correctional Services were legislatively merged in 2011 to form the New York State Department of Corrections and Community Supervision.

questioned by the ALJ as to whether the above-described disposition was what petitioner wished to do, petitioner reply "Yes Your Honor."

On June 29, 2015 petitioner was transferred to the Downstate Correctional Facility where, on July 13, 2015, DOCCS staff determined that he was medically unsuitable for placement in the Willard Drug Treatment Program. Petitioner was instead referred to an alternate drug treatment program at the Franklin Correctional Facility. Petitioner was transferred to Franklin on July 27, 2015 where he commenced the DOCCS alternate drug treatment program. According to respondent's answering papers, if petitioner successfully completes the program he is scheduled to "graduate" and be re-released to post-release parole supervision on October 23, 2015.

Citing, *inter alia*, *State ex rel Ryniec v. Willard Drug Treatment Campus*, 11 Misc 3d 1088(A), 2006 WL 1140475, the petitioner argues, in effect, that his ongoing incarceration is illegal in that DOCCS officials failed to transfer him to the Willard Drug Treatment Program, or an alternate program, in a timely fashion. After the *Ryniec* petitioner had been revoked and restored to parole supervision, following a final parole revocation hearing conducted on November 23, 2005, he apparently remained in local custody for over two months until transfer to state custody at the Wende Correctional Facility on January 27, 2006. Less than a month later, on February 22, 2006, Mr. Ryniec was transferred to Willard. Employing the provisions of Criminal Procedure Law §410.91[2] as ". . . a legislative indicator of what a reasonable time frame is to transfer a parole violator who has been revoked and restored to parole supervision, subject to successful

[2] Criminal Procedure Law §410.91 is applicable to criminal defendants who have been judicially sentenced to parole supervision. The statute provides that an individual who is so sentenced " . . . shall be placed under the immediate supervision of the department of corrections and community supervision and must comply with the conditions of parole, which shall include an initial placement in a drug treatment campus for a period of ninety days . . ." CPL §410.91(1).

completion of the Willard program," the *Ryniec* court ruled ". . . that inmates who are in such a situation are mandated to be transported to the state reception center 'forthwith' . . . and this Court interprets that to mean within ten (10) days . . . Thereafter, the parolee should be received by Willard within ten (10) days after he is admitted to the State reception center. Thus, the parolee should be received by Willard within twenty (20) days of his final parole revocation determination." *Id.* (citations omitted). Noting that the record before it was devoid of any explanation for the 91-day delay between Mr. Ryniec's November 23, 2005, final parole revocation hearing and his ultimate transfer to Willard on February 22, 2006, the Supreme Court, Seneca County, found that Mr. Ryniec was detained in violation of his due process rights and therefore directed that he be forthwith released from Willard and restored to community-based parole supervision.

Respondent counters that petitioner's parole was not "revoked and restored" at the close of his June 1, 2015 final parole revocation hearing. Rather, respondent asserts that the petitioner's parole was revoked at the close of the final hearing and the ALJ imposed a 12 month delinquent time assessment with the provision that if the petitioner entered and successfully completed an unspecified DOCCS drug treatment program the disposition of the final parole revocation hearing would be modified to "revoke and restore."

For what it is worth, this Court finds nothing in the relevant parole regulations authorizing a disposition, following a final parole revocation hearing, whereby a violator's parole is revoked and a delinquent time assessment is imposed subject to the violator's ability to, in effect, purge himself of the time assessment by participating in some form of therapeutic program. Even if the Court presumes that the authority to impose such a disposition as part of a plea agreement does exist, it perceives no reason to treat such a disposition substantially differently from a "revoke and restore" disposition at least

insofar as the parole violator's rights to a reasonably prompt determination of his/her eligibility/suitability for participation in the therapeutic program and a reasonably prompt transfer to the program if determined to be eligible/suitable are concerned. Notwithstanding the foregoing, this Court is simply not prepared to hold that such transfer must occur within a specified number of days following the final parole revocation hearing. In the case at bar petitioner was not transferred from local to DOCCS custody at the Downstate Correctional Facility until June 29, 2015. At Downstate petitioner was evaluated to determine his suitability for participation in the Willard Drug Treatment Program. On or about July 13, 2015, however, DOCCS officials determined that petitioner was medically unsuitable for a Willard placement but approved him for transfer to an alternate drug treatment program at the Franklin Correctional Facility. As noted previously, petitioner was transferred to Franklin on July 27, 2015 and commenced his participation in the alternate program on or about that date. Thus, approximately 56 days elapsed between petitioner's final parole revocation hearing and his commencement of an alternate drug treatment program at the Franklin Correctional Facility. Under these circumstances the Court finds that the amount of time petitioner spent in local/DOCCS custody was simply not so lengthy and/or unreasonable as to warrant the relief they sought in this proceeding.

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

ADJUDGED, that the petition is dismissed.

DATED: October 9, 2015 at
Indian Lake, New York

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S. Peter Feldstein
Acting Supreme Court Judge