

Matter of Johnson v Annucci
2016 NY Slip Op 30976(U)
May 13, 2016
Supreme Court, Clinton County
Docket Number: 2016-05
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF CLINTON

X

In the Matter of the Application of
PHILLIP JOHNSON, #05-B-0575,
Petitioner,

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

**DECISION, ORDER AND
JUDGMENT**

RJI #09-1-2016-0001.02

INDEX #2016-05

ORI # NY009013J

-against-

ANTHONY J. ANNUCCI, Commissioner,
NYS Department of Corrections and Community
Supervision and **TINA M. STANFORD**, Chairwoman,
New York State Board of Parole,

Respondents.

X

This proceeding was originated by the Petition for Writ of Habeas Corpus of Michael Jos. Witmer, Esq., on behalf of Phillip Johnson, verified on October 30, 2015 and originally filed in Chemung County. By Transfer Order dated December 3, 2015 the Supreme Court, Chemung County (Hon. James T. Hayden, Acting Supreme Court Justice), directed that this proceeding be transferred to Clinton County. The transfer was apparently based upon the fact that the petitioner had been transferred into the custody of the New York State Department of Corrections and Community Supervision at the Clinton Correctional Facility in Clinton County. Phillip Johnson, who will hereinafter be referred to as the petitioner, remains confined at the Clinton Correctional Facility and is challenging his ongoing incarceration in DOCCS custody.

The Court issued an Order to Show Cause on January 12, 2016 and has received and reviewed respondents' Notice of Motion to Dismiss, supported by the Affirmation of Christopher J. Fleury, Esq., Assistant Attorney General, dated February 24, 2016, as well as by the Affidavit of Robin Filmer, an employee of the New York State Department of

Corrections and Community Supervision at Counsel's office for the Board of Parole, sworn to on February 23, 2016 (the Filmer Affidavit). No opposing papers have been received from petitioner.

Following a contested final parole revocation hearing held in Monroe County and concluded on October 8, 2015 one parole violation charge (#3) was sustained. Petitioner's parole was revoked, with a modified delinquency date of December 15, 2014, and a 24-month delinquent time assessment was imposed. The document perfecting petitioner's administrative appeal from the results and disposition of the final parole revocation hearing of October 8, 2015 was received by the DOCCS Board of Parole Appeals Unit on October 27, 2015. This proceeding was commenced 10 days later, on November 6, 2015, when the underlying Petition was filed in Chemung County. *See* CPLR §304(a).

In this habeas corpus proceeding petitioner argues that he was improperly categorized/adjudicated as a Category 1, rather than Category 3, parole violator. *See* 9 NYCRR §8005.20(c). He also argues that the determination sustaining Parole Violation Charge #3 was not supported by preponderance of the evidence adduced at the final hearing and that the conduct underlying Parole Violation Charge #3, even if committed, did not represent a violation of parole "in an important respect." *See Executive Law* §259-i(3)(x).

Respondents' motion to dismiss is two-pronged. Citing, *inter alia*, *People ex rel Quartararo v. Demskie*, 238 AD2d 792, it is first argued that petitioner is simply not entitled to habeas corpus relief. After an apparently torturous administrative procedural path, Inmate Quartararo commenced a habeas corpus proceeding "... asserting various constitutional and statutory violations and claiming . . . that the only obstacle to his release was respondents' refusal to afford him a lawful [discretionary parole release] hearing." *Id.* at 793. The Appellate Division, Third Department, however, held as follows:

“It is axiomatic that the remedy of habeas corpus is available in New York only if the relator would be entitled to immediate release were he or she to prevail. Inasmuch as parole decisions are discretionary and prisoners have no right to such release prior to the expiration of their sentences, denial of parole may not be challenged by way of habeas corpus.” *Id.* at 793 (citations omitted).

The petitioner in the case at bar - unlike Inmate Quartararo - is not challenging a discretionary parole denial determination. The petitioner was already granted conditional release from DOCCS custody to community-based post-release supervision. In this proceeding he is challenging the results of a final parole revocation hearing wherein one parole violation charges was sustained and his post-release supervision was revoked. A petition for a writ of habeas corpus is the appropriate procedural vehicle to challenge a parole revocation determination where the only basis for the inmate’s continued incarceration is the Parole Board’s revocation determination. *See Zientek v. Herbert*, 199 AD2d 1075 and *People ex rel Bayham v. Meloni*, 182 Misc2d 831. *See also People ex rel Brown v. New York State Division of Parole*, 70 NY2d 391.

Notwithstanding the foregoing, the Court finds that petitioner’s challenge to his designation as a Category 1, rather than Category 3, parole violator is not a proper subject for review in the context of a habeas corpus proceeding. Such challenge does not call into question the validity of the parole revocation determination itself. Even if petitioner was to ultimately prevail on this point, such that a reduced (perhaps already expired) delinquent time assessment would be substituted for the 24-month assessment that was actually imposed, he would not thereby be entitled to immediate release from DOCCS custody. The expiration of a delinquent time assessment merely signifies a parole violator’s eligibility for, rather than entitlement to, re-release to parole supervision. *See* 9 NYCRR §8002.6(a) and *Poladian v. New York State Division of Parole*, 5 AD3d 824. Accordingly, petitioner is not eligible for habeas corpus relief with respect to this cause of action. *See People ex rel Leggett*

v. Leonardo, 274 AD2d 699 and *People ex rel McKnight v. Meloni*, 181 Misc 2d 422. As far as petitioner's remaining evidentiary-based causes of action are concerned, however, the Court finds that they are properly brought in a habeas corpus proceeding.

In the second prong of their motion to dismiss respondents (following up on the argument that habeas corpus relief is unavailable) assert that even if petitioner's various causes of action had been interposed in the context of a CPLR Article 78 proceeding dismissal would be warranted based upon his failure to exhaust administrative remedies. As far as petitioner's challenge to his designation as a Category 1 parole violator is concerned, the Court agrees. *See* CPLR §7801(1). With respect to petitioner's evidentiary causes of action, however, it is noted that although the argument advanced in the second prong of respondents' motion to dismiss is read in the context of the potential conversion of this habeas corpus proceeding into a proceeding for judgment pursuant Article 78 of the CPLR, it is noted that even a habeas corpus proceeding brought by a parole violator to challenge one or more aspects of the underlying revocation process is ordinarily subject to dismissal where the violator fails to first exhaust administrative remedies by taking an administrative appeal pursuant to 9 NYCRR Part 8006. *See People ex rel DeMarta v. Sears*, 31 AD3d 918, *lv denied* 7 NY3d 715, *People ex rel Bariteau v. Donelli*, 24 AD3d 1065, and *People ex rel Howe v. Travis*, 18 AD3d 1052. Petitioner's evidentiary challenges, moreover, fall squarely within the appellate jurisdiction of the New York State Board of Parole as set forth in 9 NYCRR §8006.3(b)(1).

As noted previously, the document perfecting petitioner's administrative appeal from the results and disposition of the final parole revocation hearing of October 8, 2015 was received by the DOCCS Board of Parole Appeals Unit on October 27, 2015. Under the provisions of 9 NYCRR §8006.4(c) the Appeals Unit had until February 27, 2016 (four months from the date the perfected administrative appeal was received) to issue its findings and recommendation before petitioner's administrative remedies would be deemed

exhausted. As of the date of the Filmer Affidavit (February 23, 2016) no findings and recommendations had been issued.

In view of all of the foregoing, the Court finds that petitioner's first cause of action, which is improperly brought in the context of a habeas corpus proceeding, will not be converted into a cause of action for relief pursuant to Article 78 of the CPLR since he failed to exhaust administrative remedies prior to the commencement of this proceeding. Petitioner's remaining evidentiary-based causes of action, although properly brought in a habeas corpus proceeding, must also be dismissed based upon exhaustion principles.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby **ORDERED**, that respondents' motion to dismiss is granted; and it is further **ADJUDGED**, that the petition is dismissed for failure to exhaust administrative remedies.

Dated: May 13, 2016 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Justice