

Matter of Sabino v LaClair

2016 NY Slip Op 31477(U)

August 3, 2016

Supreme Court, Franklin County

Docket Number: 2016-143

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

X

In the Matter of the Application of
SAUL SABINO, #08-A-1148,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #16-1-2016-0092.24
INDEX # 2016-143**

-against-

DARWIN LaCLAIR, Superintendent,
Franklin Correctional Facility,
Respondent.

X

The Court had before it the “PETITION FOR WRIT OF HABEAS CORPUS” of Saul Sabino, dated March 11, 2016, as well as the separate “VERIFIED PETITION” of Saul Sabino (also seeking habeas corpus relief), verified on March 11, 2016. Both documents were filed in the Franklin County Clerk’s office on March 15, 2016. Petitioner, who is an inmate at the Franklin Correctional Facility, purported to challenge his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision (hereinafter referred to as “DOCCS”).

Petitioner, who is serving a determinate sentence of imprisonment, was released from DOCCS custody to post-release supervision on or about October 26, 2012. He was taken into custody on or about August 11, 2015 pursuant to a parole violation warrant issued on August 10, 2015. Petitioner’s post-release supervision was ultimately revoked following a final parole revocation hearing and he was returned to DOCCS custody. In the original Petition it was argued that the August 10, 2015 parole warrant was invalid on its face and that petitioner was therefore entitled to immediate release from DOCCS custody. By Decision, Order and Judgment dated March 22, 2016, however, the Court found

petitioner's claim of entitlement to immediate release from DOCCS custody to be patently without merit and the Petition was dismissed *sua sponte*.

Thereafter, petitioner's "SUPPLEMENTAL ATTACHMENT TO PETITION FOR A WRIT OF HABEAS CORPUS," sworn to on March 19, 2016, was filed in the Franklin County Clerk's office on March 24, 2016 and a copy of that document was received in Chambers on March 28, 2016. In that document, which functions as and will hereinafter be referred to as an Amended Petition, petitioner purports to challenge his continued incarceration in DOCCS custody on grounds completely separate from those asserted in his original Petition. More specifically, in the Amended Petition, petitioner challenges the voluntariness of his plea at the final parole revocation hearing as well as the Parole Board's alleged failure to calculate the time remaining on the undischarged portion of his sentence as of the sustained delinquency date and/or the time remaining on the undischarged portion of his period of post-release supervision as of the sustained delinquency date.

Upon receipt of the Amended Petition, the Court vacated the Decision, Order and Judgment of March 22, 2016 and issued an Order to Show Cause dated April 21, 2016 with respect to the Amended Petition. In response thereto, the Court has received and reviewed the respondent's Answer and Return with exhibits, including the affirmation of Richard deSimone, Esq., Deputy Counsel in Charge, Office of Sentencing Review, dated June 17, 2016, together with the Letter Memorandum dated June 24, 2016 by Christopher J. Fleury, Esq., Assistant Attorney General. In opposition thereto, the Court has received and reviewed the petitioner's affidavit reply, sworn to June 29, 2016, together with exhibits.

On February 22, 2008, upon his guilty plea, the petitioner was sentenced by the County Court, Kings County to a seven (7) year determinate sentence of incarceration with

five (5) years post-release supervision for his conviction of Robbery in the First Degree; to a two (2) year determinate sentence of incarceration with three (3) years post-release supervision for his conviction of Criminal Possession of a Weapon the Third Degree; and a one (1) year sentence of incarceration for his conviction of Grand Larceny in the Fourth Degree. The sentences were all concurrent.

The petitioner was received by DOCCS on March 3, 2008 and he was released from custody to post-release supervision on October 26, 2012. On October 27, 2014, the petitioner was declared delinquent and he was arrested upon a parole release violation warrant on August 11, 2015.

Petitioner asserts in the Amended Petition that the final parole revocation hearing was “commenced without counsel being present which allowed parolee too (sic) make irrational decisions based on his emotional situation with his mother.” *See* Amended Petition, ¶7. Petitioner also asserts that he presented mitigating evidence to support restoration of parole and specifically argues that he was denied the ability to enter proof of his medication to substantiate his claim. Petitioner asserts that the Administrative Law Judge (hereinafter referred to as the “ALJ”) failed to provide proper notice that the retained counsel withdrew from representing the petitioner, that the ALJ allowed the petitioner to proceed *pro se* without requesting a medical opinion as to the petitioner’s ability, and the ALJ misled the petitioner to enter a plea without hearing his defense. Finally, the petitioner argues that by allowing DOCCS broad discretion to calculate how time owed is to be served violates the “double jeopardy” clause of the United States Constitution.

Respondent argues that the petitioner failed to preserve his claim for review by entering a plea of guilty at his final parole revocation hearing which operates as a waiver of any antecedent claims. Similarly, the respondent argues that the petitioner failed to object to any of the evidentiary or procedural issues petitioner now raises in this matter. Additionally, the respondent asserts that the petitioner's guilty plea was voluntary and informed. The respondent argues that the ALJ clearly questioned the petitioner regarding being represented by counsel and whether the petitioner wished to proceed *pro se*. Finally, the respondent asserts that the petitioner's claim regarding the time calculation by DOCCS is without merit.

On August 20, 2015, the petitioner appeared before Hearing Officer Sol Chamorro for a Preliminary Hearing pursuant to 9 NYCRR §8005. It is noted that the transcript reflects that the petitioner attempted to introduce evidence of his prescription medications at the preliminary hearing but Hearing Officer Chamorro advised the petitioner to retain the prescriptions to present at the final parole revocation hearing. *See*, Return Ex. H, p. 4, 6. While not physically present at the hearing, the petitioner's then-retained attorney, Barry Goldberg, Esq., advised the Hearing Officer via telephone on August 19, 2015 (which was confirmed by letter dated August 20, 2015), that the conviction of a subsequent crime provided probable cause and thereby obviated the necessity for the preliminary hearing. The final parole revocation hearing was scheduled to be held on September 1, 2015.

On September 24, 2015¹, the petitioner appeared for the final parole revocation hearing; however, his retained attorney, Barry Goldberg, had contacted the Parole Officer and requested a further adjournment to appear at the hearing. The petitioner asserted that

¹There is no indication in the record as to why the final parole revocation hearing was adjourned from September 1, 2015 until September 24, 2015.

he no longer wanted Mr. Goldberg as an attorney and wished to either proceed *pro se* or have Legal Aid assigned to him. ALJ Eva Moravec advised the petitioner that because Mr. Goldberg was counsel of record, he would have to be relieved on the record. The ALJ adjourned the proceedings to October 7, 2015.

On October 7, 2015, the final parole revocation hearing was held². ALJ Moravec confirmed with the petitioner that he sought to have Mr. Goldberg relieved as counsel and the petitioner wished to proceed *pro se*. ALJ Moravec asked a series of questions of the petitioner to ascertain the petitioner's competency, including several questions about the petitioner's prescription medications.

“ALJ MORAVEC: Are you under the influence of any kind of drugs?”

MR. SABINO: No, just the medication that I take, but that does not impair my thinking.

ALJ MORAVEC: Does it impair your ability to make decisions for yourself?

MR. SABINO: No, it does not, Mrs. Moravec.

ALJ MORAVEC: What kind of medicine is that?

MR. SABINO: It's for my ADHD and manic depression.

...

ALJ MORAVEC: And when you're on your medicines, do you think clearly?

MR. SABINO: Yes, I do.

ALJ MORAVEC: Do you think better?

MR. SABINO: Yes, I do.

ALJ MORAVEC: Than when you're off of it?

MR. SABINO: Yes, I do.

² It is noted that the petitioner did not object to the hearing being adjourned to October 7, 2015.

ALJ MORAVEC: Okay, and are you thinking clearly today?

MR. SABINO: Yes, I am, Mrs. Moravec.

ALJ MORAVEC: And you feel like you can make a decision like this?

MR. SABINO: Yes, I do.” [Resp. Ex. I, p.3-4.]

The record is devoid of any indication by the petitioner that he objected to proceeding *pro se* or that he sought the advice of counsel. The petitioner was adamant that he wished to go forward with the final parole revocation hearing on October 7, 2015. Indeed, when asked if he wished to proceed *pro se*, the petitioner responded: “Yes, because I read the New York codes and regulations and it says that if I admit to – if I take responsibility for my action, I’ll get 12 months and I can move on with my life and hopefully get back to this school and everything.” Resp. Ex. I, p.5.

Petitioner’s adamant stance that he wished to dismiss his retained attorney and proceed *pro se* negates his claim that he was denied the effective assistance of counsel. “While a parolee has a statutory right to counsel at a final parole revocation hearing, that right may be waived. Even a parolee who has previously requested the assistance of counsel at a final revocation hearing may waive his right to counsel, in the counsel’s absence, so long as an inquiry establishes that the waiver is knowing, intelligent and voluntary (*internal citations omitted*).” *People ex rel. Sinclair v. Warden, Rikers Island Corr. Ctr.*, 152 Misc. 2d 928, 933. ALJ Moravec’s determination that the petitioner was knowingly and intelligently proceeded without counsel is supported by the record. *See People ex rel. Moll v. Rodriguez*, 132 AD2d 766, 767-768.

In an effort to provide the petitioner with an additional six months of delinquency time, the respondent agreed to adjust the date of delinquency to April 27, 2015 from

October 27, 2014. Insofar as the adjustment would grant the petitioner a right to adjourn the hearing for fourteen days, ALJ Moravec clearly advised the petitioner of the right. Following a colloquy regarding his right to an adjournment and his waiver thereof, ALJ Moravec accepted the petitioner's plea of guilt to the parole violation. "[P]etitioner's 'guilty plea, standing alone, is sufficient to provide a rational basis for the finding of guilt as to the charged violation[s](*internal citations omitted*).'" *Horace v. Annucci*, 133 A.D.3d 1263, 1264. It is further noted that notwithstanding the petitioner's admission of guilt to the parole violation, the violation was based upon a certificate of conviction. "A certificate of conviction or commitment is prima facie evidence of an alleged violation." 9 NYCRR §8005.2(d).

While the petitioner alleges that he was not able to present mitigating evidence to support the restoration of his parole status, the record of the final parole revocation hearing is devoid of any efforts by the petitioner to put forth any mitigating evidence. To the contrary, when asked by ALJ Moravec if the petitioner wanted a further adjournment, the petitioner answered: "No. I want to sentence and everything today so I can move forward with my life." Resp. Ex. I, p.8. Insofar as the mitigation issue is unpreserved for review given petitioner's waiver of same at the final revocation hearing, the petitioner may not now raise such objection before this Court. *People ex rel. Webster v. Travis*, 277 A.D.2d 546, 546.

As relates to the petitioner's claim that the respondent has improperly calculated his remaining time owed and such calculation is a violation of the "double jeopardy" clause of the U.S. Constitution, the claim is without merit. Preliminarily, the petitioner's assertion is a bald, conclusory claim that DOCCS is arbitrarily calculating the loss of "good time" and

thereby extending the maximum expiration dates following the parole revocation hearing. Additionally, the petitioner's reliance upon *People v. Williams*, 14 NY3d 198, is misplaced. The Kings County sentencing court originally sentenced the petitioner to a term of five (5) years post release supervision in addition to the determinate sentence of seven (7) years incarceration. *People v. Williams* would be applicable only if the sentencing court failed to include the post release supervision into the original sentence. Notwithstanding the petitioner's complaints of a violation of "double jeopardy", the calculation of time owed following the determination of a parole revocation is statutory.

Penal Law § 70.45(a): "A period of post-release supervision shall commence upon the person's release from imprisonment to supervision by the department of corrections and community supervision and shall interrupt the running of the determinate sentence or sentences of imprisonment and the indeterminate sentence or sentences of imprisonment, if any. The remaining portion of any maximum or aggregate maximum term shall then be held in abeyance until the successful completion of the period of post-release supervision or the person's return to the custody of the department of corrections and community supervision, whichever occurs first."

Although the petitioner complains that the maximum expiration date was changed from October 26, 2017 to November 11, 2018, same was done in consideration of the dates of delinquency and time imposed at the revocation hearing. As such, the petitioner has not shown how there has been a violation of the "double jeopardy" clause and the assertion of same is without merit.

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: August 3, 2016 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice