

Matter of Wright v Demars

2016 NY Slip Op 32351(U)

November 1, 2016

Supreme Court, Clinton County

Docket Number: 16-0928

Judge: S. Peter Feldstein

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

In the Matter of the Application of
FITZROY WRIGHT, #95-A-4419,
Petitioner,

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

DECISION, ORDER AND JUDGMENT
RJI #09-1-2016-0343.30
INDEX #16-0928

-against-

JOHN DEMARS, Superintendent,
Altona Correctional Facility,
Respondent.

This proceeding was originated by the Petition for Writ of Habeas Corpus of Fitzroy Wright, sworn to on July 18, 2016 and filed in Clinton County Clerk's office on July 22, 2016. Petitioner, who is an inmate at the Altona Correctional Facility, 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 July 28, 2016. The Court has received and reviewed respondent's Answer and Return, verified on September 9, 2016 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated September 9, 2016. The Court has received and reviewed the petitioner's unsworn Reply dated September 13, 2016.

On May 2, 1995, the petitioner was sentenced by the County Court, Westchester County, to an indeterminate sentence of twenty (20) years to life incarceration upon the conviction of Murder in the Second Degree, and an indeterminate term of two and one-third (2 $\frac{1}{3}$) to seven (7) years incarceration upon the conviction of Criminal Possession of a Weapon in the Third Degree. Petitioner was released to parole supervision on October 21, 2013. On or about August 16, 2015, a former girlfriend, Lydia Daley, alleged assault and harassment by the petitioner and an arrest warrant was issued. The petitioner was arrested on or about November 5, 2015 and a parole warrant was thereafter issued as a result.

A preliminary parole revocation hearing was held on November 12, 2015 at which the petitioner, Parole Officer Gaynor and the alleged victim, Ms. Daley, testified. At the conclusion of the hearing, the Administrative Law Judge found that there was probable cause regarding Charge #1: "Fitzroy Wright violated Rule #8 of the rules governing Parole in that on 8/16/15 at about 8pm inside of 260 South 2nd Ave., Mount Vernon, NY, he pushed his victim to the ground while calling her 'a bitch and a prostitute' causing her left arm to bleed, leaving a bruise and a torn shirt." *See* Resp. Ex. F. Insofar as the Administrative Law Judge concluded that there was probable cause found on at least one charge, the entire matter was held over for a final parole revocation hearing pursuant to Executive Law §259-i(3)(c)(viii). On December 8, 2015, petitioner appeared with counsel for the final parole revocation hearing and the hearing was adjourned as the Division of Parole considered whether to add additional charges to the violation. The final parole revocation hearing was rescheduled to January 27, 2016, however, the Division of Parole requested a brief adjournment to secure the attendance of a witness and counsel for the petitioner sought an additional adjournment for scheduling purposes. As such, the final parole revocation hearing was rescheduled to March 8, 2016.

At the hearing on March 8, 2016, the Administrative Law Judge heard testimony from the alleged victim, Ms. Daley, as well as from the petitioner. Following the conclusion of the hearing, on March 17, 2016, the Administrative Law Judge found the petitioner guilty of charges 1 and 3, but not guilty of charges 2 and 4. The Administrative Law Judge imposed a time assessment of thirty-six (36) months with a delinquency date of August 16, 2015, the date of the alleged incident.

Petitioner filed a timely administrative appeal and on June 30, 2016, the Board of Parole Appeals Unit affirmed the Administrative Law Judge's determination. In response thereto, the petitioner brought the instant petition seeking immediate release.

Petitioner argues that: 1) Parole Officer Gaynor lied to the petitioner on November 3, 2015 when she advised him that there was an open warrant for his arrest and she directed the petitioner to turn himself in which lead to his (alleged) illegal arrest; 2) Parole Officer Gaynor lied at the preliminary parole revocation hearing when she testified that there was an open warrant for the petitioner's arrest; 3) the final parole revocation hearing transcript has been falsified as the petitioner denies stating: "I made a couple of calls to the police station and stuff like that, and they said, there is a warrant here"; 4) the Administrative Law Judge was biased; 5) the petitioner was not provided timely notice of the harassment charge; and 6) the parole revocation was arbitrary as it was not supported by a preponderance of legally sufficient evidence.

In response thereto, the respondent argues that any and all complaints related to the preliminary parole revocation hearing are subsumed into the final parole revocation hearing and are, on their own, moot. In addition, the respondent argues that the petitioner failed to preserve the claims for appellate review inasmuch as they were not raised at the hearing. The respondent further argues that the petitioner did raise three of the claims on administrative appeal, to wit: that the transcript of the final parole revocation hearing was falsified, that the Administrative Law Judge was biased and that the final decision was not supported by a preponderance of the evidence. However, the respondent asserts that there is no merit to the petitioner's allegation that the transcript was falsified nor is there any support to the allegation that the Administrative Law Judge was biased. Moreover, while the petitioner asserts that the decision was not supported by a preponderance of the evidence, the respondent argues that the record clearly supports the determination.

Preliminarily, "[p]etitioner's challenge to the preliminary parole revocation hearing was rendered moot by the final parole revocation determination." *People ex rel. Bell v. Santor*, 21 AD3d 1192, 1193; *see also People ex rel. McCummings v. DeAngelo*, 259 AD2d

794, *People ex rel. Chavis v. McCoy*, 236 AD2d 892. As such, the petitioner's claims relating to Parole Officer Gaynor's testimony and assertions at the preliminary parole revocation hearing are moot.

As relates to the petitioner's assertion that the final parole revocation hearing transcript was falsified, such assertion is without merit. In the petition at bar, the petitioner has asserted that he did not make the statement: "I made a couple of calls to the police station and stuff like that, and they said, there is a warrant here," and insinuates that the transcriber added same in. However, even if the record was falsified, which this Court has not determined, the claimed statement is of little significance to the overall outcome of the proceeding. *See Matter of Carbuccia v. Goord*, 298 AD2d 801 citing *Matter of Rucano v. Goord*, 264 AD2d 888. In his Reply, the petitioner claims "both the preliminary and the final hearing transcripts are tampered with in their entirety." *See Reply*, p.2. It is noted that in the administrative appeal, the petitioner alleged that all of the favorable testimony was redacted from the transcript as well as additional testimony was created, including questioning by his attorney that the petitioner asserts did not occur. The petitioner does not offer an affidavit from his attorney, Percival Clarke, to support this assertion.

As relates to the petitioner's allegation that the Administrative Law Judge was biased, the petitioner has put forth various statements made by the Administrative Law Judge during the final parole revocation hearing that he alleges prove bias.¹ Upon review, however, the Court disagrees. The statements are conclusory opinions derived from the factual testimony proffered. None can be attributed to any inherent bias. "Petitioner's contentions that the Hearing Officer's references during the hearing to the appeal process available to petitioner and other comments were indicative of bias and that he was

¹ *See Resp. Ex. M, Aff. p. 1.*

predisposed to finding petitioner guilty are without merit. Moreover, petitioner failed to establish ‘that the outcome of the hearing flowed from the alleged bias.’ ” *Nicholas v. Schriver*, 259 AD2d 863, 863.

Similarly, the petitioner asserts that the determination was not supported by a preponderance of the evidence. The Administrative Law Judge heard the testimony of Lydia Daley, the petitioner’s ex-girlfriend and victim of assault. “Issues of credibility were for the Administrative Law Judge (ALJ) to resolve.” *Johnson v. Thompson*, 134 AD3d 1404, 1405. In the matter at bar, the victim’s testimony was found to be credible regarding the assault by the petitioner and even the petitioner’s testimony somewhat supported her allegations, particularly as he repeatedly called her a “prostitute”. Insofar as the Administrative Law Judge dismissed two of the charges, clearly he weighed the testimony carefully and made his determination based upon the evidence presented.

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

ORDERED AND ADJUDGED, that the petition is dismissed.

Dated: November 1, 2016 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice