SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: PART 23

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THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. ALONZO MOORE, B&C #241-19-01304,
Warrant #805449, NYSID #02770240-P,

Petitioner, ORDER

-against- Writ of Habeas Corpus
Index No. 260284-19

WARDEN, Anna M. Kross Center, and
NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION,

Respondents.

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David L. Lewis, AJSC.:

Petitioner, Alonzo Moore, moves by writ of habeas corpus for an order vacating his parole revocation warrant and restoring him to parole supervision based on his claim that respondents failed to establish probable cause of the charged violation. Respondents oppose.

As a preliminary matter, the Court notes that petitioner has a pending criminal matter in Bronx County for which he has bail in the amount of a $3,000 bond or $1,500 cash that is unpaid. (Respondents' Exhibit F). It is well settled that the remedy of habeas corpus is unavailable to a parolee who is being held on unrelated charges since he would not be entitled to immediate release even if he could prevail on the merits. *See People ex rel. Brown v New York State Div of Parole*, 70 NY2d 391, 398 (1987). Since petitioner remains incarcerated on his unrelated case and would not be entitled to immediate relief even if he were successful on the merits of his claim, this Court converts his petition to an Article 78 proceeding pursuant to

CPLR 103(c)[1]. *See People ex rel. Harper v Warden,* 21 Misc 2d 906 (Sup Ct, Bronx County 2008); *People ex rel. Curtis v NYS Board of Parole,* 179 Misc 2d 89 (Sup Ct, Bronx County 1998). For the following reasons the converted application is granted.

In 2013, petitioner was convicted of attempted robbery in the second degree and sentenced to a determinate sentence of four years incarceration, followed by five years post release supervision. He was released to parole supervision on September 11, 2015. At that time he was provided with and agreed to abide by certain conditions of release by respondent New York State Department of Corrections and Community Supervision ("DOCCS") and told that failure to adhere to these conditions could result in a revocation of parole. (See Respondents' Exhibit A).

Petitioner was released to parole supervision on March 14, 2019, arriving at Bellevue Men's Shelter that evening. (Petitioner's Exhibit A). He was declared delinquent on March 15, 2019. A parole warrant was issued on March 25, 2019, and lodged on March 27, 2019. (Petitioner's Exhibit A; Respondents' Exhibit C). A preliminary hearing was held on April 8, 2019. Respondents were represented by Senior Parole Officer ("S.P.O.") Thomas Vega. DOCCS proceeded on Charge #1 which read:

> The subject violated Rule #1 of the conditions of release in that on 3/15/19, he failed report [sic] to NYS DOCCS at 82 Lincoln Avenue in Bronx County within 24 hours of his Release from Rikers Island on 3/14/19.

(Petitioner's Exhibit A). Condition #1 of petitioner's conditions of release stated in pertinent part that upon release petitioner must make his arrival report to the Community Supervision Office within 24 hours of his release. (Id.). Petitioner,

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[1]Respondents claim that this petition must be transferred to the Appellate Division is rejected as a finding of probable cause at a preliminary hearing is not a final determination. *See Osman v Stanford,* 137 AD3d 628 (1st Dept. 2016); *People ex rel. Waterman v Warden,* Index No. 260103/19 (Sup Ct, Bronx County 2019) and cases cited therein. (Petitioner's Exhibit A in Affirmation in Reply).

represented by The Legal Aid Society, entered a plea of not guilty.

S.P.O. Vega testified that he conferenced the case with Parole Officer ("P.O.") Franklyn, the parole officer of record. S.P.O. Vega called P.O. Darden who testified that she instructed petitioner that he must make his arrival report at a specific office, the location of which was provided to petitioner, within 24 hours of his release. S.P.O. Vega testified that petitioner did not make an arrival report on March 15, as required. In support thereof S.P.O. Vega testified that although petitioner was instructed to report to P.O. Franklyn, P.O. Franklyn, who was on medical leave, was not in the office on March 15, 2019. S.P.O. Vega added that when a parolee's parole officer is absent on the day a parolee is required to make an arrival report the parolee would then report to the on duty officer. S.P.O. Vega did not bring the on duty officer to testify at the preliminary hearing and testified that he did not know who the on duty officer was on that date, or the name of that person. S.P.O. Vega testified that he did not have any chronological reports that would have recorded petitioner's failure to make an arrival report on the designated date of March 15. S.P.O. Vega also did not produce the sign-in sheet from March 15, which, according to S.P.O. Vega would have indicated the names of the parolees that reported that day, and thus would have established petitioner's failure to appear. In sum, the sole evidence presented in support of the charge that petitioner did not report as required was the testimony from S.P.O. Vega that he was in the office on that date and did not see the petitioner. (Respondents' Exhibit E). The hearing officer found probable cause based on the testimony of S.P.O. Vega. (Respondents' Exhibit E).

Petitioner now argues that the evidence was insufficient to establish probable cause of the charged violation. A preliminary hearing is an administrative proceeding as opposed to a criminal trial. *See People ex rel. Ayers v Lombard*, 87 Misc 2d 355 (Sup Ct, Monroe County 1976), *aff'd* 55 AD2d 1051 (4th Dept. 1977). It is summary in nature. *See People ex rel. Korn v New York State Div. of Parole,* 274 AD2d 439 (2nd Dept. 2000). Thus, it is less formal than a criminal trial and requires only a minimum inquiry by the hearing officer to determine whether probable cause exists

to believe a parolee committed the acts which constitute a violation of his parole in an important respect. *See People ex rel. Calloway v Skinner,* 33 NY2d 23 (1973). The hearing officer need not follow the strict rules of evidence and any evidence, including hearsay, may be accepted. While at a preliminary hearing there is no statutory requirement or regulation that DOCCS prove each element of the charge or charges in the Violation of Release Report, it must be established that there is sufficient evidence to find "probable cause to believe that the parolee...has violated one or more conditions...of release in an important respect." Executive Law §259-i(3)(c)(iv); *see People ex rel. Korn,* 274 AD2d 439; *People ex rel. Davis v Warden,* 51 Misc 3d 849 (Sup Ct, Bronx County 2016). The burden of proof at a preliminary hearing is placed upon DOCCS to establish probable cause to believe that the parolee has violated a condition of parole in an important respect. *People ex rel. Korn, id.* Upon a challenge to a finding of probable cause, the reviewing court's power is focused on a determination as to whether the evidence in the record, if believed, was sufficient to support the hearing officer's determination. *See People ex rel. Watson v Dept. of Correction*, 149 AD2d 120 (1st Dept. 1989); *Williams v New York State Div. of Parole*, 23 AD3d 800 (3rd Dept. 2005).

Here, the evidence adequately established that petitioner received instructions to make his arrival report within 24 hours of his discharge. However, the evidence fell far short of establishing probable cause that petitioner failed to make his arrival report within the required time. Indeed there was a complete absence of any evidence to support a probable cause finding that petitioner failed to report on the specified date. No chronological reports were presented which would have documented those who did report on the given date in question and thus arguably could allow for an inference that petitioner did not report on that date. The testifying parole officer, S.P.O. Vega did not even know the name of the on duty officer for the date in question, and did not call this person to testify even though petitioner would have had to report to that officer in the absence of his assigned parole officer, P.O. Franklyn. The only evidence before the hearing officer regarding petitioner's

purportedly failed appearance is the statement from S.P.O. Vega that he was in the office the entire day and did not see petitioner. This belies the fact that petitioner would not have reported to S.P.O. Vega, but rather would have been instructed to report to the on duty officer. S.P.O. Vega had no conversation with this person to confirm petitioner's absence. While S.P.O. Vega represented that the kept records would corroborate petitioner's absence, these records were never presented as evidence at the preliminary hearing. Moreover, even if these records were presented this Court is not accepting of the notion that the absence of an entry would be sufficient to prove the allegation that petitioner did not appear. It is too tenuous and remote a connection to the core fact that DOCCS had the burden to prove; the absence of evidence may in fact not be evidence of petitioner's absence.

Finally, the remedy for respondents' failure to demonstrate the requisite probable cause is not, as is now argued, a new preliminary hearing. Respondents do not get another opportunity to litigate what it failed to prove initially. This is not a mere procedural error, but rather goes to the essence of the charged violation and the purpose of the hearing. Any notion of due process would be thwarted by according respondent another attempt to prove a charge after an initial failed attempt. *See People ex rel. Waterman v Warden,* Index No. 260103-19 (Sup Ct, Bronx County 2019) and cases cited therein. (Petitioner's Exhibit A in Affirmation in Reply).

Accordingly, this Court finds that respondents failed to establish probable cause in an important respect. The Court grants petitioner's Article 78 petition. The parole warrant lodged against the petitioner is hereby vacated and delinquency is to be cancelled.

This constitutes the decision and order of the Court.

Dated: June 26, 2019
Bronx, New York

David L. Lewis, AJSC