

**People ex rel. Laukam v Warden, Anna M. Kross  
Corr. Facility**

2019 NY Slip Op 34870(U)

December 30, 2019

Supreme Court, Bronx County

Docket Number: Index No. 260711/19

Judge: Denis J. Boyle

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: CRIMINAL TERM: PART 32

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THE PEOPLE OF THE STATE OF NEW YORK  
ex rel. YORDY LAUKAM

B & C No. 4411904416  
NYS No. 07640133Y  
Warrant No. 793857

Petitioner,

- against -

Index Number: 260711/19

WARDEN, Anna M. Kross Correctional Facility,  
NEW YORK STATE DEPARTMENT OF  
CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

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Denis J. Boyle, J.:

This relator, through counsel, brings a writ of habeas corpus challenging the legality of his detention, claiming that his due process rights to a fair preliminary hearing were violated when the hearing officer found probable cause that relator had unlawfully possessed "synthetic marijuana K-2" (Petitioner's Verified Petition for Writ of Habeas Corpus, Argument, pgs. 4-8, paragraphs 23-32). As a remedy for this alleged violation of relator's statutory and due process rights, counsel seeks an order granting the habeas petition, vacating the above referenced parole warrant and restoring him to post-release supervision.

Resolution of relator's writ of habeas corpus requires reference, in the first instance, to the procedural background of this matter and to the specific charge which relator contends, was not supported, at the preliminary hearing, by probable cause. In 2018, relator sustained a conviction

for two counts of Criminal Contempt in the First Degree, incident to which he was sentenced to indeterminate state prison sentences of one year and six months to three years incarceration (Respondent's Affirmation in Opposition to Petition for a Writ of Habeas Corpus, pg.2, paragraph 6; see Respondent's Exhibit A, Certificate of Release to Parole Supervision). On July 16, 2019, relator was released to parole supervision and agreed to adhere to certain conditions that the Department of Corrections and Community Supervision imposed upon his release. Relator was declared delinquent by parole authorities on August 15, 2019 and charged with violating eight conditions of his release to parole supervision. Among these various parole supervision violations, relator was charged with Grand Larceny, smoking and possessing a synthetic marijuana cigarette, and a curfew violation (Respondent's Affirmation in Opposition to Petition for a Writ of Habeas Corpus, pg. 2, paragraph 8; see Respondent's Exhibit B, Violation of Release Report). As a result, the subject parole warrant was issued on August 19, 2019 and lodged on August 22, 2019 (Respondent's Affirmation in Opposition to Petition for a Writ of Habeas Corpus, pg.2, paragraph 9; see Respondent's Exhibit C, Status Inquiry Summary).

Relator elected to have a preliminary hearing. Said hearing was held on August 30, 2019. At the preliminary hearing, the Department of Corrections and Community Supervision was represented by a Parole Officer and the relator was represented by counsel. As the record of that proceeding reflects, the Parole Officer, on behalf of the Department of Corrections and Community Supervision elected to proceed on charge five. Charge Five, as reflected in Respondent's Exhibit B, Violation of Release Report, alleges in pertinent part, that relator, "violated Rule # 8 of the Conditions of Release when his behavior violated the provisions of the law to which he is subject which provides for a penalty of imprisonment in that on or about

08/18/19 at approximately 07:28 p.m. inside south east corner at 35<sup>th</sup> Ave and 103<sup>rd</sup> Street, East Elmhurst, NY 11369 subject was observed smoking an alleged synthetic marijuana cigarette which subject confirmed to be K2" (Respondent's Exhibit B, Violation of Release Report, pg.2 of 3).

In support of relator's argument that, contrary to the conclusion reached by the hearing officer, probable cause that relator had violated charge number five, was not established at the preliminary hearing, relator relies, in large part, on the fact that a laboratory report concerning an analysis of the substance in issue was not submitted at the hearing. As argued by the relator, as distinct from marijuana, or various other controlled substances for which a penalty of imprisonment may be imposed, "K2 is a more general and imprecise term. It refers to any substance generally intended to seem like a substitute for marijuana. There are many different substances that come under the umbrella of 'K2.'" (Relator's Affirmation in Reply to Opposition to Writ of Habeas Corpus, pgs.3 and 7, paragraphs 8 and 17). As further argued by relator, "[N]ot all of those substances are illegal; they have not all been listed as illegal. Illegality is limited to the substances with the chemical formulation on the list of proscribed chemical compounds" (Relator's Affirmation in Reply to Opposition to Writ of Habeas Corpus, pg. 3, paragraph 8). It follows, relator argues, "[I]f the substance, based on its chemical composition, is not on the list of illegal substances, it is not illegal K2. ... Hence, with respect to K2, but unlike various other substances, without a lab test, one cannot ascertain, no matter how much training and experience he or she has, whether or not it is illegal 'K2' or synthetic marijuana, i.e., containing a substance on the list of proscribed compounds or whether it is not on any list and hence, legal K2 or synthetic marijuana" (Relator's Affirmation in Reply to Opposition to Writ of

Habeas Corpus, pg. 3, paragraph 9; see Relator's Exhibit G, National Institute of Drug Abuse, Revised February 2018). In this case, as relator contends, "there was no lab test introduced or testified to and it was never ascertained whether or not the substance was actually illegal" (Relator's Affirmation in Reply to Opposition to Writ of Habeas Corpus, pg. 4, paragraph 10). In sum, relator maintains that given that neither a lab report or testimony regarding such an analysis was introduced at the preliminary hearing, probable cause did not support a conclusion that the K2 relator had been observed smoking was an illegal substance for which a sentence of imprisonment could be imposed, as alleged under Charge Number Five.

In further support of his writ of habeas corpus, relator argues, for reasons expanded upon in relator's Verified Petition for Writ of Habeas Corpus, that pursuant to Administrative Code section 10-203, New York City does not criminalize the "simple possession" of "substances commonly known as synthetic marijuana, K2" (Relator's Verified Petition for Writ of Habeas Corpus, pg.6, paragraph 28).

The respondent opposes relator's writ on procedural grounds as well as on the merits. In response to relator's contention that a laboratory report or testimony concerning such a report was necessary to support a finding of probable cause in this case, the respondent argues that it is "settled law that laboratory testing is not required to show prima facie probable cause at a preliminary proceeding" (Respondent's Affirmation in Opposition to a Petition for a Writ of Habeas Corpus' Section B, pgs.7-8, paragraph 23). Respondent's argument in this regard neglects the fact that the illegal substances which were in issue in the cases relied upon by respondent, be they marijuana or narcotics, were identifiable by means other than a chemical analysis. In *People v Kalin* (12 NY3d 225), cited by the respondent, the defendant was charged

with Criminal Possession of a Controlled Substance in the Seventh Degree and Unlawful Possession of Marijuana based upon defendant's alleged constructive possession of heroin and marijuana. In support of his argument that the accusatory instrument to which the defendant had pled guilty was jurisdictionally deficient, the defendant contended that the "officer's allegations present an inadequate foundation for the identification of the drugs because the officer did not describe what the substances looked like, nor did he attach a laboratory report indicating that the substances had been tested and found to be heroin and marijuana" (id at pg. 231). The Court concluded that the accusatory instrument was sufficient to support a guilty plea in the absence of a waiver of prosecution by information. In doing so, the Court held in pertinent part, that a laboratory report was not "necessary to set forth a prima facie case" (id at pg. 231). The court noted, in addition, that "the officer in this case presented more in the accusatory instrument than merely stating that he used his experience and training as the foundation in drawing the conclusion that he had discovered illegal drugs. He asserted that he also relied on the packaging of the substance that he determined to be heroin and that the recovery of the marijuana pipe further supported his belief that he had found marijuana" (id at pg. 231). At issue in *People v Enelus* (52 Misc3d 1209(A) [Criminal Court Bronx County 2016]), cited as well by the respondent, was the facial sufficiency of a misdemeanor complaint charging Promoting Prison Contraband in the Second Degree (Penal Law section 205.20(1)), premised on defendant's alleged possession of K2 inside the Rikers Island Correctional Facility. In concluding that the superceding information was facially sufficient, the Court held K2 is "undoubtedly contraband" (id). The Court further noted, as distinct from the issues at hand, defendant was not charged with possessing synthetic marijuana and "the identification of the substance recovered is not at issue"

(id). To be distinguished from matters involving marijuana, heroin, and at least certain types of cocaine, among myriad other types of illegal substances for which a sentence of imprisonment may be imposed, what is characterized as K2 is not readily identifiable as an illegal substance, by its packaging or physical characteristics. As discussed supra, the possession of K2 is not illegal under every circumstance; rather, whether such possession would constitute a violation of Rule # 8 of the relator's Conditions of Release, as alleged in Charge Number Five here, depends on the chemical content of the particular substance possessed. I note, in *Timmons v Annucci* (139 AD3d 1224 [3<sup>rd</sup> Department 2016]), also cited by the respondent, at issue was the sufficiency of the evidence in support of a finding that the defendant had violated a prison disciplinary rule in possessing K2. In that case, unlike in the instant case, "petitioner's urine sample twice tested positive for the presence of synthetic marijuana"(id at pg. 1224). In that context, given the positive test results, the Third Department Appellate Division held the "identity of the exact chemical compounds detected in the synthetic marijuana was not necessary" (id at pg. 1224).

It bears further noting that at issue in the instant matter is not the alleged violation of a prison disciplinary rule prohibiting, as in *Timmons v Annucci*, supra, the possession of a controlled substance and the use of an intoxicant, or the sufficiency of an accusatory instrument for pleading purposes, as in *People v Kalin*, supra, but whether probable cause supported a determination at the preliminary hearing that relator had violated the specific charge put in issue by the parole officer, that being Charge Number Five. "At a preliminary hearing ... DOCCS must establish that there is probable cause to believe that the parolee has violated one of more conditions of his parole in an important respect (see *People ex rel. Korn v New York State Div. of Parole*, 274 AD2d 439 [2<sup>nd</sup> Dept 2008].) Only minimal inquiry is necessary to determine

whether there is probable cause or reasonable grounds to believe that the parolee has committed acts which constitute a violation of his parole conditions (See *People ex rel Calloway v Skinner*, 33 NY2d 23, 31 [1973]). Evidence is sufficient for a finding of probable cause if it is credible and accurately supports that the parolee violated one or more of the conditions governing his or her release in an important respect (*People ex rel. Vidal v New York State Div. of Parole*, 16 Misc3d 1109(A) [Supreme Court Bronx County 2007])” (*People ex rel. Davis v Warden*, 51 Misc3d 849 at 855 [Supreme Court Bronx County 2016]). Further, as recognized in *People ex rel. Vidal v New York State Div. of Parole*, cited at 16 Misc3d 1109(A), in *People ex rel Davis*, supra, “[U]pon ‘finding that there was evidence in the record which, if believed, was sufficient to support a finding of probable cause and that required procedural rules were followed, the court’s power to review is exhausted and it must dismiss the writ’ (citations omitted). Alternatively, if there is insufficient evidence in the record to support a finding of probable cause, then the court should grant the writ, and the petitioner should be restored to parole. *People ex rel. Saafir v Mantello*, 163 AD2d 824, 825-26 (2d Dept 1991)” (*People ex rel. Vidal v New York State Division of Parole*, supra). Upon application of the probable cause standard to the record before me, the lack of a laboratory report or testimony regarding such analysis is significant, given as discussed, that the chemical compounds constituting what is known as K2 vary, with the result that certain variations of K2 contain an illegal substance for which a sentence of imprisonment may be imposed, but other versions of K2 do not contain such an illegal substance. Nor does the testimony at the preliminary hearing by the police officer who recovered the substance in issue provide any further basis for concluding that the substance in issue, characterized as K2, actually included an illegal substance such as would permit the imposition of a sentence of imprisonment,

as would be required to satisfy Charge Number Five. (See *People ex rel Sullivan v Baxter*, 62 Misc3d 1217(A) [Supreme Court Monroe County 2018]). In reaching this conclusion, I note, as respondent argues, that the transcript of the preliminary hearing, attached as Exhibit E, in support of Respondent's Affirmation in Opposition to a Petition for a Writ of Habeas Corpus, reflects numerous gaps in the testimony due to the fact that portions of the tape recording of the preliminary hearing are inaudible. However, I do not consider a new preliminary hearing, as requested by respondent, to be an appropriate remedy at this juncture of the proceedings, for the failure of the DOCCS authorities to properly record the proceedings. In any event, I am satisfied from those portions of the record of the hearing which are included in Respondent's Exhibit E, that the testimony and evidence before the hearing officer did not include a laboratory report or other basis for concluding that what was recovered from the defendant contained an illegal substance. In reaching this conclusion, I would add that the admission attributed to the relator, to the effect that he acknowledged that what had been recovered from his person was K2, did not serve to establish, for purposes of a probable cause analysis, that the K2 in his possession, had within it, the kind of illegal substance for which a sentence of imprisonment could be imposed.

In the final analysis, the conclusion testified to by the police officer at the preliminary hearing, that based on his experience, the substance he recovered from the defendant's person was K2, coupled with defendant's admission that the substance was, indeed, K2, together with the additional information adduced at the preliminary hearing, did not suffice to establish probable cause to conclude that the K2 recovered from the defendant consisted of the kind of

illegal substance for which a sentence of imprisonment could be imposed.<sup>1</sup>

Respondent argues, as a further basis for dismissing the instant writ, in reliance on *People ex rel. Kaplan v Comm’r of Corr.*, 60 NY2d 648 [1983]) and *People ex rel VanSteenburg v Wasser*, 69 AD3d 1135[3<sup>rd</sup> Dept 2010], lv dismissed in part, denied in part 14 NY3d 883), that relator has unpaid bail on a pending matter and therefore, “even if successful here, Petitioner is not entitled to immediate release from custody and is thus procedurally barred from bringing a habeas corpus petition” (Respondent’s Affirmation in Opposition to a Petition for a Writ of Habeas Corpus, Argument, Point 1, pgs.4-5, paragraphs 16-18). As indicated in respondent’s Affirmation, the amount of the unpaid bail is \$1.00. In my view, the case law relied upon by respondent in support of this argument does not stand for the proposition that the instant writ should be denied because relator is not subject to immediate release, given that he has unpaid bail in the amount of \$1.00 on the pending matter. For example, reference to the decision in the Appellate Division opinion in *People ex rel. Kaplan v Comm’r of Corr.*, supra at 93 AD2d 768 [1<sup>st</sup> Department 1983], affd 60 NY2d 648, makes clear that at issue in that case was whether defendant’s plea to Manslaughter in the First Degree had been invalid. In the circumstances of that case, further proceedings were necessary for that issue to be resolved before the petitioner would be subject to release. Similarly, in *People ex rel. VanSteenburg*, supra, the issues before the Court did not involve a writ of habeas corpus in the context of a parole proceeding, as here. Further, the issues in *People ex rel. Kato v Warden* (27 Misc3d 1213(A) [Supreme Court Bronx County 2010]), addressed the impact of bail having been set in the amount of \$1.00 on the

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<sup>1</sup> In reaching this conclusion, it bears adding that relator’s arguments concerning the impact of Administrative Code section 10-203 are not persuasive. The Administrative Code does not supplant the Penal Law for purposes of the instant determination.

question of whether a parole warrant had been executed, not as here, whether unpaid bail in the amount of \$1.00 on a separate pending matter would require that the instant writ be dismissed. Moreover, with reference to the applicability of *People ex rel. Leasure v Warden*, Index Number: 251077-15 [Bronx County Supreme Court 2015], Respondent's Exhibit G, attached in support of respondent's Affirmation in Opposition to a Petition for a Writ of Habeas Corpus, review of that decision reveals that the bail conditions on the pending matter in that case were \$200,000/\$100,000, substantially and obviously, far greater than the \$1.00 bail in issue on the present writ of habeas corpus. As recognized in the *Leasure* decision, the trial court has the discretion to convert the instant matter to a CPLR Article 78 special proceeding in the interests of justice. In the instant matter, this Court in its discretion will convert this matter from a writ of habeas corpus to an Article 78 proceeding (see CPLR section 103(c); *People ex rel. Brown*, 70 NY2d 391 at 398; *People ex rel. Curtis*, 179 Misc2d 89 [Supreme Court Bronx County 1998]).

For the foregoing reasons, I find that probable cause did not support a conclusion at the preliminary hearing that relator had violated Charge Number Five, on which DOCCS had relied. Accordingly, based on all of the above, the Article 78 proceeding is granted and the Parole Warrant #793857 is hereby vacated and delinquency is to be cancelled.

This opinion constitutes the decision and order of the Court.

Date: *December 30, 2019*

*DJB*  
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Denis J. Boyle