

People ex rel. Cohen v Brann
2020 NY Slip Op 32396(U)
July 23, 2020
Supreme Court, Bronx County
Docket Number: 400198/2020
Judge: Ralph Fabrizio
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

-----X

PEOPLE OF THE STATE OF NEW YORK
EX REL. ARTHUR COHEN, Esq. on behalf of
DERRICK GRAHAM,

Petitioner,

WRIT OF HABEAS CORPUS
DECISION AND JUDGMENT
Index No 400198/2020

against

No. 400179/2020

CYNTHIA BRANN, Commissioner of
Corrections, City of New York, and ANTHONY
ANNUCCI, Acting Commissioner, New York
State Department of Corrections and
Community Supervision,

Respondents.

-----X

Petitioner Derrick Graham, who is serving a life sentence with intermittent periods of being permitted to serve that sentence under parole supervision in the community, moves for his release from custody on his latest parole warrant via this Article 70 petition to sustain the writ of habeas corpus. He argues that the City and the State have displayed deliberate indifference to his medical situation during his confinement in a city jail as he awaits his final parole revocation proceeding during the COVID pandemic. The petition is denied, and the writ is dismissed for a variety of reasons.

The attorney who brings this petition is from Queens Defenders. That attorney does not represent petitioner Graham on the parole revocation matter. When the writ was filed, petitioner Graham had an open, pending Queens County criminal matter. That case resolved itself with a plea to a misdemeanor before the hearing on this

petition. While this Court understands that the attorney-client relationship between petitioner and the Queens Defenders would continue long after the criminal case ended for a variety of reasons, counsel no longer has any interest in bringing this matter since a decision would not affect any detention on the pending Queens case. ¹For this reason, this Court dismisses this petition as moot.

Moreover, this Court is also concerned about deciding this writ on the merits for several reasons. Petitioner Graham is represented by the Legal Aid Society on the parole revocation matter. They have not brought any writ seeking their client's release based on the parole warrant. If they did in the future, that would be considered a successive writ, and most likely be dismissed. CPLR 7003(b). Moreover, counsel's representation of a client who pled guilty to a crime while on lifetime parole, which of course provides the State with the opportunity to prove he violated a serious condition of release merely through the introduction of a transcript of the allocution and a certified copy of the certificate of conviction, certainly impacts any argument being made in this matter involving this Court's weighing of the State's interest in seeking a lengthy time assessment at the upcoming final parole revocation proceeding. That, too, could lead to further, unnecessary litigation in this matter.

Queens Defenders has not withdrawn this application. And Legal Aid has not appeared. Thus, this Court will reluctantly consider the arguments raised by petitioner's Queens Defenders attorney. After reading the petition, all the accompanying

¹ The case is also being brought in Bronx County, although that case was pending in Queens. In the past, Queens Defenders has informed this Court that they have chosen this venue to avoid the binding precedent of People ex. Rel. Ferro (Pasha) v. Brann, 121 NYS 3d 658 (2nd Dept 2020), as well as the fact that some Bronx judges are more receptive to releasing parolees from custody, rulings that apparently have never been made anywhere else. See People ex. Rel. Sheftman (Anderson) v. Brann, Index No. 400189/2020, July 10, 2020 (Sup Ct. Bronx County).

documents, the returns filed by the City and the State and all their accompanying documents, and after lengthy arguments during the Article 70 hearing, this Court also denies the petition and dismisses the writ on the law.

First, petitioner has failed to meet his burden to prove that the City has acted with deliberate indifference to his medical needs. Today, the Appellate Division, First Department held that “Far from acting recklessly, [the City has] demonstrated great care to ensure the safety of everyone who enters [a jail] facility. By any objective measure, they have been anything but indifferent to the risk that COVID-19 poses to the jail population.” Matter of People ex. Rel. Stoughton (Williams) v. Brann, 2020 NY Slip Op 04236, July 23, 2020 (1st Dept). This Court has joined all other courts who have recognized from the start that the City has implemented and continues to implement health-related containment strategies that have reduced the risk of and the actual spread of the novel coronavirus in the City’s jails; while three inmates tragically died in April 2020, the rate of death in city jails “is proportionately lower than the death rate for the New York City public.” Id.; See People ex. Rel. Ferro (Pasha) v. Brann, 121 NYS 3d 658 (2nd Dept 2020); People ex. Rel. Sheftman (Anderson) v. Brann, Index No. 400189/2020, July 10, 2020 (Sup Ct. Bronx County); People ex. Rel. Williams (Sider) v. Brann, Index No. 400177/2020, June 25, 2020 (Sup Ct. Bronx County); People ex. Rel. Conway (Spencer) v. Brann, Index No. 400179/2020, June 24, 2020 (Sup Ct Bronx County); People ex. Rel. Eraso (Scott) v. Brann, Index No. 400086/2020, June 15, 2020 (Sup Ct. Bronx County); see also People ex. Rel. Carroll (Muntaqim) v. Keyser, 2020 NY App Div LEXIS 328, June 4, 2020 (3rd Dept.). Petitioner has also failed to meet his burden to show that the State has acted with deliberate indifference by not lifting the

parole detainer and releasing petitioner from City custody during the COVID pandemic. There is simply nothing illegal about the parole detainer.

In Williams, the First Department also endorsed the use of the due process balancing test in Cooper v. Morin, 49 NY2d 69 (1979) for determining under whether a State constitutional violation has been demonstrated and did so in cases involving habeas corpus relief sought both by pre-trial and post-conviction detainees. Part of this ruling seems to be at odds with both the Second Department ruling in Pasha as well as the Third Department decision in Muntaqim, each of which used the federal and state constitution “cruel and unusual punishment” standard to determine whether specific medical conditions related to confinement were met in those situations in the case of post-conviction detainees. The First Department also opined that deciding these petitions “in a holistic fashion” is less than ideal, “notwithstanding that [the Court] perceived no constitutional violation” in any of those matters. The Court directs that all habeas courts perform an individualized assessment of “risk of flight” in parole revocation matters against the “potentially serious implications of confinement on detainees with underlying health conditions.”

Thus, there is now appellate authority supporting the remedy long sought by petitioners that the traditional result of sustaining a writ in a habeas corpus proceeding based on a finding of a due process violation involving a parolee - - “the parole violation warrant is vacated, and the parole violation proceeding is dismissed.” People ex. Rel. Brown v. New York State Division of Parole, 70 NY2d 391, 402 (1987) - - is actually no longer the only remedy. Under the Williams “risk of flight” test, there is no longer a statutory bar to detain a parolee on a future parole warrant for the exact same cause

once a court sustains a writ of habeas corpus, something that would be illegal under CPLR 7012. The habeas court is no longer required to enter the judgment required by Article 70 when sustaining the writ and dismiss the parole violation proceeding. This ruling also supports a finding that a parolee is essentially entitled to be released during the pendency of a valid parole revocation proceeding, something which the law had not previously allowed. A parolee facing re-incarceration based on the lodging of a valid parole detainer has never had a right to be released during the pendency of the proceeding, even on bail. People ex. Rel. Calloway v. Skinner, 33 NY2d 23, 33-34 (1973); See Russo v. NYS Bd. Of Parole, 50 NY2d 69, 73 (1980); see also Conn. Bd. of Pardons v. Dumschat, 452 US 458, 463-64 (1981).

Today's Williams ruling therefore eliminates the legal concern voiced consistently by the State that they are not permitted to reinstate a parole revocation proceeding after a judgment dismissing the case via a writ of habeas corpus in the case of a sentenced state prisoner detained on a valid parole warrant. Although there appears to be a disparity between the law in both the Second and Third Departments, which, as noted, applied only the 8th amendment and Article I Section 5 New York State Constitutional "cruel and unusual punishment" standard to sentenced prisoners, See Muntaqim, 2020 NY App Div LEXIS 3281 at *4 - *7; Pasha, 125 NYS 3d at *659, this Court must adhere to Williams and therefore must apply the balancing test to this petition; in the past, this Court has only applied the test in the alternative. In doing so, and taking into account the Williams criteria, which includes assessing "the environment into which the petitioner is released and whether there is a plan in place to protect the person from the virus and to monitor their health," this petition is also denied notwithstanding the fact

that there is no constitutional violation involving any type of deliberate indifference in the conditions of petitioner's confinement.

Petitioner alleges that his personal medical situation outweighs the State's interest in protecting the public welfare by seeking a time assessment to return his to prison. Petitioner alleges that he is "52 years old and currently suffers from liver failure and a compromised immune system." According to a statement attributed to petitioner Graham by his attorney, petitioner "Graham approximates that he was diagnosed with Hepatitis B in 2008," which is about 12 years ago. According to the only medical documentation provided, Correctional Health Services (CHS) notes that petitioner Graham has been diagnosed with Hepatitis B, and that the condition is described as "chronic." The records disclose that he has been prescribed medication and has been counseled to take his medication as prescribed.

The Court understands that chronic Hepatitis B can be a serious medical condition. Nonetheless, as the State argues, the claim that petitioner Graham is in the throes of any kind of life-threatening liver failure or is currently immunocompromised is not supported by any medical documentation. In their return, the State cites information from the website maintained by the Center for Disease Control and Prevention (CDC) listing medical factors which enhance the risks of serious COVID outcomes. (Affirmation of Brendon Horan dated July 9, 2020 at ¶¶ 23-25). The risk of whether Hep B, or for that matter Hep C, enhances the risk of COVID complications following infection depends on whether the disease is "well-controlled" thorough medication. In fact, the CDC advises that "[i]f you have Hepatitis B or Hepatitis C and are being treated for your infection, it is important to continue your treatment and follow the advice of your healthcare provider.

This is the best way to keep your immune system healthy.” The evidence provided by petitioner, who bears the burden of proof, demonstrates that he is receiving treatment and that his CHS healthcare provider gives him the same advice as the CDC. Given all this, the medical documentation provided does not support the claim that petitioner Graham is at any significant elevated risk for COVID-19 complications based on Hepatitis B should he become infected with the novel coronavirus.

Petitioner has also submitted a letter from Dr. Rachel Bedard, proffered as the opinion of an expert, and offered to support his argument that petitioner Graham is at high risk for COVID complications. These letters have been regularly submitted by petitioners in what are referred to as “COVID writ” matters. When these writs were initially filed, the State seemed to accept these as admissible in these summary proceedings. Lately, the State is asking that the Court not accept them because they are not admissible as reliable medical opinions related to each of these individual petitioners. In Williams, the Court advised the habeas court to look to “appropriate medical records and physician affirmations.” The State has a point. There is no physician affirmation; only an unsworn opinion letter. Moreover, there is nothing in this record to suggest that Dr. Bedard ever examined petitioner Graham, or ever reviewed his entire medical chart. She does not describe the underlying medical condition that she opines places petitioner Graham at “highest risk” for COVID-19 complications. While his age, 52, is not in dispute, Dr. Bedard concludes that this is a factor that also places him at “highest risk” for COVID 19 complications. The State argues that without evidence that Dr. Bedard has any particular basis of knowledge about petitioner Graham or his particular medical situation, her opinion letter is not “admissible

evidence.” That is the law. See People v. Jones, 73 NY2d 427, 430-31 (1989). The Court does not question Dr. Bedard’s expertise. Rather, it rests this finding on the well-worn legal maxim that “ ‘an expert’s opinion not based on facts is worthless.’ ” Jones, 73 NY2d at 430 (citing Caton v. Doug Urban Constr. Co, 65 NY2d 909, 911 (1985)). It also rests this ruling on the fact that petitioner has not provided a physician’s affidavit.

Even if admissible as a non-affidavit as having some basis for the opinion that petitioner is in “the highest risk group due to age and an underlying medical condition,” the Court affords that opinion little weight. The letter was written on May 28, 2020. That is two days after petitioner was placed in City custody on the parole warrant. This Court has no idea of what, if any, records exist to review. Moreover, her opinion that at 52 he is at the “highest risk” for COVID complications may have been accurate in May; according to the State’s citation to the CDC website, it is no longer accurate in July 2020. The CDC constantly updates their risk guidelines and adjusts them according to medical data. On June 25, 2020, the CDC noted that in general risk increases with age, but that “ [t]he greatest risk for severe illness from COVID-19 is among those aged 85 or older.” <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>. Petitioner at 52 may have some risk due to but it is certainly not the “greatest” or “highest” risk; that appears to now be decades away. Moreover, if the risk assessment is based on “an underlying illness” of Hepatitis B, as already noted, there is no evidence in this record showing that petitioner Graham’s illness is not controlled. Thus, the evidence does not support that he has the type of risk that someone with uncontrolled, and unmedicated, Hepatitis B would face that would put him in the “highest risk group.” Put simply, the overall record made by petitioner in connection with his argument about

the severity of his potential health-related complications is decidedly inadequate.

In Williams, the Court opined that the habeas court should consider “each petitioner’s risk of flight as assessed by the state.” In this matter, the State argued that risk of flight is not the correct standard: “the unavailability of bail pending parole revocation proceedings is a feature of the revocation process enacted by the legislature, which reflects the conditional nature of parole release.” (Affirmation of Brendan Horan at ¶ 37). In the past, courts have recognized that release on parole, as well as re-release after a parole revocation finding, is a conditional right, absent a constitutional violation. Executive Law §259-(i)(2)(c)(A) provides: “Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law.” See Matter of Silmon v. Travis, 95 NY2d 470, 477 (2000). When DOCCS makes a determination not to release an individual to community supervision, “[j]udicial intervention is warranted only when there is a ‘showing of irrationality bordering on impropriety.’” Silmon, 95 NY2d at 476 (citing, Russo, 50 NY2d, at 77; Matter of Briguglio v New York State Bd. of Parole, 24 NY2d 21, 29 (1969)). Nonetheless, this Court will consider, as it now must, risk of flight in its decision about whether to release this parolee to the community in terms of assessing whether the State has committed a due process violation by continuing his detention.

The State provides documentary evidence which supports their position that

petitioner Graham does not meet DOOCS criteria for lifting the parole warrant or for recommending to an ALJ that he be restored to parole and released back into the community. First of all, he is serving a life sentence. That itself speaks volumes about his criminal record and history and the accompanying risk that exists to the public welfare whenever he is released back into the community. Significantly, when he has been released back into the community, which now has happened several times, he has demonstrated not merely that he is a flight risk in terms of parole supervision, but a flight fact.

Petitioner is a chronic parole violator and absconder. His parole supervision history, which dates back to 1998, discloses that he has had five prior parole violations and fifteen parole revocations. In 2020 alone, petitioner Graham has been given many opportunities to adjust to community supervision without committing serious parole violations, and his parole officer states that his adjustment is unsatisfactory. There are many facts that support that conclusion. On January 13, 2020, he tested positive for cocaine and was referred to a detox/rehab program. He was there for five days but failed to report back to his parole officer for further intervention, as he was required to do. His parole officer made unsuccessful home visits, called a cell phone number provided by petitioner Graham only to learn it had been disconnected, contacted an ex-girlfriend who had not heard from him, and learned that he had left his approved shelter residence on January 22, 2020. The Parole officer let some time pass to see whether petitioner Graham would appear, made some additional attempts to find him, and only then issued an absconder warrant on February 6, 2020.

The very next day, petitioner Graham appeared in the parole office. He tested

positive for cocaine use, as well as benzodiazepines and opioids. The parole warrant was vacated, and petitioner was referred once again to detox/rehab, with instructions that he be admitted for long-term treatment. Petitioner Graham failed to enter treatment, and then changed his address and could no longer be located. A second absconder warrant was issued on February 25, 2020. Petitioner remained a parole absconder until his Queens arrest on May 26, 2020. There is no mention in the CHS records petitioner has provided of any CHS diagnosis of substance abuse. Petitioner is alleged to have violated significant conditions of his parole supervision, including that he reside where he is told to reside and be at that residence during specific curfew hours, he enter and remain in drug programs, and he show up at the parole office when he is told to do so. Instead of complying, it is alleged he absconded. According to the parole revocation specifications, which are not seriously contested by the Queens Defenders, he has absconded for a longer period of time than he has been able to be supervised. If he did not return to face his parole officer, who gave him many chances to right himself, this Court finds it unlikely that he would return to face the charges at a parole revocation proceeding with the likely result that he would be returned to state prison. This is especially true because he is now convicted of committing a new crime, something that decidedly affects the “public welfare,” and especially when the public itself is struggling through a pandemic.

Given all this, this Court finds that the State’s interest in pursuing this parole revocation matter and seeking petitioner Graham’s re-incarceration, especially in light of the fact that he has now pled guilty to committing a crime while being a parole absconder, outweighs the unsubstantiated claim that he is in the highest risk for COVID

complications. His medical condition and risks are also outweighed by the risk of flight evidenced by the documented history of this serial parole absconder. Finally, this Court has no evidence of the existence of any plan in place to protect petitioner Graham from contracting the virus if he is released and to be able to effectively monitor his health. Oddly enough, petitioner was adrift in the community living an unhealthy lifestyle that included use of many dangerous narcotics that actually increased his risk of developing COVID complications as the pandemic raged throughout the City and March, April and May. He is now in a controlled, relatively COVID safe environment where he is medicated and being monitored by health care professionals. Thus, in terms of this Williams factor, his overall health risks appear to be lower the longer he remains in custody.

For all the above-stated reasons, the petition is denied, and this writ is dismissed.

This is the judgment of the Court.

Dated: July 23, 2020
Bronx, New York



Hon. Ralph Fabrizio, JSC.