Lopez v Evans
2011 NY Slip Op 34179(U)
January 4, 2011
Sup Ct, Bronx County
Docket Number: 0251269/2010
Judge: Mark Friedlander

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - PART IA-25

LOPEZ, EDWIN,

-against-

EVANS, ANDREA W

~~Plaintiff(s)~~, Petitioner,

~~Defendant(s)~~. Respondent

DECISION/ORDER
Index No. 0251269/2010

Present
HON. MARK FRIEDLANDER
J.S.C.

The following papers numbered 1 to 5 read on this (motion) Article 78 + cross motion on the calendar of

Papers Numbered

Notice of Motion, Order to Show Cause, Affidavits and Exhibits Annexed 1-2, 3-4
Answering Affidavits and Exhibits Annexed
Replying Affidavits and Exhibits Annexed 5

This Petition, brought under CPLR Article 78, against respondent Andrea Evans as Chairperson of the New York State Division of Parole ("DOP"), seeks a judgment vacating the warrant lodged against petitioner and the subsequent revocation of his parole, as well as the cancellation of the 24 month assessment of additional imprisonment imposed on petitioner. Respondent cross-moves for dismissal of the Petition. For the reasons set forth hereinafter the cross-motion is granted and the Petition is dismissed.

It is clear from the papers submitted herein that both sides agree as to the central issue: whether it was proper to subject petitioner to a hearing regarding revocation of his parole, when he had been found unfit to stand trial (following an examination pursuant to Article 730 of the Criminal Procedure Law) for the very criminal act that formed the basis of the alleged parole violation. Petitioner argues that the actual finding of unfitness precludes the result reached by respondent, while respondent maintains that such finding is merely one factor which should be (and was) weighed by the administrative decision maker.

The Court concludes that the issue raised here is governed by the decision in People ex rel Newcomb v. Metz, 64 A.D.2d 219, and its sequel Newcomb v. NYS Board of Parole, 88 A.D.2d 1098. Those decisions uphold the position of respondents herein. While petitioner argues that the instant facts are distinguishable from those in the afore-cited precedent, the Court does not find the distinction to be controlling. The clear statement of the rule in those decisions is controlling on this Court. Petitioner seeks to disparage the above precedent as a "30 year old fourth department precedent." (Reply, para. 8). In point of fact, it was a third department decision, and such department has long experience dealing with Article 78 petitions challenging the rulings of many state agencies. Further, the precedent was re-affirmed in the second decision, 28 years ago, and the Court of Appeals denied leave to appeal from such decision. Finally, in the absence of contrary rulings from the first department, this Court is bound by the third department precedent. Petitioner argues that the third department, in its statement of the rule, misapprehended an earlier ruling of the United States Court of Appeals. Needless, to say, it is not for this trial court to weigh the possibility of a misapprehension by the appellate division. Petitioner may seek to advance that argument at a higher level, but, at this level, until a contrary ruling by the appellate courts, there cannot be a grant of the relief sought in the Petition.

Petitioner expends much effort in an attempt to demonstrate that the result is unfair to him, but there is no legal support offered for the argument. Also, the argument is occasionally self-contradictory, as when petitioner first asserts the critical importance of the deprivation of his liberty, but later contends that public safety is not compromised because petitioner, even if he prevails, will be equally confined in a "secure psychiatric facility." In the final analysis, the administrative decision challenged here, as a practical matter, could properly turn on which kind of confinement is more appropriate for petitioner, and reasonable parties, including this Court or any other decision maker, may find the result desired by petitioner to be the more felicitous, but that is not the scope of the review available at this level. This Court cannot say, as a matter of law, that respondent's ruling on this issue was arbitrary or capricious.

Finally, it is noted in passing that another justice in this very courthouse ruled on a nearly identical situation earlier this year, as noted in Exhibit A to the cross-motion, and reached the same result set forth supra. Petitioner, in his reply, does not offer a refutation to that ruling. In any event, the Court sees no reason to issue a ruling conflicting with it. Consequently, the cross motion is granted in all respects and the Petition is dismissed.

This constitutes the Decision and Judgment of the Court.

Dated: 1/4/11

MARK FRIEDLANDER, J.S.C.