Matter of Johnson v Fischer
2012 NY Slip Op 30914(U)
February 15, 2012
Supreme Court, St. Lawrence County
Docket Number: 136602
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
LYNN JOHNSON,#03-A-3699,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2011-0543.23
INDEX #136602
ORI # NY044015J

-against-

BRIAN S. FISCHER, Commissioner, NYS Department of Corrections and Community Supervision, **DR. DORA SCHRIRO,** Commissioner, NYC Department of Correction, and **ANDREA W. EVANS,** Chairwoman, NYS Board of Parole,

Respondents.

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This proceeding was commenced by the Petition for Writ of Habeas Corpus of Lynn Johnson, filed in the St. Lawrence County Clerk's office on July 26, 2011. Petitioner, who is now an inmate at the Gowanda 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 August 12, 2011 and has received and reviewed the Return of the state respondents, Fischer and Evans, including confidential Exhibit B, dated September 23, 2011, as well as petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on November 2, 2011. In addition, the Court has received and reviewed the Affirmation in Opposition of Jeanne Gilberg, Esq., Assistant General Counsel, New York City Department of Correction, dated November 29, 2011 and submitted on behalf of the city respondent Schriro. The Court has also received and reviewed petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on December 13, 2011.

On March 26, 2002 petitioner was sentenced in Supreme Court, Kings County, to an indeterminate sentence of 4½ to 9 years upon his conviction of the crime of Criminal Sale of a Controlled Substance 3°. Following a parole revocation petitioner was restored to parole supervision on November 13, 2008. At that time the adjusted maximum expiration date of the 2002 sentence was calculated by DOCCS officials as May 31, 2011.

On November 27, 2008, while at liberty under parole supervision, petitioner committed a new criminal offense and was taken into local custody on November 28, 2008. A Violation of Release Report setting forth six parole violation charges was prepared and approved by Senior Parole Officer Parades on January 26, 2009. Notwithstanding the forgoing, also on January 26, 2009, the same Senior Parole Officer recommended that no parole delinquency be pursued pending court action. The stated reasons for the recommendation were as follows:

> "Mr. Johnson has been on parole supervision since being revoke and restore on 11/12/08. His adjustment has been poor. Soon after his release he was arrested and charged with Rape 1st, Criminal Sexual Act 1st, Unlawful Imprisonment 1st, Sexual Abuse 2nd and Assault 3 er [?]. This arrest was investigated and the arresting officer as well as the assigned ADA was interviewed. The ADA indicated that she has a very good case and that is very sensitive case due to the age of the victim she is 12 year old. We were unable to interview the victim, the ADA did not provide the victim contact information. Mr. Johnson was indicted on 1/5/09 . . . Mr. Johnson remains in jail at Riker Island C.F. in lieu of a $250,000 bail. He is due back in Brooklyn Supreme Court on 3/04/09 . . ."

This recommendation was approved by an Area Supervisor on January 29, 2009.

On February 4, 2010 petitioner was sentenced in connection with the November 27, 2008 incident to a 1-year definite term upon his conviction of the crime of Endangering the Welfare of a Child (Penal Law §260.10(1)), a class A misdemeanor. On February 16, 2010 petitioner was discharged from the 1-year definite term but continued

to be held in the custody of the New York City Department of Correction on a Connecticut warrant with respect to unrelated criminal charges. On March 1, 2010 petitioner was extradited to Connecticut where, on May 11, 2010, a New York parole violation warrant was lodged as a detainer. A Supplementary Violation of Release Report, setting forth two additional parole violation charges, was prepared and approved by Senior Parole Officer Parades on May 11, 2010. On June 28, 2010 petitioner was apparently convicted of a Connecticut felony and sentenced to time served. Petitioner waived extradition on June 30, 2010 and on July 6, 2010 Connecticut authorities notified New York State Division of Parole staff of that fact. Petitioner was returned to the custody of the New York City Department of Correction on July 29, 2010, at which time he was served with a Notice of Violation/Violation of Release Report(s) charging him with violating the conditions of his release in a total of eight separate respects. Petitioner was not entitled to a preliminary parole revocation hearing and the Notice of Violation specified that the final hearing was scheduled for August 10, 2010.

Following several adjournments, a contested final parole revocation hearing was conducted on October 4, 2010. At that hearing the Division of Parole elected to proceed only on Parole Violation Charge #5, which reads, in relevant part, as follows: "Lynn Johnson violated rule #8 of the rules governing his parole, in that on 11/27/08 . . . he endangered the welfare of a child . . . age 12." Rule #8 of the rules governing petitioner's parole release reads as follows: "I will not behave in such manner as to violate the provisions of any law to which I am subject which provide for a penalty of imprisonment nor will my behavior threaten the safety or well-being of myself or others." At the conclusion of the final hearing Parole Violation Charge #5 was sustained with a

delinquency date of November 27, 2008. Petitioner's parole was revoked and a delinquent time assessment was imposed directing that he be held to the maximum expiration of his 2002 sentence.

Petitioner was received back into DOCCS custody as a parole violator on October 12, 2010, ultimately certified as entitled to 105 days of parole jail time credit (Penal Law §70.40(3)(c)) covering the period from June 29, 2010 (the date he was discharged from the Connecticut sentence) to October 12, 2010. DOCCS officials also determined that as of the November 27, 2008 delinquency date petitioner still owed 2 years, 6 months and 4 days to the May 31, 2011 adjusted maximum expiration date of his 2002 sentence. Running that time owed from petitioner's return to DOCCS custody on October 12, 2010, less 105 days of parole jail time credit, the re-adjusted maximum expiration and conditional release dates of petitioner's 2002 sentence are currently calculated by DOCCS officials as December 31, 2012 and March 1, 2012, respectively.

Broadly speaking, petitioner challenges the alleged "improper calculation of parole and jail time credits" as well as the alleged violation of his constitutional and statutory rights in connection with the parole revocation process. Petitioner's credit calculation challenge focuses upon his assertion that " . . . respondents erroneously failed to credit the 529 days of uninterrupted jail time days to the petitioner 2002 sentence. During this period (Nov. 28, 2008 [petitioner's arrest] thru May 11, 2010 [N.Y. parole violation warrant lodged against petitioner in Connecticut]) petitioner was incarcerated on a new crime, Division stipulation of 'No Delinquency pending Court Action' during the period of petitioner's arrest on new charges thru the time that the parole warrant was actually

lodged, allowed petitioner to be continuously under parole supervision accruing time off the maximum term of the 2002 sentence." (Citation omitted).

To the extent anything in the petition might be construed as asserting petitioner's entitlement to jail time credit (Penal Law §70.30(3)) against his 2002 sentence for any portion of the time period in question, such argument must fail. Pursuant to statute, " . . . the maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody <u>prior to the commencement of such sentence</u> as a result of the charge that culminated in the sentence . . .The credit herein provided shall be calculated from the date custody under the charge commenced <u>to the date the sentence commences</u> . . ." Penal Law §70.30(3)(emphasis added). Since the running of petitioner's 2002 sentence commenced on July 17, 2003, when he was initially received into DOCCS custody (*see* Penal Law §70.30(1)), jail time credit is, by definition, unavailable for any period of time after that date.

To the extent petitioner argues that his 2002 sentence continued to run during the 529-day time period in question since no delinquency had been declared, the Court simply finds that petitioner was ultimately declared delinquent as of November 27, 2008 (the date of the criminal acts underlying petitioner's February 4, 2010 misdemeanor conviction) and, therefore, the running of his 2002 sentence was interrupted as of the November 27, 2008 delinquency date. *See* Penal Law §70.40(a). In this regard it is noted that when a declaration of delinquency is issued, the interruption of the underlying sentence is effective as of the date of the delinquency rather than the date the declaration of delinquency is issued. *See* Penal Law §70.40(3)(a) and 9 NYCRR §8004.3(b). Since

"[t]he date of delinquency is the earliest date that a violation of a parole is alleged to have occurred" (9 NYCRR §8004.3(b), the Court finds that the declaration of delinquency in the case at bar, regardless of when it was issued, interrupted the running of petitioner's 2002 sentence as of November 27, 2008, when the criminal acts underlying the February 4, 2010 misdemeanor conviction were committed. Given the sensitive nature of the charges brought against petitioner - an alleged sexual assault on a 12-year-old victim - as well as the stated inability of parole authorities to interview the young victim and petitioner's extradition to Connecticut soon after the disposition of the criminal action, the Court finds that the delay in the issuance of a parole violation warrant until May of 2010 did not evince "gross disinterest" on the part of parole official's nor did such delay constitute a due process violation. *See People ex rel Melendez v. Bennett*, 291 AD2d 590, *lv den* 98 NY2d 602 and *People ex rel Burt v. Warden*, 18 Misc 3d 869.

The Court next finds no basis to apply any portion of the 529-day time period in question against the maximum term of petitioner's 2002 sentence as parole jail time credit (Penal Law §70.40(3)(c)). The time petitioner spent incarcerated from his November 28, 2008 arrest to June 29, 2010, when he was discharged from his Connecticut sentence and held solely on the basis of the New York Parole Warrant, was not due to an arrest or surrender based upon the parole delinquency but, rather, based initially upon his arrest on additional criminal charges in New York and, later, upon his arrest on additional criminal charges in Connecticut. *See* Penal Law §70.40(3)(c)(i). Petitioner was properly found to be entitled to 105 days of parole jail time credit against his interrupted 2002 sentence for the time spent incarcerated in Connecticut and New York from June 29, 2010 until his return to DOCCS custody on October 12, 2010.

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Turning next to petitioner's challenges to the procedures underlying the revocation of his parole, the Court first finds that the October 4, 2010 final parole revocation hearing was conducted in timely fashion. An accused parole violator has a due process right to a final parole revocation hearing within a reasonable time after being taken into custody. *See Morrissey v. Brewer*, 408 U.S. 471 at 488. In New York the right to a timely final parole revocation hearing is codified in Executive Law §259-i(3)(f)(i), which provides, in relevant part, that final "[r]evocation hearings shall be scheduled to be held within ninety days of the probable cause determination." An accused parole violator's waiver of his/her right to a preliminary hearing, moreover, is the equivalent of a probable cause determination rendered at the conclusion of such a hearing. *See People ex rel Gray v. Campbell*, 241 AD2d 723. In the absence of a statutory exception any delay beyond 90 days after the probable cause determination is unreasonable per se and necessitates the vacatur of the parole violation warrant and reinstatement of parole as the only appropriate remedy. *See People ex rel Levy v. Dalsheim*, 66 AD2d 827, *aff'd* 48 NY2d 1019.

In the case at bar petitioner was not entitled to a preliminary parole revocation hearing because he was convicted on February 4, 2010 of a new crime committed while under parole supervision. *See* Executive Law §259-i(3)(c)(i) and *People ex rel Johnson v. Russi*, 258 AD2d 346, *lv den* 93 NY2d 945. Under such circumstances the 90-day deadline commenced running upon the execution of the New York parole violation warrant. *See Bagby v. New York State Division of Parole*, 211 AD2d 715.

Under the relevant provisions of Executive Law §259-i(3)(a)(iii), as it existed in June/July of 2010, "[w]here the alleged [parole] violator is detained in another state

pursued to such [New York parole violation] warrant and is not under parole supervision pursuant to the uniform act for out-of-state parolee supervision . . .the warrant will not be deemed to be executed until the alleged violator is detained exclusively on the basis of such warrant and the division of parole [now DOCCS] has received notification that the alleged violator . . . has formally waived extradition to this state . . . The alleged violator will not be considered to be within the convenience and practical control of the division of parole [now DOCCS] until the warrant is deemed to be executed." The parole violation warrant in this case was therefore not deemed executed until July 6, 2010, the day the Division of Parole (now DOCCS) received notification that petitioner had waived extradition. *See People ex rel McDaniel v. Berbary*, 35 AD3d 1172.

With the 90-day deadline for holding petitioner's final parole revocation hearing running from July 6, 2010, exclusive of that date (*see* General Construction Law §20), the 90th (and final) day to timely conduct the final parole revocation hearing fell on October 4, 2010. Accordingly, the Court finds the petitioner's final parole revocation hearing was timely conducted.

Petitioner also asserts that parole authorities failed to provide him with " . . . timely service of the parole violation charges and Notice of Violation, within five (5) days of yhe [sic] execution of the warrant." Executive Law §259-i(3)(c), which addresses <u>preliminary</u> parole revocation hearings, provides in subparagraph (iii) thereof as follows:

> "The alleged violator shall, within three days of the execution of the warrant, be given written notice of the time, place and purpose of the [preliminary] hearing unless he or she [like petitioner] is detained pursuant to the provisions of subparagraph (iv) of paragraph (a) of this subdivision. In those instances, the alleged violator will be given written notice of the time, place and purpose of the hearing within five days of the execution of the warrant. The notice shall state what conditions of presumptive release,

> parole, conditional release or post-release supervision are alleged to have been violated, and in what manner; that such person shall have the right to appear and speak in his or her own behalf; that he or she shall have the right to introduce letters and documents; that he or she may present witnesses who can give relevant information to the hearing officer; that he or she has the right to confront the witnesses against him or her. Adverse witnesses may be compelled to attend the preliminary hearing unless the prisoner has been convicted of a new crime while on supervision or unless the hearing officer finds good cause for their non-attendance."

Executive Law Article 12-B, which includes Executive Law §259-i, was enacted by L 1977, ch 904, §3. The originally-enacted version of Executive Law §259-i(3)(c)(iii), like the current statute quoted above, incorporated the requirement for notice of the "time, place and purpose" of the preliminary parole revocation hearing, along with notice of the rights the alleged violator at such hearing, with the requirement that "[t]he notice shall state what conditions of . . . [release] . . . are alleged to have been violated, and in what manner . . ." This Court notes that under the original statutory scheme all alleged parole violators, including those convicted of new crimes committed while under parole supervision, were entitled to preliminary parole revocation hearings. Executive Law §259-i(3)(c)(i), however, was later amended to eliminate the requirement that an alleged parole violator who had been convicted of a new crime committed while under parole supervision was entitled to a preliminary hearing. *See* L 1984, ch 413, §1. Notwithstanding the 1984 amendment, there was no corresponding amendment to the notice provisions set forth in Executive Law §259-i(3)(c)(iii). Thus, a statutory anomaly was created, and still remains, for alleged parole violators, like petitioner, who have been convicted of new crimes committed while under parole supervision. Although such alleged violators are not entitled to a preliminary parole revocation hearings, the statutory requirement for notice of the conditions of parole allegedly violated, and the manner of

the violation, remains incorporated in the statutory requirement for notice of the time, place and purpose of the preliminary hearings.

Executive Law §259-i(3)(f), which addresses final parole revocation hearings, provides in subparagraphs (iii) and (iv) as follows:

> "(iii) Both the alleged violator and an attorney who has filed a notice of appearance on his behalf in accordance with the rules of the board of parole shall be given written notice of the date, place and time of the [final] hearing as soon as possible but at least fourteen days prior to the scheduled date.
>
> (iv) The alleged violator shall be given written notice of the rights enumerated in subparagraph (iii) of paragraph (c) of this subdivision as well as of his right to present mitigating evidence relevant to restoration to presumptive release, parole, conditional release or post-release supervision and his right to counsel."

The statutory notice requirement for final parole revocation hearings does not specifically provide for notice of the conditions of release alleged to have been violated and the manner of the alleged violation(s). Nevertheless, since an alleged parole violator who has been convicted of a new crime committed while under parole supervision is not entitled to notice of a preliminary hearing (*see People ex rel Courtney v. New York State Division of Parole*, 208 AD2d 352) this Court finds that notice of the conditions of release alleged to have been violated and manner of the alleged violation(s) must be provided as part of the notice of the final parole revocation hearing. In the case at bar, the Notice of Violation/Violation of Release Report(s) served on petitioner on July 29, 2010, immediately upon his return to New York following extradition from Connecticut, satisfied the statutory notice requirements set forth in Executive Law §259-i(3)(f), subject to the discussion in the next paragraph of this Decision and Judgment.

Petitioner also argues that the service of the Notice of Violation/Violation of Release Report(s) on July 29, 2010 was untimely under the provisions of Executive Law

§259-i(3)(f)(iii) since such service was effected less than 14 days before the scheduled final hearing date. Although this Court notes that an attempt to conduct the contested final parole revocation hearing on August 10, 2010 final hearing appearance, over the objection of the petitioner, would have violated the 14-day statutory notice requirement, the final hearing in this case was adjourned on at least two occasions with the contested final parole revocation hearing not conducted until October 4, 2010. Such adjournments, moreover, were announced in open sessions of the final hearing, in the presence of the petitioner, who proceeded *pro se*, and thus had the effect of affording petitioner adequate notice of the contested final hearing on October 4, 2010.

Petitioner also asserts that the original Violation of Release Report, approved by Senior Parole Officer Parades on January 26, 2009, states that on November 28, 2008 he was arrested and charged with, *inter alia*, Endangering the Welfare of a Child. According to petitioner, however, he was not charged with that crime. This Court, however, finds no significance in the fact that the Violation of Release Report erroneously stated that petitioner was originally charged with Endangering the Welfare of a Child (a misdemeanor) when, in fact, he was actually charged with three felony-level offenses and misdemeanor Assault 3°. In this regard the Court notes that the sustained Parole Violation Charge #5 does not allege that petitioner was originally charged with Endangering the Welfare of a Child but, rather, only that he did endanger the welfare of a child on November 27, 2008. Parole Violation Charge #5 was, moreover, properly sustained based upon the Certificate of Disposition admitted into evidence, without objection, at petitioner's October 4, 2010 final parole revocation hearing. *See Melendez v. New York State Division of Parole*, 225 AD2d 935. According to that certificate, on February 4, 2010 petitioner was sentenced in Supreme Court, Kings County, to a definite

term of imprisonment of 1 year upon his conviction of the crime (misdemeanor) of Endangering the Welfare of a Child (Penal Law §260.10(1)).

While petitioner concedes that the Certificate of Disposition received into evidence at the final parole revocation hearing established that he had been convicted of a crime, he asserts that "[n]o evidence was adduced [at the final hearing] to support that His [petitioner's] behavior threaten the safety or well being of himself or other." As noted previously, however, Rule #8 of the rules governing petitioner's parole release directed that petitioner " . . . not behave in such a manner as to violate the provisions of any law to which I am subject which provide for a penalty of imprisonment nor will my behavior threaten the safety or well-being of myself or others." Thus, petitioner's conviction of the misdemeanor Endangering the Welfare of a Child, in and of itself, established a violation of the first prong of Parole Condition #8. In addition, Penal Law §260.10(1) to which petitioner plead guilty, specifies that "[a] person is guilty of endangering the welfare of a child when: 1. He or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his or her life or health . . ." Thus the evidence adduced at the final parole revocation hearing also established a violation of the second prong of Parole Condition #8 since petitioner's criminal behavior not only violated the provisions of law to which he was subject and which provided for a penalty of imprisonment, but also, by definition, threatened the safety or well-being of his 12-year old victim.

Finally, petitioner argues that his due process right to cross-examine and confront witnesses at the October 4, 2011 final parole revocation hearing was violated. In this regard he asserts as follows:

> " . . . [The] Division [of Parole's] failure to produce P.O. Smith at the hearing, who petitioner wanted to cross-examine about the admission of vop [violation of parole?] report. Instead Dep. Chief Simpson gave testimony based on hearsay that was relayed through petitioner parole officer. Upon request to cross-examine the only other person present for the Division, the ALJ stop petitioner from questioning Mr. Simpson and stated that petitioner could not because Mr. Simpson did not testify. It is this action along with not producing Petitioner parole officer that violate petitioner due process right to cross-examine adverse witness at a final hearing. " (Citation omitted).

At the final parole revocation hearing no witnesses testified on behalf of the Division of Parole. Deputy Chief Simpson represented the Division at the final hearing and after the Violation of Release Report(s) and Certificate of Disposition were received into evidence, without objection, the Division rested. The ALJ then advised petitioner that he could testify on his own behalf and/or submit other evidence relevant to Parole Violation Charge #5. Petitioner responded that he wanted to testify and after interposing an objection to the timeliness tot he final hearing the following colloquy took place:

"Mr. Johnson: . . . as far as this charge number five at the beginning it wasn't one of the charges I was charged with, so I'm trying to figure out where, where did Parole get this on. I know I understand that I pleaded guilty to a charge but - -

The Court: He [Deputy Chief Simpson] can't answer you have to testify now, your not asking him questions.

Mr. Johnson: Okay. I thought I would be able to, you know cross -

The Court: Alright, well okay he didn't testify, all he did was put into evidence a certificate of disposition.

Mr. Johnson: Okay.

The Court:	Alright. That's in evidence now. I will relax the rule a little bit do you have any objection Mr.- -
Mr. Simpson:	No."

The petitioner then proceeded to question Deputy Chief Simpson with regard to the time that elapsed between his November 28, 2008 arrest and the lodging of the parole violation warrant in Connecticut on May 11, 2010. After Deputy Chief Simpson completed answering petitioner's questions, none of which related to the Certificate of Disposition evidencing petitioner's Endangering the Welfare of Child conviction, the ALJ asked petitioner if there were any other questions for Deputy Chief Simpson. Petitioner responded "[n]o I don't have any more questions." Petitioner next discussed some procedural issues with the ALJ and was ultimately asked whether there was anything additional he wanted to say with respect to Parole Violation Charge #5. Petitioner responded "[n]o." The ALJ then asked " . . . both sides have rested?" Petitioner responded "[y]es." No objections were interposed with respect to the fact that P.O. Smith was not present at the final hearing and this Court finds nothing in the record to suggest that the ALJ curtailed petitioner's examination of Deputy Chief Simpson.

Based upon all of the above, it is, therefore, the decision of the Court an it is hereby **ADJUDGED**, that the petition is dismissed.

Dated: February 15, 2012, at
Indian Lake, New York

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S. Peter Feldstein
Acting Justice, Supreme Court