Matter of Gilbert v Taylor
2012 NY Slip Op 31089(U)
April 25, 2012
Sup Ct, St. Lawrence County
Docket Number: 137570
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
NATHANIEL GILBERT, #02-B-2455,
Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2011-0850.37
INDEX #137570
ORI # NY044015J

-against-

JUSTIN TAYLOR, Superintendent,
Gouverneur Correctional Facility, and **ANDREA EVANS,** Chairwoman, NYS Board of Parole,

Respondents.

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This proceeding was originated in Erie County by the Petition for Writ of Habeas Corpus of Nathaniel Gilbert, verified on July 5, 2011. By Order dated November 7, 2011 Supreme Court, Erie County (Hon. Christopher J. Burns), transferred this proceeding from Erie County to St. Lawrence County. The transfer order was apparently necessitated by the fact that petitioner was no longer held in local custody in Erie County, having been transferred into State DOCCS custody at the Gouverneur Correctional Facility in St. Lawrence County. The papers originally filed in Erie County were received in the St. Lawrence County clerk's office on November 18, 2011 and in chambers on November 25, 2011. Petitioner, who remains an inmate at the Gouverneur Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. This Court issued an Order to Show Cause on November 28, 2011 and has received and reviewed respondents' Return, verified on January 13, 2012. No Reply thereto has been filed by petitioner.

On October 15, 2002 petitioner was sentenced in Erie County Court, as a second violent felony offender, to a determinate term of 8 years, with 5 years post-release

supervision, upon his conviction of the crime of Attempted Rape 1°. He was received into DOCCS custody on November 29, 2002 certified as entitled to 634 days of jail time credit. On February 27, 2009, apparently upon reaching the maximum expiration date of the 8-year determinate term, petitioner was released from DOCCS custody to post-release supervision. After being returned to DOCCS custody as a post-release supervision violator on August 4, 2009, petitioner was released from DOCCS custody to post-release supervision for a second time on December 23, 2010.

On May 2, 2011 petitioner was allegedly served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his post-release supervision in 13 separate respects. A probable cause determination was made following a preliminary parole revocation hearing conducted on May 9, 2011. Following a contested final hearing, concluded on September 7, 2011, six parole violation charges were sustained. The presiding Administrative Law Judge (ALJ) revoked petitioner's post-release supervision and recommended a 24-month delinquent time assessment. Upon board review a single parole commissioner rejected the ALJ's recommendation and directed that petitioner be held to the maximum expiration date of his sentence.

The only argument clearly advanced in this proceeding is that the petitioner did not receive copies of the "parole charges and the warrant" on May 2, 2011. More specifically, petitioner alleges that when a parole officer came to see him on May 2, 2011 at the Erie County holding center, " . . .I asked for a preliminary hearing and signed for a copy of my violation papers which I did not receive." Petitioner further alleges that at the time of the May 9, 2011 preliminary hearing he " . . .had not received a compleat [sic] pack of my parole charges or the warrant." Petitioner suggests that it would have been impossible for him to have received copies of the "parole charges and the warrent [sic]" on May 2, 2011 " . . .because the parole papers were not signed by parole officers until May 16th, 2011."

The respondents, for their part, counter that the Notice of Violation and first three pages of the Violation of Release Report were, in fact, served on petitioner on May 2, 2011. After noting that the third page of the Violation of Release Report is dated May 2, 2011,respondents assert that "[t]he remaining portion of the Violation of Release Report (which constitutes the Case Summary portion of the Violation of Release Report), was signed on May 13 and May 16, 2011."

Executive Law §259-i(3)(c)(iii) provides, in relevant part, that "[t]he alleged [parole] violator shall, within three days of the execution of the [parole] warrant, be given written notice of the time, place and purpose of the [preliminary] hearing . . .The notice shall state what conditions of . . . post-release supervision are alleged to have been violated, and in what manner . . ." The statute also mandates that the written notice inform the alleged parole violator of certain enumerated rights to which he/she is entitled in connection with the preliminary hearing. See also 9 NYCRR §8005.3.

The Court finds that the single-page Notice of Violation document (setting forth, *inter alia*, the time, place and purpose of the preliminary hearing as well as petitioner's rights at such hearing) together with the first two pages of the Violation of Release Report document (setting forth the 13 parole violation charges) fully comply with the notice requirements set forth in Executive Law §259-i(3)(c)(iii) and 9 NYCRR §8005.3. The Court further finds no statutory or regulatory requirement that the additional information set forth in the "CASE SUMMARY" document be served upon petitioner. The only relevant issue, therefore, is whether or not petitioner was served with the Notice of Violation and first two pages of the Violation of Release Report on May 2, 2011.

It is first observed that the Notice of Violation document itself bears petitioner's signature with the date of the signature stated as "5/2/11." Petitioner's signature, moreover, appears immediately after the printed line reading "Violation of Release Report

received." In addition, at the outset of the preliminary hearing the following colloquy took place:

"HEARING OFFICER POMERLEAU:	. . . You have certain due process rights, Mr. Gilbert. You should have received notice of today's hearing. I have in front of me a notice of violation in your name . . . that specifies the hearing for today's date. It appears to bear your signature on May 2nd, 2011. Did you receive the notice of violation on that date?
INMATE:	Yes.
HEARING OFFICER POMERLEAU:	At the same time you should have received a copy of the violation of release report that contains 13 charges. Did you receive that as well?
INMATE:	Yes."

The preliminary hearing then went forward and was completed without petitioner interposing an objection that he had not been served with a copy of the Notice of Violation and/or the 13 parole violation charges set forth in the first two pages in the Violation of Release Report. Accordingly, the Court rejects petitioner's contention that he was not timely served with the requisite documents in advance of the preliminary hearing.[1]

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[1] Under the circumstances of this case the service of the Notice of Violation/Violation of Release Report on May 2, 2011 was in compliance with the statutory requirement that such documents be served "within three days of the execution of the [parole] warrant"(Executive Law §259-i(3)(c)(iii)) notwithstanding the fact that the warrant was apparently executed on April 27, 2011. In calculating the three-day time period, the day the parole violation warrant was executed (April 27, 2011) is not counted. *See* General Construction Law §20 and *People ex rel Gray v. Campbell*, 241 AD2d 723. Excluding April 27, 2011, the date the parole violation warrant was executed, the statutory notice deadline would have expired on April 30, 2011. Since, however, April 30, 2011 fell on a Saturday, service of the requisite parole violation papers could be timely effectuated on Monday May 2, 2011, the next business day. *See* General Construction Law §25-a and *People ex rel Grey v. Campbell*, 241 AD2d 723. In any event, failure to comply with the three-day notice requirement set forth in Executive Law §259-i(3)(c)(iii) " . . .does not directly affect the right to be restored to parole, especially in the absence of a showing of prejudice." *People ex rel Williams v. Walsh*, 241 AD2d 979, *lv den* 90 NY2d 809. *People ex rel Washington v. New York State Division of Parole*, 279

Finally, to the extent anything in paragraph 4(d) of the petition might be construed as including a challenge to the failure of the Hearing Officer (HO)presiding at petitioner's May 9, 2011 preliminary parole revocation hearing to adjourn the hearing so that petitioner might seek counsel, the Court rejects such challenge. At the outset of the preliminary hearing petitioner was advised by the HO that he had a "qualified right" to an attorney. The HO next stated as follows: "By that I mean it's within my discretion to grant an adjournment in order for you to obtain an attorney. In other words, for the purpose of this hearing it's not an absolute right to have an attorney. If, however, this matter goes on to a final hearing, you do have an absolute right to an attorney for the final hearing. Do you have an attorney Mr. Gilbert?" The petitioner responded in the affirmative, stating that although he had written to what he believed to be "assigned" counsel at Aid to Indigent Prisoners, he had not yet gotten a response. After informing petitioner that Aid to Indigent Prisoners did not provide representation at preliminary hearings, only final hearings, the hearing officer inquired into petitioner's ability to represent himself (education level, whether he had read and understood the Notice of Violation/Violation of Release Report, mental health and current medications). Before proceeding with the preliminary hearing the HO also confirmed that parole officials would only be presenting evidence with respect to Parole Violation Charge #2, wherein it was alleged as follows: "Nathaniel Gilbert did violate Rule #4 of the conditions governing his release on 04/27/11 at approximately 10:55 p.m., in that, he failed to permit parole officers to visit him at his approved Parole residence of 155 Nevada Street in Buffalo, N

AD2d 379, 380. *See People ex rel Matos v. Warden, Rikers Island Correctional Facility*, 58 AD3d 523, *lv den* 12 NY3d 712 and *People ex rel Thompson v. Warden of Rikers Island Correctional Facility*, 41 AD3d 292. This Court perceives no basis for any allegation of prejudice where, as here, petitioner appeared and participated in a contested preliminary parole revocation hearing without interposing any objection as to the timeliness of notice.

Y when he failed to answer the door, in spite of 15 minutes of knocking and pounding on various doors and windows of the residence." The HO characterized this charge as "straightforward" and determined to proceed without adjournment.

" . . . [I]n the vast majority of cases, there should be no need for the assistance of counsel at [the] preliminary stage of the parole revocation process." *People ex rel Calloway v. Skinner*, 33 NY2d 23, 31. This Court, moreover, finds nothing in the record herein to suggest that this is one of the small minority of cases in which due process compels the assistance of counsel. *See Id., McCants v. Travis*, 291 AD2d 594 and *People ex rel Wagner v. Travis*, 273 AD2d 849.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: April 16, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court