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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
KARL E. BROOME,#08-B-0540,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2011-0866.40
INDEX #137610
ORI # NY044015J

-against-

PAUL KNAPP, Superintendent,
Ogdensburg Correctional Facility, and
ANDREA EVANS, Chairwoman, NYS
Board of Parole,

Respondents.

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This proceeding was originated by the Petition For Writ of Habeas Corpus of Karl E. Broome, verified on November 16, 2011 and filed in the St. Lawrence County Clerk's office on November 29, 2011. Petitioner, who is now an inmate at the Orleans Correctional Facility, challenged his then ongoing incarceration in the custody of the New York State Department of Corrections and Community Supervision.[1] The Court issued an Order to Show Cause on December 1, 2011 and has received and reviewed respondents' Answer and Return, including Confidential Exhibit B, verified on February 1, 2012. The Court has also received and reviewed petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on February 14, 2012.

On February 6, 2008 petitioner was sentenced in Onondaga County Court to a controlling determinate term of 4 years, with 1 year post-release supervision, upon his

[1] At the time this proceeding was commenced petitioner was confined at the Ogdensburg Correctional Facility. As will be referenced in this Decision and Judgment, on December 30, 2011 petitioner was released from DOCCS custody to post-release supervision but apparently confined after such release in local custody at the Saint Lawrence County Correctional Facility. On an unspecified date petitioner was apparently returned to DOCCS custody as a post-release supervision violator and is currently confined at the Orleans Correctional Facility.

convictions of the crimes of Criminal Sale of a Controlled Substance 3°, Criminal Possession of a Controlled Substance 3° and Criminal Possession of a Controlled Substance 4°. He was received into DOCCS custody on February 22, 2008 certified as entitled to 95 days of jail time credit. At that time DOCCS officials calculated the maximum expiration and conditional release dates of petitioner's merged sentences as November 16, 2011, and September 20, 2010, respectively.

Petitioner was conditionally released from DOCCS custody to post-release supervision on January 7, 2011. As of that date the running of petitioner's 1-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the maximum expiration date thereof originally calculated as January 7, 2012. Also as of January 7, 2011 the running of petitioner's 4-year determinate term was interrupted with the remaining 10 months and 9 days owed to the originally calculated November 16, 2011 maximum expiration date thereof held in abeyance pending petitioner's successful completion of the period of post-release supervision or his return to DOCCS custody. *See* Penal Law §70.45(5)(a).

Petitioner's post-release supervision was revoked, with a sustained delinquency date of January 12, 2011, following a final parole revocation hearing concluded on March 22, 2011. As of that delinquency date the running of petitioner's period of post-release supervision was interrupted (*see* Penal Law §70.45(5)(d)(I)) with 11 months and 26 days still owing to the originally computed January 7, 2012 maximum expiration date thereof. The Administrative Law Judge (ALJ) presiding at the final parole revocation hearing directed a mandatory "revoke and restore" to the Willard Drug Treatment Campus Program. *See* 9 NYCRR §8005.20(c)(2)(i). Petitioner was restored to post-release supervision on April 18, 2011 apparently certified as entitled to 3 months and 5 days of parole jail time credit. The parole jail time credit was applied against the

interrupted 2008 determinate term (*see* Penal Law §70.45(5)(d)(iii)), reducing the time previously held in abeyance against such term from 10 months and 9 days to 7 months and 4 days.

Petitioner's conditional release to post-release supervision was revoked for a second time, with a sustained delinquency date of April 28, 2011, following a final parole revocation hearing concluded on May 18, 2011. As of that delinquency date the running of petitioner's period of post-release supervision was again interrupted, with 11 months and 15 days still owing against the 1-year period thereof. The ALJ presiding at petitioner's second parole revocation hearing imposed a delinquent time assessment of 8 months.

Petitioner was returned to DOCCS, as a post-release supervision violator, on May 19, 2011 certified as entitled to 21 days of parole jail time credit apparently covering the period from the April 28, 2011 delinquency date to May 19, 2011. This additional parole jail time credit was applied against the interrupted 2008 determinate term, reducing the time previously held in abeyance against such term from 7 months and 4 days to 6 months and 13 days. The 6 months and 13 days still held in abeyance against petitioner's 2008 determinate term re-commenced running upon his May 19, 2011 return to DOCCS custody. *See* Penal Law §70.45(5)(a). Only after petitioner completed serving those 6 months and 13 days did the running of the 11 months and 15 days still owing against the 1-year period of post-release supervision recommence, with petitioner remaining in DOCCS custody pursuant to the 8-month delinquent time assessment imposed following the second final parole revocation hearing. *See* Penal Law §70.45(5)(d)(iv). DOCS officials thus determined the adjusted maximum expiration date of petitioner's 2008 determinate sentence, including the 1-year period of post-release supervision, as November 17, 2012 (6 months and 13 days owed against the 4-year determinate term plus 11 months and 15 days owed against the 1-year period of post-

release supervision running, in sequence, from petitioner's May 19, 2011 return to DOCS custody).

Petitioner was re-released from DOCCS custody to post-release supervision on December 30, 2011, upon expiration of the 8-month delinquent time assessment. As alluded to previously, DOCCS officials calculated that petitioner would remain subject to post-release supervision until November 17, 2012. By Letter Order dated January 12, 2012 respondents' request for the dismissal of this habeas corpus proceeding as moot was denied. In this regard the Letter Order of January 12, 2012 reads, in relevant part, as follows: "Although petitioner's December 30, 2011 release from DOCCS custody to [post-release] parole supervision (at the St. Lawrence County Correctional Facility) may have rendered the request for habeas corpus relief moot, the issues raised in the petition, if resolved in favor of the petitioner, could impact on the maximum expiration date of his sentence and therefore warrant conversion of this proceeding into a CPLR Article 78 proceeding. *See People ex rel Speights v. McKoy*, 88 AD3d 1039." The Court has since received and reviewed respondents' Answer and Return, including Confidential Exhibit B, verified on February 1, 2012, as well as petitioner's Reply thereto, dated February 9, 2012 and filed in the St. Lawrence County Clerk's office on February 14, 2012. By Letter Order dated April 13, 2012, respondents were directed to supplement the record by filing a transcript of the March 15, 2011 session of petitioner's first final parole revocation hearing. In response thereto, a copy of the missing transcript was filed in the St. Lawrence County Clerk's office on May 14, 2012.

Petitioner first asserts that his 1-year of period of post-release supervision should have commenced running on September 20, 2010 (his originally calculated conditional release date) rather than January 7, 2011 when he was, in fact, actually released from DOCCS custody to post-release parole supervision. According to petitioner, the delay in

his release from September 20, 2010 to January 7, 2011 was occasioned by a " . . . dispute between parole officers and Petitioner over area of supervision . . ." In paragraph four of the petition the following is asserted: "It is well known that whenever a release is delayed for any reason (other than loss of good time, or disciplinary proceeding) e.g. residence, availability of bed at treatment facility or half-way house etc. the releasees [sic] supervision period is commenced from the date he/she should or would have been released, but for delay and not the date they are actually released, because to do so would add to the supervision period." Petitioner further asserts in his Reply that "[t]here was no legal basis for the D.O.P. [presumably, Division of Parole] not to give petitioner credit for the period from 9/20/10 to 1/6/11 during dispute over area of supervision; no parolee has ever not been given credit for these days towards the release period when release is delayed for other than disciplinary . . ." Notwithstanding the stridency of his assertions, petitioner cites no statutory, regulatory or judicial authority in support thereof and this Court finds no basis to direct that the time period from September 20, 2010 to January 7, 2011 be credited against petitioner's period of post-release supervision. In any event, it is noted that the period in question was credited, as ordinary sentence time, against petitioner's underlying 4-year determinate term. If the running of the period of post-release supervision were to have commenced on September 20, 2010, the running of the underlying determinate term would have been interrupted as of that date. *See* Penal Law §70.45(5)(a). Since, under the facts and circumstances of this case, petitioner is serving out the remainder of his 1-year period post-release supervision in DOCCS custody, it does not matter whether the time period in question was credited against the underlying determinate term or the period of post-release supervision. Only where an inmate successfully completes his/her period of post-release supervision with time still remaining

against the underlying determinate term can he/she receive credit against the determinate term for the period of post-release supervision. *See* Penal Law §70.45(5)(b).

Petitioner next advances an argument that can only be characterized as an evidentiary challenge to the determination of the ALJ who presided at the final parole revocation hearing concluded on March 22, 2011 to sustain all four parole violation charges then pending. The Court notes that the first three parole violation charges all centered upon the allegation that petitioner failed to stay at his approved residence - the Syracuse Rescue Mission - on the night/morning of January 12, 2011/January 13, 2011. The fourth parole violation charge alleged that on January 13, 2011 petitioner " . . . threatened the safety and well-being of himself and others by failing to comply with verbal commands to be taken into custody, by refusing to put his hands behind his back, stating 'get your hands off me.'"

Much of what transpired between petitioner's release from DOCCS custody on January 7, 2011 and the execution of the parole violation warrant against him on January 13, 2011 is not in dispute. In summarizing the relevant events the Court will note the discrepancies between the testimony of parole staff and that of petitioner. Petitioner made his arrival report to the Syracuse Area Parole Office (SAPO) on January 7, 2011 and later that day reported to the rescue mission with a bag of personal belongings. Petitioner testified that he was advised by mission staff that he could not bring personal property inside. It is apparently the policy of the mission that individuals seeking to spend the night have to demonstrate an intent to regularly reside thereat before being allowed to bring personal property inside. Petitioner testified that he then attempted to call the SAPO but the office was closed and there was no answering service. He then took it upon himself to leave the mission and spend the weekend at the residence of an unspecified relative. On the following Monday morning (January 10, 2011) petitioner left a phone

message for P.O. Nicotra. Petitioner testified that the phone message simply indicated that he was not able to stay at the rescue mission but, instead, stayed with relatives over the weekend. P.O. Nicotra, however, testified that as part of the phone message petitioner stated that he would not stay at the "Salvation Army." Later on January 10, 2011 petitioner went to the SAPO and spoke personally with P.O. Nicotra. At that time P.O. Nicotra advised petitioner that the relative's residence would have to be investigated before it could be sanctioned as his approved residence, but she gave petitioner permission to continue to reside at the relative's residence pending completion of such investigation.

Petitioner next appeared at the SAPO for a regularly scheduled office visit on January 12, 2011. Petitioner was initially observed in the waiting area of the parole office kneeling/praying. According to the testimony of P.O. Nicotra petitioner was then brought into an interview area where he refused to cooperate in being searched and was subsequently given a drug test. According to the testimony of the petitioner, however, he was handcuffed, strip searched and had his head banged against the wall. P.O. Nicotra also testified that petitioner was specifically directed by supervising parole staff to return to the Syracuse Rescue Mission but that he twice verbally refused to do so. According to P.O. Nicotra, petitioner " . . . came right out and said he wasn't going to go to the Rescue Mission." Petitioner, however, upon cross examination, denied that he ever refused to go to the mission. P.O. Nicotra went on to testify that petitioner was directed to return to the SAPO the next day (January 13, 2011) to be fitted for an electronic monitoring system. At that point, according to the testimony of P.O. Nicotra, petitioner fell to the floor, complaining of pain in his side and stomach, and was subsequently transported to a local emergency room. According to the testimony of Senior P.O. Moore, who, along with

others, accompanied petitioner to the hospital, petitioner was advised at the hospital to report to the Syracuse Rescue Mission after his release.

After petitioner was released from the emergency room on the evening of January 12, 2011, he walked to the Syracuse Rescue Mission where he was advised by facility staff that there were no beds available but that he could be provided with a chair to rest in. Since, according to petitioner's testimony, he had been advised by hospital staff to get "bed rest," he elected not to stay at the mission but, instead, returned to the residence of his relative. Petitioner stayed at that residence on the night/morning of January 12, 2011/January 13, 2011 but returned to the SAPO prior to 8:00 AM on January 13, 2011.

When petitioner arrived at the SAPO on January 13, 2011 a Senior Parole Officer was advised that petitioner had failed to remain at the Syracuse Rescue Mission the prior evening, as he had been directed, and a determination was made to take him into custody. According to the testimony of P.O. Nicotra, petitioner was brought into the reporting room and directed by Senior P.O. Riveria to turn around and put his hands behind his back. At that point, according to P.O. Nicotra, petitioner became non-compliant, refusing to put his hands behind his back and telling S.P.O. Rivera to "[g]et your hands off me." P.O. Nicotra then testified as follows: "At that point in time I felt that my safety was being threatened, because he was non-compliant. I immediately grabbed whatever he had in his hands [a book and pen]. I grabbed them out of his hands, and [S.P.O.] Rivera immediately grabbed his [petitioner's] hands and put them behind his back and immediately cuffed him, and then he was placed on the bench." The petitioner, however, testified as follows with regard the January 13, 2011 incident:

> " . . .[W]hen I got called into the office, I was grabbed immediately, with no explanation. I don't know who this guy [presumably S.P.O. Rivera] was, because he wasn't somebody I seen the day before, because there was some

> guys there that I had never seen before. These were the guys that grabbed me and handcuffed me. Because the thing is, there was a young guy, and as he's giving me direction, I'm going along with his direction, but apparently I'm not moving fast enough for him. So he's thinking that I'm refusing his direction, and it's actually because I'm injured, you know. I had injuries, so I'm like okay - - and he's saying stand up, and I'm moving kind of slow, so it seemed to me that he was taking my slow movement as being some sort of - - I wasn't fast enough, so they started yanking me around, slamming my head against the wall, etc., etc."

In addition, upon cross examination petitioner testified that he did not recall being directed to turn around and put his hands behind his back. He also denied telling SPO Rivera to get his hands off him and denied that SPO Rivera was even in the room when he was taken into custody.

In the extensive "ANALYSIS" accompanying the April 12, 2011 written Parole Revocation Decision Notice the ALJ stated as follows:

> "It is clear from the testimony of Nicotra and Moore that Broome was resistant all along to the idea of staying at the Rescue Mission and in fact stated on at least two separate occasions that he was not willing to stay there. Although his parole officer attempted to give him some leeway at the time of his initial release and allowed him to stay at the Kinne Street address [the relative's residence] pending a field review of that residence, her decision was overridden by her supervisors on 1/12/11. Broome was specifically advised of that change and directed to stay at the Rescue Mission, not at the Kinne Street address. The Syracuse Area Supervisor and SPO Moore made this decision after meeting with Broome in the SAO on 1/12/11. Broome admits that on that date he was making claims that he had violated his parole by stealing a car and failing to stay in his approved residence. Broome claims he made those statements only in an attempt to be taken into custody so he could get medical attention. However, those statements, along with his unusual behavior of kneeling on the floor in the waiting room, as well as throwing himself on the floor in the interview room of the parole office, reasonably led parole staff to be concerned about Broome. The field staff had not yet had an opportunity to investigate the residence where Broom [sic] indicated he had been staying. A legitimate decision was made by the SPO and Area Supervisor to have Broome stay at the Rescue Mission until a further review of the matter could be made. Surely given all that had transpired at the SAO prior to Broome being transported to the hospital, Broome would have been well aware that failure to stay at the Rescue Mission on the night of 1/12/11 - 1/13/11 would be met

> with serious consequences. Broome was not so ill that he was kept in the hospital. He managed to walk from the hospital to the Rescue Mission. He was offered a chair to rest in for the night. The Defense presented no proof that Broome was in such serious medical shape that he could not have spent the night in a chair at the Rescue Mission. It is clear that Broome once again decided he simply did not want to stay at the Rescue Mission and chose not to do so. Had Broome previously made an effort to complied [sic] with the Division of Parole's directive that he stay at the Rescue Mission, his failure to do so one [sic] this one night after being seen at the hospital might be viewed in a different light. However, by failing to fully cooperate with the conditions of his release and having less than positive interactions with parole staff during his short period in the community, Broome placed himself in the position of not being entitled to further exceptional consideration. Charges 1, 2, and 3 are sustained in that . . . Broome violated the conditions of his release in an important respect when he failed stay [sic] at the Rescue Mission on 1/12/11 - 1/13/13 [sic] thereby changing his approved residence without notifying his parole officer, failing to abide by his curfew to be in his approved residence between the hours of 9 pm - 7 am, and failing to follow the directive of SPO Moore. Charge 4 is also sustained based on the credible testimony of Moore and Nicotra that Broome failed to comply with SPO Rivera's commands to put his hand behind his back and stating, 'get your hands off me' to Rivera on 1/13/11."

In paragraph 5 and 5-a of the petition the following is alleged: " . . . Petitioner was attacked for making nafl Islamic prayer in the waiting-room of the Syracuse area [parole] office and then given technical violations to cover-up the hate crime . . . The allegations that were the basis of the violations was [sic] fabricated." 9 NYCRR §8005.19(e) provides that "[t]he standard of proof at a final revocation hearing is a preponderance of evidence adduced at the hearing in support of a charge that the alleged violator has violated one or more of the conditions of his release in an important respect." In considering an evidentiary challenge to a parole revocation determination, in the context of the habeas corpus proceeding, the reviewing court must uphold the revocation determination if there is evidence in the hearing record which, if credited, would support such determination. *See People ex rel Crespo v. Yelich*, 71 AD3d 1214 and *People ex rel Gonzalez v. LaClair*, 63 AD3d 1493, *lv den* 13 NY3d 705. Applying this limited standard of review to the

evidence adduced at petitioner's final parole revocation hearing, the Court finds no basis to overturn the ALJ's determination to sustain the four parole violation charges, especially when considered in conjunction with the ALJ's analysis of the evidence.

The Court finds nothing in the record to support petitioner's conclusory assertion that " . . . intentional delays were employed during the revocation process to expand a 19 day revocation process in to 95 days . . ."

Finally, petitioner asserts a jurisdictional challenge to the determination revoking his post-release supervision following the final parole revocation hearing concluded on May 18, 2011. That parole revocation proceeding stemmed from petitioner's refusal to enter into the Willard Drug Treatment Campus program after disposition of the final parole revocation hearing concluded on March 22, 2011. As noted previously, the ALJ presiding at the final parole revocation hearing concluded on March 22, 2011 directed a mandatory "revoke and restore" to the Willard program pursuant to 9 NYCRR §8005.20(c)(2)(i). In paragraph 6-b of the petition it is alleged that "[w]hen confronted by parole officers while at Willard . . . on April 29, 2011 Petitioner informed them that he was not on p.r.s. [presumably, post-release supervision], as he had not signed a new certificate of release after p.r.s had been revoked [following the final parole revocation hearing concluded on March 22, 2011] and he did not want to be restored to p.r.s. but preferred to serve the balance remaining on p.r.s in custody." The Court finds, however, that this jurisdictional challenge was previously considered, but rejected, by Supreme Court, Seneca County (Hon. Dennis F. Bender) by Decision and Judgment dated August 12, 2011 (Seneca County Index No. 45343). Relitigation at this juncture is barred by res judicata principles.

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: June 15, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court