

People ex rel. Dean v New York State Div. of Parole
2013 NY Slip Op 33881(U)
December 6, 2013
Supreme Court, Bronx County
Docket Number: 251406-13
Judge: Leonard Livote
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**SUPREME COURT, BRONX COUNTY
CRIMINAL TERM, PART T18**

THE PEOPLE OF THE STATE OF NEW YORK
ex. rel. Jerry Dean,

Relator

against

**New York State Division of Parole,
Warden of the Penitentiary or the City of
New York, Rikers Island, New York,**

Defendant

:
: **BY:** Leonard Livote, AJSC
: **DATED:** December 6, 2013
: **INDEX. NO.:** 251406-13

Bronx Hall of Justice

265 East 161st Street
Bronx, NY 10451
December 6, 2013

BEFORE:

HONORABLE LEONARD LIVOTE,
Justice of the Supreme Court

APPEARANCES:

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Defendant

The petitioner, Jerry Dean, seeks a writ of *habeas corpus* on the grounds that he was denied his right to a preliminary hearing on his parole violation.

Background

The petitioner was incarcerated for two 2009 convictions for Attempted Criminal Sale of a Controlled Substance in the Third Degree and Criminal Possession of a Controlled Substance in the Fifth Degree. Petitioner was sentenced to indeterminate terms of two to six years and zero to one year and six months incarceration, respectively for each conviction.

On or about December 27, 2012, the petitioner was released to parole supervision, and agreed to adhere to certain conditions that the respondent, Department of Corrections and Community Supervision ("DOCCS"), imposed upon his release.

On February 20, 2013, the petitioner was arrested and charged with Criminal Possession of a Controlled Substance in the Seventh Degree. The petitioner absconded from parole supervision by failing to make a scheduled parole office visit on February 27, 2013.

On May 2, 2013, DOCCS filed a Violation of Release Report which charged the petitioner with violating four (4) provisions of his conditional release. A warrant was issued for the petitioner's arrest.

On May 23, 2013, the petitioner was arrested and charged with Criminal Possession of a Weapon in the Second Degree. On May 24, 2013, the petitioner was served with the Violation of Release Report and a Notice of Violation. The petitioner waived his right to a preliminary hearing.

On June 25, 2013, the petitioner was served with a Supplemental Violation of Release Report which charged the petitioner with two (2) additional violations of his conditional release. The petitioner was not notified that he could contest these additional charges at a preliminary hearing.

Discussion

As a preliminary matter, the petitioner has not made bail on his pending matters and is, therefore, procedurally barred from *habeas corpus* relief. Accordingly, the Court converts this petition into an Article 78 proceeding and decides it on its merits (*see, People ex rel. Harper v Warden, Rikers Is. Correctional Facility* 21 Misc.3d 906[2008]).

When a parolee is charged with a violation, the parolee is entitled to a preliminary hearing within 15 days (Executive Law §259-i[3][c][I]). DOCCS must notify the parolee of the preliminary hearing and "[t]he 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" (Executive Law § 259-i[3][c][iii]).

A parolee may waive his or her right to a preliminary hearing, provided that the waiver is "made knowingly and intelligently" (*Matter of White v. New York State Division of Parole*, 214 AD2d 301, 302 [1995]). Here, the petitioner signed a waiver of his right to a preliminary hearing of the charges that were presented to him. He did not, and, indeed, could not waive his right to a preliminary hearing on charges that were not yet in existence. Thus, the petitioner was denied a preliminary hearing on the charges contained in the Supplemental Violation of Release Report and accordingly those charges must be dismissed.

With respect to the charges in the original Violation of Release Report, the petitioner executed a valid waiver of his right to a preliminary hearing. The fact that he was denied his rights with respect to the supplemental charges offers no basis for dismissal of the original charges (*People ex rel. Crowley v. Warden*, Index No. 340133-13 [Bronx Co. Sup. Ct. June 24, 2013])(Villegas, J.).

Accordingly, the petition is granted to the extent that the matter is converted to an Article 78 proceeding and, upon conversion, the petition is granted to the extent that the charges in the Supplemental Violation of Release Report are dismissed. The petition is otherwise denied.

This constitutes the Decision and Order of the Court.



A.J.S.C.