

**Matter of Muhammed v New York State Dept. of  
Corr. & Community Supervision**

2017 NY Slip Op 30281(U)

January 27, 2017

Supreme Court, Clinton County

Docket Number: 16-1317

Judge: S. Peter Feldstein

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This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK  
SUPREME COURT****COUNTY OF CLINTON**

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In the Matter of the Application of  
**JOSHUA MUHAMMED, #12-A-5360,**  
Petitioner,

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

**DECISION AND JUDGMENT**  
**RJI #09-1-2016-0524.45**  
**INDEX #16-1317**

-against-

**NEW YORK STATE DEPARTMENT OF  
CORRECTIONS AND COMMUNITY  
SUPERVISION, WARDEN OF  
CLINTON CORRECTIONAL FACILITY,  
CHAIRPERSON, NYS BOARD OF PAROLE,<sup>1</sup>**  
Respondents.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of Joshua Muhammed, sworn to on August 30, 2016 and filed in the Seneca County Clerk's Office on September 23, 2016. By Order dated September 29, 2016, Supreme Court, Seneca County transferred the matter to the Clinton County Clerk's Office which was received on October 12, 2016. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. By Order (CPLR 1101) dated September 29, 2016, the petitioner was granted poor person status.

The Court issued an Order to Show Cause on October 18, 2016. The Court has received and reviewed the Answer and Return, together with a Letter-Memorandum by Christopher J. Fleury, Esq., Assistant Attorney General, dated December 9, 2016. In further

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<sup>1</sup> The petitioner initially named the New York State Department of Corrections and Community Supervision (DOCCS) as well as the Warden of the Willard Drug Treatment Campus. In the Transfer Order and the CPLR 1101 Order, the caption was noted to be "Rickey Bartlett, Superintendent, Willard Drug Treatment Campus and the Chairperson of the NYS Board of Parole." The petitioner objects that the appropriate respondent, DOCCS, was substituted for the Chairperson of the NYS Board of Parole. As such, the Court will direct that DOCCS be added to the caption again.

support of the petition, the Court has received and reviewed the petitioner's Reply together with a Letter-Memorandum dated December 14, 2016 and received on December 19, 2016.

On November 26, 2012, petitioner was sentenced by the Supreme Court, New York County to a determinate term of incarceration for a period of four (4) years with five (5) years post-release supervision upon the conviction of Assault in the Second Degree.<sup>2</sup> The petitioner was received at the New York State Department of Corrections and Community Supervision (hereinafter referred to as "DOCCS") on December 3, 2012 at which time he was credited with 340 days of jail time credit for time served from December 29, 2011 until December 2, 2012. The petitioner's maximum expiration date for his determinate term was calculated to be December 22, 2015.

The petitioner was released to post-release supervision on May 22, 2015. At that time, seven (7) months time incarceration was held in abeyance and his maximum expiration date of his post-release supervision was May 22, 2020. On February 23, 2016, the petitioner tested positive for marijuana and cocaine at a parole visit. On March 22, 2016, the petitioner again tested positive for marijuana and cocaine. A violation warrant was issued with a delinquency date of February 23, 2016. A final parole revocation hearing was held on June 2, 2016 at which the petitioner pled guilty to charges #3 and #4 of the parole violation which alleged that he used marijuana and cocaine on and before February 23, 2016. The Administrative Law Judge (ALJ) heard testimony from the petitioner's Parole Officer Fitzgerald Stewart as well as the petitioner. Subsequently, the ALJ imposed a time assessment of 12 months or the completion of a 90 day drug treatment

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<sup>2</sup> The petitioner was also sentenced to a one year definite term of incarceration for the conviction of Resisting Arrest, 180 days definite term of incarceration for the conviction of Aggravated Unlicensed Operation of a Vehicle in the Second Degree and a 15 day definite term of incarceration for the conviction of Unlicensed Operation of a Motor Vehicle. These sentences were served concurrently with the largest sentence, to wit: four years determinate. *See* Penal Law §70.30(3)(a).

program (Willard program). *See* Resp. Ex. H. The petitioner was returned to the custody of DOCCS on July 5, 2016 wherein he was credited with 105 days of parole jail time for the period of March 22, 2016 (date of arrest on the parole warrant) to July 4, 2016. Upon his return to the custody of DOCCS, after receiving credit for the parole jail time, the petitioner still owed 3 months and 15 days of the time held in abeyance and his maximum expiration date was calculated to be October 20, 2016. In addition, the petitioner owed 4 years 2 months and 29 days of post-release supervision for which the maximum expiration date of the post-release supervision was calculated to be January 19, 2021. On August 24, 2016, when presented with the Willard Drug Treatment contract for participating, the petitioner refused and continued to refuse on August 25, 2016 based upon his belief that his maximum expiration date was October 20, 2016. *See* Resp. Ex. H. Thereafter, the petitioner was returned to the custody of DOCCS to serve the remainder of his 12 month penalty.

Petitioner commenced the instant action challenging the determination of the ALJ to hold the petitioner for longer than his maximum expiration date. The petitioner argues that the imposition of the 12 month penalty is tantamount to a re-sentencing and DOCCS does not have authority to do so. Petitioner challenges the constitutionality of Penal Law §70.45.

Respondents argue that the petitioner violated the terms of his parole and was violated. Insofar as the petitioner was sanctioned by additional time past the jail time held in abeyance, same is authorized by Penal Law §70.45. As the petitioner is being lawfully detained pursuant to the parole revocation sanction, the petitioner is not entitled to immediate release and, therefore, his application for habeas corpus relief must be dismissed.

Penal Law §70.45 reads, in relevant part:

“(1) When a court imposes a determinate sentence it shall in each case state not only the term of imprisonment, but also an additional period of post-release supervision as determined pursuant to this article. Such period shall commence as provided in subdivision five of this section and **a violation of any condition of supervision occurring at any time during such period of post-release supervision shall subject the defendant to a further period of imprisonment up to the balance of the remaining period of post-release supervision, not to exceed five years.**

(d) When a person is alleged to have violated a condition of post-release supervision and the department of corrections and community supervision has declared such person to be delinquent: (i) the declaration of delinquency shall interrupt the period of post-release supervision; (ii) such interruption shall continue until the person is restored to post-release supervision; (iii) if the person is restored to post-release supervision without being returned to the department of corrections and community supervision, any time spent in custody from the date of delinquency until restoration to post-release supervision shall first be credited to the maximum or aggregate maximum term of the sentence or sentences of imprisonment, but only to the extent authorized by subdivision three of section 70.40 of this article. Any time spent in custody solely pursuant to such delinquency after completion of the maximum or aggregate maximum term of the sentence or sentences of imprisonment shall be credited to the period of post-release supervision, if any; and (iv) **if the person is ordered returned to the department of corrections and community supervision, the person shall be required to serve the time assessment before being re-released to post-release supervision.** In the event the balance of the remaining period of post-release supervision is six months or less, such time assessment may be up to six months unless a longer period is authorized pursuant to subdivision one of this section.” **(Emphasis added.)**

Preliminarily, it is noted that the petitioner pled guilty to charges #3 and #4. “[P]etitioner's ‘guilty plea, standing alone, is sufficient to provide a rational basis for the finding of guilt as to the charged violation[s]’ (*internal citations omitted*).” *Horace v.*

*Annucci*, 133 AD3d 1263, 1264. The petitioner does not challenge the twelve (12) month assessment directly other than to argue that he cannot be held past the maximum expiration date insofar as the sentencing court only directed that his term be for four (4) years. While the petitioner may have not understood the potential consequences of violating the terms of post-release supervision, the statute clearly indicates that a defendant who violates the terms and conditions of post-release supervision “may be subject to a further period of imprisonment up to the balance of the remaining period of post-release supervision.” Penal Law §70.45(1). Furthermore, although the petitioner asserts that Penal Law §70.45 violates his constitutional rights, his assertion is merely a bald and conclusory statement.

“Habeas corpus relief is available only if an inmate can demonstrate that he or she is entitled to immediate release from prison. An inmate is not entitled to immediate release from prison until the expiration of his or her sentence (internal citations omitted).” *People ex rel. Porter v. Napoli*, 56 AD3d 830, 831. “Even assuming, *arguendo*, that petitioner was eligible for conditional release, we conclude that he would not be entitled to immediate release from prison, and thus in any event his request for habeas corpus relief is inappropriate.” *People ex rel. Emm v. Hollins*, 299 AD2d 850. In the matter at bar, the petitioner is not entitled to habeas corpus relief.

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

**ORDERED AND ADJUDGED**, that the petition is dismissed.

**Dated:** January 27, 2017 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice