Matter of Melend v Goodwin
2011 NY Slip Op 34247(U)
October 4, 2011
Supreme Court, Bronx County
Docket Number: 250699/2011
Judge: Alison Y. Tuitt

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA-5

In the Matter of the Application of

INDEX NUMBER: **250699/2011**

MICHAEL MELEND

Petitioner,

-against-

Present:
HON. **ALISON Y. TUITT**

SHARON GOODWIN, ASSISTANT ,

Respondents

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

The following papers numbered 1 - 3,

Read on this Article 78 Petition

On Calendar of **3/14/11**

Order to Show Cause-Petition, Exhibits, Affidavit 1

Affirmation in Opposition 2

Reply Affidavit 3

Upon the foregoing papers, the Petition pursuant to Article 78 of the CPLR is denied for the reasons set forth herein.

Petitioner brings the instant Article 78 Petition seeking an Order from this Court compelling respondents to "correct, redact, and/or amend the unfair, unreliable, and inaccurate information contained in the pre-sentence report that was prepared by the New York City Department of Corrections in relation to Petitioner's underlying criminal conviction...". Petitioner states that he is a prisoner serving an "indeterminate term of imprisonment" as a result of a criminal conviction from a jury trial and verdict in the Supreme Court of the State of New York, Bronx County, under Indictment Number 8515-89. Petitioner was convicted of the

crimes of murder in the second degree and criminal possession of a weapon in the second degree.

Petitioner now argues that the pre-sentence report erroneously indicates that his conviction resulted from a guilty plea and inaccurately describes the underlying offense which resulted in the death of Vinicio Diaz. Petitioner states that by letters dated December 31, 2010, he advised respondents that the underlying pre-sentence report violated Part 350 of 9 NYCRR and requested that respondents "correct, redact, and/or amend the unfair, unreliable, and inaccurate information contained in the pre-sentence report." Notwithstanding petitioner's request, by letter dated January 20, 2011, respondent Vincent N. Schiraldi, through his agent, refused petitioner's request. Petitioner states that he did not receive a response from respondent Sharun Goodwin. By letters dated January 28, 2001, petitioner then requested, in the alternative, that respondents amend the underlying pre-sentence report. Petitioner states that respondents have not responded to his letters.

Petitioner argues that since the pre-sentence report's description of the underlying offense and conviction is not based upon the trial evidence, the pre-sentence report fails to provide the Department of Parole, the Parole Board and the Department of Correctional Services with fair and reliable information. Petitioner further argues that this pre-sentence report will adversely affect his upcoming appearance for parole release consideration and could keep him incarcerated for a longer duration of time.

Article 78 of the CPLR provides for limited judicial review of administrative actions. Administrative -agencies enjoy broad discretionary power when making determinations of matters they are empowered to decide. Section 7803 provides in relevant part that "[t]he only questions that may be raised in a proceeding under this article are... (3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or (4) whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

In deciding whether an agency's determination was supported by substantial evidence or was arbitrary, capricious or an abuse of discretion, the reviewing court is limited to assessing whether the agency had a rational basis for its determination and may overturn the agency's decision only if the record reveals that the agency acted without having a rational basis for its decision. See, Heintz v. Brown, 80 N.Y.2d 998, 1001 (1992)

citing Pell v. Board of Education, 34 N.Y.2d 222, 230-31 (1974); Sullivan County Harness Racing Association v. Glasser, 30 N.Y.2d 269, 277 (1972). Substantial evidence is more than "bare surmise, conjecture, speculation or rumor" and "less than a preponderance of the evidence." 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176, 180 (1978). Substantial evidence consists of "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." Id. See, also Consolidated Edison v. New York State DHR, 77 N.Y.2d 411, 417 (1991). Where the Court finds the agency's determination is "supported by facts or reasonable inference that can be drawn from the record and has a rational basis in the law, it must be confirmed." American Telephone and- Telegraph Co. v. State Tax Commissioner, 61 N.Y.2d 393, 400 (1984). The arbitrary and capricious test "chiefly 'related to whether a particular action should have been taken or is justified... and whether the administrative action is without foundation in fact." Pell, *supra*, quoting 1 N.Y. Jur., Administrative Law, §184, p. 609 . The reviewing Court does not examine the facts *de novo* to reach an independent determination. Marsh v. Hanley, 50 A.D.2d 687. Furthermore, a Court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary, unreasonable and an abuse of discretion. Pell, *supra*. The Court must also defer to the administrative fact finder's assessment of the evidence and the credibility of the witnesses. Lindenmann v. American Horse Shows Association, 222 A.D.2d 248, 250 (1st Dept. 1995) citing Berenhaus v. Ward, 70 N.Y.2d 436, 443 (1987).

In the instant matter, the Petition is denied and dismissed. Petitioner seeks to correct, amend and/or redact a pre-sentence report that is 20 years old. The law is clear on this issue. The challenges that petitioner now makes to the pre-sentence report should have been made before the sentencing. Hughes v. New York City Dept. of Probation, 721 N.Y.S.2d 770 (1st Dept. 2001). See also, Matter of Sciafaffo v. New York City Dept. of Probation, 669 N.Y.S.2d 513 (2d Dept. 1998)("The Supreme Court properly dismissed the petition because the challenged now made to the accuracy of the presentence report should have been raised before sentencing."); Matter of Gayle v. Lewis, 622 N.Y.S.2d 626 (3rd Dept. 1995), *lv. denied*, 82 N.Y.2d 701 (1995)(Article 78 petition requesting that court direct probation officer who authored the presentence report to expunge allegedly inaccurate information contained therein was untimely; petition was filed some two years and seven months after sentencing, and inmate was required to contest the accuracy of information in the presentence report prior to sentencing).

Here, petitioner's sentencing occurred on nearly 20 years ago. Accordingly, the petition is denied as exceedingly untimely.

This constitutes the decision and Order of this Court.

Dated: October 4, 2011

Hon. Alison Y. Tuitt