Matter of Iverson v Evans

2013 NY Slip Op 30687(U)

March 26, 2013

Sup Ct, Franklin County

Docket Number: 2012-704

Judge: S. Peter Feldstein

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

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In the Matter of the Application of
MICHAEL IVERSON,#96-B-0740,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2012-0337.78
INDEX # 2012-704
ORI # NY016015J

-against-

ANDREA W. EVANS, Chairwoman,
NYS Board of Parole, and **BRUCE S. YELICH**,
Superintendent, Bare Hill Correctional Facility,
Respondents.

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The Court has before it the Petition for a Writ of Habeas Corpus of Michael Iverson, verified on June 25, 2012 and originally filed in Erie County. By Transfer Order dated July 25, 2012 the Supreme Court, Erie County (Hon. Christopher J. Burns) transferred this proceeding from Erie County to Franklin County. The Transfer Order was necessitated by the fact that petitioner had been transferred from the Gowanda Correctional Facility in Erie County to the Bare Hill Correctional Facility in Franklin County. The papers originally filed in Erie County were filed in the Franklin County Clerk's office on August 1, 2012. Petitioner, who was an inmate at the Bare Hill Correctional Facility but is now at liberty under parole supervision, challenged his then continuing incarceration in the custody of the New York State Department of Corrections and Community Supervision.

An Order to Show Cause was issued on August 8, 2012. The Court has received and reviewed respondents' Return, dated September 21, 2012, as well as petitioner's Reply thereto, dated October 4, 2012 and filed in the Franklin County Clerk's office on

October 9, 2012. Additional submissions were received from petitioner directly in chambers on December 24, 2012.

On February 22, 1996 petitioner was sentenced in Tioga County Court to an indeterminate sentence of 5 to 15 years upon his conviction of the crime of Kidnaping 2°. On April 15, 1996 petitioner was sentenced in Steuben County Court to a controlling, concurrent indeterminate sentence of 6 to 18 years upon his conviction of the crime of Rape 1°. Following a previous release from DOCCS custody to parole supervision and return to custody as a parole violator, petitioner was released to parole supervision for a second time on September 15, 2010. On June 28, 2011, however, petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in six separate respects. Parole Violation Charge #1 alleged, in relevant part, that petitioner " . . .violated Rule #13 of his Special Conditions of Release to parole supervision in that on or about 11/6/10 . . . he tampered with his GPS bracelet . . ." Parole Violation Charge #3 alleged, in relevant part, that petitioner " . . . violated Rule #13 -10 of his Special Conditions of Release to Parole Supervision in that on 11/8/10 and thereafter he moved from his approved residence without the prior permission of his parole officer."[1]

A preliminary parole revocation hearing was convened at the Erie County Correctional Facility on June 30, 2011. At the preliminary hearing the following colloquy occurred:

[1] A New York Parole Warrant was apparently issued on November 12, 2010 and lodged against petitioner on February 24, 2011 in the State of Texas, where petitioner had absconded and had been arrested in connection with unrelated criminal charges.

"HEARING OFFICER POMERELAU:	Mr. Iverson, prior to going on the record you brought something to my attention. Will you please indicate on the record what you stated off the record.
PAROLEE:	I wish to waive the preliminary hearing.
HEARING OFFICER POMERELAU:	All right. I want to make sure you understand that by waiving the preliminary hearing it's an equivalent of a finding of probable cause. It's not an admission of guilt in any manner. You're just skipping this stage in the hearing process inasmuch as you will go on to a final hearing that's been scheduled for July 12th, 2011. Is that what you want to do?
PAROLEE:	Yes.
HEARING OFFICER POMERELAU:	All right. Then at this time, the hearing is waived. That will conclude today's matter. Thank you."

A final parole revocation hearing was conducted at the Erie County Correctional Facility on July 13, 2011. During the final hearing petitioner, who was represented by counsel, placed a variety of objections on the record for preservation purposes and then pled guilty to Parole Violation Charges #1 and #3. Petitioner's parole was revoked with a modified delinquency date of December 12, 2010 and the presiding Administrative Law Judge (ALJ) recommended a 24-month delinquent time assessment, estimated by the ALJ to expire on February 25, 2013. Upon Board review, the ALJ's recommendation was

modified to a hold to the maximum expiration date of petitioner's sentence. Petitioner's administrative appeal from the results and disposition of the parole revocation process was received by the DOCCS Parole Appeals Unit on January 11, 2012. The Appeals Unit, however, failed to issue findings and recommendations within the four-month time period specified in 9 NYCRR §8006.4(c). This proceeding ensued.

The Court initially notes that although the ALJ's recommendation of a 24-month delinquent time assessment was modified on Board review to a hold to maximum expiration date, subsequent DOCCS calculations with respect to petitioner's eligibility for re-release to parole supervision were apparently based upon a 24-month delinquent time assessment. Indeed, the Amended DOCCS Parole Jail Time Certificate dated November 13, 2012 specifically references "HOLD: 024 MONTHS" (see exhibits attached to petitioner's additional submissions received in chambers on December 24, 2012). Although there is nothing in the record addressing the circumstances under which a 24-month hold was reinstated, it is clear that DOCCS officials deemed petitioner eligible for re-release to parole supervision as of February 24, 2013 - 24 months after the parole warrant was lodged on February 24, 2011. *See* 9 NYCRR §8002.6(b)(1). In his December 20, 2012 cover letter accompanying the submissions received in chambers on December 24, 2012 petitioner, moreover, reported that he would be released on February 22, 2013. Among the papers included with petitioner's submissions was a copy of a November 20, 2012 Parole Board Release Decision Notice reflecting a Parole Decision as follows: "PAROLED - EARLIEST RELEASE DATE: 02/22/2013." While the Court received no further written correspondence, petitioner did contact chambers by telephone to report a new address in the community. Although this development has rendered

petitioner's application for immediate re-release from DOCCS custody to parole supervision moot, the outright dismissal of his Petition for a Writ of Habeas Corpus is not warranted at this juncture. Since a favorable resolution of the issues advanced by petitioner would impact the maximum expiration date of his underlying sentence, the Court finds it appropriate to convert this habeas corpus proceeding into a proceeding for judgment pursuant to Article 78 of the CPLR. *See People ex rel Speights v. McKoy*, 88 AD3d 1039 and *People ex rel Howard v. Yelich*, 87 AD3d 772.

Petitioner advances a variety of arguments in support of the assertion that his due process/statutory/regulatory rights were violated by the procedures associated with this preliminary parole revocation hearing. More specifically, petitioner asserts that he was not served with the Notice of Violation/Violation of Release Report within five days of the execution of the parole violation warrant (*see* Executive Law §259-i(3)(c)(iii)); that he was not afforded a preliminary hearing within 15 days after the execution of the parole violation warrant (*see* Executive Law §259-i(3)(c)(i)) and that he was served with the Notice of Violation/Violation of Release Report less than 48 hours prior to the preliminary hearing (*see* 9 NYCRR §8005.3(a)). The Court agrees with respondents, however, that petitioner's waiver of his right to a preliminary parole revocation hearing effectively waived his right to advance the above arguments. *See People ex rel Miller v. Walters*, 60 NY2d 899 and *People ex rel Quinones v. New York State Board of Parole*, 109 AD2d 908. The Court, moreover, finds nothing in the record, other than petitioner's conclusory assertions, to suggest that the waiver was not made knowingly and intelligently. *See White v. New York State Division of Parole*, 60 NY2d 920. In this regard the Court finds nothing inherently improper in the fact that the hearing officer

presiding at petitioner's preliminary parole revocation hearing obviously conducted some discussions with petitioner prior to going on the record. The off-the-record discussions were noted by the hearing officer when she went on the record and the nature of the waiver was clearly explained to petitioner who affirmed his wavier without asserting any reservation or objection.

To the extent petitioner challenges the form of the Notice of Violation/Violation of Release Report the Court notes that under the relevant provisions of Executive Law §259-i(3)(c)(iii) the written notice of the time, place and purpose of the preliminary hearing " . . . shall state what conditions of presumptive release, parole, conditional release or post-release supervision are alleged to have been violated, and in what manner; that such person [the accused parole violator] shall have the right to appear and speak in her or his own behalf; that he or she shall have the right to introduce letters and documents; that he or she may present witnesses who can give relevant information to the hearing officer; that he or she has the right to confront the witnesses against him or her." The Court finds that all of the above items were included in the Notice of Violation/Violation of Release Report received by petitioner on June 28, 2011.

Finally, to the extent petitioner alleges that he was not afforded at least 14-days notice of the scheduling of the final parole revocation hearing (*see* Executive Law §259-i(3)(f)(iii)), the Court notes that when this issue was raised at the final hearing on July 13, 2011 the hearing officer stated that such issue could be addressed by giving petitioner "more time," presumably by adjourning the final hearing. Counsel for the petitioner, however, responded to the offer by confirming that the 14-day notice issue was waived.

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: March 26, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge