STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of ALEXANDER MARCANO,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-12-ST4042 Index No. 5733-12

Appearances: Cooper Erving & Savage LLP
Attorneys For the Petitioner
39 North Pearl Street
Albany, NY 12207

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Brian J. O'Donnell,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

On January 7, 2011 City of Schenectady police officers Anthony Savignano and Michael Hudson were dispatched to the Hamilton Hill area of the City upon a report of a man with a weapon. They came upon the petitioner on Mumford Street. They got out of the

patrol car, requested him to stop and, when he failed to do so, they pursued and apprehended him. The petitioner was on parole for a conviction of robbery in the first degree at the time. He was declared delinquent as of that date and six parole violation charges were lodged against him (hereinafter, "First Parole Revocation Proceeding"). At the final parole revocation hearing held on May 6, 2011 he was found guilty of violating two of the charges, for which a 16 month time assessment was imposed (which he served). He was re-released to parole supervision in March 2012. Subsequently, the petitioner was charged with unrelated parole violations, with a warrant being issued on June 28, 2012 (hereinafter, "Second Parole Revocation Proceeding"). The final parole revocation hearing on the new charges was completed on July 25, 2012. During the latter hearing he entered a plea of guilty to two charges, with the remaining two charges being withdrawn. The Administrative Law Judge imposed a 12 month time assessment.

The instant proceeding seeks review of the First Parole Revocation Proceeding, alleging that there was no probable cause to stop the petitioner on January 7, 2011. During the March 30, 2011 the parole revocation hearing, Officer Savignano gave the following testimony:

> Q. The judge has identified the gentleman across from me as Mr. Marcano. Do you recognize him?
>
> A. Yes, I do.
>
> Q. How? How do you recognize him?
>
> A. His face, and I've dealt with him.
>
> Q. Have you – do you recall having any contact with him on January 7 during the course of your shift?

A. Yes, I do.

Q. Okay, what was the nature of that contact?

A. We had gotten information that there was a possible man with a weapon in the area of Hamilton Hill. So myself and Officer Hudson were responding to that area.

Q. And came on to Mr. Marcano?

A. Yes. We came across Mr. Marcano who matched the description of the male that we were looking for.

Q. Okay, did you and Officer Hudson approach Mr. Marcano at that point?

A. Yes. When we realized that he matched the description pretty much to a T, we'd exited our vehicle and requested him to stop.

Q. And did he at that point?

A. No, he did not.

Q. What did transpire?

A. We engaged Mr. Marcano in a foot pursuit which lasted approximately two or three minutes through a couple backyards.

At that point, Officer Savignano gave an account of the pursuit, which ultimately resulted in petitioner's capture. Under cross-examination, he gave the following testimony:

Q. Do you recall the description that you were given of this individual?

A. It was a – from the radio transmission, it was a light-skinned black or Hispanic with a darker-colored jacket on.

Q. And as you sit here today, that's the only description that you recall being given of this individual?

A. That I can recall, yes.

Q. Okay, but it's your testimony that I believe the phrase you used was, it fit him to a T, Mr. Marcano?

A. Yes.

Q. A light-skinned Hispanic or a light skinned black male or a Hispanic male with a darker color jacket?

A. Yes.

Thereafter, Administrative Law Judge (ALJ) Patricia E. O'Malley, in sustaining two of the charges, clearly placed great reliance upon the testimony given by Officer Savignano:

> "Police Officer Anthony Savignano testified he has been police officer with the City of Schenectady for three years. He recognized Mr. Marcano as the man he had contact with on 1/7/11 but did not recall having any prior contact with him. At that time, Officer Savignano was working the 4 PM to midnight and partnered with Officer Hudson. Officer Savignano received information there was a light-skinned black or Hispanic male wearing a "Carhartt" brand jacket and dark jeans with a gun in the Hamilton Hill area. He was dispatched to the Mont Pleasant Zone around Mumford Street. As he was driving on Paige Street, a street parallel to Mumford Street, he recalled passing a few people but then came upon Mr. Marcano who matched the description that was given him to a "T" and requested Mr. Marcano to stop. He shown the light of his vehicle at Mr. Marcano but before he could ask him anything, Mr. Marcano fled."

Subsequently in the same decision, ALJ commented as follows:

> "The Fourth Amendment to the United States Constitution guarantees that citizens shall be free of unreasonable searches and seizures, of individual liberty and privacy, and the right to be left alone. Not answering a police inquiry or walking or running away from law enforcement is not a crime. In Peo. v DeBour, 40 NY2d 210 (1976), the Court of Appeals firmly established that "Before the police may stop a person pursuant

> to the common-law right to inquire there must exist at that moment a founded suspicion that criminal activity is present," and "the police may not justify a stop by a subsequently acquired suspicion resulting from the stop." Most plainly, Officer Savignano received dispatch information fitting Mr. Marcano's description to a "T" and this suspect had a weapon. That a subsequent show-up, which Mr. Marcano testified did not occur, did not implicate him or that no weapon was located, is hindsight. Officer Savignano did not have the luxury of the Monday-morning quarterback at the time of the call. He was in the vicinity of the complaint that was radioed to him. As he was traversing the area, he came upon Mr. Marcano. When the light was focused on him, Mr. Marcano recalled his prior contact with another police officer and ran. Given the information Officer Savignano had at that time, he had the right to inquire but Mr. Marcano did not give him the opportunity and the resulting chase ensued. Just as Mr. Marcano had information in his mind about his prior contact with the police a few months earlier, so too did Officer Savignano have in his mind information that led him to try to make an inquiry about it."

The petitioner has apparently commenced a civil action in U.S. District Court for the Northern District of New York for damages arising out of the subject arrest. During the course of pretrial discovery, the attorneys for the petitioner demanded and obtained copies of the audio tape and video tape recordings of the events which occurred on January 7, 2011. A transcript of the initial dispatch on that day includes the following:

"Dispatcher:	Ok further, perpetrator with a gun black male, jumped a fence and headed toward Mumford now on foot.
Dispatcher:	Black male, jumped a fence headed toward Mumford, all units.
Officer Hudson:	37, any clothing description?
Dispatcher:	Unknown at this time, black male is the only description we have at this time.

Officer Hudson: [Laughter] Okay."

Shortly thereafter, Officers Hudson and Savignano arrive at Mumford Street and can be heard inquiring of a person on the street in the following manner:

"Officer Savignano: Did you see a guy come through here?

Officer Savignano: Did you see a black guy come through here?

Officer Savignano: Did you just see a black guy come through here?

Unknown Person: No."

Subsequent to this Officer Savignano observes a person shoveling snow, and asks him if he saw a black guy come through. Officer Hudson says "Maybe this guy on the right", which turns out to be the petitioner.

According to the petitioner, the first description of any clothing worn by the suspect is given by Officer Savignano after having attempted to stop the petitioner:

"Dispatcher: All I've got is black male, any clothing yet?

Officer Savignano: Black male, green Carhartt jacket on.

Officer Savignano: Green Carhartt, hat, blue jeans.

Dispatcher: Correction all units, Hispanic male, green Carhartt, jeans and a hat."

By letter dated September 26, 2012 addressed to DOCCS the attorneys for the petitioner demanded a rehearing based upon the above "newly discovered" evidence. In the same

letter, it was indicated that if they did not receive a response prior to October 12, 2012 they would commence a CPLR Article 78 proceeding seeking to vacate the May 6, 2011 revocation.

The petitioner commenced the above-captioned CPLR Article 78 proceeding seeking to review both parole revocation determinations: the first by reason that the police officers did not have probable cause to stop him; the second on grounds that it was tainted by the first. The respondent argues, in general, that the issues raised are now moot. With respect to the First Parole Revocation Proceeding, it maintains that the grant of a rehearing is within respondent's broad discretion; and that there is no time limit for consideration of such a request in Division of Parole Rules (citing 9 NYCRR 8006.3).

First Parole Revocation Proceeding

It is well settled that an inmate's subsequent release on parole does not render a CPLR Article 78 proceeding to review a parole revocation determination moot, since "'the impact of parole violation charges does not end with petitioner's release from prison, but may continue to affect matters such as the maximum parole expiration date'"(Newcomb v New York State Bd. of Parole, 88 AD2d 1098, 1098 [3d Dept., 1982], quoting Lindsay v New York State Bd. of Parole, 48 NY2d 883, 884; see also Parsons v Chairman of the New York State Div. of Parole, 249 AD2d 616 [3d Dept., 1998]; Nieblas v New York State Bd. of Parole, 28 AD3d 1017 [3d Dept., 2006]).

The police officer's testimony concerning the physical description of the suspect

appears to be at material variance from that indicated in recordings of police dispatches. ALJ Patricia E. O'Malley expressly relied upon the police officer's testimony in finding that there was probable cause to apprehend the petitioner. On the other hand, the letter of petitioner's attorney requesting a rehearing is dated September 26, 2012, and demanded a response on or before October 12, 2012, within approximately sixteen days. As the respondent points out § 8006.3 of the Rules of the Division of Parole does not contain any specific deadline for the respondent to rule upon a request for a rehearing (see 9 NYCRR 8006.3). In this respect, the Court cannot conclude on the instant record that the respondent erred, as a matter of law, in failing to rule upon the request as the petitioner demanded, within sixteen days. Nor does the Court agree that it should usurp the duties and responsibilities of the respondent by reviewing and considering the new evidence in the absence of an appropriate administrative determination. The Court finds that the petition generally fails to state a cause of action, but will grant the petition to the limited extent that it will direct the respondent to rule on petitioner's request for a rehearing, if not sooner done, within forty-five (45) days of the date hereof.

Second Parole Revocation Proceeding

The Court cannot ignore the fact that the petitioner entered a plea of guilty to two of the charges, in connection with a negotiated plea agreement in which, through his attorney, he agreed to accept a twelve month hold, which was a joint recommendation. The remaining charges were withdrawn. In the Court's view, irrespective of the fact that the Administrative Law Judge made reference to this petitioner's fifth violation, the petitioner has failed to

demonstrate how or in what respect the plea agreement was tainted by the prior parole revocation determination. The Court finds that this portion of the petition must be dismissed.

Other Relief

The Court finds all other requests for relief must be denied. The declaratory relief which the petitioner seeks is essentially a restatement of the relief sought pursuant to CPLR Article 78 (see e.g. Mangini v Christopher, 290 AD2d 740, 747 [3d Dept., 2002]). In the Court's view, the petitioner would not have a right to release until such time as he receives a favorable determination after a rehearing (if such a hearing is granted).

Lastly, turning to petitioner's request for attorneys fees under CPLR Article 86, as stated in Wittlinger v Wing (99 NY2d 425 [2003])

> "The Legislature enacted the Equal Access to Justice Act to help litigants secure legal assistance to contest wrongful actions of State agencies (see Governor's Mem approving L 1989, ch 770, 1989 McKinney's Session Laws of NY, at 2436). By allowing victorious plaintiffs to gain attorneys' fees, the statute seeks to help those whose rights have been violated but whose potential damage awards may not have been enough to induce lawyers to fight City Hall. The Legislature, however, did not intend to provide every plaintiff -- or even every 'prevailing' plaintiff -- with attorneys' fees. Instead, fees 'may' be awarded only where the plaintiff 'prevails' and where the agency's position was not 'substantially justified' and no 'special circumstances make an award unjust' (Wittlinger v Wing, supra, at 431, quoting CPLR 8601 [a]).

The incipient harm here did not arise from any act on the part of officers and/or employees of the respondent, but rather from testimony given at the parole revocation hearing. The Court, as set forth above, can find no fault with respect to respondent's actions. When framed in this fashion, the Court finds that the petitioner failed in his burden to demonstrate that the

respondent's position was not substantially justified. Under such circumstances, an award under CPLR Article 86 would be unjust, and must be denied (see Wittlinger v Wing, supra).

Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is granted in part and denied in part; and it is further

ORDERED and ADJUDGED, that the petition is granted to the limited extent that the respondent is directed, within forty five (45), to issue a determination with regard to petitioner's request for a rehearing dated September 26, 2012, but is otherwise denied and dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the petitioner. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: July 2, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated October 17, 2012, Petition, Supporting Papers and Exhibits
2. Answer Dated November 9, 2012, Supporting Papers and Exhibits
3. Reply Affirmation of Brian W. Matula, Esq., dated November 15, 2012 and Exhibit