

Matter of Bickley v Fischer

2013 NY Slip Op 31897(U)

August 14, 2013

Supreme Court, St. Lawrence County

Docket Number: 140159

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE

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In the Matter of the Application of
THEODORE BICKLEY, #11-A-0968,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

**DECISION AND JUDGMENT
RJI #44-1-2012-0829.33
INDEX #140159
ORI # NY044015J**

-against-

BRIAN FISCHER, Commissioner,
NYS Department of Corrections and
Community Supervision,

Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Theodore Bickley, verified on November 20, 2012 and filed in the St. Lawrence County Clerk’s office on November 27, 2012. Petitioner, who is an inmate at the Five Points Correctional Facility, is challenging the results of a Tier III Superintendent’s Hearing held at the Gouverneur Correctional Facility commencing on May 8, 2012 and concluding on May 17, 2012. The Court issued an Order to Show Cause on December 5, 2012 and received and reviewed respondent’s Answer/Return, verified on February 8, 2013, as well as petitioner’s undated letter in opposition, filed in the St. Lawrence County Clerk’s office on February 21, 2013. By Decision and Order dated June 20, 2013 respondent’s request for the issuance of an order transferring this proceeding to the Appellate Division, Third Department, was denied and he was directed to serve supplemental answering papers. The Court has since received and reviewed respondent’s Supplemental Answer/Return, verified on July 10, 2013, as well as petitioner’s Reply thereto, dated July 19, 2013 and filed in the St. Lawrence County Clerk’s office on July 31, 2013.

As the result of an incident that occurred at the Bare Hill Correctional Facility on February 9, 2012 petitioner was issued an inmate misbehavior report charging him with a violation of inmate rule 113.10 (weapon). The inmate misbehavior report, authored by C.O. Fowler, alleges, in relevant part, as follows: “. . . I OFFICER G. FOWLER WAS ASSIGNED TO FRISK CUBE K-2-44, INMATE BICKLEY . . . UPON FRISKING THE LARGE LOCKER ON THE SECOND SHELF FROM THE TOP, HIDDEN IN THE BINDING OF A DICTIONARY I FOUND A WEAPON APPROXIMATELY 7 INCHES LONG BY ¼ INCH ROUND ICE PICK TYPE WEAPON SHARPENED TO A POINT AT ONE END. THE WEAPON WAS FOUND IN THE PRESENCE OF INMATE BICKLEY . . .”

A Tier III Superintendent’s Hearing was originally conducted at the Bare Hill Correctional Facility on February 14, 2012. At the conclusion of the hearing petitioner was found guilty as charged and a disposition was apparently imposed confining him to the special housing unit for 20 months, directing the loss of various privileges for a like period of time and recommending the loss of 20 months of good time. Upon administrative appeal, however, the results and disposition of the Tier III Superintendent’s Hearing of February 14, 2012 were reversed purportedly based upon the “FAILURE TO MAINTAIN A COMPLETE ELECTRONIC RECORD OF THE HEARING.”

A re-hearing was commenced at the Gouverneur Correctional Facility on May 8, 2012. At the conclusion of the re-hearing, on May 17, 2012, petitioner was again found guilty of violating inmate rule 113.10 and a disposition was imposed confining him to the special housing unit for 12 months, directing the loss of various privileges for a like period of time and recommending the loss of 12 months of good time. Upon administrative appeal all dispositional penalties were reduced from 12 months to 6 months but the results of the re-hearing were otherwise affirmed. This proceeding ensued.

Throughout the hearing/re-hearing process petitioner took the position that he had no knowledge of the weapon allegedly found in his locker and that he did not possess the weapon. Petitioner also took the position that at some point after he was placed just outside the immediate cube search area - so that the search could be conducted in his presence - he was removed to a different room to be interviewed by Sergeant Powers. According to petitioner, DOCCS staff did not attempt to return him to just outside the immediate cube search area until after the weapon described in the inmate misbehavior report had allegedly been found. Petitioner thus disputes the assertion set forth in the inmate misbehavior report that the weapon was found in his presence.

DOCCS Directive 4910 states, in relevant part, as follows:

“The search of a general confinement housing unit may be conducted with or without the inmate being present. If the inmate is removed from quarters prior to the search, he or she shall be placed outside the immediate area to be searched, but allowed to observe the search. However, if, in the opinion of a supervisory security staff member, the inmate presents a danger to the safety and security of the facility, the inmate shall be removed from the area and not allowed to observe the search.”

Upon consideration of the above-quoted directive, the Appellate Division, Third Department had determined that although an inmate’s cell may be searched in his/her absence where such inmate was not present at the time the search was initiated (*see Mitchell v. Fischer*, 81 AD3d 1013), absent a determination that his/her presence endangers the safety or security of the facility, an inmate must be permitted to observe the search of his/her cell when he/she is removed therefrom for the purpose of conducting the search. *See Morales v. Fischer*, 89 AD3d 1346.

Notwithstanding the fact that the results and disposition of the original Tier III Superintendent’s Hearing of February 14, 2012 were reversed based upon the “FAILURE TO MAINTAIN A COMPLETE ELECTRONIC RECORD OF THE HEARING,” a certified

copy of the transcript of the original February 14, 2012 hearing was annexed to the respondent's Answer/Return as Exhibit C. The Court's review of that transcript, moreover, reveals no significant gaps or any other obvious indication that such transcript does not represent a complete record of the original hearing. It is noted, moreover, that there is nothing in petitioner's original or supplemental answering papers even attempting to shed further light on the basis for the administrative reversal of the results and disposition of the original February 14, 2012 hearing in the face of a seemingly complete transcript of that hearing.

At the original hearing of February 14, 2012 C.O. Fowler acknowledged that although petitioner was present when the cube frisk started (and remained present for the "majority" of the search), at some point Sergeant Powers took petitioner away from the cube search area for questioning. The following colloquy then occurred:

"HO [Hearing Officer]:	Alright, so when you, do you recall when you found what was it, that at a point when Bickley was present there or might he have been with the Sergeant?
CO [Fowler]:	He was just, he was almost (inaudible) about coming back from his interview. He was right in between the officer's station and
HO:	Okay, so he was just coming back from the sergeant talking to him?
CO:	Yes sir.
HO:	Okay, um, are, is it required fer [sic] an inmate to be present ah
CO:	No sir.
HO:	dur, during a cube frisk?
CO:	No sir.

HO: Directive 4910.

CO: No sir.

HO: Control Search[?], so it's not mandated that the inmate's present fer [sic] the

CO: No, no, sir.

HO: cube frisk. Okay, um, when you approached his cube, was he there?

CO: Yes sir."

C.O. Fowlers subsequent testimony clarified his position that since the weapon was found at a time when petitioner was between the officer's station and his cube (while petitioner was returning from his interview with Sgt. Powers), the weapon should be considered to have been found in petitioner's presence.

Sergeant Powers testified at the original hearing of February 14, 2012 that he could not specifically recall at what point during the cube search he removed petitioner from the immediate search area for questioning. According to Sgt. Powers, he interviewed between eight and ten inmates on the morning in question. Notwithstanding the foregoing, when Sergeant Powers was asked if he recalled where petitioner was when the weapon was found, he responded as follows: "I believe he was standing right next to the cube. It was shortly after ah, you know, there was some break in my interviews. I, I don't recall when the, the interview was with him. There was some breaks in them [the interviews] due to some of the ah contraband that was found that morning. I, I don't recall but I do recall him being escorted from the side of his cube up to the front foyer area of the dorm."

Following the close of testimony at the original hearing of February 14, 2012 the hearing officer read into the record his written disposition and statement of evidence relied upon. That statement included the following: "Your [petitioner's] statements

during testimony that you were not present for the entire frisk of your cube were addressed by CO Fowler during his testimony when he indicated ah, you were taken, when he indicated you were taken ah to the day room for an interview by the sergeant for a portion of the frisk. He also testified that it is not required for inmate to be present for the cube, for his cube to be frisked.”

At the re-hearing concluded on May 17, 2012 C.O. Fowler again testified and upon cross-examination by petitioner the following colloquy occurred:

“Inmate Bickley:	Alright, um, at any time was I taken from the cube during search?
Hearing Officer:	Okay, the, um, ticket and the memo both state that the inmate was present during the search. Is that correct or was he removed at any time?
C.O. Fowler:	Yes, he was present sir.
Hearing Officer:	For the entire search?
C.O. Fowler:	Yes, sir.
Hearing Officer:	Okay. Any other questions?
Inmate Bickley:	Can you, can you ask him did Sergeant Powers take me out during the search?
Hearing Officer:	He stated you were there for the entire search.
Inmate Bickley:	The whole . . . can he, can they explain what he, can he explain what happened during the, I mean, how long, how long was he searching my cube. Can he explain how long he was search my cube for?
Hearing Officer:	Do you remember how long it took to conduct the search?

C.O. Fowler: I don't, I don't, Captain.

Hearing Officer: No he does not remember. Any other questions?

Inmate Bickley: At, at no time, at the whole, so he, he stated the whole time I was there during the search. I never left my . . .

Hearing Officer: Yes.

Inmate Bickely: . . . I never left my cube for an interview or anything?

Hearing Officer: That's what he stated

Inmate Bickely: With Sgt. Powers?

Hearing Officer: That's what he stated. Yes. Any other questions?"

At the re-hearing concluded on May 17, 2012 Sergeant Powers was asked if he "specifically remembered" interviewing petitioner and he responded "Sure." The following then colloquy occurred:

"Inmate Bickley: Where did he interview me at?

Hearing Officer: Where did you interview inmate Bickley? Do you remember?

Sergeant Powers: In front of the laundry room, I believe. . .

Inmate Bickley: Was this before, or after, or during the weapon, before the weap . . .

Hearing Officer: Before or after, or during the search when the weapon was found?

Sergeant Powers: Before . . . Prior to the search is all.

Hearing Officer: Okay.

- Inmate Bickley: Alright. So he's saying (inaudible) prior to the search? So he came into the dorm and did, and did not announce the search? He came straight to my cube?
- Hearing Officer: Listen. Just get to the question you want to ask.
- Inmate Bickely: Sir, that's what I'm asking. He, he came, he said he came in the dorm, so he did not, so, um . . .
- Hearing Officer: I'll tell you what I'm going to do because I know your question and I'm sick of you going all around, round in circles. I'm going to ask him. Was the inmate present during the cell search, the cube search when the weapon was found? Was the inmate there?
- Sergeant Powers: Yes, sir.
- Hearing Officer: Okay, there you go.
- Inmate Bickley: Alright, sir. I understand you, what you're trying to do.
- Hearing Officer: I'm not going to do this all day. I know what you want to get out cause you've already brought it up. He said you were there during the cube search. He interviewed you prior to the cube search. During the cube search you were there. That's what he said. Next question."

Sergeant Powers later added "We didn't start the frisks of any inmate's cubes until after I conducted three interviews for target inmates and then conducted, shortly after the frisk started, we started to conduct interviews with the inmates that were, their frisks were completed."

After C.O. Fowler and Sergeant Powers completed their testimony at the re-hearing concluded on May 17, 2012 petitioner sought to introduce his own copy of what he described as an audiotape of the original February 14, 2012 hearing for impeachment

purposes. This request was denied by the hearing officer who stated that petitioner's "... last hearing [original February 14, 2012 hearing] has nothing to do with this tier hearing. This is, this is completed independently."

In this proceeding petitioner advances a variety of arguments in support of his ultimate contention that the results and disposition of the Tier III Superintendent's Hearing (rehearing) concluded on May 17, 2012 must be overturned. The Court is most concerned with petitioner's claim that the hearing officer presiding at the rehearing improperly denied his request to introduce the audiotape of the original February 14, 2012 hearing in order to demonstrate that the re-hearing testimonies of C.O. Fowler and Sgt. Powers differed, in significant respects, from their testimonies at the original hearing. Petitioner also argues that "DOCCS was in violation [sic] of their own rules and regulations by removing me from viewing my cube being searched because at the time of the search I was not a threat nor danger to the order and security of the facility in violation of Directive #4910."

The record before the Court in this proceeding is disturbing in several unusual respects. At the original hearing of February 14, 2012 both C.O. Fowler and Sergeant Powers testified that petitioner was removed from the immediate vicinity of the cube search for a portion of the time when the search was being conducted. Their testimonies differed only in that C.O. Fowler testified that petitioner was on his way back to the cube area when the weapon was allegedly found while Sergeant Powers testified that petitioner was already back at the immediate cube area. Petitioner, for his part, testified that DOCCS staff did not attempt to return him to the immediate cube area until after the

weapon had already been found.¹ In addition, the Court finds it significant that the hearing officer presiding at the original February 14, 2012 hearing specifically noted in his determination of guilt that C.O. Fowler “. . . also testified that it is not required for an inmate to be present for his cube to be frisked.”

The first disturbing aspect of the record is that although the results of the original Tier III Superintendent’s Hearing of February 14, 2012 were administratively reversed, with a rehearing ordered, based upon the finding of a “FAILURE TO MAINTAIN A COMPLETE ELECTRONIC RECORD OF THE HEARING,” an apparently complete transcript of the original February 14, 2012 hearing was annexed to the respondent’s February 8, 2013 Answer/Return as Exhibit C. Nothing in the record clarifies the circumstances surrounding the reversal on administrative appeal.

Even more disturbing than the lack of clarity with respect to the circumstances surrounding the reversal on administrative appeal, the testimonies of both C.O. Fowler and Sergeant Powers at the rehearing concluded on May 17, 2012 appear to directly contradict their testimonies at the original hearing. At the rehearing both C.O. Fowler and Sergeant Powers testified that petitioner was not removed from the immediate cell search area at any time during the course of the search. The Court finds nothing in the record that even attempts to explain the apparent contradictions in their testimonies.

Under the unusual facts and circumstances of this case - and with so much riding on the hearing officer’s assessment of the credibility of the witnesses at the rehearing - this Court finds that the hearing officer erred in failing to receive into evidence and

¹ At this juncture the Court is not called upon to determine whether or not an inmate can be lawfully removed from the immediate cell search area during a portion of the search of his/her cell - and thus not allowed to observe a portion of the search - provided such inmate is returned to the immediate cell search area at or prior to the time contraband is discovered.

consider the audiotape of the original February 14, 2012 hearing, which included the apparent contradictory prior testimonies of C.O. Fowler and Sergeant Powers.

Notwithstanding the fact that petitioner has apparently completed service of the SHU confinement and loss of privileges components of the dispositional penalties imposed following the rehearing, the Court notes that he still faces the potential consequences of the recommended loss of six months good time. The Court also takes note of the extremely serious nature of the alleged violation of standards of inmate misbehavior set forth in the underlying misbehavior report. Accordingly, the Court will authorize the respondent to conduct a new hearing to consider the charges set forth in the underlying inmate misbehavior report.

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the results and disposition of the Tier III Superintendent's Rehearing concluded on May 17, 2012 are reversed with the respondent authorized to conduct a new hearing in accordance with this Decision and Judgment, with said new hearing to be completed no later than September 30, 2013; and it is further

ADJUDGED, that in the event respondent elects not to conduct a new hearing in accordance with this Decision and Judgment, he is directed to expunge all reference to the Tier III Superintendent's Rehearing concluded on May 17, 2012, as well as the incident underlying same, from petitioner's institutional records it is further directed to reimburse petitioner's inmate account for any mandatory surcharge imposed at the conclusion of the Tier III Superintendent's Rehearing concluded on May 17, 2012.

Dated: August 14, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court