Matter of Henderson v Annucci
2018 NY Slip Op 32409(U)
September 27, 2018
Supreme Court, Clinton County
Docket Number: 2018-78
Judge: S. Peter Feldstein

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

In the Matter of the Application of
ISAIAH HENDERSON, #14-A-1366,
Petitioner,

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

DECISION & JUDGMENT
RJI #09-1-2018-0036.05
INDEX #2018-78

-against-

ANTHONY J. ANNUCCI, DOCCS COMMISSIONER,
Respondent.

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Isaiah Henderson, verified and supported by the Petitioner's Affidavit in Support of Order to Show Cause, dated on January 5, 2018 and were filed in the Clinton County Clerk's Office on January 5, 2018. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the determination of a Tier III Superintendent's Disciplinary Hearing.

The Court issued an Order to Show Cause on January 29, 2018. In response thereto, the Court has considered the Answer and Return, with a confidential exhibit, together with a Letter-Memorandum by Christopher J. Fleury, Esq., Assistant Attorney General. In further support of the Petition, the Court has considered the Reply received on August 10, 2018.

On September 30, 2017, the Petitioner was served with an Inmate Misbehavior Report charging rule violations 113.10 (weapon) and 114.10 (smuggling). The description of the incident reads as follows:

> "At approximately 3:05 p.m. on [9-29-17] I C.O. Duffina was directed by Sgt. Hartman to assist in escorting Inmate Henderson, I. 14A1366 to the hospital 1st floor. During the strip frisk Henderson was directed to review and drop the weapon and paper to the floor with his right hand which he

> complied. At this time I recovered and secured the weapon and paper on my person and reported to the facility I.D. office for photos and description of the weapon. Photos were taken and the weapon measured 1 ¾" long by ½" wide cermic (*sic*) blade melted into purple plastic with a black plastic sheath. I remained in possession of the weapon and then secured the weapon in the evidence drop box in the watch commanders office per directive 4910a." Resp. Ex. A.

The Tier III Superintendent's Disciplinary Hearing commenced on October 5, 2017. The Petitioner was provided with the Unusual Incident report; a memo from Lt. Mason from Sgt. Hartman dated 9/29/17; a memo to Sgt. Hartman from Officer Duffina dated 9/29/17; a copy of the report; report of strip search/strip frisk; PC refusal form; request for urinalysis test; and contraband receipt. The Hearing Officer also noted that he had possession of photographs of the contraband for use during the hearing. During the hearing on October 11, 2017, the Petitioner reminded the Hearing Officer that he had requested the chain of custody form, a copy of Directive 4910A, and a copy of the North yard log book but had not received copies of any of these. At the next appearance on October 13, 2017, the Hearing Officer provided a copy of the evidence log book which indicated the chain of custody of the weapon. Petitioner questioned why he was not provided with a chain of custody of the "note" that he was also described as hiding and the Hearing Officer indicated that he was not being charged with the note as contraband or possessing gang materials. The Hearing Officer stated that he would put in a request for any documentation related to the gang materials that the Petitioner was not being charged with possessing, despite the issue not being addressed during this hearing. At the continuation of the hearing on October 17, 2017, the Hearing Officer advised the Petitioner that the North Yard logbook did not contain any entry pertaining to the Petitioner.

During the hearing, testimony was received from the Petitioner, Officer Duffina, Officer Tucker, and Captain Devlin. While the Petitioner initially requested the testimony

of another inmate, such request was withdrawn on the record. At the conclusion of the hearing on October 17, 2017, the Petitioner was found guilty of both charges and was sanctioned with 165 days of Special Housing Unit, loss of packages, commissary and phone privileges for a period of 165 days, and a recommended loss of 2 months of good time. Petitioner filed a timely appeal and the disposition was affirmed on November 17, 2017.

Petitioner challenges the determination and argues that Respondent failed to comply with his own directives when there was no probable cause for the strip-frisk and the strip-frisk occurred in the presence of an additional officer (Officer Duffina) in contravention of Directive #4910(III)(G)(1)(a). In addition, the Petitioner alleges that he was denied documentary evidence that would have helped him prepare an adequate defense.

Respondent argues that the only form of documentary evidence that the Petitioner was denied was the North Yard logbook entry for the date and time of the incident, but the Petitioner failed to preserve such objection during the hearing. Similarly, while the Petitioner sought the chain of custody for the "note" recovered, inasmuch as the Petitioner was not charged with a rule violation for possession of the purported gang material, there was no chain of custody prepared and therefore, the Petitioner cannot claim he was denied documentary evidence that does not exist. Respondent asserts that the Petitioner was not prejudiced by the presence of a third correctional officer during the strip-frisk insofar as the Petitioner allegedly admitted having possession of the weapon and the third officer was present as a safety precaution. Even if the third officer present was in contravention of Directive #4910, such procedural deviation does not invalidate the results of the strip-frisk. Finally, Respondent argues that there was probable cause for the strip-frisk as the BOSS chair alerted the correctional officers to the presence of an unknown metal object. Respondent further argues that the Petitioner's admission of possession of a weapon provided probable cause necessary to authorize the strip-frisk.

Preliminarily, failure to raise an objection during the hearing constitutes a waiver of such objection upon review. *See*, *Wilson v. Annucci*, 148 Ad3d 1281. Nonetheless, while the Petitioner argues that he was denied the North Yard log book, the Hearing Officer reported that upon reviewing same, there was no entry pertaining to the Petitioner. Resp. Ex. G, p. 13. As such, the Petitioner was not prejudiced by being denied the North Yard log book for the date and time of the incident. Similarly, the Petitioner was not prejudiced by the denial of the chain of custody documentation pertaining to the "note" when such evidence did not exist. *See*, *Martin v. Fischer*, 109 AD3d 1026.

The Petitioner argues that there was no probable cause for the strip-frisk but also acknowledges that the lighter in his back pocket likely alerted the officers when he sat on the BOSS chair. Indeed, the testimony of Officer Tucker explained how the Petitioner was directed to the BOSS chair:

> "TUCKER: Uh, basically when I work uh, on the nights I work at the yard door, I watch the inmates as they walk through metal detector. Uh, if an inmate shows three or four green stars, but doesn't set the metal detector off, I'll have him come over and I'll have him run his feet on the BOSS chair, sit on the BOSS chair and do his cheeks on the BOSS chair because small metal items can go through the metal detector and not have him alert red, but can show us as a couple of stars. He alerted three stars, so I had him come over to do the BOSS chair.
>
> HO BULLIS: And uh, what happened after that?
>
> TUCKER: Uh, when he sat in the BOSS chair it alerted. I had him sit again. It alerted a second time. Brought him up, put him on the wall to pat frisk him. And, uh, after that I placed him in handcuffs and informed our huh, supervisor and brought him to the hospital and performed a strip frisk on him, where we uh, found that he had a razor hidden between his uh, butt cheeks." Resp. Ex. G, p. 25.

Upon the alert, the Petitioner was escorted to the hospital wing and advised that he would be strip-frisked. Directive #4910(F) defines "probable cause" as the following:

> "1. Where an Officer believes an inmate is hiding contraband on his or her body or in an anal, genital, or other body cavities, the Officer must report this to a Sergeant or higher ranking Officer to secure permission to conduct a strip frisk.
> 2. A Sergeant or higher ranking Officer has 'probable cause' when he or she has information that would lead a reasonable person who possesses the same expertise as the official to believe under the circumstances that the inmate is hiding contraband on his or her body or in the anal, genital, or other body cavity area. Mere suspicion or belief, unsupported by articulable fact, is insufficient." Res. Ex. K.

In this instance, the metal detector showed three stars which alerted Correction Officer Tucker to the possibility of contraband and he directed the Petitioner to the BOSS chair. The BOSS chair alerted the officer twice that there was indeed contraband. Clearly, under these circumstances, there was probable cause for the strip-frisk. *See, People v. Pagan*, 304 AD2d 980.

Petitioner argues that only the Correction Officer conducting the search, herein Officer Tucker, and the Sergeant or higher rank, herein Sergeant Hartman, were allowed to be present during the strip-frisk. Insofar as Correction Officer Duffina was also present, the Petitioner argues that the results of the strip-frisk are invalid. The Court disagrees.

> "Not all administrative violations invalidate agency actions, and the proper remedy for an administrative violation must take into account the purpose of the regulation that was violated. Here, a plain reading of former Directive No. 4910 (V) (C) (2) establishes that the provision is intended to promote institutional safety rather than to protect an inmate's interests in regard to the search of his or her cell. Accordingly, we perceive no reason that petitioner would automatically be entitled to suppression of any evidence recovered from a search due to a violation of a directive that was not intended

to protect his rights in regard to that search (*internal citations omitted*)." *Tenney v. Annucci*, 156 AD3d 1108, 1109.

In this matter, the Respondent argues that the Petitioner admitted to Sergeant Hartman that he had contraband and, while this is not a specified reason for additional officers in the room during the strip-frisk, the Petitioner has not shown how he was prejudiced by the presence of Correction Officer Duffina either. Clearly, the intention of the limited number of officers that are to be present during a strip-frisk is to prevent an abuse of the inmate's privacy. In this matter, the Petitioner did not argue that he was harassed during the strip-risk nor did he even raise this issue during the hearing.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby **ADJUDGED,** that the petition is otherwise dismissed.

Dated: September 27, 2018 at
Lake Pleasant, New York.

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S. Peter Feldstein
Acting Supreme Court Justice