SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: PART 23

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THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. CHRISTOPHER TAYLOR-KIMBLE, B&C #241-19-01524;
Warrant #755835; NYSID #07988600-R;

Petitioner, ORDER

-against- Writ of Habeas Corpus
Index No. 260378-19

WARDEN, Vernon C. Bain Center, and
NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION,

Respondents.

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David L. Lewis, AJSC.:

Petitioner, Christopher Taylor-Kimble, moves by way of a writ of habeas corpus for an order vacating his parole revocation warrant and restoring him to parole supervision based on his claim that the New York State Department of Corrections and Community Supervision (hereinafter "DOCCS") is illegally refusing to honor its plea deal. For the reasons set forth below, petitioner's application is granted to the extent that DOCCS is ordered to adhere to the initial plea offer and in keeping with such immediately transfer petitioner for his participation in the designated drug treatment program.

Petitioner was convicted in February 2013 of attempted burglary in the second degree and sentenced to a determinate sentence of four years incarceration, plus one year and ten months of post-release supervision. Petitioner was released to parole supervision on March 29, 2018, and agreed to adhere to certain conditions imposed by DOCCS. (Respondents' Exhibit A).

Petitioner was declared delinquent on October 19, 2018, and charged with violating six conditions of his release. (Respondents' Exhibits B and C). Specifically, petitioner was charged with failures to report to his assigned parole officer; improperly changing his residence; and the failure to complete treatment programs for mental health, substance abuse and anger management. (Respondents' Exhibit B). A parole warrant was issued against petitioner on November 8, 2018, and lodged on April 11, 2019. (Respondents' Exhibit D). Petitioner was served with a copy of the Violation of Release Report and Notice of Violation (Respondents' Exhibit E) and elected to waive his right to a preliminary parole revocation hearing.

The final hearing was held on April 23, 2019, before Administrative Law Judge ("ALJ") Mary Ross; respondents DOCCS were represented by Parole Revocation Specialist ("PRS") Toni Williams, and petitioner was represented by counsel from The Legal Aid Society. (Respondents' Exhibits F and G). Counsel requested a revoke and restore to parole supervision at an outpatient treatment program. A 12 month time assessment with a 90 day DOCCS treatment alternative was proposed by PRS Williams. ALJ Ross indicated that she was willing to impose the 12 month/90 day treatment alternative proposed by PRS Williams. (Respondents' Exhibit F). This plea offer was discussed between counsel and petitioner, and petitioner was given an opportunity to adjourn the case to consider the offer. Petitioner, who voiced his frustration with the process decided to enter the plea on that date in order to expedite his entry into the treatment program. (Id.). ALJ Ross read the charge aloud, *viz.*, failing to make a designated office report; petitioner admitted he violated the charge and was apprised of the sanction which would be imposed. ALJ Ross accepted the plea and imposed the agreed upon sanction. (Id.).

Immediately after the entry and acceptance of his plea, petitioner had an outburst which escalated to the point of involving an altercation with corrections officers. During this time petitioner, who at times was sobbing and talking about his inability to be with his family, was airing his frustrations and voicing how unfair the

process was, or as respondents now so apply put it was "unburdening himself of his feelings." (Respondents' Affirmation in Opposition, para. 16, pg. 4). Petitioner's scattered monologue was rife with profanity. The ALJ described it as petitioner going "beserk." (Respondents' Exhibit F). An unusual incident report was filed by PRS Williams on April 23. (Respondents' Exhibit H). A written decision, dated April 24, reflecting the plea and imposed sanction was issued by ALJ Ross. (Petitioner's Exhibit B; Respondents' Exhibit M).

Counsel received ALJ Ross's written decision on April 26, 2019. However, unbeknownst to counsel, on April 24, ALJ Ross emailed DOCCS personnel instructing them to "discard the decision I sent on the [petitioner]. I may need to revise it." (Respondents' Exhibit N). Several hours later on April 24, Supervising Administrative Law Judge ("SALJ") O'Malley emailed ALJ Ross, PRS Williams, DOCCS personnel and counsel to "please schedule the case for a de novo hearing." (Respondents' Exhibit O). On April 26, ALJ Ross sent an email to SALJ O'Malley, counsel and DOCCS personnel recusing herself from the case "since my decision has been rescinded and my judgment put into question." (Respondents' Exhibit P). SALJ O'Malley responded to ALJ Ross in an email stating that inasmuch as she had listened to the audio of the hearing "...and discussed the case with you. In the conversation, I mentioned to you , as a matter of course, it is explained on the record a plea must be knowing, voluntary, and intelligent, and a plea cannot not (sic) be accepted unless that is the case. During the conversation you indicated to me you had reservations about the voluntariness of the plea. Therefore, I do no see the basis for you to say your judgment was questioned. Based on the conversation, I followed up with an unusual incident report form to be completed, and I ask that you submit it by the close of business today." (Respondents' Exhibit Q). ALJ Ross, in an email sent approximately one hour later stated, "I know I said I had reservations about the voluntariness of the plea but when I thought about it later and listened to the recording, I realized that he didn't really act out until the Corrections Officer came

in after the plea." (Respondents' Exhibit R). What followed was an email from the Director of The Parole Revocation Defense Unit of The Legal Aid Society, Lorraine McEvilley, to SALJ O'Malley and ALJ Ross[1] and DOCCS on April 26, objecting to the rescission of the decision and to the scheduling of a de novo hearing. Ms. McEvilley stated, in substance, that after reviewing the circumstances and consulting with the petitioner by phone that "there is absolutely no basis or legal reason to rescind ALJ's decision....[Petitioner] is requesting that his decision be implemented forthwith and that he be transferred to state DOCCS to have a 90 day DOCCS program made available to him...." (Respondents' Exhibit S). The Chief Administrative Law Judge, Rhonda Tomlinson, replied by email, "Did your review of the circumstances include listening to the hearing or reviewing the transcript? If not, I invite you to do both. A plea entered with protestations about fairness while audibly and visibly agitated are reasons for concern about the voluntariness of the plea...." (Respondents' Exhibit T). A final email from Lorraine McEvilley, in response, indicated that petitioner's counsel had no doubt that petitioner entered into the plea knowingly, voluntarily and intelligently with a full understanding of his options. Ms. McEvilley stressed that this was not only the opinion of petitioner's counsel but also of ALJ Ross who, unlike the supervising judge who was not present during any aspect of the hearing, was able to gauge petitioners demeanor and concluded under the circumstances that the plea was appropriate in all respects. (Respondents' Exhibit U).

On May 10, 2019, a supplementary violation of release report was filed which included three charges relating to petitioner's conduct at the April 23 final hearing. (Respondents' Exhibit V). A de novo final hearing was held on May 21, 2019. DOCCS was represented by Parole Violations Unit Chief Edward Del Rio and petitioner was represented by the same Legal Aid counsel had at the April hearing,

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[1]The email was also addressed to DOCCS personnel and the Chief Administrative Law Judge Rhonda Tomlinson.

as well as a supervisor from that office. Counsel objected to the hearing indicating that petitioner had entered a valid plea on April 23, and that any protestations had by petitioner that the plea or process was unfair was not sufficient to support a finding that the plea was otherwise not knowingly or voluntarily entered into. Counsel also argued that there was no authority for the SALJ who was not even present in the hearing room to make a determination as to the voluntariness of the entry of the plea. (Respondents' Exhibit W). A new plea offer was then extended to petitioner and the case was adjourned to June 25, 2019, for petitioner to contemplate the plea offer. (Respondents' Exhibit W). On June 25, 2019, petitioner pleaded guilty and the sanction imposed was incarceration until the maximum expiration of his sentence, that being February 2020. (Respondents' Affirmation in Opposition, para. 40, pg. 15; Petitioner's Affirmation in Reply to Opposition, pg. 12, footnote 1).

Petitioner now argues that respondents' refusal to honor the April 23 plea deal is a violation of due process. Respondents contend that DOCCS has the authority to revoke its decisions, and that regardless the plea was not sufficiently voluntary. Initially, this Court notes that nothing in the Executive Law explicitly addresses revocation of the withdrawal of a parole revocation decision, and respondents so concede. Respondents' position that pursuant to 9 NYCRR 8000.4, the "board" may revoke any decisions or determinations belies the fact that "board" is defined as the State Board of Parole in the Executive Department. However, here the board did not take the plea and did not vacate the plea. Respondents' reliance on 9 NYCRR 8000.4 for authority for the unilateral recision of the plea is thus misplaced.

Not only is there a lack of authority for the rescission of the plea, there is no inherent authority for the recision of a plea. Indeed, to the contrary, absent a defendant's consent there is no statutory authority for a court to set aside a guilty plea on its own motion in the absence of fraud, deceit, trickery or illegality. *See Campbell v Pesce,* 60 NY2d 165 (1983); *Crooms v Corriero*, 206 AD2d 275 (1st Dept. 1994). The same notions of due process and fairness apply with equal force

in the taking of a plea in the context of a parole violation.

Here, there is no claim made by respondents that the plea was a fraud or in some other way illegally obtained. Rather, what respondents contend is that the plea was not voluntary as is now claimed to be evidenced by petitioner's outburst. Contrary to respondents' argument, petitioner's outburst was concomitant to the sentence not the plea. ALJ Ross implicitly endorsed, even in retrospect, the taking of the plea by subsequently issuing her written decision memorializing the plea and sanction. Further support for a finding that the plea was voluntarily entered into can explicitly be found in ALJ Ross's email to SALJ O'Malley wherein she stated that,"I know I said I had reservations about the voluntariness of the plea but when I thought about it later and listened to the recording, I realized that he didn't really act out until the Correction Officers came in after the plea." (Respondents' Exhibit R). To now bootstrap petitioner's behavior to the voluntariness of the plea is disingenuous at best given the circumstances surrounding the plea and sanction, and the observations of the ALJ Ross who elicited the plea. Petitioner's behavior cast no doubt on the voluntariness of the taking of the plea but rather on his understandable unhappiness over the impose sanctioned. There is, however, no support for a finding that the plea was unknowing or otherwise involuntary, nor does petitioner make this claim, a claim that belongs to petitioner and not DOCCS.

While this Court concludes that the vacatur of the plea and the ordering of the de novo hearing was without authority, this Court finds that petitioner is not entitled to be restored to parole supervision. Indeed, where the primary imposition is a time assessment which can be alternatively satisfied by participation and completion in a drug program, due process does not mandate release after the expiration of the 90 days it would take to complete the drug program. This was not the situation where petitioner was revoked and restored to parole for his mandatory participation in a program. Here, petitioner would only be revoked and restored to parole status upon his completion of the program.

Although this Court denies the release of petitioner, DOCCS is ordered to immediately transfer petitioner to the designated drug treatment program. *See People ex rel. Salas v.Warden*, 16 Misc. 3d 1110(a)(Sup. Ct. Bronx Co. 2007).

Accordingly, the writ is sustained to the extent that it is ordered that respondents transfer petitioner to DOCCS treatment program forthwith.

This constitutes the decision and order of the Court.

Dated: July 12, 2019
Bronx, New York

David L. Lewis, AJSC