

**People v Warden, Eric M. Taylor Ctr.**

2021 NY Slip Op 33651(U)

June 21, 2021

Supreme Court, Bronx County

Docket Number: Ind. No. 260270-19

Judge: April A. Newbauer

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

**THE PEOPLE OF THE STATE OF NEW YORK  
ex rel. ANGELO RIVERA,**

**-against-**

**DECISION & ORDER**

**Ind. # 260270-19**

**WARDEN, ERIC M. TAYLOR CENTER  
& NEW YORK STATE CORRECTIONAL  
DEPARTMENT & COMMUNITY SUPERVISION,**

**Respondents.**

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Relator Angelo Rivera ("Rivera") petitions for a writ of *habeas corpus*<sup>1</sup> to vacate the parole violation warrant against him, claiming that his constitutional and statutory rights were violated because parole warrant #803941 was not lodged and executed with due diligence. The respondents contend that Rivera's claims are without merit as the warrant was issued and executed with due diligence awaiting New York Police Department action. For the reasons stated below, the parole warrant # 803941 is dismissed and Rivera's request to be restored to parole status is granted, provided that he is not presently incarcerated on the basis of another warrant or commitment not predicated on the violation of parole.

**Facts**

On December 11, 2009, Petitioner Rivera was sentenced to a determinate sentence of seven years' incarceration and five years' post release supervision for his conviction of

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<sup>1</sup> The court reviewed the following papers: Writ of Habeas Corpus and Verified Petition for a Writ of Habeas Corpus from Rufus Urion, Esq. with numerous unlabeled exhibits attached; Affirmation in opposition to a verified amended petition for a writ of Habeas Corpus by Assistant Attorney General David Cheng with Exhibits A-R; Affirmation in Reply to opposition to writ of habeas corpus by Kerry Elgarten, Esq. with Exhibits A.

attempted robbery in the second degree in New York County. On August 26, 2017, Rivera was released to parole supervision. Rivera agreed to adhere to certain conditions that the Department of Corrections and Community Supervision (“DOCCS”) imposed upon his release with the understanding that his failure to abide by these conditions would result in revocation of his parole. The maximum post release supervision expiration date is August 26, 2020.

On November 15, 2017, petitioner’s parole officer was informed by New York Police Department detectives that they had issued an I-card for the petitioner regarding an incident that took place on November 6, 2017 and were looking to take the petitioner into custody. The detectives also informed the parole officer that petitioner’s sister had also been arrested for acting with the petitioner on November 6, 2017. The parole officer contacted the petitioner and directed him to contact the detectives. The petitioner agreed to meet with the detectives on November 20, 2017 but the petitioner failed to show and disconnected his cell phone. The petitioner did not appear at his next scheduled report with his parole officer on November 27, 2017 and any date thereafter and was not present at his approved residence during a home visit.

On November 29, 2017, DOCCS issued a warrant for the petitioner charging him with failure to report to parole on November 27, 2017 and any date thereafter as directed by his parole officer and changing his approved residence without getting permission and notifying his parole officer. No charges for the November 6, 2017 were included in this violation of release report. On December 1, 2017, warrant number 761173 was issued with a delinquency date of November 27, 2017.

On December 17, 2017, petitioner was arrested on unrelated charges involving providing false identity to police officers who were responding to a domestic violence incident. On December 18, 2017, a parole violation warrant # 761173 was lodged and petitioner was served with a copy of the Violation of Release Report and Notice of Violation. Petitioner

refused to sign and a preliminary hearing was scheduled for December 21, 2017. On December 21, 2017, the preliminary hearing was held and resulted in a finding of probable cause that petitioner violated conditions of his parole. At the preliminary hearing, the petitioner agreed to plead guilty to the failure to report charge.

On December 27, 2017, petitioner was charged with violating additional charges of his conditions of parole involving the December 17, 2017 incident. The matter was adjourned for several dates and on April 16, 2018, petitioner pleaded guilty to providing false identities to police officer and was assessed twelve months of re-incarceration or in the alternative by successful completion of a 90-day drug treatment program.

Petitioner was not released back to parole supervision until December 18, 2018. The very next day, the New York City Police Department contacted petitioner's parole officer and informed him that the petitioner was wanted for assault concerning the November 6, 2017 incident. Petitioner reported to his parole officer on December 19, 2018. Then, on December 21, 2018, the decision was made to hold the petitioner for the detectives at his next parole report. On December 24, 2018, petitioner reported to his parole officer as scheduled. His parole officer contacted the NYPD but no one was available to take the petitioner into custody. The petitioner was instructed to report to his parole officer on January 7, 2019.

On January 7, 2019, the petitioner was taken into custody by the New York City Police Department for the incident in November of 2017. On January 9, 2018, the petitioner reported to parole as directed within 24 hours of his release from NYPD custody. He informed his parole officer that he did not know that he was wanted for the 2017 assault incident and that criminal charges had been filed against him and his next appearance date was on January 11, 2019. On January 14, 2019, petitioner reported to parole and explained that the initial I-card was issued

while he previously supervised in Queens that his parole was subsequently revoked for failing to report. Petitioner stated his next court date was July 26, 2019.

On January 28, 2019, the petitioner made his office report and as taken into custody on the violation of parole. On January 28, 2019, DOCCS issued and lodged a warrant (number 803941) for the petitioner charging him with five charges of violating rule #8 of the conditions governing his release for the incident that occurred on November 6, 2017 in Kings County, where he is alleged to have acted in concert with his sister to assault the complainant. The delinquency date was November 6, 2017. In addition, on January 28, 2019, petitioner was served with a copy of the Violation of Release Report and Notice of Violation. Petitioner acknowledged service, and a preliminary hearing was scheduled for February 8, 2019 and a final hearing was initially scheduled for February 21, 2019.

On February 8, 2019, the parole officer sought an adjournment due to the unavailability of the complainant and the hearing was adjourned. On February 11, 2019, the preliminary hearing was conducted. At the conclusion of the hearing, the hearing officer found probable cause that Rivera had violated charge #1, rule #8 of the conditions of his parole by holding the complainant who testified at the hearing against a fence while another female cut her face with a sharp instrument. The matter was adjourned for a final hearing. After several adjournments, Rivera elected to have his final hearing placed on the "K Calendar" for an indefinite adjournment because he has a pending criminal matter<sup>2</sup> and is awaiting a resolution.

On April 15, 2019, petitioner filed the writ of habeas corpus claiming that DOCCS did not exercise due diligence in executing the parole warrant which constituted a denial of due

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<sup>2</sup> The criminal matter currently pending in Kings County where the defendant is currently charged with assault with intent to disfigure/dismember and gang assault in the second degree. On the pending criminal matter, bail set in the amount of \$3,500 cash. The next appearance date is July 26, 2019.

process. On June 17, 2019, the respondent filed an affirmation in opposition claiming that the petitioner's claims are without merit and that the respondent acted with sufficient diligence in issuing and executing the parole warrant.

## **FINDINGS**

Although there is no statutory or regulatory period within which a parole warrant must be lodged and executed after DOCCS learns of a new arrest or parole violation, in the interest of fundamental fairness, a parolee should be granted the benefit of the prompt disposition of charges against him. *People ex rel Flores v Dalsheim*, 66 AD2d 381 (2<sup>nd</sup> Dept 1979); *see also People ex rel Washington v Pagan*, Index No. 75019/03 (Bronx Sup Ct. Sept. 9, 2003)(Boyle, J.). Whether a disposition is prompt is governed by several factors including the length of the delay, the reason for the delay and whether the petitioner contributed to the delay. *Id.* at 388; *see also People ex rel Richman v Pagan*, 2003 NY Slip Op 51258, 2003 WL 22134908 (Sup Ct Bx Co 2003). Absent "gross disinterest," the issuance and execution of the parole warrant is a matter within DOCCS's discretion and not subject to review. *See ex rel Cross V New York State Div of Parole*, 261 AD2d 108 (1<sup>st</sup> Dept 1999); *People ex rel Merritt v New York State Div of Parole*, 257 AD2d 435 (1<sup>st</sup> Dept 1999). Applying these principles to the facts of this writ, the court finds that the petitioner was denied due process by the delay of the lodging and execution of the warrant on January 28, 2019 for charges arising from the incident that occurred on November 6, 2007.

The court recognizes that the DOCCS is afforded a reasonable time to investigate new criminal charges, but the subsequent period of delay was not reasonable under these circumstances. There is no specified time in which to bring charges but in this instance, DOCCS appears to have intentionally held the charges in abeyance while issuing and executing another

warrant against the petitioner. In the face of petitioner's fervent allegations to this effect, DOCC's silence is deafening.

On November 15, 2017, DOCCS was aware of the November 6, 2017 felony assault allegations against the petitioner and that the New York City Police Department had opened an I-card for the petitioner. The parole officer contacted the petitioner and directed him to contact a specific detective who was assigned to the case. The petitioner did not meet with the detective as agreed and failed to report to his scheduled date with his parole officer on November 27, 2017 and thereafter. The petitioner disconnected his phone and moved from his approved residence without notifying the parole officer. When the parole officer submitted the violation of parole paperwork for warrant # 761173, the only charges listed was failing to report to parole and changing his approved residence without consent or knowledge of his parole officer. There was no mention of the 2016 assault charges.

The alleged incident and arrest occurred more than one year before the execution of the new warrant, #803941, and DOCCS had known about the allegations for that entire period that the petitioner was incarcerated. Even when DOCCS filed a supplemental absconder warrant, they did not include charges for the November 6, 2017 incident. All of the events alleged in the charges on the 2019 warrant pre-date the events of the 2017 warrant. At no time did DOCCS file a delinquency pending court action. Instead, DOCCS waited one year and two months for the petitioner to be released before issuing and executing a warrant seeking a delinquency date November 6, 2017 which predated petitioner's release from a 12-month time assessment by more than a year. Here, his parole officer knew about the petitioner's whereabouts as he was incarcerated for a 12-month time assessment and readily available to parole. *See People ex rel Stracci v Warden*, 72 AD2d 393 (1<sup>st</sup> Dept 1980).

DOCCS has not provided a legitimate reason for this delay. Although the petitioner was not arrested by the NYPD officers and charged with a crime from November 7, 2017 until January 7, 2019, it does not excuse DOCCS's failure to promptly file a parole violation charging the petitioner with criminal conduct they were made aware of within 10 days of its occurrence. In fact, the petitioner's parole officer was made aware the fact that the petitioner's sister, who was the co-defendant to the November 6, 2017 assault, was arrested for the felony assault charges prior to November 15, 2017 and plead guilty. These facts demonstrate that the New York Police Department had contact with the complainant who cooperated in bringing charges against petitioner's sister. Yet, the first time the parole officer ever attempted to reach out the complainant from the November 2017 assault regarding petitioner's alleged involvement was on January 25, 2019. *See* Affirmation in opposition, Ex. J, p. 4.

The failure of the NYPD to act upon the allegations with respect to the petitioner does not excuse DOCCS' obligation to act promptly when advised that the petitioner violated a condition of parole. DOCCS choose to allow the petitioner to serve twelve months in jail before deciding to prosecute the charges it held in abeyance since before the first warrant was issued. The court recognizes that DOCCS typically does not issue and execute a warrant until after conducting an investigation fo the criminal charges and/or the parolee's criminal case has been resolved. However, the timing of the investigation in this case is suspect both as to the actions of the NYPD officers and DOCCS. DOCCS was aware of the pending allegations, the name of the complainant and was also aware of the petitioner's location. It was not until the day after petitioner was released from custody did the NYPD and DOCCS decide to act on the November 6, 2017 allegations. Unlike a number of cases that the respondent cites in support of the proposition that they exercised due diligence, the petitioner here in no way contributed to the delay or impede the actions of DOCCS.




In this case, the court finds that the petitioner was denied his due process rights by DOCCS's failure to exercise due diligence in issuing and executing the 2019 parole warrant. *See People ex rel Jackson v New York State Div of Parole*, 211 AD2d 585 (1<sup>st</sup> Dept 1995); *see also People ex rel Burt v Warden*, 18 Misc3d 869, 872 (Sup Ct Bx Co Jan 3, 2008)(Price, J.). The petitioner has established that DOCCS manifested a gross disinterest in retaking him and that there was an unwarranted delay on the part of the respondent. This practice appears to be intentional and a manipulative use of the charging and warrant process, which must always meet minimum standards of due process.

The petitioner has been unreasonably prejudiced and injured by this delay. Had the petitioner not adjourned the matter indefinitely to the K-calendar pending the outcome of the criminal case and the administrative law judge conduct a final hearing and sustain any one of the five charges in the violation of regulations report, the petitioner would lose credit for the entire 12-month time assessment that he served from December 18, 2017 to December 18, 2018 as well as the time after his release that he continue to report to parole supervision due to the delinquency date of November 6, 2017 of the alleged assault charges.

The parole warrant is vacated and petitioner is ordered to be released and restored to parole supervision provided that no other valid hold exists. This decision shall constitute the order of this court.

**E N T E R**

Dated: Bronx, New York  
June 21, 2019

  
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April A. Newbauer  
Acting Supreme Court Justice