September 2021

Decision in Art. 78 proceeding - Santiago, John (2010-07-22)

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

_____X

In the Matter of the Application of
JOHN SANTIAGO, #07-A-1732,
Petitioner,

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

DECISION AND ORDER
RJI #16-1-2008-0735.218
INDEX # 2008-1957
ORI #NY016015J

-against-

GEORGE B. ALEXANDER, Chairman,
NYS Division of Parole,
Respondent.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of John Santiago, verified on December 23, 2008, and filed in the Franklin County Clerk's office on December 29, 2008. Petitioner, who is now an inmate at the Auburn Correctional Facility, challenged the October 31/November 1, 2007 determination denying him parole, but only to the extent it was directed that he be held for an additional 24 months with a scheduled re-appearance in November of 2009. In this regard petitioner sought a Court order directing respondent to conduct " . . . a final revocation hearing at the conclusion of petitioner's intervening [2007] sentence, in accordance with [Executive Law §259-i(3)(d)(iii)] . . ."

By Decision and Judgment dated February 24, 2010 the petition was dismissed. Petitioner's motion for leave to reargue with respect to the Decision and Judgment of February 24, 2010, including his memorandum of law in support thereof, was filed in the Franklin County Clerk's office on April 5, 2010. Although respondent requested, and received, an extension of time to submit papers in response to petitioner's motion, the Court has no record of having received opposing papers.

On March 18, 1992, petitioner was sentenced in Supreme Court, Bronx County, to a controlling indeterminate sentence of 8 to 24 years upon his convictions of the crimes of Manslaughter 1°, Criminal Possession of a Weapon 2° and Assault 2° . He was released from DOCS custody to parole supervision on September 6, 2000, but arrested on July 8, 2006, in connection with new criminal charges. On March 22, 2007, petitioner was sentenced in Rockland County Court, as a second felony offender, to an indeterminate sentence of 1 ½ to 3 years upon his conviction of the crime of Attempted Criminal Possession of a Forged Instrument 2°. There is nothing in the record to suggest that petitioner's parole was revoked following a final parole revocation hearing. Rather, petitioner's parole was revoked by operation of law as a result of his March 22, 2007 conviction and sentencing for a felony committed while at liberty under parole supervision. *See* Executive Law §259-i(3)(d)(iii).

Petitioner was received back into DOCS custody on March 29, 2007, certified as entitled to 264 days of jail time credit. At that time DOCS officials determined petitioner still owed 8 years, 2 months and 20 days against the undischarged maximum term of the 1992 indeterminate sentence. That undischarged term was aggregated with the maximum term of petitioner's 2007 indeterminate sentence pursuant to Penal Law §70.30(1)(b). *See People ex rel Gill v. Greene*, 12 NY3d 1. Accordingly, the maximum expiration, conditional release and parole eligibility dates with respect to petitioner's multiple sentences were calculated as September 24, 2017, December 27, 2015, and January 4, 2008, respectively.

On October 31, 2007, petitioner appeared before a three-member Parole Board in anticipation of his January 4, 2008 parole eligibility date. At the conclusion of the October 31, 2007 hearing parole was denied and it was directed that petitioner be held for

an additional 24 months with his next Parole Board appearance scheduled for November 2009.

Petitioner's application for relief in this proceeding was ultimately premised upon the assertion that his aggregate maximum term of imprisonment could be broken down into discrete segments corresponding to the maximum term of each underlying, consecutive indeterminate sentence. In this regard petitioner asserted that he would not commence serving the 8 years, 2 months and 20 days still owing against the 24-year maximum term of his 1992 indeterminate sentence until he first completed serving the 3-year maximum term of his consecutive, 2007 indeterminate sentence . Assuming the viability of this foundation argument, petitioner went on to assert, in effect, that although his October 31, 2007 Parole Board appearance was properly scheduled to coincide with the expiration of the 1½-year minimum period of incarceration associated with his 2007 indeterminate sentence, his next scheduled appearance following the 24-month hold would not occur until November of 2009, approximately ". . . 6 months over the legal requirements of the new [2007] sentence and 6 months into the un-discharged term [of the 1992 sentence]." According to the petitioner, the respondent would not have statutory authority to consider him for discretionary parole release in November of 2009 ". . . because the fact of the matter is that the petitioner herein would have completed the legal requirements of the new [2007] sentence in accordance with [Executive Law §] 259-[i](3)(d)(iii) and would be detained on the sole premises of a parole violation."(Emphasis in original). Petitioner went on to argue that when he completed service of the 2007 indeterminate sentence- presumably, according to his reasoning, on July 4, 2009 - his then continuing detention in DOCS custody would be based solely on the underlying parole violation with his custodial status subject to review at that time under the provisions of Executive Law §259-i(3)(f)(x).

Petitioner's request for relief in this proceeding was premised not only upon the statutory arguments, outlined above, but also upon an equal protection claim that parolees convicted/sentenced in other jurisdictions are entitled to final revocation hearings/custodial dispositions upon the expiration of their intervening, out-of-state sentences pursuant to Executive Law §259-i(3)(f)(x) whereas parole violators, like himself, convicted/sentenced in New York State only receive ongoing discretionary parole release consideration pursuant to Executive Law §§259-i(3)(d)(iii) and 259-i(2).

"A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court . . ." CPLR §2221(d)(2). Such a motion is directed to the sound discretion of the Court. *See Loris v. S&W Realty Corp*, 16 AD3d 729. Despite the statutory nomenclature, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted . . ." *William P. Pahl Equipment Corp v. Kassis*, 182 AD2d 22, 27 (citations omitted).

In petitioner's motion for leave to reargue he initially asserts, in effect, that the Court misapprehended the provisions of Executive Law §259-i(3)(d)(iii) and, in doing so, failed to effectuate the appropriate legislative intent. The statutory provision in question provides, in relevant part, that "when a . . . parolee . . . has been convicted of a new felony committed while under such [parole] supervision and a new indeterminate . . . sentence has been imposed, the [parole] board's rules shall provide for a final declaration of delinquency. The inmate shall then be notified in writing that his release has been revoked on the basis of the new conviction . . . The inmate's next appearance before the board shall be governed by the legal requirements of said new indeterminate . . . sentence . . ." Executive Law §259-i(3)(d)(iii), the Court notes, was added by L 1984, ch 238, approved and effective as of June 19, 1984. Although Executive Law §259-i(3)(d)(iii)

has been amended since 1984, its provisions, insofar as relevant to this proceeding, have not changed since enactment.

In its Decision and Judgment of February 24, 2008 the Court, citing *People v. Buss*, 11 NY3d 553, rejected petitioner's argument that in July of 2009 he completed serving the 3-year maximum term of his 2007 indeterminate sentence and commenced serving the 8 years, 2 months and 20 days remaining against the undischarged maximum term of his 1992 indeterminate sentence. In this regard the Court found that "[w]here, as here, an individual is subject to multiple indeterminate sentences of imprisonment, running consecutively, the respective minimum periods and maximum terms are added pursuant to Penal Law §70.30(1)(b) to yield a single, aggregate indeterminate sentence. An inmate serving such a single, aggregate indeterminate sentence, moreover, remains subject to all of the component sentences for the duration of the aggregate maximum term of imprisonment."

Although petitioner's motion papers express concern with respect to perceived implications of the Court's reliance on *Buss*, the Court finds no basis to conclude that it misapprehended the import of *Buss*. In addition, the Court finds nothing in the statutory language of Executive Law §259-i(3)(d)(iii) to suggest that an individual, such as petitioner, convicted of a new felony committed while under parole supervision and sentenced to a new indeterminate sentence, must be afforded a parole revocation hearing after "completing" the new sentence so that a delinquent time assessment can be imposed in connection with the "remaining" undischarged term of such individual's initial sentence. As noted by the Court of Appeals in *People ex rel Harris v. Sullivan*, 74 NY2d 305, where a parolee is convicted of a new felony and sentenced in New York " . . . a final parole revocation hearing would be a vain gesture because no fact finding by the Board of Parole would be necessary to ascertain that the parolee has in fact violated the

conditions of his parole. The court of conviction and sentence would have already undisputably established that reality. Additionally, when a parolee is convicted of a New York felony and a new indeterminate sentence is imposed, a final parole revocation hearing is not needed to fix the parolee's reappearance before the Board because the violator's reappearance date is automatically fixed by law at the time of sentencing for the new felony." *Id.* At 310 (citations omitted).

The petitioner's references to *Sparago v. New York State Board of Parole*, 71 NY2d 943 *and Maguire v. New York State Division of Parole*, 304 AD2d 1003, do not persuade the Court that a contrary conclusion is warranted. The petitioners in each of those cases were convicted and sentenced in New York in connection with new felonies committed while under parole supervision. In *Sparago*, however, where the administrative and/or statutory revocation of parole was vacated by stipulation, the Court confronted a situation where, despite Mr. Sparago's conviction and sentencing in connection with new charges, his release on parole from the original charges was never considered to have been effectively revoked. The *Maguire* petitioner, who was originally convicted/sentenced in 1985, was convicted in 1992 of a new crime committed while under parole supervision. Sentencing calculations with respect to the 1992 conviction, however, were erroneously made without considering the unexpired 1985 sentence. Mr. Maguire was released to parole supervision for a second time in 1997 but was subsequently convicted/sentenced in connection with an additional crime committed while under parole supervision. It was not until that time that the error in calculating the release dates for Mr. Maguire's 1992 conviction was discovered. Although the Appellate Division, Third Department noted that Mr. Maguire's parole from his 1985 conviction was revoked by operation of law when he was convicted/sentenced in 1992 (Executive Law §259-i(3)(d)(iii)), no delinquency was ever established for such parole violation. Thus the *Maguire* court faced a situation,

similar to that faced by the *Sparago* court, where a petitioner was convicted/sentenced in New York for a felony committed while under parole supervision but there was an underlying flaw in the parole revocation process. In the case at bar, however, no such flaw is apparent. The record herein contains no indication that the statutory revocation of petitioner's parole following his 2007 conviction/sentencing was vacated by stipulation or otherwise. In addition, on June 1, 2007, after petitioner's return to DOCS custody, he was declared delinquent as of July 8, 2006 - the day that the offense underlying his 2007 conviction was committed (Exhibit J, annexed to the petition). *See Jarrell v. Rodriguez*, 167 AD2d 776.

In his motion for leave to reargue petitioner also asserts, in effect, that this Court overlooked a matter of law in failing to consider the impact of the 1979 decision of the Court of Appeals in *Lindsay v. New York State Board of Parole*, 48 NY2d 883, *rev'g* 63 AD2d 997. Mr. Lindsay allegedly violated the conditions of parole release in 1973 but no revocation hearing had been conducted as of the 1977 commencement of his CPLR Article 78 proceeding seeking to vacate the four-year-old parole violation charges. A "parole eligibility hearing" had been conducted in 1977 in conjunction with a new conviction.[1] The Court of Appeals in *Lindsay* reversed the Appellate Division, Second Department, finding that the conduct of the parole eligibility hearing did not render academic the failure to hold a final parole revocation hearing. According to the Court of Appeals, "[d]ue to its different nature and scope, the eligibility hearing could not serve as a substitute for the final revocation hearing." 48 NY2d 883, 884.

Petitioner appears to argue that in the Decision and Judgment of February 24, 2010 this Court permitted the October/November 2007 discretionary parole denial

[1] None of the pending parole violation charges, however, alleged the commission of a new crime. 63 AD2d 997.

determination to serve as a substitute for a final parole revocation hearing, in contravention of *Lindsay*. This argument, however, fails to take into consideration the fact that *Lindsay* was decided prior to the 1984 enactment of Executive Law §259-i(3)(d)(iii). The Court of Appeals was thus confronted with a situation where Mr. Lindsay's parole had not been revoked prior to discretionary parole release consideration and it rejected the argument that such discretionary consideration could serve as a substitute for a final parole revocation hearing. In the case at bar, however, petitioner's parole was revoked by operation of law (Executive Law §259-i(3)(d)(iii)) on March 22, 2007 when he was convicted of a new felony committed while under parole supervision and a new indeterminate sentence of imprisonment was imposed. With his parole revoked by operation of law, petitioner appeared before the Parole Board on October 31, 2007 for discretionary release consideration. The timing of that appearance was governed by the legal requirements of petitioner's March 22, 2007 sentence in accordance with the provisions of Executive Law §259-i(3)(d)(iii). *See People ex rel Harris v. Sullivan*, 74 NY2d 305 at 310. The Court therefore finds that under the facts and circumstances of this case the enactment of Executive Law §259-i(3)(d)(iii) has rendered *Lindsay* irrelevant.

Finally, the Court finds no basis to conclude that it overlooked or misapprehended any matter of fact or law in connection with petitioner's equal protection claim. The distinctions associated with the re-release to parole supervision procedures applicable after the revocation of parole by operation of law, as opposed to such procedures applicable after the revocation of parole following a final hearing, were spelled out in detail on pages 9 through 12 of the court's Decision and Judgment of February 24, 2010. The issue of whether or not such distinctions constitute an equal protection violation appears to be one of first impression. Although petitioner obviously disagrees with this Court's February 24, 2010 decision rejecting his equal protection claim, a motion for leave

to reargue is not a proper procedural vehicle to simply rehash the issue. *See Bankers Trust Company of California, N.A. v. Payne*, 188 Misc 2d 726.

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

ORDERED, that petitioner's motion for leave to reargue is denied.

Dated: July 22, 2010 at
Indian Lake, New York.

_____
S. Peter Feldstein
Acting Supreme Court Justice