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STATE OF NEW YORK – BOARD OF PAROLE

Administrative Appeal Decision Notice

Inmate Name: SMITH, DARREN

Facility: Clinton Correctional Facility

NYSID No [redacted]

Appeal Control #: 06-148-18 R

Dept. DIN#: 92A1356

Appearances:
For the Board, the Appeals Unit
For Appellant:

Darren Smith (92A1356)
Clinton Correctional Facility
Route 374, Cook Street, Box 2001
Dannemora, New York 12929

Board Member(s) who participated in appealed from decision: None.

Decision appealed from: 5/2018 Revocation of Parole; 15-month hold.

Pleadings considered:
Brief on behalf of the Appellant submitted on: October 10, 2018.
Statement of the Appeals Unit's Findings and Recommendation.

Documents relied upon:
Notice of Violation, Violation of Release Report, Final Revocation Hearing Transcript, Parole Revocation Decision Notice.

Final Determination: The undersigned have determined that the decision from which this appeal was taken be and the same is hereby

Commissioner	___ Affirmed	___ Reversed for De Novo Hearing	___ Reversed - Violation Vacated
	___ Vacated for De Novo Review of Time Assessment Only		___ Modified to _____
Commissioner	✓ Affirmed	___ Reversed for De Novo Hearing	___ Reversed - Violation Vacated
	___ Vacated for De Novo Review of Time Assessment Only		___ Modified to _____
Commissioner	✓ Affirmed	___ Reversed for De Novo Hearing	___ Reversed - Violation Vacated
	___ Vacated for De Novo Review of Time Assessment Only		___ Modified to _____

If the Final Determination is at variance with Findings and Recommendation of Appeals Unit, written reasons for the Parole Board's determination must be annexed hereto.

This Final Determination, the related Statement of the Appeals Unit's Findings and the separate findings of the Parole Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 12/28/18 LB.

Distribution: Appeals Unit – Inmate - Inmate's Counsel - Inst. Parole File - Central File
P-2002(R) (May 2011)

STATE OF NEW YORK - BOARD OF PAROLE

STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

Inmate Name: SMITH, DARREN
Dept. DIN#: 92A1356
Page: 1

Facility: Clinton Correctional Facility
Appeal Control #: 06-148-18 R

Findings:

Appellant raises a number of issues in the brief he submitted in support of his administrative appeal initiated following the Administrative Law Judge's (hereafter "ALJ") decision to revoke Appellant's parole and impose a hold of 15 months. The Appeals Unit has reviewed each of the issues raised by Appellant, and finds that the issues have no merit.

Appellant is serving an aggregate term of imprisonment of 15 years to Life after having been convicted of multiple crimes, which are: Attempted Murder in the first degree; Criminal Use of a Firearm in the second degree; Criminal Possession of a Controlled Substance in the third degree; Criminal Possession of a Weapon in the second degree; and two counts of Criminal Possession of a Weapon in the third degree.

A contested final revocation hearing was held before the ALJ on May 15, 2018. Appellant raises the following issues in his brief: (1) the final revocation hearing was conducted in a manner that violated Appellant's Due Process rights under both the New York State Constitution and the Constitution of the United States; (2) Appellant was not served with his Notice of Violation of parole in a timely manner; (3) the ALJ should have permitted Appellant to substitute another attorney in place of the attorney assigned to him by the Legal Aid Society; (4) Appellant was denied the effective assistance of counsel in his defense of the alleged parole violations brought against him by the Department of Corrections and Community Supervision (hereafter "Department") ; (5) the final revocation hearing was not completed in a timely manner; and (6) the length of the time assessment imposed by the ALJ following the final revocation hearing should have been reduced due to mitigating circumstances.

As to Appellant's first issue, the only rights under the Due Process Clause at the Federal level held by an Appellant in a parole revocation proceeding include written notice of the claimed violations of parole, disclosure to the parolee of evidence against him, an opportunity to be heard in person and to present evidence, the right to confront and cross-examine witnesses, unless a hearing officer finds good cause for not allowing confrontation, a neutral and detached hearing body, and a written factfinding decision. Morrisey v. Brewer, 408 U.S. 471 (1972); People ex rel. Walker v. New York State Division of Parole, 98 A.D.2d 33 (2d Dept. 1983). This is partially because the parole revocation hearings are not designed to be adversarial, but rather, to be predictive and discretionary, in addition to any factfinding function. Gagnon v Scarpelli, 411 U.S. 778 (1973). In addition, States have wide latitude under the U.S. Constitution to structure parole revocation proceedings, and may make it an informal, nonadversarial, administrative process. Pennsylvania Board of Probation v. Scott, 524 U.S. 357 (1998). A parole revocation proceeding is not to be equated to a criminal prosecution, and should be flexible enough to consider letters,

affidavits, and other material that normally would not be admissible at a criminal trial. Morrissey v. Brewer, *supra*. The parolee received all of these due process benefits.

As for the New York State Due Process Clause, the statutory scheme enacted under section 259-i of the Executive Law assures that a parolee's due process rights are protected. People ex.rel. Matthews v. New York State Division of Parole, 58 N.Y.2d 196 (1983). There are no specific allegations raised by Appellant which demonstrate that the provisions of Executive Law §259-i were not complied with.

In response to Appellant's second issue, testimony at the final revocation hearing clearly established that Appellant absconded from the State of New York without the permission of his parole officer. A parole violation warrant (Warrant #783538) was issued on April 5, 2017, with a delinquency date of January 23, 2017. On November 15, 2017, Newark, New Jersey police took Appellant into custody and notified New York State parole of his arrest and custody in the State of New Jersey. New York State parole lodged the parole violation warrant on Appellant on November 15, 2017. Appellant was extradited to New York and was served with his Notice of Violation on November 24, 2017. He signed the Notice of Violation, and penned in "11-24-17" next to his signature on the Notice of Violation. The Notice of violation provided for a preliminary hearing to be held on or before December 1, 2017. A preliminary hearing was held on November 29, 2017, and the Preliminary Hearing Officer (hereafter "PHO") made a finding of probable cause as to Charge 3 as contained in the Violation of Release Report. "[W]hen the Division lodges a detainer against an alleged parole violator in an out-of-state facility, the 15-day period is not triggered until the individual has completed the out-of-state sentence and is available for extradition." People ex rel. Matthews v. New York State Division of Parole, 95 N.Y.2d 640, 645 (2001). Moreover, where the other jurisdiction has indicated that the parolee waived extradition but will not be available for pick up until a later date, even where there are no other holds, the warrant is not deemed executed until the later date specified by the holding state (and New York State authorities have no obligation to urge the other state to move the pick-up to an earlier date). People ex rel. Angel Reyes v. Warden, Index No. 250404/17 (Sup. Ct., Bronx Co., August 14, 2017) (Boyle, J.). The preliminary hearing was held in compliance with the provisions of Executive Law § 259-i(3)(c)(i) and the aforementioned legal authority, and any defects allegedly attending the preliminary revocation hearing were subsumed into the final hearing once it was completed, and have been rendered moot if not preserved on the record at the final revocation hearing. People ex rel. Allah v. Warden Rikers Island Correctional Facility, 22 A.D.3d 345 (1st Dept. 2005); People ex rel. Frett v. Warden Rikers Island, 25 A.D.3d 472 (1st Dept. 2006); Matter of Wescott v. New York State Board of Parole, 256 A.D.2d 1179 (4th Dept. 1998); People ex rel. Chavis v. McCoy, 236 A.D.2d 892 (4th Dept. 1997).

As to issues 3 and 4, there is no legal basis for permitting a parolee in a final revocation hearing to select an assigned counsel of his choice. As to ineffective assistance of counsel claims, counsel "is presumed to have been competent and the burden is on the [Appellant] to demonstrate upon the record the absence of meaningful adversarial representation". Matter of Jeffrey V., 82 N.Y.2d 121, 126 (1993); People v. Hall, 224 A.D.2d 710 (2d Dept. 1996). "[T]here is nothing to substantiate [Appellant's] contention that he was denied the effective assistance of counsel as the record discloses that he received meaningful representation". Matter of James v. Chairman of New York State Board of Parole, 106 A.D.3d 1300, 1300-1301 (3d Dept. 2013); see also, Matter of Rosa v. Fischer, 108 A.D.3d 1227 (4th Dept. 2013). An ineffective assistance of counsel claim requires more than a showing of disagreement with defense counsel's strategy or tactics. Ordmandy v. Travis, 300 A.D.2d 713 (3d Dept. 2002); People v. Guay, 72 A.D.3d 1201 (3d Dept. 2010). Appellant's hindsight disagreement with counsel's tactics do not render counsel's assistance ineffective. People ex rel. Williams v. Allard, 19 A.D.3d 890 (3d Dept. 2005). Furthermore, the right to effective assistance of counsel does not entitle Appellant to a flawless performance by his counsel. People v. Groves, 157 A.D.2d 970. Counsel for Appellant stated during the final hearing that his Office is handling revocation matters in court nearly every day. Therefore, we could expect that the attorneys at the Legal Aid Society are well versed in handling parole revocation matters. Also of note, counsel for Appellant was successful in bringing about the dismissal of Charge 2 contained in the Violation of Release Report. Finally, both counsel and Appellant stated during the final revocation hearing that they had several discussions during adjournment appearances of the final hearing, and on the telephone, prior to the final hearing held on May 15, 2018. There is, therefore, no basis to support issues 3 and 4 raised by Appellant in his brief.

As to issue 5, Appellant asserts that the final revocation hearing was not held in a timely manner. The final revocation hearing must be completed within 90 days from either the date probable cause is found at the preliminary hearing, or the date when the alleged violator waived his right to a preliminary hearing. 9 NYCRR §8005.17(a); §259-i (3)(f)(i). Where a parolee is incarcerated in another state, the 90-day provision does not begin to run until he is returned to New York. People ex rel. Chapman v. New York State Board of Parole, 166 Misc.2d 890 (1995). The Department was ready to begin the final hearing on January 3, 2018. Appellant's attorney asked for an adjournment at that time, and several other adjournments were requested by Appellant's attorney over the next two months. After considering the adjournments made at the request of Appellant or his counsel, the final hearing was commenced and completed in a timely manner. See Executive Law § 259-i (3)(f)(i); 9 NYCRR §8005.17(ac)(ii).

Finally, as to the length of the time assessment, Appellant is a Category 1 violator, so the ALJ must impose a minimum of 15 months as a time assessment, or a hold to maximum expiration

of the sentence, whichever is less, unless a mitigating reduction of up to three months is applied for a violator who accepts responsibility for his or her conduct, or unless there are exceptional mitigating circumstances. 9 N.Y.C.R.R. §8005.20(c)(1); People ex rel. Newland v. Travis, 185 Misc.2d 881 (Sup. Ct., Bronx Co., 2000). The time assessment imposed here was not excessive. See, e.g., Matter of Wilson v. Evans, 104 A.D.3d 1190 (4th Dept. 2013); Matter of Rosario v. New York State Division of Parole, 80 A.D.3d 1030 (3d Dept. 2011); Matter of Bell v. Lemons, 78 A.D.3d 1393 (3d Dept. 2010); Matter of Torres v. New York State Division of Parole, 58 A.D.3d 1039 (3d Dept. 2009). As to mitigating circumstances, it is the province of the ALJ to resolve credibility issues and to determine the relative weight to be accorded the evidence. Simpson v. Alexander, 63 A.D.3d 1495 (3d Dept. 2009); Matter of Santiago v. Dennison, 45 AD3d 994 (3d Dept. 2007). In doing so, we find no basis to support Appellant's conclusion that the time assessment should have been reduced due to mitigating circumstances.

Recommendation:

It is the recommendation of the Appeals Unit that the ALJ's decision be affirmed.