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Administrative Appeal Decision - Benitez, Pedro (2020-03-10)

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ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Benitez, Pedro

Facility: Collins CF

NYSID: [REDACTED]

Appeal Control No.: 07-001-19 R

DIN: 16-B-0881

Appearances: Stephen Underwood Esq.
1395 Union Road
West Seneca, New York 14224

Decision appealed: June 17, 2019 revocation of release and imposition of a time assessment of 12 months.



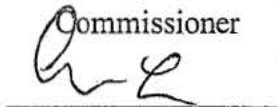
Final Revocation Hearing Date: June 4, 2019

Papers considered: Appellant's Brief received October 31, 2019

Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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

Final Determination: The undersigned determine that the decision appealed is hereby:

 _____ Commissioner	<input checked="" type="checkbox"/> Affirmed <input type="checkbox"/> Reversed, remanded for de novo hearing <input type="checkbox"/> Reversed, violation vacated <input type="checkbox"/> Vacated for de novo review of time assessment only <input type="checkbox"/> Modified to _____
 _____ Commissioner	<input checked="" type="checkbox"/> Affirmed <input type="checkbox"/> Reversed, remanded for de novo hearing <input type="checkbox"/> Reversed, violation vacated <input type="checkbox"/> Vacated for de novo review of time assessment only <input type="checkbox"/> Modified to _____
 _____ Commissioner	<input checked="" type="checkbox"/> Affirmed <input type="checkbox"/> Reversed, remanded for de novo hearing <input type="checkbox"/> Reversed, violation vacated <input type="checkbox"/> Vacated for de novo review of time assessment only <input type="checkbox"/> 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 3/10/2020 66.

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Benitez, Pedro

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Findings: (Page 1 of 2)

Appellant challenges the June 17, 2019 determination of the administrative law judge (“ALJ”), revoking release and imposing a 12-month time assessment. Appellant’s underlying instant offense is for raping his 14 year old [REDACTED] while he was high on cocaine. Appellant’s current revocation charges included changing employment without notifying his parole officer, and then not responding truthfully about it, visiting a shopping mall without permission, and testing positive for cocaine. At the final parole revocation hearing, a plea bargain was entered into. Appellant pled guilty to the use of cocaine, and visiting the shopping mall charges, and was given a 12 month time assessment. Appellant raises the following issues: 1) there was a lack of evidence against him, as well as mitigating factors. 2) he received ineffective assistance of counsel on these matters. 3) the time assessment imposed is harsh and excessive.

Appellant’s parole was revoked at the hearing upon his unconditional plea of guilty. Appellant was represented by counsel at the final hearing, and the Administrative Law Judge explained the substance of the plea agreement. The inmate confirmed he understood and there is nothing to indicate he was confused. The guilty plea was entered into knowingly, intelligently and voluntarily, and is therefore valid. Matter of Steele v. New York State Div. of Parole, 123 A.D.3d 1170, 998 N.Y.S.2d 244 (3d Dept. 2014); Matter of James v. Chairman of N.Y. State Bd. of Parole, 106 A.D.3d 1300, 965 N.Y.S.2d 235 (3d Dept. 2013); Matter of Ramos v. New York State Div. of Parole, 300 A.D.2d 852, 853, 752 N.Y.S.2d 159 (3d Dept. 2002). Consequently, his guilty plea forecloses this challenge. See Matter of Steele, 123 A.D.3d 1170, 998 N.Y.S.2d 244; Matter of Gonzalez v. Artus, 107 A.D.3d 1568, 1569, 966 N.Y.S.2d 710, 711 (4th Dept. 2013).

Counsel “is presumed to have been competent and the burden is on the accused to demonstrate upon the record the absence of meaningful adversarial representation.” Matter of Jeffrey V., 82 N.Y.2d 121, 126, 603 N.Y.S.2d 800, 803 (1993); see also People v. Hall, 224 A.D.2d 710, 638 N.Y.S.2d 732 (2d Dept. 1996) (“When, as in this case, a defendant receives an advantageous plea agreement and the record does not cast doubt on the apparent effectiveness of counsel, the defendant is deemed to have been furnished with meaningful representation”). “[T]here is nothing to substantiate petitioner’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 Bd. of Parole, 106 A.D.3d 1300, 1300-1301, 965 N.Y.S.2d 235, 237 (3d Dept. 2013); accord Matter of Partee v. Stanford, 159 A.D.3d 1294, 74 N.Y.S.3d 114 (3d Dept. 2018); Matter of Rosa v. Fischer, 108 A.D.3d 1227, 969 N.Y.S.2d 706 (4th Dept.), lv. denied, 22 N.Y.3d 855, 979 N.Y.S.2d 561 (2013). It will be noted that nothing can be gleaned from the record to indicate his counsel was ineffective. However, even if he was, by the appellant’s plea of guilty, it would not warrant a different result. Hunter v New York State Board of Parole, 167 A.D.2d 611, 563 N.Y.S.2d 234(3d Dept 1990).

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

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The inmate’s assertion of an innocent excuse creates a credibility issue for the Administrative Law Judge to resolve, and does not negate the fact that the behavior violated the condition of parole. Bolton v Dennison, 38 A.D.3d 1077, 832 N.Y.S.2d 118 (3d Dept. 2007). The excuse is unavailing when the condition of parole prohibited the conduct. Carney v New York State Division of Parole, 244 A.D.2d 746, 665 N.Y.S.2d 687 (3d Dept. 1997).

Prior parole violations may be used in determining a time assessment for a parole violation. Matter of Williams v. New York State Bd. of Parole, 233 A.D.2d 267, 268, 650 N.Y.S.2d 546 (1st Dept. 1996) (two year time assessment), lv. denied, 89 N.Y.2d 815, 659 N.Y.S.2d 855 (1997); see also Matter of Rosa v. Fischer, 108 A.D.3d 1227, 1228, 969 N.Y.S.2d 706, 707 (4th Dept.) (72-month time assessment permissible given violent criminal history and recurrent disregard for conditions of parole), lv. denied, 22 N.Y.3d 855, 979 N.Y.S.2d 561 (2013); Matter of Rosario v. New York State Div. of Parole, 80 A.D.3d 1030, 915 N.Y.S.2d 385 (3d Dept. 2011) (32 month time assessment was not excessive for repeat violator); Matter of Bowes v. Dennison, 20 A.D.3d 845, 800 N.Y.S.2d 459 (3d Dept. 2005) (given petitioner’s criminal history and prior parole violations, the Board’s directive that he be held until his maximum expiration date was not excessive). It is presumed the Administrative Law Judge considered all of the relevant factors. Ramirez v New York State Board of Parole, 214 A.D.2d 441, 625 N.Y.S.2d 505 (1st Dept 1995); Garner v Jones, 529 U.S. 244, 120 S.Ct. 1362, 1371, 146 L.Ed.2d 236 (2000). The time assessment imposed is clearly permissible. Otero v New York State Board of Parole, 266 A.D.2d 771, 698 N.Y.S.2d 781 (3d Dept 1999) leave to appeal denied 95 N.Y.2d 758, 713 N.Y.S.2d 2 (2000); Carney v New York State Board of Parole, 244 A.D.2d 746, 665 N.Y.S.2d 687 (3d Dept 1997); Issac v. New York State Division of Parole, 222 A.D.2d 913, 635 N.Y.S.2d 756 (3d Dept. 1995).

Recommendation: Affirm.