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Administrative Appeal Decision - Okeefe, Joel M (2020-02-04)

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ADMINISTRATIVE APPEAL DECISION NOTICE

Name: O'Keefe, Joel

Facility: Auburn CF

NYSID [REDACTED]

Appeal Control No.: 01-123-19 R

DIN: 95-A-1020

Appearances: Cheryl Kates, Esq.
P.O. Box 734
Fairport, New York 14450

Decision appealed: December 5, 2018 revocation of release and imposition of a time assessment of 17 months.

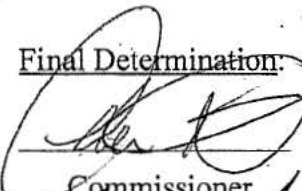
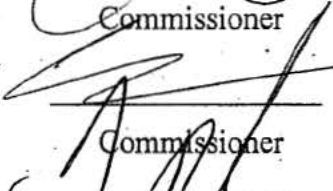

Final Revocation Hearing Date: November 27, 2018

Papers considered: Appellant's Brief received September 3, 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"/> Vacated for de novo review of time assessment only	<input type="checkbox"/> Reversed, remanded for de novo hearing <input type="checkbox"/> Reversed, violation vacated	<input type="checkbox"/> Reversed, violation vacated <input type="checkbox"/> Modified to _____
 _____ Commissioner	<input checked="" type="checkbox"/> Affirmed <input type="checkbox"/> Vacated for de novo review of time assessment only	<input type="checkbox"/> Reversed, remanded for de novo hearing <input type="checkbox"/> Reversed, violation vacated	<input type="checkbox"/> Reversed, violation vacated <input type="checkbox"/> Modified to _____
 _____ Commissioner	<input checked="" type="checkbox"/> Affirmed <input type="checkbox"/> Vacated for de novo review of time assessment only	<input type="checkbox"/> Reversed, remanded for de novo hearing <input type="checkbox"/> Reversed, violation vacated	<input type="checkbox"/> Reversed, violation vacated <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 2/4/2020 AA.

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: O'Keefe, Joel **DIN:** 95-A-1020
Facility: Auburn CF **AC No.:** 01-123-19 R

Findings: (Page 1 of 3)

Appellant is serving an aggregate sentence of fourteen years, six months to 29 years upon his conviction of Criminal Possession of a Weapon in the third degree, Burglary in the First Degree, Escape in the first degree, Promoting Prison Contraband in the first degree, and two counts of Attempted Escape in the first degree. He was released to parole supervision in March 2018. In October 2018, he was charged with violating conditions of parole by, among other things, giving a card to a woman seeking a sexual encounter after being directed not to do so and failing to notify his parole officer that he had contact with police. Thereafter, Appellant's parole was revoked upon his unconditional plea of guilty to two violations (Rule 13 and 6) and eight remaining charges were withdrawn. The Department recommended a 20-month time assessment while counsel advocated for less. The Administrative Law Judge ("ALJ") – who initially had indicated she would offer 18 – imposed a 17-month time assessment. This appeal ensued.

Appellant challenges the December 5, 2018 determination of the ALJ on the following grounds: (1) Appellant's plea is invalid; (2) new evidence shows he attempted to contact his parole officer and there is insufficient evidence to sustain other charges; (3) the time assessment is excessive and violates the Eighth Amendment; (4) Appellant was denied effective assistance of counsel; (5) DOCCS failed to adequately investigate to determine his intent in handing out cards; (6) the accusatory instrument was facially insufficient; (7) the ALJ was biased and failed to conduct the hearing in a lawful manner; (8) Appellant's discretionary sex offender designation violates his guilty plea in the underlying criminal case, renders it invalid and violates Equal Protection, Due Process, Double Jeopardy, Ex Post Facto and the Eighth Amendment; (9) Appellant's parole conditions violate the First Amendment right of free association; (10) Appellant was denied reasonable accommodations in regard to ██████████ in violation of the ADA; and (11) DOCCS improperly denied Appellant records requested for this appeal. Appellant seeks to be revoked and restored to parole without a discretionary sex offender categorization or, alternatively, granted a new hearing.

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 ALJ explained the substance of the plea agreement. Appellant confirmed that was how he wished to proceed and there is nothing to indicate he was confused or coerced. Nothing in the Executive Law requires a detailed plea allocution. 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).

STATE OF NEW YORK – BOARD OF PAROLE

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DIN: 95-A-1020

Facility: Auburn CF

AC No.: 01-123-19 R

Findings: (Page 2 of 3)

Appellant's guilty plea establishes that he violated parole in an important respect and precludes a challenge to the sufficiency of the evidence. See Matter of Harris v. Evans, 121 A.D.3d 1151, 993 N.Y.S.2d 790 (3d Dept. 2014); Matter of Steele, 123 A.D.3d 1170, 998 N.Y.S.2d 244; Matter of Taylor v. NYS Division of Parole, 108 A.D.3d 953, 968 N.Y.S.2d 808, 809 (3d Dept. 2013); Matter of Holdip v. Travis, 9 A.D.3d 825, 779 N.Y.S.2d 382 (4th Dept. 2004); Matter of Fuller v. Goord, 299 A.D.2d 849, 849, 749 N.Y.S.2d 628, 629 (4th Dept. 2002), lv. denied, 100 N.Y.2d 531, 761 N.Y.S.2d 592 (2003). We nonetheless note a parole condition can be verbal and Appellant admits on appeal that he engaged in conduct giving rise to the Rule 13 violation. Conduct which is less than criminal conduct may result in a revocation of parole where such conduct is proscribed by the conditions of parole. People ex rel. Walker v. Hammock, 78 A.D.2d 369, 435 N.Y.S.2d 410 (4th Dept. 1981). Claims concerning withdrawn charges are moot. See generally Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713-14, 431 N.Y.S.2d 400, 402 (1980). And while asserting he attempted to contact his parole officer, Appellant does not dispute the revocation.

Appellant argues he must be revoked and restored to parole. However, the ALJ acted within her discretion to impose a 17-month time assessment pursuant to 9 N.Y.C.R.R. § 8005.20(c)(1). The Executive Law does not place an outer limit on the length of time that may be imposed. Matter of Washington v. Annucci, 144 A.D.3d 1541, 41 N.Y.S.3d 808 (4th Dept. 2016); Matter of Wilson v. Evans, 104 A.D.3d 1190, 1191, 960 N.Y.S.2d 807, 809 (4th Dept. 2013). The time assessment was not excessive in view of Appellant's serious criminal history and the nature of the sustained Rule 13 violation alone. See, e.g., Matter of Lafferty v. Annucci, 148 A.D.3d 1628, 50 N.Y.S.3d 221 (4th Dept. 2017); D.L. Riley v. Alexander, 139 A.D.3d 1206, 1207, 31 N.Y.S.3d 318, 320 (3d Dept. 2016); Matter of Murchison v. N.Y. State Div. of Parole, 91 A.D.3d 1005, 1005, 935 N.Y.S.2d 741, 742 (3d Dept. 2012). It also does not constitute an Eighth Amendment violation. See Gill v. Stella, 845 F. Supp. 94, 102 (E.D.N.Y. 1994).

Appellant's claim of ineffective assistance of counsel is foreclosed by his guilty plea. People v. Bethany, 182 A.D.2d 1084, 882 N.Y.S.2d 877, 878 (4th Dept. 1992). "There is no showing that counsel's alleged ineffectiveness infected the plea bargaining process, that [Appellant] entered a plea because of his attorney's poor performance, or that [his] guilty plea was not knowing, intelligent and voluntary." Id. (citations omitted). In any event, 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, 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"). Appellant's claim is without

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DIN: 95-A-1020

Facility: Auburn CF

AC No.: 01-123-19 R

Findings: (Page 3 of 3)

merit “as the record discloses that he received meaningful representation.” Matter of James, 106 A.D.3d at 1300-1301, 965 N.Y.S.2d at 237; 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); see also Matter of Bond v. Stanford, 171 A.D.3d 1320, 97 N.Y.S.3d 807 (3d Dept. 2019).

Appellant complains that DOCCS thwarted record requests submitted for the purposes of his appeal by failing to respond. However, the record reflects DOCCS released some records and the requests otherwise were denied. We also note Appellant’s claim would not provide a basis to disturb the ALJ’s earlier determination rendered upon Appellant’s valid plea of guilty.

Appellant’s remaining challenges are foreclosed by his plea of guilty. In addition, his objections were not raised and therefore were waived. See, e.g., Matter of Davis v. Laclair, 165 A.D.3d 1367, 1368, 85 N.Y.S.3d 623 (3d Dept. 2018); People ex rel. Murray v. New York State Div. of Parole, 95 A.D.3d 1527, 944 N.Y.S.2d 403 (3d Dept. 2012). His First Amendment challenge to withdrawn charges is moot. See generally Hearst Corp., 50 N.Y.2d at 713-14, 431 N.Y.S.2d at 402. And his objections to his discretionary sex offender designation are beyond the scope of the Board’s jurisdiction, as is any challenge to his underlying criminal conviction. 9 NYCRR § 8006.3; *id.* §§ 8006 *et seq.*

We nonetheless note there is no support in the record for Appellant’s claim that the administrative law judge was biased against him. Matter of Hampton v. Kirkpatrick, 82 A.D.3d 1639, 919 N.Y.S.2d 422 (4th Dept. 2011); People ex rel. Brazeau v. McLaughlin, 233 A.D.2d 724, 725, 650 N.Y.S.2d 361 (3d Dept. 1996), *lv. denied*, 89 N.Y.2d 810, 656 N.Y.S.2d 738 (1997). Appellant’s assertion that the ALJ applied the incorrect “standard of review” is without merit. Appellant’s plea of guilty establishes the violation. There is no requirement of a detailed plea allocation. Moreover, Appellant had the opportunity to raise mitigating evidence during off-the-record plea discussions.

Recommendation: Affirm.