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A.C. 41464 (DOCKET NO.: LLI-CV-17-5009822-S)	:	APPELLATE COURT STATE OF CONNECTICUT
In the matter of a Petition for a Common Law Writ of Habeas Corpus, NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN, Plaintiff-Appellant, v. R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC., Defendants-Appellees.	:	JUNE 5, 2018

MOTION FOR REVIEW

Plaintiff Nonhuman Rights Project, Inc. ("Plaintiff" or the "NhRP") hereby seeks review of the Trial Court's May 23, 2018 partial denial of its Motion for Articulation. Notice of this decision was sent by the appellate clerk on May 29, 2018.

I. BRIEF HISTORY

On December 26, 2017, the Trial Court (Bentivegna, J.) issued an Order dismissing Plaintiff's Verified Petition for a Common Law Writ of Habeas Corpus ("Petition") on behalf of three elephant detainees. On January 16, 2018, the NhRP filed a Motion to Reargue, which was denied by the Trial Court in a separate Order on February 27, 2018. On March 16, 2018, the NhRP timely filed its appeal of both decisions. On April 18, 2018, the NhRP filed a Motion for Articulation of the Trial Court's December 26, 2017 and February 27, 2018 decisions. The Motion raised sixteen requests for articulation. On May 23, 2018, the

Trial Court denied the Motion for Articulation as to fifteen of those requests, and granted it for one. The NhRP now files this Motion for Review.

II. SPECIFIC FACTS

In its December 26, 2017 Order, the Trial Court dismissed the NhRP's Petition under Practice Book § 23-24 (a)(1) on the ground that the NhRP lacked standing under Practice Book § 23-24 (a)(2) or, in the alternative, on the ground the Petition was "wholly frivolous on its face as a matter of law." (12/26/17 Decision at 1) The Trial Court denied the NhRP's Motion to Reargue on February 27, 2018. On March 16, 2018, the NhRP timely filed its appeal of both decisions.

On April 18, 2018, the NhRP filed a Motion for Articulation, raising sixteen requests for articulation. The first six requests pertained to the Trial Court's decision that the NhRP lacked standing. On May 23, 2018, the Trial Court denied the Motion for Articulation as to all six standing-related requests, contending that "they are unambiguously addressed by the court's December 26, 2017 and February 27, 2018 memoranda of decision." (5/23/18 Decision at 4)

The NhRP's first standing request stated: "Articulate the Connecticut judicial precedent, rule, statute, or other authority that requires a petitioner filing a petition for a common law writ of habeas corpus on another's behalf to be a formal 'next friend' of the detainee." (4/18/18 Motion for Articulation at 2) The second stated: "Articulate how such authority may be reconciled with the Connecticut common law cases cited in the Motion to Reargue at pages 9 through 11." (4/18/18 Motion for Articulation at 2) Neither the Trial Court's December 26, 2017 Memorandum of Decision nor its February 27, 2018 Memorandum of Decision furnishes any support for the conclusion that Connecticut

requires a habeas petitioner to be a "formal next friend." Likewise, neither Memorandum of Decision addresses the Connecticut precedent set forth in the NhRP's Motion to Reargue demonstrating that strangers may file habeas corpus petitions on behalf of detainees.

The third request stated: "Articulate the Connecticut precedent that adopts or otherwise applies the second prong of the *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990) standing test to a Connecticut common law habeas corpus action where the detainee is neither a convicted prisoner nor the subject of a child custody dispute." (4/18/18 Motion for Articulation at 2) The fourth stated: "Articulate the Connecticut judicial precedent, rule, statute, or other authority that requires a 'significant relationship' to exist between a petitioner in a Connecticut common law habeas corpus action and the detainee upon whose behalf the writ is sought." (4/18/18 Motion for Articulation at 3) Again, neither Memorandum of Decision pointed to any Connecticut precedent that adopted or applied the second prong of *Whitmore*, nor did they articulate any binding precedent in Connecticut requiring such a "significant relationship."

The final two standing requests averred:

> 5. Articulate why elephant detainees do not automatically fall under the exceptions set forth in *Hamdi v. Rumsfeld*, 294 F.3d 598, 604 n.3 (4th Cir. 2002) and cited by this Court to any requirement that a "significant relationship" must exist between a detainee and the petitioner in a Connecticut common law habeas corpus action.
>
> 6. Articulate why the Court did not take judicial notice or infer through the Petition that the elephant detainees have no "significant relationships" within the meaning of *Whitmore*.

(4/18/18 Motion for Articulation at 3)

Nothing in the Trial Court's Memoranda of Decision articulated why elephants do not qualify for the *Hamdi* exception or why judicial notice could not be taken to recognize elephants cannot have such relationships within the meaning of *Whitmore*.

The remaining ten requests pertained to the Trial Court's frivolousness determination. The Court denied the Motion for Articulation on all of those requests except for number ten.[1] In so doing, the Court refused to articulate:

---

[1]Number ten provided: "If the *Lozoda* standard for determining frivolousness set forth in *Fernandez* applies to Practice Book sec. 23-24 (a)(2), articulate: a. why the legal arguments presented in the Petition and supporting Memorandum of Law are not debatable among jurists of reason, especially in light of the fact that the Petition and Motion to Reargue cited at least four cases in which a writ of habeas corpus or its equivalent were in fact granted on behalf of nonhuman animals, and the fact that cases of first impression in Connecticut *per se* pass frivolousness review under *Lozoda*. [footnote omitted]. [b] why courts could not possibly resolve the issues presented in the Petition in a different manner, especially in light of the fact that courts have in fact granted the relief the NhRP seeks in this case on behalf of other nonhuman animals. [c.] why the arguments presented in the Petition and supporting Memorandum of Law are not adequate to deserve encouragement to proceed further." (4/18/18 Motion for Articulation at 2) The Trial Court articulated: "Under either standard [of frivolity in Connecticut law], the court found the nonbinding legal and nonlegal authority cited by the petitioner to be unpersuasive. Accordingly, the court expressly concluded that the petitioner was unable to point to any authority demonstrating a possibility or probability of victory for its theory that an elephant is a legal person for the purpose of issuing a writ of habeas corpus." (5/23/18 Decision at 3) The Trial Court's articulation of this issue, however, still fails to address the fact that the lack of specific authority in this case due to the novelty of the NhRP's claims does not negate the requirement that the court address its merits. *See Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 2018 WL 2107087, at *1-2 (N.Y. May 8, 2018)(Fahey, J. concurring)(attached as Exh. A).

> why the present case of first impression that (a) specifically seeks a good faith extension of the common law of habeas corpus to elephant detainees, (b) cites to cases in New York and Argentina in which writs of habeas corpus or their equivalent were issued on behalf of great apes, (c) cites to statutes in New Zealand in which such nonhuman entities as a river and a national park were designated as "persons," (d) cites to cases in India that hold that a Hindu idol, a mosque, and the Holy Books of the Sikh religion are "persons," and (e) cites to over 100 published scholarly books and law review articles that specifically discuss the issues raised in the Petition and supporting Memorandum of Law is frivolous on its face within the meaning of Practice Book § 23-24(a)(2).

(Request 13) (4/18/18 Motion for Articulation at 5) The Court also refused to articulate, *inter alia*:

> why the NhRP's equality arguments (Pet. at ¶¶10, 33-34, 55; Mem. at pgs. 13-20), liberty arguments (Pet. at ¶¶ 10, 23, 32, 43, 51, 55; Mem. at pgs. 11-13), autonomy arguments (Pet. at ¶¶ 32, 50, 51, 55, 57, 61, 82, 88, 98; Mem. at 11-14), and pet trust statute C.G.S.A. § 45a-489a argument (Pet. at ¶ 45), either separately or taken together, do not compel the conclusion that the Petition is not frivolous on its face within the meaning of Practice Book § 23-24 (a)(2).

(Request 11) (4/18/18 Motion for Articulation at 4-5) The Trial Court contended that these and the other issues in the NhRP's frivolousness requests were "unambiguously addressed" by its previous "memoranda of decision." Yet conspicuously missing from either Memorandum of Decision is any discussion whatsoever of the NhRP's equality, liberty, autonomy, and pet trust arguments, or any discussion of why a case of first impression does not automatically satisfy the *Lozoda* criteria, as set forth in the Motion to Reargue.

The NhRP now respectfully requests that the Trial Court be ordered to articulate the factual and legal bases for its December 26, 2017 and February 27, 2018 decisions, so as to better facilitate appellate review.

III. LEGAL GROUNDS

Practice Book Section 66-7.

THE PLAINTIFF-APPELLANT,

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EXHIBIT A

2018 WL 2107087
Court of Appeals of New York.

In the Matter of NONHUMAN RIGHTS PROJECT, INC., ON BEHALF OF TOMMY, Appellant,
v.
Patrick C. LAVERY, & c., et al., Respondents.
In the Matter of Nonhuman Rights Project, Inc., on Behalf of Kiko, Appellant,
v.
Carmen Presti et al., Respondents.

Motion No. 2018–268
|
Decided May 8, 2018

Opinion
Motion for leave to appeal denied.

Chief Judge DiFiore and Judges Rivera, Fahey, Garcia and Wilson concur, Judge Fahey in an opinion. Judges Stein and Feinman took no part.

FAHEY J. (concurring):
***1** The inadequacy of the law as a vehicle to address some of our most difficult ethical dilemmas is on display in this matter.

In these habeas corpus proceedings brought by petitioner Nonhuman Rights Project on behalf of Tommy and Kiko, two captive chimpanzees, petitioner seeks leave to appeal from an order of the Appellate Division, First Department affirming two judgments of Supreme Court declining to sign orders to show cause to grant the chimpanzees habeas relief. The adult chimpanzees, according to the habeas petition, have been confined by their owners to small cages in a warehouse and a cement storefront in a crowded residential area, respectively.

If this Court were to grant petitioner leave to appeal, I would be most likely to vote to affirm pursuant to CPLR 7003(b) (Successive petitions for writ). Accordingly, I concur in the Court's decision to deny leave.

However, I write to underscore that denial of leave to appeal is not a decision on the merits of petitioner's claims. The question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing?

"A person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his [or her] behalf ... may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance" (CPLR § 7002[a]). The lower courts in this appeal and related cases, in deciding that habeas corpus is unavailable to challenge the legality of the chimpanzees' confinement, rely in the first instance on dictionary definitions. The habeas corpus statute does not define "person," but dictionaries instruct us that the meaning of the word extends to any "entity ... that is recognized by law as having most of the rights and duties of a human being" (Black's Law Dictionary [10th ed 2014], person [3]; *see also e.g.* Oxford English Dictionary, http://www.oed.com [last accessed May 4, 2018], person [7] ["An individual ... or corporate body ... recognized by the law as having certain rights and duties"]).

The Appellate Division then reasoned that chimpanzees are not persons because they lack "the capacity or ability ... to bear legal duties, or to be held legally accountable for their actions" (*Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 78, 54 N.Y.S.3d 392 [1st Dept. 2017]; *see also People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 152, 998 N.Y.S.2d 248 [3d Dept. 2014], *lv denied* 26 N.Y.3d 902, 2015 WL 5125518 [2015] [stating that chimpanzees "cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions"]). Petitioner and amici law professors Laurence H. Tribe, Justin Marceau, and Samuel Wiseman question this assumption. Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child (*see People ex rel. Wehle v. Weissenbach*, 60 N.Y. 385 [1875]) or a parent suffering from dementia (*see e.g. Matter of Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969, 643 N.Y.S.2d 861 [4th Dept. 1996]). In short, being a "moral agent" who can freely choose to act as morality requires is not a necessary condition of being a "moral patient" who can be wronged and may have the right to redress wrongs (*see generally*

Tom Regan, The Case for Animal Rights 151–156 [2d ed 2004]).

The Appellate Division's conclusion that a chimpanzee cannot be considered a "person" and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species (*see Nonhuman Rights Project, Inc.*, 152 A.D.3d at 78, 54 N.Y.S.3d 392 [stating that petitioner's argument "that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights.... ignores the fact that these are still human beings, members of the human community"]). I agree with the principle that all human beings possess intrinsic dignity and value, and have, in the United States (and territory completely controlled thereby), the constitutional privilege of habeas corpus, regardless of whether they are United States citizens (*see Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 [2008]), but, in elevating our species, we should not lower the status of other highly intelligent species.

The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here. Moreover, the answer to that question will depend on our assessment of the intrinsic nature of chimpanzees as a species. The record before us in the motion for leave to appeal contains unrebutted evidence, in the form of affidavits from eminent primatologists, that chimpanzees have advanced cognitive abilities, including being able to remember the past and plan for the future, the capacities of self–Awareness and self–Control, and the ability to communicate through sign language. Chimpanzees make tools to catch insects; they recognize themselves in mirrors, photographs, and television images; they imitate others; they exhibit compassion and depression when a community member dies; they even display a sense of humor. Moreover, the amici philosophers with expertise in animal ethics and related areas draw our attention to recent evidence that chimpanzees demonstrate autonomy by self–Initiating intentional, adequately informed actions, free of controlling influences (*see* Tom L. Beauchamp, Victoria Wobber, *Autonomy in chimpanzees*, 35 Theoretical Medicine and Bioethics 117 [2014]; *see generally* Jane Goodall, The Chimpanzees of Gombe: Patterns of Behavior 15–42 [1986]).

Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention. To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect (*see generally* Regan, The Case for Animal Rights 248–250).

The Appellate Division's approach to these proceedings is mistaken in another respect. Petitioner seeks the transfers of the chimpanzees to a primate sanctuary, rather than the wild. The Appellate Division held that habeas relief was properly denied, because petitioner "does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility" (*Nonhuman Rights Project, Inc.*, 152 A.D.3d at 79, 54 N.Y.S.3d 392; *see also Matter of Nonhuman Rights Project, Inc. v. Presti*, 124 A.D.3d 1334, 1335, 999 N.Y.S.2d 652 [4th Dept. 2015], *lv denied* 26 N.Y.3d 901, 2015 WL 5125507 [2015]). Notably, the Appellate Division erred in this matter, by misreading the case it relied on, which instead stands for the proposition that habeas corpus *can* be used to seek a transfer to "an institution separate and different in nature from the ... facility to which petitioner had been committed," as opposed to a transfer "within the facility" (*People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691, 512 N.Y.S.2d 19, 504 N.E.2d 386 [1986]). The chimpanzees' predicament is analogous to the former situation, not the latter.

***2** The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a "person" or relegated to the category of a "thing" amounts to a refusal to confront a manifest injustice. Whether a being has the right to seek freedom from confinement through the writ of habeas corpus should not be treated as a simple either/or proposition.

The evolving nature of life makes clear that chimpanzees and humans exist on a continuum of living beings. Chimpanzees share at least 96% of their DNA with humans. They are autonomous, intelligent creatures. To solve this dilemma, we have to recognize its complexity and confront it.

In the interval since we first denied leave to the Nonhuman Rights Project (*see* 26 N.Y.3d 901, 2015 WL 5125507 [2015]; 26 N.Y.3d 902, 2015 WL 5125518 [2015]), I have struggled with whether this was the right decision. Although I concur in the Court's decision to deny leave to appeal now, I continue to question whether the Court was right to deny leave in the first instance. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a "person," there is no doubt that it is not merely a thing.

All Citations

--- N.E.3d ----, 2018 WL 2107087 (Mem), 2018 N.Y. Slip Op. 03309

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CERTIFICATION

I hereby certify that: a copy of the foregoing has been delivered electronically on the date hereof to each other counsel of record and the non-appearing defendants; counsels' and defendants' names, addresses, e-mail addresses, telephone and facsimile numbers are listed below; the foregoing has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and the foregoing complies with all applicable rules of appellate procedure.

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