

Matter of Azor v Perez
2012 NY Slip Op 30892(U)
March 28, 2012
Supreme Court, Franklin County
Docket Number: 2011-490
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

**COUNTY OF FRANKLIN
X**

In the Matter of the Application of
JEAN AZOR, #11-A-0564,

Petitioner,

for Judgment Pursuant to Article 70
of the Civil Practice Law and Rules

**DECISION AND ORDER
RJI #16-1-2011-0218.42
INDEX # 2011-490
ORI #NY016015J**

-against-

ADA PEREZ, Superintendent,
Downstate Correctional Facility,

Respondent.

X

This proceeding was originated in Dutchess County by the Petition for Writ of Habeas Corpus of Jean Azor, verified on March 28, 2011. Petitioner, who was an inmate at the Downstate Correctional Facility but is now incarcerated at the Bare Hill Correctional Facility, purported to challenge his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. An Order to Show Cause was issued out of Supreme Court, Dutchess County on April 4, 2011. By Decision and Order dated May 9, 2011 the Supreme Court, Dutchess County (Hon. Valentino T. Sammarco) directed that this proceeding be transferred from Dutchess County to Franklin County. The papers originally filed in Dutchess County were received in the Franklin County Clerk's office on May 18, 2011. By Letter Order dated May 24, 2011 this Court directed the respondent to serve and file a Return.

The Court received and reviewed respondent's Return, dated June 17, 2011, as well as petitioner's Reply thereto (denominated, Objection), filed in the Franklin County Clerk's office on July 7, 2011. By Letter Order dated July 29, 2011 the litigants were directed to submit such additional affidavits, memoranda and/or documentary evidence

as they deemed appropriate to clarify three specific issues/concerns highlighted in the Letter Order. In response thereto the Court received and reviewed the Affirmation of Robert C. Glennon, Esq., Assistant Attorney General, dated August 12, 2011 and submitted on behalf of the respondent. The Court also received and reviewed petitioner's Reply thereto, dated October 24, 2011 and filed in the Franklin County Clerk's office on November 1, 2011.

By Decision and Judgment dated December 20, 2011 the petition was dismissed. Petitioner now moves for "Rehearing and/or Reconsideration" with respect to the Decision and Judgment of December 20, 2011. The Court will deem petitioner's application as a motion for leave to reargue pursuant to CPLR §2221(d). 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.

On July 6, 1998 petitioner was sentenced in Supreme Court, Kings County, to an indeterminate sentence of 5 to 15 years upon his conviction of the crime of Robbery 1^o. He was received into DOCCS custody on July 28, 1998 certified as entitled to 807 days of jail time credit. At that time DOCCS officials calculated the maximum expiration date of petitioner's 1998 sentence as May 10, 2011. Petitioner was first conditionally released to parole supervision on May 10, 2006. His parole, however, was subsequently revoked with a delinquency date of January 17, 2007. Petitioner was returned to DOCCS as a parole violator on May 21, 2007, credited with 41 days of parole jail time (Penal Law §70.40(3)(c)). As of the delinquency date petitioner still owed 4 years, 3 months and 23 days to the originally-computed maximum expiration date. Running that time owed from petitioner's May 21, 2007 return to custody, less 41 days of parole jail time credit, DOCCS

officials calculated the adjusted maximum expiration date of petitioner's 1998 sentence as August 3, 2011.

Petitioner was re-released to parole supervision on April 10, 2008. On October 16, 2008, however, he was arrested in connection with new criminal charges arising from conduct that took place on that date. Two days later, on October 18, 2008, petitioner was released on bail from local custody. Two months after that, on December 18, 2008, petitioner was re-taken into local custody, presumably on a parole violation warrant. Petitioner's parole was subsequently revoked, with a sustained delinquency date of October 16, 2008, following a final parole revocation hearing conducted on April 20, 2009. The Administrative Law Judge presiding at the final hearing imposed a delinquent time assessment directing that petitioner be held to his maximum expiration date.

Petitioner remained in local custody until February 8, 2011, when he was returned to DOCCS custody following the January 14, 2011 imposition of a new indeterminate sentence in connection with the criminal offense committed on October 16, 2008. In the meantime, notwithstanding the fact that a delinquent time assessment of hold to maximum expiration had been imposed, on November 5, 2010 petitioner was conditionally released from DOCCS custody to parole supervision but continued to be held in local custody in connection with the new criminal charges. Petitioner was ultimately certified as entitled to 75 days of parole jail time credit (Penal Law §70.40(3)(c)) covering the period from December 18, 2008 to March 3, 2009.¹ On January 14, 2011 petitioner was sentenced in Supreme Court, Kings County, as a second felony offender (Penal Law §70.06), to an indeterminate sentence of 1½ to 3 years upon his conviction of the crime of Attempted Criminal Possession of a Weapon 3°. He was

¹ This Court is unsure as to the significance of the March 3, 2009 date.

received back into DOCCS custody on February 8, 2011, initially certified as entitled to 710 days of jail time credit covering the time periods from October 16, 2008 to October 18, 2008 and from March 3, 2009¹ to February 8, 2011.

Upon his return to DOCCS custody on February 8, 2011 petitioner was notified pursuant to Executive Law §259-i(3)(d)(iii) that, based upon the new (January 14, 2011) conviction/sentencing “ . . . the Board of Parole has issued a final declaration of delinquency with a delinquency date of 1/14/11.” Also upon petitioner’s return to DOCCS custody on February 8, 2011 a Legal Date Computation printout was generated based upon petitioner’s 2011 sentence but without reference to the remaining undischarged term of his 1998 sentence. Pursuant to that initial computation, the 3-year maximum term of the 2011 sentence was calculated as running from petitioner’s arrival in DOCCS custody on February 8, 2011, less 710 days of jail time credit, to produce a maximum expiration date of February 22, 2012 and a conditional release date of February 22, 2011. Several days later a revised Legal Date Computation Sheet, incorporating 2 years, 2 months and 19 days allegedly still owing against the maximum term of petitioner’s 1998 sentence, was generated.² According to the revised computation, the maximum expiration

² The running of petitioner’s 1998 sentence was interrupted as of the October 16, 2008 delinquency date with 2 years, 9 months and 17 days still owed to the August 3, 2011 adjusted maximum expiration date of that sentence. There is uncertainty in the record, however, with the respect to the issue of when petitioner’s 1998 sentence re-commenced running after the October 16, 2008 delinquency date. Although it appears to this Court that the 1998 sentence should have re-commenced running on November 5, 2010, when petitioner was “released” back to parole supervision (although remaining in local custody), the respondent’s Return indicated (erroneously) that petitioner was returned to DOCCS custody on August 31, 2010 and the sentence calculation methodology set forth in the Return recommenced the running of petitioner’s 1998 sentence as of that date. Even after it was acknowledged in the August 12, 2011 Affirmation of Robert C. Glennon, Esq., Assistant Attorney General that petitioner was not, in fact, returned to DOCCS custody on August 31, 2011, it appears that the underlying DOCCS sentence calculation methodology is still based upon a recommencement of the running of petitioner’s 1998 sentence as of August 31, 2010. This Court, however, is unable to discern the significance of the August 31, 2010 date and thus does not understand the rationale behind the DOCCS determination to continue calculating the recommencement date of petitioner’s 1998 sentence as of that date. In any event, upon subtracting 75 days

and conditional release dates of petitioner's multiple sentences (1998 and 2011) fell on May 11, 2014 and August 15, 2012, respectively. In March of 2011, however, the New York City Department of Correction issued an amended jail time certificate evidencing petitioner's entitlement to 782 days of jail time credit covering the entire period from his December 18, 2008 arrest to February 8, 2011, when he was returned to DOCCS custody.³

With the 2 years, 2 months and 19 days still owing against the re-adjusted maximum expiration date of petitioner's 1998 sentence added to the 3-year maximum term of the consecutive 2011 sentence (total = 5 years, 2 months and 19 days) (*see* Penal Law §70.30(1)(b)), less 782 days of jail time credit, all calculated as running from February 8, 2011, when petitioner was received back into DOCCS custody, the maximum expiration date of petitioner's multiple sentences is currently calculated by DOCCS officials as March 4, 2014. The conditional release date of petitioner's multiple sentences is currently calculated by DOCCS officials as June 8, 2012, based upon 1 year, 8 months and 26 days of potential "good time" (1/3 of 5 years, 2 months and 19 days) subtracted from the March 4, 2014 maximum expiration date of petitioner's multiple sentences.

In paragraph six of his Affidavit in Support of Motion for Rehearing and/or Reconsideration petitioner asserts that in issuing the Decision and Judgment of December 20, 2011 this Court failed to take " . . . **into Consideration the 22 Months Parole Jail Time Credit** Completed In N.Y. City D.O.C. Riker's Island, which was the Basis for his Signing Out on **NOVEMBER 5, 2010.**" (Emphasis in original). Although

of parole jail time credit from the 2 years, 9 months and 17 days still owing against the maximum term of petitioner's 1998 sentence as of the October 16, 2008 delinquency date, and upon recommencing the running of the 1998 sentence as of August 31, 2010, a re-adjusted maximum expiration date of April 3, 2013 was produced, with 2 years, 2 months and 19 days still owing against that re-adjusted maximum expiration date as of the January 14, 2011 delinquency date.

³ The Amended Jail Time Certificate fails to account for the two-day period from petitioner's October 16, 2008 arrest to October 18, 2008, when he was released on bail.

petitioner does not specify which “22 Months” he is referring to, the Court presumes that such reference covers the time period from petitioner’s arrest on December 18, 2008 until November 5, 2010, when he was conditionally released to parole supervision while continuing to be held in local custody in connection with the new criminal charges.

Petitioner’s assertion to the contrary notwithstanding, the time period from December 18, 2008 to November 5, 2010 was not ignored by the Court in formulating the Decision and Judgment of December 20, 2011. A 75-day portion of that time period (December 18, 2008 to March 3, 2009) was credited as parole jail time (Penal Law §70.40(3)(c)) against petitioner’s interrupted 1998 sentence. In addition, the entire time period from December 18, 2008 to November 5, 2010 was credited as jail time (Penal Law §70.30(3)) against petitioner’s newly-imposed 2011 sentence as part of the amended certification of petitioner’s entitlement to 782 days of jail time credit. Notwithstanding the 75 days of overlap noted above, jail time credit and parole jail time credit can be viewed as mutually exclusive, with jail time credit being applied against the parole violator’s newly-imposed sentence and parole jail time credit being applied against his/her prior interrupted sentence. Periods of time credited against one sentence can not be credited against the other. *See Jeffrey v. Ward*, 44 NY2d 812.

Had petitioner’s 2011 sentence been effectively imposed as running concurrently with respect to the undischarged term of his 1998 sentence, with the maximum terms of such sentences merging in and being satisfied by discharge of the term having the longest unexpired time to run (*see* Penal Law §70.30(1)(a)), the proper statutory allocation of the time period from December 18, 2008 to November 5, 2010 between parole jail time credit and jail time credit may have been a crucial factor in accurately calculating the maximum expiration date of the merged, concurrent sentences. In the case at bar, however, DOCCS officials did not err in calculating petitioner’s 2011 sentence, imposed upon him as a

second felony offender, as running consecutively with respect to the undischarged term of his 1998 sentence. See Penal Law §70.25(1) and (2-a) and *People ex rel Gill v. Greene*, 12 NY3d 1, *cert denied sub nom. Gill v. Rock*, 130 S. Ct 86.

Under the provisions of Penal Law §70.30(1)(b) when an individual, such as petitioner, is subject to two indeterminate sentences running consecutively, “. . . the maximum terms are added to arrive at an aggregate maximum term equal to the sum of all the maximum terms . . .” Thus, in the case at bar, where petitioner received credit for each of the days he spent incarcerated in local custody from December 18, 2008 to November 5, 2010 (and indeed was double-credited for 75 days of that period) any issue with respect to the proper statutory allocation of such credits between parole jail time and jail time are of academic interest only. Even if the Court were to ultimately determine that petitioner should have received additional parole jail time credit for a time period extending beyond March 3, 2009, the joinder of the New York City Department of Correction would have been directed and a corresponding reduction in jail time credit ordered. Since it remains clear that petitioner did, in fact, effectively receive credit against the merged maximum term of his 1998 and 2011 sentences for each day during the time period from December 18, 2008 to November 5, 2010, no additional credit is warranted and there is no basis to direct that he be released from DOCCS custody at this time.

Finally, to the extent petitioner’s motion papers suggest that the Court did not take into consideration the fact that he was not returned to DOCCS custody on August 31, 2010 but instead remained in local New York City DOC custody from December 18, 2008 to February 8, 2011, is simply incorrect. In this regard it is noted that the narrative set forth in footnote number two of this Decision and Order was taken verbatim from pages five and six of the underlying Decision and Judgment of December 20, 2011 and clearly reflects the Court’s understanding that petitioner was not returned to DOCCS custody

until February 8, 2011. Given the fact, however, that petitioner received jail time credit for the entire 782-day period he spent in local custody from December 18, 2008 to February 8, 2011, it is clear that the current DOCCS sentence calculation, which is erroneously premised upon petitioner's return to DOCCS custody on August 31, 2010, has produced maximum expiration and conditional release dates more favorable to the petitioner.

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

ORDERED, that petitioner's motion is denied.

Dated: March 28, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice