Matter of Randolph v LaClair
2012 NY Slip Op 30898(U)
February 9, 2012
Supreme Court, Franklin County
Docket Number: 2011-1007
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
JERALD RANDOLPH,#07-A-5477,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2011-0429.83
INDEX # 2011-1007
ORI # NY016015J

-against-

D. E. LaCLAIR, Superintendent,
Franklin Correctional Facility,
Respondent.

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This proceeding was commenced in Bronx County by the filing of the Petition for Writ of Habeas Corpus of Jerald Randolph, sworn to on August 3, 2011. The originally filed petition named "Warden, EVELYN MIRADEL, NYC DEPT. Of CORRECTION," as sole respondent. Mr. Randolph, who was apparently in the custody of the New York City Department of Correction pending disposition of parole violation charges at the time the Petition was filed, was transferred back into state DOCCS custody at the Franklin Correctional Facility on or about August 23, 2011. By order dated September 21, 2011 the Supreme Court, Bronx County directed that venue be transferred to Franklin County. The papers originally filed in Bronx County were received in Franklin County Clerk's office on October 6, 2011. Jerald Randolph, who will hereinafter be referred to as the petitioner, remains an inmate at the Franklin Correctional Facility.

This Court issued an Order to Show Cause on October 13, 2011 and as a part thereof it was directed that D.E. LaClair, Superintendent, Franklin Correctional Facility, be substituted as respondent herein. An Amended Order to Show Cause was issued on November 1, 2011. The Amended Petition for a Writ of Habeas Corpus of Kerry Elgarten, Esq., The Legal Aid Society, Parole Revocation Defense Unit, on behalf of Jerald

Randolph, verified on December 8, 2011, was filed in the Franklin County Clerk's office on December 12, 2011. The Court has since received and reviewed respondent's Return, consisting of the Affirmation of Glen Frances Michaels, Esq., Assistant Attorney General, dated January 5, 2012, as well as the Reply Affirmation of Kerry Elgarten, Esq., dated January 17, 2012 and filed in the Franklin County Clerk's office on January 20, 2012.

On February 3, 2003 petitioner was sentenced in Supreme Court, Kings County, as a probation violator, to an indeterminate sentence of 1 to 3 years upon an underlying conviction of the crime of Criminal Possession of a Controlled Substance 5°. He was received into DOCCS custody on February 12, 2003 certified as entitled to 12 days of jail time credit. The maximum expiration date of petitioner's 2003 sentence was calculated as January 29, 2006.

Following completion of the Shock Incarceration Program, petitioner was released from DOCCS custody to parole supervision on October 30, 2003. On or about October 13, 2004, however, petitioner was arrested in connection with new criminal charges and taken into local custody in New York City. Notwithstanding this arrest, no parole delinquency was declared and no parole violation proceedings were initiated. On January 29, 2006, while still in local custody, petitioner was discharged from parole upon reaching the maximum expiration date of his 2003 sentence.

On June 11, 2007 petitioner was sentenced in Supreme Court, Queens County to a controlling determinate term of 3½ years, with 2½ years post-release supervision, upon his convictions of the crimes of Robbery 2°, Robbery 3°, Criminal Possession of Stolen Property 5° and Bail Jumping 1°.[1] Reviews of the June 11, 2007 sentencing

[1] On August 29, 2007 petitioner was sentenced in Supreme Court, Kings County, to an additional determinate term of 1 year, with 1-year post-release supervision, upon his conviction of the crime of Criminal Sale of a Controlled Substance 5°. The criminal offense underlying the August 29, 2007 sentence was apparently committed on January 3, 2007. This sentence, which was directed to run concurrently with

minutes and the relevant Sentence and Commitment Order reveal no reference to petitioner's 2003 sentence.

Petitioner was received back into DOCCS custody on October 4, 2007 initially credited by the New York City Department of Correction as entitled to 949 days of jail time credit covering the time periods from the October 13, 2004 arrest to August 18, 2006 and from January 3, 2007 to petitioner's return to DOCCS custody on October 4, 2007.[2] On or about November 9, 2010, however, the New York City Department of Correction issued an Amended Jail Time Certification reducing petitioner's jail time credit to 475 days covering the periods from January 30, 2006 (the day after the maximum expiration date of petitioner's 2003 sentence was reached) to August 18, 2006 and from January 3, 2007 to October 4, 2007. In amending the original Jail Time Certification, city officials noted that "[t]he period of 10/13/04 - 1/29/06 for 474 jail time days was credited to a previously imposed sentence as per NYSDOC and cannot be applicable jail time credit towards the [June 11, 2007]sentence the above is currently serving."

After petitioner's return to DOCCS custody on October 4, 2007 he was conditionally released to post-release supervision on two separate occasions. Each time, however, he was returned to DOCCS custody as a post-release supervision violator. DOCCS officials currently calculate the maximum expiration date of petitioner's June 11, 2007 sentence, including the period of post-release supervision, as September 21, 2012. Petitioner does not challenge the arithmetic computations underlying this calculation.

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respect to the June 11, 2007 sentence, plays no role in DOCCS calculation of petitioner's current maximum expiration date, nor does it play a role in any argument advanced by petitioner in this proceeding. Any reference in this Decision and Judgment to the "2007 sentence" should therefore be considered a reference to the June 11, 2007 sentence.

[2] Although the record is not clear as to the significance of the August 18, 2006 and January 3, 2007 dates, this Court presumes that petitioner was released on bail from local custody on August 18, 2006 and re-arrested on January 3, 2007 in connection with the criminal offense underlying his August 29, 2007 sentence (see footnote #1).

Rather, as discussed below, he challenges respondent's failure to provide additional credit against the June 11, 2007 determinate term.

Petitioner advances three arguments in support of his ultimate contention that he is entitled to immediate release from DOCCS custody. Petitioner's first argument, which the Court need not discuss in detail, is rejected out of hand since it is ultimately based on the erroneous premise that his 2007 sentence must be calculated as running concurrently with respect to his 2003 sentence. Penal Law §70.25(1)(a) provides, in relevant part, that " . . . when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence . . . imposed by the court shall run either concurrently or consecutively with respect to . . . the undischarged term . . . in such manner as the court directs at the time of sentence. If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run as follows: (a) . . . [A] determinate sentence shall run concurrently with all other terms . . ."

It is the petitioner's contention that since the 2007 sentencing court did not specify the manner in which its determinate sentence was to run vis a vis the 2003 sentence, such determinate sentence must be calculated as running concurrently. Petitioner's entire first argument springs from this premise. The Court finds, however, that since the 2003 sentence was never interrupted by a parole delinquency it continued to run after petitioner's October 13, 2004 arrest until the January 29, 2006 maximum expiration date was reached. *See Mena v. Fischer*, 84 AD3d 1611. Thus, when petitioner was sentenced in connection with the new criminal charges on June 11, 2007 he was not "subject to any undischarged term of imprisonment" for Penal Law §70.25(1)(a) purposes. This Court therefore finds that DOCCS officials properly calculated the maximum expiration date of

petitioner's 2007 sentence without reference his 2003 sentence, which expired before the 2007 sentence was imposed.

Citing *Sparago v. New York State Division of Parole*, 132 AD2d 881, *mod* 71 NY2d 943, petitioner next argues that since the running of the 2003 sentence was never interrupted by a parole delinquency he is entitled to jail time credit (Penal Law §70.30(3)) against the 2007 sentence for the entire time spent in local custody after his October 13, 2004 arrest until the commencement of the running of the 2007 sentence on October 4, 2007, when he was received back into DOCCS custody (*see* Penal Law §70.30(1). For the reasons set forth below, however, the Court is not persuaded by petitioner's reliance on *Sparago*.

The calculation of jail time credit is controlled by Penal Law §70.30(3) which provides, in relevant part, as follows:

> "The term of a determinate sentence . . . imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence . . . The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the . . . maximum term of any previously imposed sentence . . ."

According to the Appellate Division, Third Department, in *Sparago*, the crediting of time against the maximum term of a previously imposed sentence, within the meaning of the proscription against double crediting set forth in Penal Law §70.30(3), only " . . . occurs when the previously imposed sentence is duly interrupted, with jail time accruing during the period of interruption." 132 AD2d 881 at 883.[3] While the *Sparago*

[3] In addition to its determination with respect to the jail time credit issue, the Appellate Division in *Sparago* also determined that Mr. Sparago's most recently imposed (1984) sentence had to run consecutively with respect to the undischarged term of his previously imposed (1980) sentence. It also found that Mr. Sparago's " . . .maximum release date was properly calculated by aggregating the undischarged portion of the 1980 maximum and the 1984 maximum." 132 AD2d 881 at 882. There is nothing in the Court of Appeals decision in *Sparago* (71 NY2d 943) to suggest that such court was called

rationale might arguably be applied to the facts and circumstances of this case, it is noted that the specific fact pattern in *Sparago* (which the Third Department deemed "unusual") bears little resemblance to the fact pattern in the case at bar. It is also noted that although the Appellate Division, Third Department issued its decision in *Sparago* more than 24 years ago, the relevant holding therein apparently remains uncited in any officially-reported case. More importantly, since 1987 the Appellate Division, Third Department, has issued a number of decisions seemingly at odds with the relevant rationale expressed in *Sparago*. *See Mena v. Fischer*, 84 AD3d 1611, *lv den* 17 NY3d 710, *Hot v. New York State Department of Correctional Services*, 79 AD3d 1383, *lv den* 16 NY3d 710, *Villanueva v. Goord*, 29 AD3d 1097 and *DuBois v. Goord*, 271 AD2d 874.

Hot and *Villanueva*, to be sure, involve fact patterns dissimilar to both *Sparago* and the case at bar. Each of these cases involve individuals who had already commenced serving definite or indeterminate sentences and who were subsequently sentenced to additional indeterminate or determinate sentences. In each case the Appellate Division, Third Department, found that jail time credit against the subsequent sentence(s) was unavailable with respect to time spent in local custody after the previously-imposed

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upon to review the determination of the Appellate Division, Third Department, with respect to the jail time credit issue. After noting that the Appellate Division had reversed Supreme Court with regard to the jail time credit issue, the Court of Appeals further noted that "[t]he Appellate Division agreed with Supreme Court on the issue now before us, however, holding that because petitioner's sentences were to run consecutively . . .they had to be aggregated . . . It [the Appellate Division] did not address which aggregation method used by respondents was proper, but implicitly held the recalculated sentence was computed using the correct method. We agree with the Appellate Division that petitioner's sentences had to be aggregated, but disagree, under these facts, as to the aggregation method which should be used." 71 NY2d 943 at 945 (citations omitted) (emphasis added). Indeed, the Court of Appeals' only specific mention of the jail time credit issue occurred after it set forth its reasoning with respect to the sentence aggregation issue, stating as follows: "This [aggregation] method not only effectuates the stipulation which provided petitioner's parole would not be revoked, but also credits him with the 217 days of jail time to which the Appellate Division found him entitled." *Id* at 946. It is therefore the finding of this Court (Supreme Court, Franklin County) that the *Sparago* holding with respect to the jail time credit issue, as well as the rationale underlying that holding, is that of the Appellate Division, Third Department, rather than the Court of Appeals.

definite or indeterminate sentence had commenced. Although neither *Hot* nor *Villanueva* involved any parole delinquency issues, it is still noteworthy that, contrary to *Sparago*, the proscription against double crediting set forth in Penal Law §70.30(3) was applied notwithstanding the fact that the previously imposed sentences were not interrupted but continued to run during the periods of time for which jail time credit was sought.

Mena and *DuBois* on the other hand both involve fact patterns similar to the fact pattern in the case at bar. Each of these cases involved individuals who spent time in local custody in connection with new criminal charges with respect to acts committed while on parole from previously-imposed sentences. In each case, moreover, the previously imposed sentence(s) expired prior to the imposition of sentence(s) associated with the new criminal charges. Despite the similar fact pattern *Mena* is only of tangential interest since it involved a parole eligibility date calculation issue rather than a jail time credit issue and, therefore, the proscription against double crediting set forth in Penal Law §70.30(3) was not specifically considered. The *Mena* court, after determining that Mr. Mena's parole was not revoked by operation of law (Executive Law §259-i(3)(d)(iii)) since his previously imposed sentence expired prior to sentencing on the subsequent charges, found that he " . . . continued to serve his [previously-imposed] 1989 sentence after his incarceration [in local custody] in November 1993 [in connection with the new criminal charges] until that [previously-imposed] sentence expired on its own terms on December 28, 1994. Thus, the Department properly credited all prison time thereafter served to the new commitment on his 1995 sentences." *Mena v. Fischer*, 84 AD3d 1611 (emphasis added) (citing *Hot*, *Villianueva* and *DuBois*). No mention was made of any credit against Mr. Mena's subsequently-imposed 1995 sentence for the time he spent incarcerated in local custody prior to the December 28, 1994 expiration of his previously-imposed 1989 sentence.

In *DuBois* the jail time credit issue was front and center. The petitioner in *DuBois*, who was serving an indeterminate sentence of 5 to 15 years imposed in 1979, was released on parole but subsequently violated and returned to DOCCS custody with an adjusted maximum expiration date of May 14, 1989. In August of 1988 Mr. DuBois was transferred to county jail pending disposition of criminal charges stemming from an incident that had occurred while he was on parole. On October 13, 1988 he was again released from DOCCS custody to parole supervision but remained in county jail in connection with the new charges. He was ultimately sentenced in connection with those charges on an unspecified date in 1989 to an indeterminate sentence of 10 to 20 years. On June 26, 1989 Mr. DuBois was received back into DOCCS custody to begin serving his 1989 sentence certified as entitled to 46 days of jail time credit against such sentence covering the time period from May 14, 1989 (the adjusted maximum expiration date of his 1979 sentence) to his June 26, 1989 return to DOCCS custody. Mr. Dubois contended, however, that he was entitled to jail time credit for the entire time spent in local custody from August 11, 1988 to June 26, 1989. The Appellate Division, Third Department, rejected this contention. Without mentioning Penal Law §70.30(3), or *Sparago*, the *DuBois* court found as follows:

> " . . . [P]etitioner was not entitled to a credit against the 1989 sentence for time served in County Jail prior to the expiration of the 1979 sentence because that period of incarceration was credited against petitioner's 1979 sentence . . . Because petitioner continued to serve the 1979 sentence despite his October 13, 1988 release on parole, the jail time served following his parole release and prior to the maximum expiration date of the 1979 sentence may not be credited towards the 1989 sentence . . ." 271 AD2d 874 at 875-876 (citations omitted).

Based upon the decisions of the Appellate Division, Third Department in *Mena*, *Hot*, *Villanueva* and, particularly, *DuBois*, this Court is not persuaded that the *Sparago* rationale is applicable under the facts and circumstance of the case at bar. This Court

finds that the proscription against double crediting set forth in Penal Law §70.30(3) is applicable notwithstanding the fact that petitioner's 2003 sentence was not interrupted but continued to run while petitioner was confined in local custody from October 14, 2004 until January 29, 2006, when the maximum expiration date of such sentence was reached. Accordingly, this Court would find that there was no error in excluding that time period in the amended jail time certificate.

In his third and final argument petitioner asserts as follows:

> " . . . DOCCS appears to have made an arbitrary decision to count the time in jail against only the original undischarged sentence [presumably, the 2003 sentence], rather than against the new [2007] sentence. Petitioner, of course, argues that the time should have been counted against both sentences, but even if it were restricted to one, it should have gone to the new sentence. Penal Law §70.40(3)(c), addresses the crediting of time in situations involving violations of parole. Under P.L. 70.40(3)(c), the credit does not go to the old sentence unless the arrest was for a parole delinquency. If custody came about due to an arrest on a criminal matter, the credit goes to that sentence first. Here, the custody came about as a result of an arrest on the criminal matter that resulted in the [2007] sentence . . . and the credit should have gone towards that sentence."

The Court first observes that Penal Law §70.40(3)(c) plays no role in the allocation (between the 2003 and 2007 sentences) of the time petitioner spent in local custody from his October 13, 2004 arrest to his October 4, 2007 transfer from local to state custody. The parole jail time credit statute only comes into play with respect to " . . . time spent by a person in custody from the time of [parole] delinquency to the time service of the sentence resumes . . ." Penal Law §70.40(3)(c). Since there was no declaration of a parole delinquency in the case at bar, Penal Law §70.40(3)(c) cannot serve as a basis for the application of any of petitioner's local custody time against his 2007 sentence. In the absence of the declaration of a parole delinquency, moreover, petitioner's 2003 sentence continued to run after his October 13, 2004 arrest until the maximum expiration of such sentence was reached on January 29, 2006 and the 2003 sentence expired on its own

terms. *See Mena v. Fischer*, 84 AD3d 1611. The Court therefore finds nothing arbitrary in the DOCCS determination to allocate the time petitioner spent in local custody from October 13, 2004 to January 29, 2006 against the 2003, rather than 2007, sentence.

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

ADJUDGED, that the petition is dismissed.

DATED: February 9, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge