

**Matter of Johnson v Doldo**

2012 NY Slip Op 31090(U)

April 5, 2012

Sup Ct, St. Lawrence County

Docket Number: 137746

Judge: S. Peter Feldstein

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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF ST. LAWRENCE**

**X**

In the Matter of the Application of  
**KEVIN JOHNSON, #08-B-1827,**  
Petitioner,

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

**DECISION AND JUDGMENT  
RJI #44-1-2011-0916.42  
INDEX # 137746  
ORI # NY044015J**

-against-

**NUNZIO DOLDO**, Acting Superintendent,  
Gouverneur Correctional Facility, and  
**BRIAN FISCHER**, Commissioner,  
NYS Department of Corrections and  
Community Supervision,

Respondents.

**X**

This proceeding was originated by the Petition for Writ of Habeas Corpus of Kevin Johnson, verified on December 14, 2011 and filed in the St. Lawrence County Clerk's Office on December 20, 2011. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging his continued incarceration in the custody of New York State Department of Corrections and Community Supervision. More specifically, petitioner asserts that he is being held in DOCCS custody beyond the October 29, 2011 maximum expiration date of his current sentence. The Court issued an Order to Show Cause on December 28, 2011 and has received and reviewed respondents' Return, verified on February 23, 2012, as well as petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on March 13, 2012.

On May 14, 2004 petitioner was sentenced in Onondaga County Court, as a second felony offender, to an indeterminate sentence of 2 to 4 years upon his conviction of the crime of Criminal Possession of a Controlled Substance 4<sup>o</sup>. He was received into DOCCS custody on May 21, 2004 certified as entitled to 72 days of jail time credit. At that time

DOCCS officials calculated the maximum expiration date of petitioner's 2004 sentence as March 8, 2008.

Petitioner was conditionally released on November 8, 2006. On September 12, 2007, however, he was arrested and taken into local custody in connection with new criminal charges. Apparently no parole revocation proceedings were pursued and on March 8, 2008, while he was still held in local custody in connection with the new criminal charges, petitioner was discharged from parole upon reaching the maximum expiration date of his 2004 sentence. On June 2, 2008 petitioner was sentenced in Onondaga County Court, as a second felony offender, to a determinate term of 4 years, with 1 year post-release supervision, upon his conviction of the crime of Attempted Criminal Possession of a Controlled Substance 4<sup>o</sup>. The 2008 sentencing court directed that its sentence be executed as a sentence of parole supervision pursuant to Criminal Procedure Law §410.91.

Petitioner was received into DOCCS custody on June 6, 2008 originally certified by the Onondaga County Sheriff's Department as entitled to 268 days of jail time credit for the entire time period from his September 12, 2007 arrest through June 5, 2008. As will be discussed later in this Decision and Judgment, on September 22, 2011 the Onondaga County Sheriff issued an amended certification of jail time credit reducing such credit to 89 days covering the period from March 9, 2008 (the day after the maximum expiration date of petitioner's 2004 sentence was reached) through June 5, 2008. The amended jail time certificate contained the following comment: "PURSUANT TO SECTION 70.30 SUB (3) OF THE NYS PENAL LAW, JAIL TIME CAN NOT INCLUDE ANY TIME THAT IS CREDITED AGAINST THE TERM OR MAXIMUM TERM OF ANY PREVIOUSLY IMPOSED SENTENCE OR PERIOD OF POST-RELEASE SUPERVISION TO WHICH A PERSON IS SUBJECT. THEREFORE, BASED ON THE ABOVE SECTION,

SECTION 600-A OF THE NYS CORRECTION LAW AND REQUEST BY NYS DEPARTMENT OF CORRECTIONAL SERVICES, JAIL TIME CREDIT HAS BEEN AMENDED.”

On September 11, 2010 petitioner, who was, in effect, statutorily deemed subject to post-release supervision immediately upon his arrival in DOCCS custody on June 6, 2008 (*see* CPL §410.91(1)), was declared delinquent. His post-release supervision was subsequently revoked, with a sustained delinquency date of November 11, 2010, upon a plea at a final parole revocation hearing conducted on December 21, 2010. A delinquent time assessment was imposed directing that petitioner be held until his maximum expiration date. He was returned to DOCCS custody as a post-release supervision violator on January 3, 2011.

Upon petitioner’s return to DOCCS custody the maximum expiration date of his 2008 sentence was calculated based upon the then-effective certification of 268 days of jail time credit. Running the 4-year determinate term from June 6, 2008 (*see* Penal Law §70.30(1)), less 268 days of jail time credit, an initial maximum expiration date of September 7, 2011 was calculated. Since, however, as alluded to previously, petitioner’s 1-year of post-release supervision effectively commenced running on June 6, 2008, the running of his 4-year determinate term was immediately interrupted with the remaining 3 years, 3 months and 1 day (4 years less 268 days jail time credit) held in abeyance. *See* Penal Law §70.45(5)(a). One year later, on June 6, 2009, petitioner completed serving the 1-year period of post-release supervision and the 3 years, 3 months and 1 day previously held in abeyance against the 4-year determinate term, reduced to 2 years, 3 months and 1 day by the credit provided in Penal Law §70.45(5)(b), resumed running with petitioner remaining under DOCCS supervisory jurisdiction. *See* Penal Law §70.45(5)(b). At that time - still prior to the issuance of the amended jail time certification - the 2 years,

3 months and 1 day owing against petitioner's 4-year determinate term was calculated as running from the completion of the 1-year of period of post-release supervision on June 6, 2009 to produce the adjusted (but identical) maximum expiration date of September 7, 2011.

The running of the remaining portion of petitioner's determinate term was interrupted as of the November 11, 2010 delinquency date with 9 months and 26 days still owing to the adjusted maximum expiration date of such sentence. Running that time owed from January 3, 2011, when petitioner was returned to DOCCS custody as a parole violator, a re-adjusted maximum expiration date of October 29, 2011 was produced. It is this maximum expiration date - calculated prior to the issuance of the amended jail time certification - that petitioner relies upon in asserting an entitlement to immediate release from DOCCS custody. After the issuance of the amended jail time certification on September 22, 2011, however, DOCCS officials re-calculated the maximum expiration date of petitioner's 2008 determinate term utilizing the same methodology as set forth above but with 89 days of jail time credit substituted for 268 days. Upon doing so, the current maximum expiration date of April 28, 2012 was established. This Court finds no error in the DOCCS sentence calculation methodology.

In the petition it is alleged that the respondents "revoked" petitioner's March 13, 2008 final discharge from parole under the 2004 sentence. As explained above, the change in the calculation of the maximum expiration date of petitioner's 2008 sentence was occasioned solely by application of the reduced jail time credit as specified in the amended jail time certification issued on September 22, 2011 by the Onondaga County Sheriff. In this regard it is noted that where, as here, a criminal defendant was confined in local custody outside the City of New York, jail time credit is calculated by the County Sheriff and certified to the New York State Department of Corrections and Community

Supervision upon transfer of the inmate from local to state custody. *See* Correction Law §600-a. State DOCCS authorities are bound by the jail time certified by the County Sheriff and can neither add nor subtract from the time so certified. *See Neal v. Goord*, 34 AD3d 1142, *Torres v. Bennett*, 271 AD2d 830 and *Jarrett v. Coughlin*, 136 Misc 2d 981. Where the County Sheriff amends a previously issued jail time certificate, DOCCS officials are bound by the most recently issued certificate. *See Villanueva v. Goord*, 29 AD3d 1097.

In his Reply petitioner appears to assert that assigned counsel at the December 21, 2010 final parole revocation hearing failed to contact a local judge (Syracuse City Court?) to clarify if an unspecified local sentence was to run “. . . concurrently with his parole sentence, which was part of the original plea deal [at the final parole revocation hearing] . . . Thus, because petitioners [sic] attorneys had not cleared this matter, petitioner is being held past the specific performance of the plea . . .” This Court, however, finds nothing in the Petition for a Writ of Habeas Corpus asserting any cause of action associated with some sort of failure of the plea agreement at petitioner’s December 21, 2010 final parole revocation hearing.

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

**ADJUDGED**, that this petition is dismissed.

**DATED:** April 5, 2012 at  
Indian Lake, New York

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S. Peter Feldstein  
Acting Supreme Court Judge