People v New York State Dept. of Correctional Servs.
2012 NY Slip Op 31300(U)
May 16, 2012
Supreme Court, Wyoming County
Docket Number: 21,187-2012
Judge: Mark H. Dadd
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At a term of Supreme Court held in and for the County of Wyoming, at Warsaw, New York, on the 16th day of May, 2012.

PRESENT: HONORABLE MARK H. DADD
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT : COUNTY OF WYOMING

The People of the State of New York
ex rel FRANKLIN LEONARD, #99-B-0631, *Relator*

v.

New York State Department of
Correctional Services, *Respondent*

Index No. 21,187-12

For the Relator
WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC.
Norman P. Effman, Director

For the Respondent
ERIC T. SCHNEIDERMAN, Attorney General
by Darren Longo
Assistant Attorney General

MEMORANDUM AND JUDGMENT

By petition for a writ of habeas corpus verified on March 19, 2012, Franklin Leonard contends that he is entitled to immediate release because he is incarcerated for violating the release conditions of a term of Post Release Supervision ["PRS"] which was not properly imposed upon him by the court that sentenced him. The relator appeared with counsel assigned by the amended writ dated April 4, 2012. Respondent requests that the petition be denied upon the affirmation and return of Darren Longo, Assistant Attorney General, dated April 18, 2012. Also opposing the petition, the Monroe County District Attorney's Office submits the

affirmation of Leslie E. Swift, Assistant District Attorney, dated April 12, 2012. In further support of the petition, relator's counsel submits a reply affirmation dated April 25, 2012, and the relator submits an answering affidavit sworn to on April 27, 2012.

The relator is serving an aggregate sentence composed of multiple prison terms. He was first received into state custody on April 1, 1999, after being sentenced in Monroe County on January 26, 1999, to serve a term of 3½ to 7 years for his conviction for Criminal Possession of Stolen Property in the Third Degree under case number 98-0241. At that time he also received a determinate term of 7 years for his conviction of Robbery in the Second Degree under case number W3028-99, but the Monroe County Supreme Court subsequently vacated that conviction while granting the People leave to re-present the matter to the grand jury. After being re-indicted, the relator was tried and convicted of Robbery in the Second Degree and two counts of Grand Larceny in the Fourth Degree. On February 15, 2001, he received a determinate term of 5 years for the Robbery in the Second Degree count, and two indeterminate terms of 2 to 4 years for the two counts of Grand Larceny in the Fourth Degree. The Court imposed these terms to run concurrently with each other and consecutively with the term imposed in 1999 (see, Matter of Leonard v. Dushantinski, 4 A.D.3d 642 [3rd Dept., 2004]). Then on November 21, 2005, the relator received from the Orleans County Court an additional consecutive indeterminate term of 1½ to 3 years for his conviction of Attempted Assault in the Second Degree. Thus, combining the relator's multiple sentences in accordance with the provisions of Penal Law §70.30(1)(b) results in a controlling aggregate maximum term of imprisonment of 14 years. After crediting the relator with 129 days of jail time, the maximum expiration date initially calculated for his aggregate sentence was November 21, 2012.

The relator was granted conditional release on May 21, 2008, and he remained under parole supervision thereafter until he was declared delinquent on February 4, 2010. Restored to supervision on October 1, 2010, the relator was again declared delinquent on November 20, 2011. On January 24, 2012, he was returned to prison.

The Penal Law required that the relator's determinate sentence for Robbery in the Second Degree include a 5 year period of PRS (Penal Law §70.45[2]), and the commitment for the relator's February 15, 2001, sentence does contain the PRS term. Based upon this apparently valid commitment, the relator has treated the relator's periods under supervision as release to PRS, calculating his aggregate sentence accordingly. As required by Penal Law §70.45(5), while the relator has been under parole supervision the respondent has held in abeyance the running of the time remaining upon the 14 year aggregate maximum term pending

the relator's successful completion of the 5 year PRS period. Conversely, when the relator has been re-incarcerated due to his violations of release conditions, his time in custody has been credited to his aggregate prison term while the running of the PRS term has been stopped. Allocating the time periods in this manner, the respondent presently calculates the relator's maximum expiration date as April 21, 2016. Under this calculation the relator currently owes 2 years, 1 month and 28 days of delinquent time upon his PRS term. Richard de Simone, Associate Counsel in charge of the respondent's Office of Sentencing Review, states in his letter attached as an exhibit to the return that if the relator were not subject to the 5 year PRS term, his adjusted maximum expiration date would now be calculated as June 19, 2013.

The parties agree that the relator's PRS term was not properly imposed. The sentencing minutes for the relator's 2001 sentence show that the judge failed to include the PRS term when he pronounced sentence upon the relator. The clerk of the court added it to the commitment despite this omission by the judge. To be valid, a PRS term must be stated by the sentencing court in the defendant's presence (CPL §§380.20 and 380.40[1]). It may not be administratively added by a court clerk (People v. Sparber, 10 N.Y.3d 457 [2008]; see also, Hill v. United States ex rel. Wampler, 298 U.S. 460 [1936]; People ex rel. Johnson v. Warden, 2007 N.Y. Slip Op. 50463(U), 836 N.Y.S.2d 501 [Sup. Ct. Bronx Co., decided March 12, 2007]). The relator is entitled to hear his PRS term pronounced by the court. Thus, it would appear that the relator's 2001 sentence is subject to being vacated and the matter remitted to the sentencing court for re-sentencing with the inclusion of the PRS term required by Penal Law §70.45 (Sparber, supra, 465-466; see also, Correction Law §§601-a and 601-d).

The Court, however, is not persuaded by the relator's argument that he is entitled to immediate release on this ground. He continues to be subject to an aggregate prison term which has not expired. He therefore does not have a right to mandatory release pursuant to Penal Law §70.45 based upon the claimed expiration of the 2001 determinate term because he has not, in fact, finished serving that term. The 2001 sentence was combined with those received in 1999 and 2005 pursuant to the Penal Law. It has been held that this process of aggregation results in a single aggregate sentence such that "a prisoner serving multiple sentences is subject to all the sentences, whether concurrent or consecutive, that make up the merged or aggregate sentence he is serving" (People v Buss, 11 N.Y.3d 553, 557-558 [2008]; see also, People v. Nieves, ___ A.D.3d ___, 2012 N.Y. Slip Op. 03276 [1st Dept., 2012]). In short, none of the terms which comprise the relator's aggregate sentence will be satisfied until his entire aggregate sentence has been fully satisfied.

Because the relator is held pursuant to an unexpired aggregate prison term, not solely upon a PRS term, his case is distinguishable from those other cases, such as People ex rel. Burch v. Goord (48 A.D.3d 1306 [4th Dept., 2008]; see also People ex rel. Lewis v Warden, Otis Baum Correctional Ctr., 14 Misc.3d 468 [Sup. Ct., Bronx, Co., 2006, affirmed 51 A.D.3d 512 [1st Dept., 2008]; People ex rel. Gerard v. Kralik, 44 AD3d 804, 805 [2007], appeal withdrawn by 9 N.Y.3d 1030 [2006]), where the nullification of an administratively imposed PRS term provided a basis for habeas relief. On the contrary, the relator has "no federal or state constitutional right to be released to parole supervision before serving [his] full sentence" (People ex rel. Stevenson v. Warden, 24 A.D.3d 122, 123 [1st Dept., 2005]). Also, because he has not completely served his 2001 determinate prison term, the relator is incorrect in claiming, based upon the holding of the Court of Appeals in People v. Williams, (14 N.Y.3d 198 [2010]), that he has acquired a "reasonable expectation of finality" with respect to the 2001 sentence which would preclude the sentencing court from curing its failure to pronounce the required PRS term by re-sentencing the relator.

The Court notes that the relator does not argue in his petition that he is entitled to release without conditions, nor does he dispute that he was found to have violated the conditions of his release. The authority for imposing release conditions, and the procedure for adjudicating alleged violations of them, are substantially the same regardless of whether the conditions imposed by the Board of Parole are denominated conditions of "PRS" or conditions of "parole release." After being granted release under conditions set pursuant to Penal Law §§70.40(1)(b) and 70.45(3), the relator has been returned to prison upon a determination made pursuant to the Executive Law that he had violated those conditions (Penal Law §70.45[4]; Executive Law §259-i[3] and [4]). Given that even without the inclusion of the PRS term the relator's sentence permitted him to be released only under conditions, the Court finds no basis for overturning the determination revoking his release for their violation. (In this regard, to the extent that it reached a different conclusion in vacating a PRS violation warrant and granting habeas corpus, this Court disagrees with the reasoning of People ex rel. Harper v. Warden (21 Misc.3d 906, 911 [Sup. Ct., Bronx Co., 2008])). Since the relator was properly subjected to release conditions and found to have violated them, his current incarceration pursuant to his prison sentence is lawful. For the foregoing reasons, the Court finds that the relator is not entitled to habeas relief.

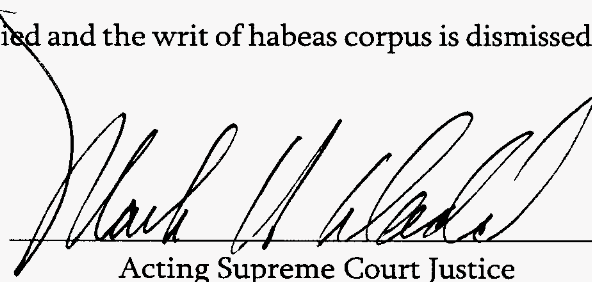
Finally, although the parties agree that the PRS term was not properly imposed, the respondent continues to calculate the relator's aggregate sentence with the PRS term

included in accordance with the terms of the 2001 commitment. The respondent asserts that case law requires it to do so (see, Matter of Garner v. Department of Correctional Services, 10 N.Y.3d 358, 362 [2008]; People ex rel. Griffin v New York State Div. of Parole, 55 A.D.3d 1452 [4th Dept., 2008], leave to appeal dismissed by 11 N.Y.3d 884 [2008]; Matter of Murray v Goord, 1 NY3d 29, 32 [2003]; Middleton v. State, 54 A.D.2d 450, 452 [3rd Dept., 1976]; People ex rel. Coates v. Martin, 8 A.D.2d 688 [4th Dept., 1959]). The Court finds that it is not necessary in this proceeding to rule upon whether or not the respondent is correctly calculating the relator's sentence, however. For the determination of the relator's habeas petition, it is sufficient that the Court has found that the relator's prison sentence has not expired. Moreover, as he declares in his answering affidavit, the relator "is not stating that his sentence was inaccurately calculated." As such, the Court finds that converting the matter to a proceeding under CPLR Article 78 in order to address the propriety of the respondent's sentence calculation would be inappropriate in this case. Nothing in the Court's decision precludes the relator from initiating an Article 78 proceeding in the future to seek further review of the sentence calculation. Similarly, nothing in the Court's decision precludes the relator from bringing a motion before the sentencing court pursuant CPL §440.20(1) asking that the 2001 sentence be vacated.

NOW, THEREFORE, it is hereby

ORDERED that the petition is denied and the writ of habeas corpus is dismissed.

Dated: May 16, 2012



Acting Supreme Court Justice