Matter of Leshore v O'Meara

2012 NY Slip Op 33060(U)

December 21, 2012

Supreme Court, St. Lawrence County

Docket Number: 138899

Judge: S. Peter Feldstein

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STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
VERNON LESHORE,#11-R-2116,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #44-1-2012-0357.15
INDEX #138899
ORI # NY044015J

-against-

ELIZABETH A. O'MEARA, Superintendent, Gouverneur Correctional Facility, **BRIAN S. FISCHER**, Commissioner, NYS Department of Corrections and Community Supervision, and **MICHAEL J. SPOSATO**, Nassau County Sheriff,
Respondents.

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The Court had before it the Petition For Writ of Habeas Corpus of Vernon Leshore, verified on May 11, 2011 and filed in the St. Lawrence County Clerk's office on May 17, 2012. Petitioner, who is an inmate at the Gouverneur Correctional Facility, purported to challenge his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision (DOCCS). By Decision and Order dated May 22, 2012 petitioner's request for the issuance of a writ of habeas corpus or order to show cause in a habeas corpus proceeding was denied, with leave granted to petitioner to file an amended petition for judgment pursuant to Article 78 of the CPLR. The Court now has before it the "Amended Petition for Article 78" of Vernon Leshore, verified on July 4, 2012 and filed in the St. Lawrence County Clerk's office on July 16, 2012. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging the time computations associated with his ongoing incarceration in DOCCS custody.

The Court issued an Order to Show Cause on August 3, 2012 and has received and reviewed the Answer/Return of the respondents O'Meara and Fischer, including Confidential Exhibit's C and D, verified on September 21, 2012, as well as the Answer of the respondent Sposato, dated September 21, 2012 and filed in the St. Lawrence County Clerk's office on September 26, 2012. The Court has also received and reviewed petitioner's Reply, verified on October 6, 2012 and filed in the St. Lawrence County Clerk's office on October 16, 2012.

On January 8, 2003 petitioner was sentenced in Supreme Court, Queens County, as a second felony offender, to an indeterminate sentence of 4½ to 9 years upon his conviction of the crime of Criminal Sale of a Controlled Substance 3°, a class B felony offense defined in Article 220 of the Penal Law. He was received into DOCCS custody on January 31, 2003 and presumptively released therefrom to parole supervision (*see* Correction Law §806 and 7 NYCRR Part 2200) on April 28, 2005. His presumptive release was revoked, however, with a sustained delinquency date of August 17, 2007, following a final parole revocation hearing conducted on November 16, 2007. The Administrative Law Judge presiding at petitioner's final hearing imposed a 15-month delinquent time assessment estimated to expire on November 24, 2008. Petitioner was received back into DOCCS custody on February 15, 2008 and was re-released to parole supervision on November 24, 2008. On or about June 30, 2010, however, he was arrested and taken into local custody in connection with new criminal charges. On January 4, 2011, in the absence of any parole violation proceedings undertaken in the aftermath of the incident underlying petitioner's June 30, 2010 arrest, the Division of Parole issued a "Final Discharge" certificate, apparently as a result of the November 24,

2010 mandatory merit termination of petitioner's sentence pursuant to Executive Law §259-j(3-a), as it then existed.

On June 6, 2011 petitioner was sentenced in connection with the new criminal charges in Supreme Court, Nassau County, as a second felony offender, to an indeterminate sentence of 2 to 4 years upon his conviction of the crime of Attempted Assault 2°. Petitioner was received into DOCCS custody on June 17, 2011 initially certified by the Nassau County Sheriff's Department as entitled to 352 days of jail time credit covering the entire period from his June 30, 2010 arrest through June 16, 2011. On October 21, 2011, however, an amended jail time credit certificate was issued reducing petitioner's entitlement of jail time credit to 163 days covering the period from January 5, 2011 - the day after the issuance of the certificate discharging petitioner from parole - through June 16, 2011.

Executive Law §259-j(3-a), as amended by L 2008, ch 486, § 1, effective August 5, 2008, read, in relevant part, as follows: "The division of parole must grant termination of sentence after three years of unrevoked presumptive release or parole to a person serving an indeterminate sentence for a class A felony offense defined in article two hundred twenty of the penal law, and must grant termination of sentence after two years of unrevoked presumptive release or parole to a person serving an indeterminate sentence for any other felony offense defined in article two hundred twenty . . . of the penal law." Prior to the enactment of L 2008, ch 486, §1, Executive Law §259-j(3-a) read in identical fashion except without either reference to "presumptive release.[1]" The pre-2008

[1] The Court notes that Executive Law §259-j(3-a) was deleted by L 2011, ch 62, Part C, Subpart A, §38-g, effective March 31, 2011. However, the substance of the former Executive Law §259-j(3-a), as it existed after the 2008 amendment, was re-codified into newly-enacted Correction Law §205(4) pursuant

[* 4]

amendment version of Executive Law §259-j(3-a) was added by L 2004, ch 738, §37, effective February 12, 2005. *See* L 2004, ch 738, §41(i-1).

Prior to the 2008 amendment to Executive Law §259-j(3-a) the Appellate Division, Third Department, considered the mandatory sentence termination claim of an inmate who had served five years of unrevoked parole between 1993 and 1998 but had been returned to state custody, following a parole violation, in 1999. The Appellate Division, Third Department, held as follows:

> "In our view, the statutory text requiring 'three years of *unrevoked* parole' does not contemplate a period of parole served which was ultimately revoked. Further, although the legislative history of the statute indicates that the provision was designed to provide retroactive relief to those who had accrued sufficient consecutive parole time at the point of enactment (*see* Assembly Introducer Mem in Support, Bill Jacket, L 2004, ch 738, at 6), nothing in the statutory language or legislative history suggests that the provision was to apply to prior periods exceeding three years of parole served where the parolee thereafter violated that parole and was returned to prison. Indeed, by specifying an effective date in the legislation, the Legislature evinced its intent that the provision apply only to those persons who had or would thereafter accrue a period of *unrevoked* parole on or after that effective date . . ." *Ciccarelli v. New York State Division of Parole*, 35 AD3d 1107, 1108, *lv den* 8 NY3d 806 (citations omitted) (emphasis in original)."

The above-quoted holding in *Ciccarelli* remains good law in the Appellate Division, Third Department. *See People ex rel Speights v. McKoy*, 88 AD3d 1039. Also prior to the 2008 amendment the Appellate Division, Third Department, held that Executive Law §259-j(3-a) applied only to parolees, not to inmates (like petitioner in the case at bar) granted merit presumptive release pursuant to Correction Law §806. *See Sweeney v. Dennison*, 52 AD3d 882.

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to L 2011, ch 62, Part C, Subpart A, §32, also effective March 31, 2011.

As noted previously, the 2008 amendment to Executive Law §259-j(3-a) expanded the mandatory sentence termination benefits of the statute to inmates who had been granted presumptive release. The Legislative Memorandum (Memorandum in Support, New York State Senate) relating to the 2008 amendment, as set forth on page 2159 of the second volume of the 2008 McKinney's Session Laws of New York, describes the purpose of the 2008 amendment as follows: "This bill amends the executive law to correct an oversight in a chapter of the laws of 2004 that unintentionally neglected to include certain offenders who are presumptively released in the mandatory termination of parole supervision provisions." In setting forth the justification for the 2008 amendment, moreover, the memorandum addresses *Sweeney* as follows:

> "The appellate court in the Third Judicial Department recently decided, in . . . [*Sweeney*] that the mandatory termination of parole supervision provision does not apply to offenders who were presumptively released rather than granted parole by the Board of Parole. The decision was based on the plain language of the statute [Executive Law §259-j(3-a) prior to the 2008 amendment] which only refers to 'unrevoked parole' and neglects to specifically refer to presumptive release. The result of this decision is nonsensical because offenders serving indeterminate sentences are denied the right to be discharged from parole because they earned presumptive release from Department of Correctional Services.
>
> In order to be presumptively released, an inmate must demonstrate exemplary program participation, have no history of a violent conviction and no serious disciplinary infractions. It is actually harder to earn presumptive release than it is to be paroled by the Board of Parole. Therefore, if any offenders should be eligible for a termination of sentence it is those who have earned presumptive release. However, because of a drafting oversight, offenders who have earned presumptive release are being penalized. This bill will correct that oversight."

The 2008 amendment to Executive Law §259-j(3-a), moreover, was specifically drafted to " . . .take effect immediately [August 5, 2008] and apply to persons sentenced to an indeterminate sentence prior to, on and after the effective date of this act . . ."

The central issue to be resolved in this proceeding is whether or not the mandatory sentence termination provisions of the post-2008 amendment version of Executive Law §259-j(3-a) are applicable with respect to an inmate, like petitioner, who was on unrevoked presumptive release for a period in excess of two years but who subsequently violated the conditions of his/her release and was returned to DOCCS custody prior to the August 5, 2008 effective date of the amendment but after the February 12, 2005 effective date of the original version of the statue. Although the Appellate Division, Third Department has not yet addressed this issue, it has been addressed by the Fourth Department (*People ex rel Forshey v. John*, 75 AD3d 1100) and by the First Department (*People ex rel Rosa v. Warden*, 80 AD3d 525). Both the *Forshey* court and the *Rosa* court found the sentence termination provisions of the post-2008 amendment version of Executive Law §259-j(3-a) to be applicable.

The petitioner in *Forshey* spent over two years on unrevoked presumptive release from April of 2005 to July of 2007 and he challenged the authority of the Division of Parole to subsequently arrest him in connection with an alleged July 2007 parole violation. Although the *Forshey* respondent argued that the 2008 amendment to the Executive Law §259-j(3-a) should not be applied retroactively, the Fourth Department rejected such argument holding that Mr. Forshey's " . . . sentence should have been terminated in April 2007, following two years of unrevoked parole [presumptive release],

and the [lower] court should have sustained the writ of habeas corpus and ordered petitioner's immediate release." 75 AD3d 1100, 1101.

The *Rosa* court was even more clear in holding that the petitioner therein, who had been on unrevoked presumptive release from September 21, 2004 to January 22, 2008, was entitled to take advantage of the mandatory sentence termination provisions set forth in the post-2008 amendment version of Executive Law §259-j(3-a). The First Department in *Rosa* concluded " . . . that the Legislature, by enacting the [2008] amendment to Executive Law §259-j(3-a), intended to extend the benefits of the statute to presumptive releasees retroactively to February 12, 2005, the original effective date of the statute . . . Accordingly, petitioner is entitle to have his sentence terminated because as required by Executive Law §259-j(3-a), he had completed over two years of uninterrupted presumptive release from the statute's effective date prior to having it revoked on January 22, 2008." 80 AD3d 525, 526 (citations omitted).

This Court finds that the relevant facts in the case at bar are undistinguishable from the facts in *Forshey* and *Rosa*. In the absence of any contrary ruling by the New York State of Appeals or the Appellate Division, Third Department, this Court, sitting in the Third Department, considers itself bound by the decisions of the Fourth Department and First Department in *Forshey* and *Rosa*. *See Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663, *Ivory v. International Business Machines Corp.*, 2012 NY Slip Op 52123(U) and *People v. Zwack*, 188 Misc 2d 761. Accordingly, this Court finds that petitioner's challenge to the time computations associated with his ongoing incarceration in DOCCS custody must be considered within a framework whereby his 2003 sentence is deemed to have been terminated on April 28, 2007 - two years after he was presumptively

released to parole supervision. Although this Court finds, for the reasons set forth below, that petitioner is entitled to additional jail time credit, it rejects any assertion on his part that he is entitled to immediate release from DOCCS custody.

As noted previously, on June 6, 2011 petitioner was sentenced in Supreme Court, Nassau County, to an indeterminate sentence of 2 to 4 years upon his conviction of the crime of Attempted Assault 2°. At the time he was received into DOCCS custody on June 17, 2011, initially certified as entitled to 352 days of jail time credit covering the entire period from his June 30, 2010 arrest through June 16, 2011, the maximum expiration and conditional release dates associated with the 2011 sentence were calculated by DOCCS officials as June 24, 2014 and February 24, 2013, respectively. The subsequent (October 21, 2011) reduction in the certification of petitioner's entitlement to parole jail time credit from 352 to 163 days was ultimately premised upon a finding that the period from his June 30, 2010 arrest through January 4, 2011 (the date of the issuance of the certificate purporting to discharge petitioner from his 2003 sentence) could not be credited against petitioner's 2011 sentence because it had already been credited against his 2003 sentence . Since, however, this Court now holds that petitioner's 2003 sentence must be deemed to have been terminated as of April 28, 2007, no basis exists for the reduction in petitioner's jail time credit from 352 days to 163 days.

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the State respondents are directed to recalculate petitioner's June 6, 2011 Nassau County sentence with petitioner deemed entitled to 352 days of jail

time credit covering the entire period from his June 30, 2010 arrest through June 16, 2011.

Dated: December 21, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court