Matter of Allen v Yelich
2016 NY Slip Op 32348(U)
November 18, 2016
Supreme Court, Franklin County
Docket Number: 2016-363
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
ERICK ALLEN,#05-A-3504,
Petitioner,

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

DECISION, ORDER & JUDGMENT
RJI #16-1-2016-0227.48
INDEX # 2016-363

-against-

BRUCE S. YELICH, Superintendent,
Bare Hill Correctional Facility,
Respondent.

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Petitioner's original Petition for Writ of Habeas Corpus was filed in Bronx County and subsequently replaced by the Amended Petition for a Writ of Habeas Corpus of Percival A. Clarke, Esq., on behalf of Erick Allen, verified on April 23, 2016 and also filed in Bronx County. By order dated June 8, 2016 the Supreme Court, Bronx County (Hon. Vincent T. Quattrochi) directed that venue in this proceeding be changed to Franklin County. The change in venue was apparently necessitated by the fact that petitioner was no longer held in local custody in Bronx County but, rather, had been transferred into the custody of the New York State Department of Corrections and Community Supervision (hereinafter referred to as "DOCCS") and confined at the Bare Hill Correctional Facility. As an additional part of that order, Attorney Clarke was relieved of his assignment to represent petitioner. Petitioner, who remains incarcerated at Bare Hill, is challenging his continued incarceration in DOCCS custody.

This Court issued an Order to Show Cause on June 28, 2016. The Court has received and reviewed the Answer and Return, including the affirmation of Richard deSimone, Esq., Deputy Counsel in Charge of DOCCS dated August 5, 2016 attached as Exhibit G, together

with the Letter-Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated August 8, 2016. In further support of the petition, the Court has received and reviewed the Reply Affirmation of Michael E. Cassidy, Esq., Managing Attorney of the Plattsburgh Office of Prisoner Legal Services of New York, dated September 15, 2016, together with exhibits annexed thereto on behalf of the petitioner.

On June 24, 2005, the petitioner was sentenced as a second felony offender by the Kings County Supreme Court to a determinate sentence of four (4) years incarceration and five (5) years post-release supervision upon the conviction of Attempted Criminal Possession of a Weapon in the Third Degree. The petitioner was received by DOCCS[1] on July 12, 2005 and was credited with 209 days of jail time for the period of December 16, 2004 to July 12, 2005. At that time, the petitioner's maximum expiration date was calculated to be December 12, 2008. Insofar as the petitioner would be eligible for 6 months and 28 days of possible good time (which is time held in abeyance during release), his conditional release date was scheduled to be May 14, 2008. As such, the petitioner's maximum expiration of his post-release supervision was calculated to be May 14, 2013.

On May 14, 2008, the petitioner was released to post-release supervision. On October 22, 2008, the petitioner's release was declared delinquent. On May 26, 2009, petitioner's release was revoked and he was returned to the custody of DOCCS. He was credited with 140 days of parole jail time for the period of January 6, 2009 to May 25, 2009. At that time, the petitioner owed 2 months and 8 days of jail time on the determinate sentence. As such, his adjusted maximum expiration date became August 4, 2009. The

[1] The Department of Correctional Services and the Division of Parole merged on March 31, 2011 to become what is now Department of Corrections and Community Supervision and will be addressed herein as DOCCS even for the relevant period prior to the merger.

petitioner also owed 4 years 6 months and 22 days of delinquent time to post-release supervision and, as such, his adjusted post-release supervision maximum expiration date became February 26, 2014.

On July 6, 2010, the petitioner was again released to post-release supervision[2]. Petitioner was declared delinquent on January 15, 2011. Thereafter, on May 12, 2011, the petitioner was arrested and charged with new criminal charges[3] in the State of New Jersey. DOCCS lodged a parole violation warrant on the same day, however, the petitioner remained in the custody of New Jersey.

On June 1, 2012, the petitioner was sentenced by the Superior Court, Essex County, New Jersey, to an indeterminate term of three (3) to seven (7) years incarceration upon the conviction of Eluding a Law Enforcement Officer, and to a determinate term of four (4) years incarceration upon the conviction of Aggravated Assault of a Law Enforcement Officer. Each sentence was to run concurrent to each other and was directed to "run concurrent with the sentence imposed on New York State parole violation." *See*, Resp. Ex. C. At the time of sentencing, the petitioner was credited by the State of New Jersey with 386 days of jail time for the period of May 12, 2011 to May 31, 2012.

On January 11, 2016, the petitioner was released from the New Jersey Department of Corrections and returned to the custody of DOCCS. On April 28, 2016, following the final parole revocation hearing, the petitioner's release was revoked and a seventy-one (71)

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[2] The papers do not indicate why the petitioner was not released to post-release supervision on August 4, 2009, his first adjusted maximum expiration date.

[3] The petitioner was indicted for the following charges: one count of Attempted Burglary in the Third Degree, two counts of Aggravated Assault in the Second Degree, one count of Aggravated Assault of a Law Enforcement Officer in the Third Degree, one count of Eluding a Law Enforcement Officer -Failing to Stop in the Second Degree, and one count of Resisting Arrest by Physical Force or Violence in the Third Degree.

month delinquent time assessment was imposed. The petitioner was credited with 108 parole jail time days. The respondent has calculated that the petitioner owed 2 years 9 months and 23 days to post-release supervision and therefore, the maximum expiration of delinquent time has been calculated to be February 21, 2019.

It is noted that the petitioner filed a Notice of Appeal to challenge the disposition of the parole revocation hearing and the Parole Board Appeals Unit advised the petitioner that the date to perfect the appeal was by September 6, 2016. The Court has not been provided with any further information relative to the administrative appeal.

The original petition filed on or about April 13, 2016[4] alleges that the petitioner was declared delinquent on November 22, 2010 when the post-release violation warrant was issued[5]. The petition also alleges that despite having reached the maximum expiration of his sentence, respondent failed to vacate the post-release violation warrant vacated. It is noted that the final parole revocation hearing did not occur until April 28, 2016.

By Notice of Motion dated June 7, 2016, respondent sought a transfer of the petition insofar as the petitioner was no longer housed at Rikers Island, Bronx County. By Order dated June 8, 2016, Supreme Court, Bronx County transferred the matter to Franklin County.

The respondent argues that the petitioner has failed to exhaust his administrative remedies insofar as the petition was filed in advance of the final parole revocation hearing.

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[4] The original petition filed in the Bronx County Clerk's Office does not indicate the date of filing but the petition is sworn on April 1, 2016. The Order for Poor Person Status of an Inmate is dated April 13, 2016 so it is presumed that the date of filing is contemporaneous with the Order.

[5] Parole Warrant #605837 is dated November 22, 2010, however, was not notarized until November 24, 2010. *See*, Petition Ex. A.

In addition, as the petitioner has appealed the disposition rendered at the April 28, 2016 hearing and the appeal had not yet been perfected, respondent argues that the filing of the petition was premature. Notwithstanding the foregoing, the respondent argues that the petitioner is not entitled to habeas corpus relief insofar as he has not reached his maximum expiration date, to wit: February 21, 2019.

Insofar as the original petition was indeed filed prior to the parole revocation hearing and at least three months after the petitioner was returned to DOCCS custody following his release from New Jersey, the Reply Affirmation filed on the petitioner's behalf expands upon the original arguments.[6] The petitioner continues to argue that he is entitled to immediate release, but the basis for release is that the respondent has deprived him of out-of-state credit for jail time served while in New Jersey on the concurrent sentence. Petitioner argues that if he were afforded the proper jail time credit for time served in New Jersey, he would have reached the maximum expiration of his complete sentence on August 23, 2014. Petitioner further argues that while the respondent claims that he has failed to exhaust his administrative remedies relative to the final parole revocation hearing, the petitioner denies that the parole revocation hearing or time assessment are at the heart of the issue before the Court. Instead, petitioner argues that if he was afforded the proper jail time credit for days accrued while under sentence in New Jersey, he would have been past his maximum expiration date prior to the parole revocation proceeding and, as such, the parole revocation and time assessment were null from the outset. The petitioner also argues that the determination of Deputy Counsel in Charge de Simone constitutes a final

[6] The Court notes that the respondent did not seek to file a sur-reply to address these enhanced arguments.

determination of the respondent's position and the matter is therefore ripe for judicial review.

Petitioner alleges that DOCCS refuses to credit him for a period of 3 years 7 months and 10 days derived from his incarceration under sentence in New Jersey for the period of June 1, 2012 to January 11, 2016. In addition, the petitioner alleges that DOCCS has failed to award credit for the jail time served during the period of May 12, 2011 to May 31, 2012, or approximately 1 year 19 days. The petitioner argues that respondent, particularly Deputy Counsel in Charge de Simone, misinterprets Penal Law §70.40(3)(c)(iii) which reads, in relevant part:

> "(c) Any time spent by a person in custody from the time of delinquency to the time service of the sentence resumes shall be credited against the term or maximum term of the interrupted sentence, provided:
>
> (iii) that such custody arose from an arrest on another charge which culminated in a conviction, but in such case, if a sentence of imprisonment was imposed, the credit allowed shall be limited to the portion of the time spent in custody that exceed the period, term or maximum term of imprisonment imposed for such conviction."

Petitioner interprets PL §70.40(3)(c)(iii) to apply "where the other sentence is not expressly directed to run concurrently with the parole sentence (the prior interrupted and undischarged New York sentence). In short, it only governs the situation where sentences run consecutively, not concurrently." Reply, ¶22. Citing the Appellate Division, Fourth Department's 1978 holding in the *Matter of Midgley v. Smith*, petitioner argues that an out-of-state concurrent sentence should be treated similarly to a definite sentence directed to run concurrent to an interrupted felony sentence wherein jail time credit would apply to both sentences. 63 AD2d 223. Mr. Midgley, who was serving several indeterminate

sentences of imprisonment in DOCCS custody, absconded while on furlough from a state correctional facility. The running of his indeterminate sentences of imprisonment was interrupted by that act with such interruption to continue until his return to a DOCCS facility. *See* Penal Law § 70.30(7). Mr. Midgley was thereafter arrested for petit larceny and after pleading guilty to that charge was sentenced to a definite one-year term of imprisonment to run concurrently with his prior sentences. He served the one-year term in local custody at Rikers Island and was not returned to a DOCS facility until December 2, 1977. Mr. Midgley then commenced an Article 78 proceeding to compel DOCS officials to credit the maximum term of his previously-imposed indeterminate sentence with the 252 days spent in local custody at Rikers Island from March 25, 1977, to December 2, 1977. Mr. Midgley prevailed at the Supreme Court level. In affirming the Supreme Court determination, the Fourth Department, citing Penal Law § 70.25(1), rejected the argument that the petit larceny court had no authority to direct its definite sentence to run concurrently with Mr. Midgley's interrupted indeterminate sentences. *Id* at 226. While the *Midgley* Court and others have found the imposition of a definite sentence, one that is typically served in a local correctional facility as opposed to a state facility, can be served concurrently with an existing indeterminate or determinate sentence of incarceration, such factual scenario is clearly different from the one at bar.

In the affirmation of Deputy Counsel in Charge de Simone, respondent relies upon the holding in *People ex rel. Howard v. Yelich*, a factually more similar circumstance to the one at bar. 87 AD3d 772. In *Howard*, the Appellate Division, Third Department held that the out-of-state sentence was not calculated against the interrupted New York sentence. "While his Pennsylvania sentence was apparently intended to run concurrently with the

undischarged portion of his New York sentence, it was incumbent upon the Pennsylvania authorities to return him to New York to effectuate that intent." *Howard* at 773.

Petitioner argues that this Court is not bound to the holding in *Howard* in light of the later holding by the Appellate Division, Third Department in *Matter of Hall v. LaValley*, 115 AD2d 1125. The petitioner asserts that the *Howard* Court cited no authority for the proposition that the out-of-state jurisdiction would need to return the inmate to the custody of DOCCS for the concurrent jail time to be awarded. The petitioner also asserts that the holding in *Hall* clearly allows the other jurisdiction to direct a concurrent sentence and the failure to DOCCS to recognize same is an impermissible lengthening of the petitioner's sentence. "To run the sentences sequentially essentially because of the manner in which they were administered despite express intent otherwise by both sovereigns is analogous to a governmental entity other than the court lengthening a sentence, which this state does not permit." *Hall* at 1126.

The petitioner's reliance upon *Hall* is flawed. In the *Hall* matter, the petitioner, Timothy Hall, while on federal release, was arrested on state charges. As part of the plea arrangement, Hall pled guilty to a state charge and received a determinate term of incarceration for eight and one-half (8½) years plus five (5) years post-release supervision. At the time of the plea, Hall was advised by the County Court that if the federal sentence for the parole violation occurred before the County Court sentencing, it would make the state sentence concurrent to the federal sentence. However, insofar as the federal sentencing had not yet occurred at the time of the scheduled state sentence, and the County Court would not agree to further adjourn the sentencing, the County Court could not impose a concurrent sentence to a federal sentence that did not yet exist. A month after the County

Court sentencing, the federal court sentenced Hall to 36 months on the federal charges and expressly directed the sentence to be concurrent to the previously imposed state sentence. Hall served his sentence in federal prison and upon release to DOCCS to serve his state sentence, Hall was not afforded any jail time credit served in federal prison against the state sentence. The Appellate Division found that both the Federal Court and the County Court knew of the other's potential plea deal and proposed sentences which were to include concurrent terms. The Third Department opined that the failure of DOCCS to award credit for federal time served against the state sentence was unfair in that "both sovereigns intended the state and federal sentences to run concurrently." *Hall* at 1126.

In the matter at bar, while the State of New Jersey agreed to run the petitioner's New Jersey sentence concurrently to the parole sentence of New York, there is no indication that anyone of authority within DOCCS agreed to same. This matter is distinguishable from the fact pattern in *Hall* in that there was active plea arrangements occurring on behalf of Hall to which both sovereigns, federal court and state court, were aware.[7] If the State of New Jersey had intended to allow the petitioner to serve his sentence concurrently with the parole sentence in New York, the petitioner should have been returned to the custody of DOCCS to effectuate same. Instead, the commentary of the sentencing judge in New Jersey has no binding effect upon the calculation of jail time credit or parole jail time credit in New

[7] While both courts were aware of the pending plea arrangements, as Judge McCarthy indicated in his dissent: "While the federal court may have intended the sentences to run concurrently – despite the court not properly implementing concurrent sentencing – County Court did not indicate a clear intention that the state and federal sentences should run concurrently... When petitioner [ ] wrote to County Court seeking assistance to compel DOCCS to calculate his state sentence with credit for time served in federal prison, the court responded that 'there was no provision in your sentence regarding any federal prosecution and no representation of what sentence a federal court might impose or how such sentence might be calculated or carried out.' Thus, I cannot agree that the state court clearly intended concurrent sentencing." *Hall* at 1129. Clearly, the specific factual circumstances in the *Hall* matter do not lend precedential effect to the matter at bar.

York. Furthermore, the language of PL §70.40(3)(a) and (b) clearly indicate that the "interruption shall continue until the return of the person to an institution under the jurisdiction of the state department of corrections and community supervision." The calculation of time served began when the petitioner was returned to DOCCS custody as is contemplated by PL §70.40(3).

As indicated previously, it is unclear as to the status of the Parole Board appeal relative to the time assessment as the petitioner did not raise such issues in this petition. As such, the only issue discussed in this petition related to the jail time and/or parole jail time credit awarded to the petitioner for the time served under the New Jersey sentence. This decision does not preclude the petitioner from seeking whatever administrative or legal remedies are available to him relative to the Parole Board revocation determination of April 2016.

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

ORDERED AND ADJUDGED, that the petition is dismissed.

DATED: November 18, 2016 at
Indian Lake, New York

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S. Peter Feldstein
Acting Supreme Court Judge