No. 1

The People &c., ex rel. Anthony Gill,

Respondent,

v.

Gary Greene, as Superintendent of Great Meadow Correctional Facility,

Appellant.

Barbara D. Underwood, for appellant.
Robert C. Newman, for respondent.
District Attorneys Association of the State of New York, amicus curiae.

SMITH, J.:

We hold that, when a court is required by statute to impose a sentence that is consecutive to another, and the court does not say whether its sentence is consecutive or concurrent, it is deemed to have imposed the consecutive sentence the law requires.

I

In 1994, Anthony Gill was sentenced as a second felony offender to an indeterminate term of 2½ to 5 years for criminal possession of stolen property. Before then, he had been convicted and sentenced twice for earlier crimes, for manslaughter in 1982 and for several larceny-related offenses in 1993. Neither of Gill's previous sentences had been discharged by 1994; he had been paroled on the first, and had absconded from a temporary release program while serving the second.

It is undisputed that the court that sentenced Gill in 1994 was required by Penal Law § 70.25 (2-a) to impose a prison term to run consecutively to his previous, undischarged sentences. It is also undisputed, however, that that court did not say, orally or in any document, that the sentence it imposed was either consecutive to or concurrent with the previous ones. The court was simply silent on that subject. The Department of Correctional Services (DOCS) calculated Gill's release date on the assumption that the 1982, 1993 and 1994 sentences were consecutive to each other.

In 2006, Gill, pro se, began this proceeding against the Superintendent of the prison where he was held, seeking a writ of habeas corpus. He asserted that his 1994 sentence was, as a matter of law, concurrent with his earlier ones, because the sentencing court had not said otherwise. Supreme Court dismissed the petition without reaching the merits of this claim, on the

ground that even if Gill were correct he would not have been entitled to habeas corpus.

Gill appealed to the Appellate Division, which converted his proceeding to one under CPLR article 78, reversed Supreme Court and annulled DOCS's determination that Gill's sentences ran consecutively (People ex rel. Gill v Greene, 48 AD3d 1003 [3d Dept 2008]). The Appellate Division agreed with Gill "that DOCS had no authority to calculate his sentences consecutively where the court did not do so" (id. at 1005). The Appellate Division granted the Superintendent permission to appeal to this Court, and we now reverse.

II

There is no question that, as the Appellate Division acknowledged and as Gill concedes, the sentencing court was required in 1994 to impose a consecutive sentence. Gill was sentenced under the second felony offender statute, Penal Law § 70.06, and his sentence was therefore governed by Penal Law § 70.25 (2-a), which says: "When an indeterminate . . . sentence of imprisonment is imposed pursuant to section . . . 70.06 . . . and such person is subject to an undischarged indeterminate or determinate sentence of imprisonment imposed prior to the date on which the present crime was committed, the court must impose a sentence to run consecutively with respect to such undischarged sentence." But Gill argues, and the Appellate Division held, that though the court was required to impose a consecutive

sentence it did not do so, and that DOCS cannot correct the court's error.

Gill relies on Matter of Garner v New York State Dept. of Correctional Servs. (10 NY3d 358 [2008]), in which we held that, where a court omits to impose a required term of post-release supervision (PRS), the error can be corrected only by a court, not by correctional authorities. He also relies on Earley v Murray (451 F3d 71 [2d Cir 2006]), in which the Court of Appeals for the Second Circuit held that it violated due process for DOCS to correct a sentencing court's error in failing to impose a term of PRS. But the analogy Gill draws between consecutive sentencing and PRS is flawed.

The problem in Garner and Earley was that a part of the sentence -- the PRS term -- was never imposed. In each case, the court imposed a term of imprisonment, and said nothing about PRS. That was indeed an error that only a court could correct. But here, the sentence at issue -- a term of imprisonment for 2½ to 5 years -- was imposed. All that was omitted was the characterization of the sentence as either concurrent or consecutive.

That characterization is provided by the statute, Penal Law § 70.25 (2-a), which says the sentence must be consecutive. Nothing in the statute and nothing in the Constitution requires the sentencing court to say the word "consecutive," either orally or in writing. Nothing in the statute even requires that the

sentencing court be made aware that the prior sentences are undischarged. Unlike the petitioners in Garner and Earley, who were told nothing about PRS by the courts that sentenced them, Gill was told in plain terms that he was being sentenced to 2½ to 5 years in prison. He was never given any reason to think that part or all of that sentence would be effectively nullified, by running simultaneously with sentences he had already received. Indeed, nothing in the record here shows the court knew that previous undischarged sentences existed.

We read the words of Penal Law § 70.25 (2-a) -- "the court must impose a sentence to run consecutively with respect to such undischarged sentence" -- to mean that any sentence imposed by the court shall run consecutively to the undischarged sentence, whether the sentencing court says so or not. This reading is supported by subdivision 1 of Penal Law § 70.25, in which the Legislature provided rules for interpreting sentences that might otherwise be thought either consecutive or concurrent. Section 70.25 (1) says that as a general rule -- with exceptions that include cases subject, as this one is, to section 70.25 (2-a) -- sentences "shall run either concurrently or consecutively . . . in such manner as the court directs at the time of sentence." The statute goes on to provide a default rule: "If the court does not specify the manner in which a sentence imposed by it is to run," the sentences shall run concurrently in certain classes of cases, and consecutively in others (Penal Law § 70.25 [1] [a],

[b]). But where, as in this case, the court has no choice about which kind of sentence to impose, no default rule for interpreting the court's silence is provided by statute, because none is necessary. The court is simply deemed to have complied with the statute.

In short, the sentencing court here committed no error and there was none for DOCS to correct. DOCS properly interpreted Gill's 1994 sentence as being consecutive to his previous undischarged sentences, as Penal Law § 70.25 (2-a) requires.

Accordingly, the order of the Appellate Division should be reversed without costs and the petition dismissed.

* * * * * * * * * * * * * * * * *

Order reversed, without costs, and petition dismissed. Opinion by Judge Smith. Judges Ciparick, Graffeo, Read, Pigott and Jones concur. Chief Judge Lippman took no part.

Decided February 12, 2009