Matter of Machuca v Fischer
2008 NY Slip Op 33643(U)
June 25, 2008
Sup Ct, St. Lawrence County
Docket Number: 137000
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
LOUIS MACHUCA,#07-R-0853,

Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #44-1-2011-0664.31
INDEX #137000
ORI # NY044015J

BRIAN J. FISCHER, Commissioner, NYS Department of Corrections and Community Supervision, and **ANDREA W. EVANS**, Chairwoman, NYS Board of Parole,

Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Louis Machuca, verified on September 4, 2011 and filed in the St. Lawrence County Clerk's office on September 9, 2011. Petitioner, who is an inmate at the Riverview Correctional Facility, is apparently challenging the delinquent time assessment imposed following a final parole revocation hearing concluded on August 26, 2008. Petitioner also appears to be challenging the methodology associated with the implementation of the delinquent time assessment. The Court issued an Order to Show Cause on September 15, 2011 and has received and reviewed respondents' Answer and Return, verified on October 31, 2011, as well as petitioner's Reply thereto, dated November 9, 2011 and filed in the St. Lawrence County Clerk's office on November 15, 2011.

By Letter Order dated April 2, 2012 the litigants were directed to supplement their pleadings to address five potential issues identified by the Court in the Letter Order. In response thereto the Court has received and reviewed petitioner's

Supplemental Affidavit in Support of Petition, sworn to on April 16, 2012 and filed in the St. Lawrence County Clerk's office on April 18, 2012. The Court has also received and reviewed an April 20, 2012 Letter Memorandum submitted by counsel for the respondents as well as petitioner's Reply Affidavit in Response to Respondents' Letter, sworn to on April 25, 2012 and filed in the St. Lawrence County Clerk's office on April 27, 2012.

On February 15, 2007 petitioner was sentenced in Supreme Court, New York County, to a controlling determinate term of 4½ years, with 5 years post-release supervision, upon his convictions of the crimes of Criminal Sale of a Controlled Substance 2° and Criminal Sale of a Controlled Substance 3°. He was received into DOCCS custody on March 2, 2007 certified as entitled to 337 days of jail time credit. At that time the maximum expiration date of petitioner's 4½-year determinate term was calculated by DOCCS officials as September 24, 2010.

After completing the DOCCS Shock Incarceration Program petitioner was conditionally released to post-release supervision on October 11, 2007. *See* Correction Law §867(4). As of that date the running of petitioner's 5-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the maximum expiration date thereof calculated as October 11, 2012. Also as of October 11, 2007 the running of petitioner's underlying 4½-year determinate term was interrupted with the remaining 2 years, 11 months and 13 days owed to the originally calculated September 24, 2010 maximum expiration date thereof held in abeyance pending his successful completion of the period of post-release supervision or his return to DOCCS custody. *See* Penal Law §70.45(5)(a).

Petitioner's conditional release to post-release supervision was revoked, with a sustained delinquency date of May 22, 2008, following a final parole revocation hearing

concluded on August 26, 2008.[1] As of that delinquency date the running of petitioner's period of post-release supervision was interrupted (*see* Penal Law §70.45(5)(d)(i)) with 4 years, 4 months and 19 days still owing to the originally calculated October 11, 2012 maximum expiration date thereof. The Administrative Law Judge (ALJ) presiding at the final revocation hearing imposed a delinquent time assessment directing that petitioner be held to his maximum expiration date.[2]

Petitioner was returned to DOCCS custody, as a post-release supervision violator, on September 2, 2008 certified as entitled to 97 days of parole jail time credit. The parole jail time credit was applied against the interrupted 2007 determinate term (*see* Penal Law §70.45(5)(d)(iii)), reducing the time previously held in abeyance against such term from 2 years, 11 months and 13 days to 2 years, 8 months and 6 days. The 2 years, 8 months and 6 days still held in abeyance against petitioner's 2007 determinate term re-commenced running upon his September 2, 2008 return to DOCCS custody. *See* Penal Law §70.45(5)(a). Only after petitioner completed serving those 2 years, 8 months and 6 days would the running of the 4 years, 4 months and 19 days still owing to the originally calculated maximum expiration date of the 5-year period of post-release supervision re-commence, with petitioner remaining in DOCCS custody pursuant to the delinquent time assessment imposed following the final revocation hearing. *See* Penal

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[1] Three parole violation charges were sustained. The first charge alleged that petitioner left the State of New York without authorization and traveled to Maryland to obtain a driver's license. The second charge alleged that petitioner left the City of New York without the permission of his Parole Officer. The final sustained charge alleged that petitioner failed to reply truthfully when his Parole Officer inquired if he went to Maryland to obtain a driver's license.

[2] Although the "ANALYSIS" portion of the written Parole Revocation Decision Notice specifies a delinquent time assessment of "Hold to Shock Max," the decision form itself specifies a delinquent time assessment of "Max." The Court finds the ALJ's reference to "shock max" to be puzzling since it is unaware of any statute or regulation prescribing or limiting the maximum delinquent time assessment that can be imposed on an adjudicated violator simply by reason of the fact that such violator had participated in the Shock Incarceration Program. Accordingly, it is presumed that the ALJ intended to impose a delinquent time assessment equal to the maximum allowed by law.

Law §70.45(5)(d)(iv). DOCS officials determined the current maximum expiration date of petitioner's 2007 determinate sentence, including the 5-year period of post-release supervision, as September 27, 2015 (2 years, 8 months and 6 days owed against the 4½-year determinate term plus 4 years, 4 months and 19 days owed against the 5-year period of post-release supervision running, in sequence, from petitioner's September 2, 2008 return to DOCS custody).

Petitioner first argues that the ALJ erred in failing to designate him a Category 3 violator under the provisions of 9 NYCRR §8005.20(c)(3)(ii). According to petitioner, if he had been so categorized he " . . . should have received a 3 month time assessment." Petitioner next argues, in effect, that the "shock max" delinquent time assessment imposed by the ALJ has been misinterpreted by DOCCS officials. According to petitioner, the time assessment in question " . . . was meant to hold petitioner until the completion of the 4½ years sentence." Finally, petitioner argues " . . . that the length of the time [assessment] imposed was harsh and excessive and an abuse of discretion."

As a preliminary matter the Court rejects respondents' belated assertions that this proceeding is time-barred under the four-month statute of limitations set forth in CPLR §217(1) and that petitioner failed to exhaust administrative remedies inasmuch as none of the arguments advanced in this proceeding were raised on administrative appeal. Neither of these affirmative defenses was asserted in respondents' Answer and Return. Rather, they were mentioned for the first time in counsel's Letter Memorandum of April 20, 2012 which was submitted in response to the Court's Letter Order of April 2, 2012. The Court finds that respondents waived the statute of limitations defense by failing to raise it in their Answer and Return or in a pre-answer motion to dismiss. *See* CPLR §3211(a)(5), CPLR §3211(e) and *Horst v. Brown*, 72 AD3d 434, *app dis* 15 NY3d 743. Similarly, "[f]ailure to exhaust administrative remedies is

not an element of an article 78 claim for relief, but an affirmative defense which must be raised by respondent either in an answer or by preanswer motion or else be deemed waived." *Warwick v. Henderson*, 117 AD2d 1001 (citations omitted). *See Custom Topsoil, Inc. v. City Buffalo*, 12 AD3d 1162 and *Greco v. Trincellito*, 206 AD2d 779.

Turning to the merits, or lack thereof, of petitioner's arguments, the Court is struck by various uncertainties as to the applicability of potentially relevant regulatory provisions. If petitioner had been paroled or conditionally released from an indeterminate sentence of imprisonment there would be no doubt that he must be designated a Category 3 parole violator subject, at first glance, to a delinquent time assessment of time served plus three months (*see* 9 NYCRR §8005.20(c)(3)(ii)) but, notwithstanding the foregoing, ultimately subject to a potentially much longer minimum delinquent time assessment prescribed for parole violators released from custody upon completion of the DOCCS Shock Incarceration Program. *See* 9 NYCRR §8010.3. Petitioner, however, was sentenced to a determinate term and was conditionally released from DOCCS custody to post-release supervision with a substantial portion of the underlying determinate term held in abeyance pursuant to Penal Law §70.45(5)(a). As discussed below, recent case law calls into question the applicability of 9 NYCRR §8005.20 in this situation.

In *Jacoby v. Evans*, 84 AD3d 1731 the Appellate Division, Fourth Department, considered the case of an individual who was found to have violated the conditions of post-release supervision and who was designated a Category 1 violator (9 NYCRR §8005.20(c)(1)) with an 18-month delinquent time assessment imposed. The Fourth Department annulled that portion of the administrative determination finding Mr. Jacoby to be a Category 1 violator. According to the *Jacoby* court, " . . . 9 NYCRR 8005.20 applies to individuals on parole and conditional release, not those serving a

period of PRS [post-release supervision] . . . Violators of PRS are subject to Penal Law §70.45(1), pursuant to which 'a violation of any condition of supervision occurring at any time during such period of [PRS] shall subject the defendant to a further period of imprisonment up to the balance of the remaining period of [PRS], not to exceed five years' (*see* Executive Law §259-i(3)(f)(x)(D))." *Id* at 1732 (other citation omitted). The 18-month delinquent time assessment, however, was upheld since Mr. Jacoby's remaining period of post-release supervision exceeded 18 months. *Id.* Notwithstanding the foregoing, the *Jacoby* court did not specify whether the petitioner therein had been released to post-release supervision upon reaching the maximum expiration date of his underlying determinate sentence or had been conditionally released from DOCCS custody to post-release supervision pursuant to Penal Law §70.40(1)(b) or, like the petitioner in the case at bar, had been conditionally released from DOCCS custody to post-release supervision after completion of the Shock Incarceration Program pursuant to Correction Law §867(4).

In *People ex rel Hines v. Bradt*, 86 AD3d 678, the Appellate Division, Third Department, considered the case of a DOCCS inmate who had been conditionally released to post-release supervision on February 29, 2008 with a 8 months and 20 days still remaining to the maximum expiration date of his underlying determinate sentences. Upon conclusion of a final revocation hearing a 12-month delinquent time assessment was imposed against Mr. Hines and he was returned to DOCCS custody. The *Hines* court commented upon the time assessment as follows:

> "Having been conditionally released to a period of postrelease supervision (*see* Penal Law §70.40(1)(b); §70.45(5)(a)), it appears that at the revocation hearing, petitioner could have been considered either a conditional releasee for purposes of Executive Law §259-i(3)(f)(x)(C) or a person released to a period of postrelease supervision for purposes of Executive Law §259-i(3)(f)(x)(D)." *Id.*

Neither *Jacoby* nor 9 NYCRR §8005.20 was mentioned by the *Hines* court.

9 NYCRR §8010.3(a) provides as follows:

> "The shock incarceration program provides an eligible inmate with an unprecedented opportunity to obtain parole release after service of only six months of imprisonment at a shock incarceration facility, regardless of the length of the minimum period of imprisonment imposed by the court. In recognizing the extraordinary benefit conferred upon an eligible inmate by early parole release upon completion of this program, the board believes that the commensurate penalty for violation of one or more of the conditions of parole should be severe. Therefore, when a releasee, under the jurisdiction of the division after having been paroled based upon his or her successful completion of the shock incarceration program, is found to have violated one or more of the conditions of parole in an important respect, the presiding officer shall make a decision in accordance with section 8005.20 of these rules, except that notwithstanding any provision of section 8005.20 to the contrary, if a releasee is not restored to supervision or the Willard drug treatment campus program, and the presiding officer directs that the violator be reincarcerated, said period of reincarceration shall be for at least a period of time equal to the minimum period of imprisonment imposed by the court."

9 NYCRR §8010.3(b) goes on to clarify that the six-month period of shock incarceration is not deemed to be part of the minimum period of imprisonment (for 9 NYCRR §8010.3(a) purposes) but that the " . . . minimum period of reincarceration shall be reduced by the violator's pre-commitment jail time and any time spent incarcerated at a State correctional facility other than a shock incarceration facility."

With its references to "parole release" and "minimum period of imprisonment," it appears that 9 NYCRR §8010.3 was drafted to be applicable to inmates serving indeterminate sentences of imprisonment rather than determinate sentences. In this regard it is noted that when the Shock Incarceration Program was established by L 1987, ch 261, § 15, determinate sentences were not part of the New York Penal Law. Accordingly, the Shock Incarceration Program was initially available only to inmates serving indeterminate sentences of imprisonment. Determinate sentences were

introduced into the Penal Law by L 1995, ch 3 and the Shock Incarceration Program was extended to inmates serving determinate sentences by L 2004, ch 738, §14. 9 NYCRR §8010.3, which was enacted prior to the date the Shock Incarceration Program was extended to inmates serving determinate sentences, has apparently has never been amended to address such inmates. This state of facts is significant. Although the petitioner herein argues that the relevant provisions of 9 NYCRR §8005.20(c)(3)(ii), establishing the delinquent time assessment for Category 3 violators as time served plus three months, is applicable in this case notwithstanding the fact that he was conditionally released to post-release supervision from a determinate sentence, he also argues that the "shock minimum" provisions of 9 NYCRR §8010.3(a) do not apply to him since he is serving a determinate, rather than indeterminate, sentence.

In the view of the unsettled statutory/regulatory framework described above, and in view of the somewhat underdeveloped state of the record herein with regard to these matters, this Court declines to issue any broad determination with respect to the applicability of 9 NYCRR §8005.20 and/or 9 NYCRR §8010.3. Instead, the Court simply finds that even if the ALJ had the authority to impose a delinquent time assessment effectively returning petitioner to DOCCS custody until the September 27, 2015 maximum expiration date of his 5-year period of post-release supervision, such an assessment must be vacated as harsh and excessive.

The Court's authority to disturb a delinquent time assessment imposed following a final parole revocation hearing is limited. Executive Law §259-i(5) provides that "[a]ny action by the board or by a hearing officer pursuant to this article shall be deemed a judicial function and shall not be reviewable if done in accordance with law." Notwithstanding the forgoing, where the reviewing court concludes that a delinquent time assessment imposed against a parole violator is "'clearly disproportionate to the

offense and completely inequitable in light in the surrounding circumstances,'" such time assessment may be overturned. *See Lord v. State of New York Executive Department Board/Division of Parole*, 263 AD2d 945, *lv den* 94 NY2d 753, *rearg den* 95 NY2d 826, quoting *Kostika v. Cuomo*, 41 NY2d 673, 676. Stated otherwise, " . . . the test is whether such punishment is 'so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness.' " *Pell v. Board of Education*, 34 NY2d 222, 233 (citations omitted). According to the Court of Appeals in *Pell*, ". . . a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct...of the individual, or to the harm or risk of harm . . . to the public generally visited or threatened by the derelictions of the individuals." *Id* at 234.

The convictions underlying petitioner's ongoing incarceration in DOCCS custody (CSCS 2° and CSCS 3°) constitute his entire felony record. Thus, although such convictions are of serious concern, petitioner is not a violent felony offender. In addition, petitioner had no prior record of any sustained parole violation and the conduct underlying his current parole violations did not constitute a criminal offense nor was such conduct inherently dangerous. Still, petitioner finds himself subject to a delinquent time assessment effectively mandating his return to DOCCS custody for a period in excess of seven years. The two cases cited in respondents' Answer and Return in support of their assertion that the time assessment imposed was not excessive are not particularly helpful to the Court. Few facts are cited by the Appellate Division, Third Department, in *Wilkerson v. Travis*, 25 AD3d 835. All that can be gleaned is that the parole revocation in that case was Mr. Wilkerson's third and that he was ordered held until the maximum expiration date of an unspecified underlying sentence. One is unable to determine from a reading of *Wilkerson* how long a period of reincarceration was

involved. The *Wilkerson* Court simply held as follows: "Considering petitioner's extensive criminal record, his prior parole violations and his failure to take advantage of treatment programs made available to him for his continuing substance abuse problems, we do not find that it was unduly harsh for the Board to order petitioner held until his maximum expiration date. *Id* at 835-836 (citation omitted). In *Robinson v. Travis*, 295 AD2d 719, on the other hand, the facts are well-spelled out and in stark contrast to the facts and circumstances in the case at bar. The *Robinson* petitioner was serving an indeterminate sentence of 20 years to life imposed upon his conviction of the crime of Murder 2°. The act underlying the Murder 2° conviction was committed while Mr. Robinson was at liberty under parole supervision from a prior conviction. In addition, the parole violation under consideration by the Appellate Division, Third Department, was Mr. Robinson's fourth and involved a motor vehicle accident which ultimately lead to his plea of guilty to the crime of driving while intoxicated as a felony. Upon Mr. Robinson's plea at the final parole revocation hearing a delinquent time assessment of 60 months (5 years) was imposed. Under these circumstances the Appellate Division, Third Department was not persuaded by Mr. Robinson's contention that the time assessment was arbitrary and capricious and that he should have been placed in an alcohol abuse treatment program. According to the *Robinson* court, "[p]etitioner has previously been ordered to attend substance abuse counseling which, regrettably, has had no discernable impact on his alcoholism. In view of petitioner's repeated failure to adjust to the constraints of parole supervision and given the risk that he poses to society during periods of release when he is apparently incapable of resisting the temptation of operating a motor vehicle while intoxicated, we deem the requirement that petitioner must wait 60 months before again applying for parole release to be appropriate." *Id* at 720 (citations omitted).

This Court is well aware of the limitations inherent in any attempt to undertake a comparative analysis of delinquent time assessments imposed against various parole violators in order to assess whether a particular time assessment is excessive. Such an approach my not take into account subtle, aggravating and or mitigating factors unique to each particular case. *See Hobson v. Coughlin*, 137 AD2d 940. Still, the Court has not been presented with, nor has its own research uncovered, any reported example of a sustained delinquent time assessment anywhere near the 7+ year assessment under review in the case at bar imposed upon a non-violent, first time felon with no prior parole violations and with violative behavior that did not involve violence or otherwise constitute a criminal act. Compare *People ex rel Murray v. New York State Division of Parole*, 95 AD3d 1527, *Murchison v. New York State Division of Parole*, 91 AD3d 1005, *Davis v. New York State Board of Parole*, 81 AD3d 1020, *Rosario v. New York State Division of Parole*, 80 AD3d 1030 and *Brew v. New York State Division of Parole*, 22 AD3d 930.

In response to the Court's Letter Order of April 2, 2012 the respondents cited no additional cases directly addressing the issue of whether the delinquent time assessment in the case at bar was harsh and excessive. Rather, the respondents simply asserted that "... the petitioner was given the extraordinary benefit of the shock incarceration program and violated his release conditions shortly after being released on his determinate sentence. As such, his time assessment is not excessive or unduly harsh." In their response to the Letter Order of April 2, 2012 the respondents go on to assert as follows:

> "Since petitioner was a shock parolee, the options were limited by regulation. Pursuant to 9 N.Y.C.R.R. §8010.3(a), upon an ALJ's finding of violation by a shock parolee, if such releasee 'is not restored to supervision or the Willard Drug Treatment Campus Program, and the presiding officer directs that the violator be reincarcerated, said period of reincarceration shall be for **at least** a period of time equal to the minimum period of imprisonment imposed by the court'. That minimum period would only be reduced 'by the violator's pre-commitment jail time and any time spent incarcerated at a State correctional facility other than a shock incarceration

> facility.' 9 N.Y.C.R.R. §1010.3(b). The six-month shock period does not reduce the time assessment. *Id.*
>
> Neither 9 NYCRR §8005.20 nor 9 NYCRR §8010.3 establish a ceiling for the time assessment to be imposed, but instead addresses what the 'minimum' permissible time assessment is. Thus, the penalty imposed in petitioner's case is not illegal." (Emphasis in original) (Citations omitted).

To the extent the provisions of 9 NYCRR §8005.20 and 9 NYCRR §8010.3 might be found applicable to the facts and circumstances of this case, the Court would take issue with respondents' assertion that the regulations do not establish a "ceiling" for the time assessment to be imposed, at least with respect to Category 3 violators. The relevant provisions of 9 NYCRR §8005.20(c)(3)(ii) establish the delinquent time assessment for Category 3 violators as time served plus three months. This Court reads 9 NYCRR §8010.3(a) as requiring an ALJ to set delinquent time assessments for a shock parole violators in accordance with the provisions of 9 NYCRR §8005.20, except that if reincarceration is directed the period of reincarceration (delinquent time assessment) must at least equal the minimum period of imprisonment originally imposed by the sentencing court. For Category 3 violators, the Court does not read §8010.3(a) as authorizing an ALJ to impose a delinquent time assessment in excess of the time served plus three months specified §8005.20(c)(3)(ii), except insofar as the §8010.3(a) "shock minimum" exceeds time served plus three months. Put another way, and again assuming the applicability of 9 NYCRR §8005.20 and 9 NYCRR §8010.3 to petitioner's case, and further assuming that petitioner's §8010.3(a) "shock minimum"[3] exceeds the otherwise

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[3] How the "shock minimum" of a determinate sentence would be calculated pursuant to a regulation (9 NYCRR §8010.3(a)) drafted to be applicable to inmates serving indeterminate sentences is not clear. If one presumes that a shock parole violator would be required to be re-incarcerated for at least six-sevenths of his/her determinate term (the amount of time such inmate would generally be required to serve prior to becoming eligible for conditional release pursuant to the relevant provisions of Correction Law §803(1)(c) and Penal Law §70.40(1)(b), then an inmate, such as petitioner, serving a 4 ½-year determinate term would have a "shock minimum" of <u>approximately</u> 3 years, 10 months and 9 days " . . . reduced by the violator's pre-commitment jail time and any time spent incarcerated in a State correctional facility other than a shock incarceration facility." 9 NYCRR §8010.3(b). Under this scenario petitioner, who was originally received

applicable time served plus three months time assessment under §8005.20(c)(3)(ii), this Court would not read §8010.3(a) as authorizing the ALJ to impose a delinquent time assessment in excess of the "shock minimum."

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 delinquent time assessment imposed following the final parole revocation hearing concluded on August 26, 2008 is vacated and the matter remanded for the imposition of a new delinquent time assessment not inconsistent with this Decision and Judgment.

Dated: June 25, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court

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into DOCCS custody certified as entitled to 337 days of jail time credit, would have a "shock minimum" of approximately 2 years and 11 months. For what it is worth, the Court notes that petitioner, who was returned to DOCCS custody as a post-release supervision violator on September 2, 2008, has already been re-incarcerated for more than 3 years and 9 months and yet still will not reach the effective expiration of his delinquent time assessment until the maximum expiration of his period of post-release supervision is reached on September 27, 2015.