

Matter of Ortiz v LaClair
2013 NY Slip Op 30495(U)
March 7, 2013
Supreme Court, Franklin County
Docket Number: 2013-196
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

**COUNTY OF FRANKLIN
X**

In the Matter of the Application of
JOSE R. ORTIZ, #09-A-1761,
Petitioner,

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

**DECISION, ORDER AND
JUDGMENT
RJI #16-1-2013-0091.28
INDEX # 2013-196
ORI #NY016015J**

-against-

D. E. LaCLAIR, Superintendent,
Franklin Correctional Facility, **V. MARSH**,
Coordinator, Inmate Records, and A. P. A.,
J. COOLEY,

Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Jose R. Ortiz, verified on February 26, 2013 and filed in the Franklin County Clerk's office on February 28, 2013. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the respondents' alleged failure to implement the plea deal reached at his final parole revocation hearing. The papers before the Court will be considered as an *ex parte* request for the issuance of an Order to Show Cause in a CPLR Article 78 proceeding. For the reasons set forth below, however, the Court declines to issue such an order.

It appears from the DOCCS Legal Date Computation printout, annexed to the Petition as Exhibit 2, that petitioner was sentenced to a determinate term of 2 years with 2 years post-release supervision. It further appears that petitioner was conditionally released from DOCCS custody to post-release supervision on August 17, 2010 with 6 months and 28 days owing to the originally computed March 15, 2011 maximum

expiration date of the determinate term held in abeyance pursuant to Penal Law §70.45(5)(a). As of petitioner's August 17, 2010 conditional release from DOCCS custody the 2-year period of post-release supervision commenced running (*see* Penal Law §70.45(5)(a)) with the maximum expiration date thereof obviously calculated as August 17, 2012. Petitioner's post-release supervision, however, was subsequently revoked, with a modified delinquency date of April 17, 2012, following a final parole revocation hearing conducted on October 17, 2012. As of the modified delinquency date the running of petitioner's period of post-release supervision was interrupted (*see* Penal Law §70.45(5)(d)(i)) with 4 months still owing to the originally computed August 17, 2012 maximum expiration date thereof. The Administrative Law Judge (ALJ) presiding in petitioner's final parole revocation hearing imposed a delinquent time assessment directing that petitioner be held to his maximum expiration date.

Petitioner was returned to DOCCS custody, as a post-release supervision violator, on November 2, 2012 certified as entitled to 178 days of parole jail time credit (Penal Law §70.40(3)(c)). The parole jail time credit was applied against the interrupted determinate term (*see* Penal Law §70.45(5)(d)(iv)), reducing the time previously held in abeyance against such term from 6 months and 28 days to 1 month. The 1 month still held in abeyance against petitioner's determinate term recommenced running upon his November 2, 2012 return to DOCCS custody. *See* Penal Law §70.45(5)(a). After petitioner completed serving that 1 month the running of the 4 months still owing to the originally computed maximum expiration date of the 2-year period of post-release supervision recommenced, with petitioner remaining in DOCCS custody pursuant to the delinquent time assessment. *See* Penal Law §70.45(5)(d)(iv). DOCCS officials thus determined the current maximum expiration date of petitioner's determinate sentence, including the 2-year period of post-release supervision, as April 2, 2014 (1 month owed

against the 2-year determinate term plus 4 months owed against the 2-year period of post-release supervision running, in sequence, from petitioner's November 2, 2012 return to DOCCS custody.

The petitioner asserts no challenge to the accuracy of the sentence calculations set forth in the preceding two paragraphs. Rather, he asserts that at the final parole revocation hearing the ALJ and all other parties present (presumably the parole revocation specialist and his own attorney) agreed that the plea bargain, which included a guilty plea to a new parole violation charge and the modification of the delinquency date from February 10, 2012 to April 17, 2012, would result in a re-calculated maximum expiration date of January 23, 2013. Petitioner's assertion on this point appears to be supported by the partial transcript of the final hearing annexed to the Petition as Exhibit 1 as well as by the Parole Revocation Decision Notice annexed to his petition as part of Exhibit 5, wherein the ALJ estimated that the delinquent time assessment (hold to maximum expiration) would expire on January 23, 2013.¹

The problem with the position espoused by petitioner, however, is that the authority to calculate relevant sentence dates - including the maximum expiration date of a sentence - lies with DOCCS not the ALJ. Although DOCCS officials are bound by the modified delinquency date and delinquent time assessment established at the final parole revocation hearing, they are not be bound by any "agreement" with respect to the re-calculated maximum expiration date of the underlying judicially-imposed determinate

¹ In the Parole Revocation Decision Notice the ALJ stated that there was 1 month and 15 days remaining on the undischarged portion of petitioner's 2-year period of post-release supervision as of the sustained (modified) delinquency date. The Court is unable to discern how that figure was computed. As noted previously, petitioner was conditionally released from DOCCS custody to post-release supervision on August 17, 2010. The 2-year period of post-release supervision would therefore would have been originally calculated to expire on August 17, 2012. It would thus appear that as of the April 17, 2012 modified delinquency date, which interrupted the running of petitioner's 2-year period of post-release supervision, precisely 4 months remained on the undischarged portion of such period of post-release supervision.

sentence, including the period of post-release supervision. There is no allegation in the petition that the respondents utilized an incorrect delinquency date and/or delinquent time assessment in their sentence calculations. As alluded to previously, petitioner alleges no error whatsoever in the respondents' calculation of the maximum expiration date of his sentence other than that such calculation produced a different maximum expiration date (April 2, 2013) than the "agreement" purportedly reached at the final parole revocation hearing. The parties at a final parole revocation hearing, together with the ALJ, however, have no authority to enter into an "agreement" altering the statute-based calculation of the maximum expiration date of a parole violator's judicially imposed sentence.

The Court declines to issue an Order to Show Cause inasmuch as the petition, as currently drafted, is patently without merit. *See King v. Gregorie*, 90 AD2d 922. In the absence of any allegation that respondents' calculation of petitioner's maximum expiration date is inaccurate it would appear that petitioner's only potential remedy would involve a CPLR Article 78 proceeding against the Board of Parole asserting that his guilty plea at the final parole revocation hearing of October 17, 2012 was based upon a mutual mistake with respect to impact of such plea on the calculation of the maximum expiration date of his underlying determinate sentence, including the period of post-release supervision. Even if its successful, however, petitioner might only be entitled to have the plea vacated and the matter remanded for further parole revocation proceedings. In this regard the Court simply observes that this entire dispute will likely be rendered moot in less than four weeks when the April 2, 2013 maximum expiration date of petitioner's sentence, as calculated by DOCCS officials, is reached.

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

ORDERED, that petitioner's request for the issuance of an Order to Show Cause in a CPLR Article 78 proceeding is denied; and it is further

ADJUDGED, that the petition is dismissed.

Dated: March 7, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice