Matter of Fuentes v Yelich
2013 NY Slip Op 33101(U)
December 3, 2013
Supreme Court, Franklin County
Docket Number: 2013-412
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT COUNTY OF FRANKLIN

In the Matter of the Application of
JOSE W. FUENTES,#06-A-2268,
Petitioner,

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

-against-

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

DECISION AND JUDGMENT
RJI #16-1-2013-0199.55
INDEX # 2013-412
ORI # NY016015J

This proceeding was originated by the Petition for Writ of Habeas Corpus of Jose W. Fuentes, verified on May 3, 2013 and filed in the Franklin County Clerk's office on May 9, 2013. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. The Court issued an Order to Show Cause on May 14, 2013 and has received and reviewed respondent's Return, dated June 28, 2013, as well as petitioner's Reply thereto, sworn to on July 17, 2013 and filed in the Franklin County Clerk's office on July 29, 2013. Almost one month later petitioner moved to amend the underlying petition.

By Letter Order dated September 11, 2013 the Court established September 27, 2013 as the return date for petitioner's motion to amend. In addition, as part of its Letter Order of September 11, 2013, the Court directed petitioner to address a specified issue with respect to the length/expiration date of the delinquent time assessment imposed in connection with petitioner's final parole revocation hearing. In response thereto, the Court has received and reviewed the Letter Memorandum of Glen Francis Michaels, Esq.,

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Assistant Attorney General in Charge, dated September 23, 2013, as well as petitioner's Supplemental Reply, sworn to on October 16, 2013 and filed in the Franklin County Clerk's office on October 21, 2013.

On April 11, 2006 petitioner was sentenced in Nassau County Court to a controlling determinate term of 3½ years, with 5 years post-release supervision, upon his convictions of the crimes of Burglary 2° and Possession of Burglar's Tools. He was received into DOCCS custody on April 28, 2006 certified as entitled to 365 days of jail time credit. At that time DOCCS officials calculated the maximum expiration date of petitioner's 3½-year determinate sentence as October 27, 2008.

On April 28, 2008 petitioner was conditionally released from DOCCS custody to post-release parole supervision. Upon such release the running of petitioner's 3½-year determinate term was interrupted, with the 5 months and 29 days still owing to the maximum expiration date thereof "held in abeyance" pursuant to Penal Law §70.45(5)(a). Also as of petitioner's April 28, 2008 release, the running of his 5-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the maximum expiration date of that period initially calculated as April 28, 2013.

After his conditional release petitioner was apparently deported to El Salvador but subsequently returned to the United States illegally on or about August 10, 2010. He was taken into custody by federal authorities in Texas and a New York parole warrant was lodged against him on December 6, 2010. On April 18, 2011 petitioner was sentenced in United States District Court for the Southern District of Texas, upon a plea, to a 33-month term of imprisonment (with a 2-year period of supervised release) upon his conviction of the federal crime of being found in the United States after previous deportation. During

the course of petitioner's sentencing the federal judge made the following statement: "I'm also going to recommend the sentence run concurrent with this revocation matter that you may be facing up in New York. You're still on probation or parole on that case so there'll probably be a warrant issued to go up there and get revoked. So I recommend the sentence run concurrent . . . with whatever sentence you might get up there." The federal sentencing judgment contained the following language: "The Court further recommends that the imprisonment term imposed in the instant offense run concurrently with any imprisonment term that maybe imposed if parole is revoked in . . . New York." Petitioner was nevertheless incarcerated in federal custody until the expiration of his federal sentence on January 4, 2013. At that time he was apparently transferred from federal custody to local custody in Nassau County pending parole revocation proceedings.

A final parole revocation hearing was conducted at the Nassau County Jail on January 24, 2013. Based upon a plea agreement placed on the record at that hearing, petitioner's post-release supervision was revoked, with a modified delinquency date of October 14, 2010, and a 12-month delinquent time assessment was imposed. The October 14, 2010 modified delinquency date interrupted the running of petitioner's period of post-release supervision (*see* Penal Law §70.45(5)(d)(i)) with 2 years, 6 months and 14 days still owed to the originally-calculated April 28, 2013 maximum expiration date of such period.

Petitioner was returned to DOCCS custody as a post-release supervision violator on February 5, 2013 certified as entitled to 32 days of parole jail time credit covering the period from the expiration of his federal sentence to his return to DOCCS custody. The parole jail time credit was applied against the interrupted 2006 determinate term,

reducing the time previously held in abeyance against such term from 5 months and 29 days to 4 months and 27 days. The 4 months and 27 days remaining in abeyance against petitioner's 2006 determinate term recommenced running as of his February 5, 2013 return to DOCCS custody (*see* Penal Law §70.45(a)), with the re-calculated maximum expiration date of such term apparently reached on or about July 2, 2013. As of that date the 2 years, 6 months and 14 days still owing against petitioner's 5-year period of post-release supervision re-commenced running (*see* Penal Law §70.45(5)(d)(iv)) with the maximum expiration date thereof calculated to be reached on January 16, 2016.

In this proceeding petitioner argues that the time he spent incarcerated in federal custody must be applied against the 5-year period of New York post-release supervision based upon the concurrency language set forth in the 2011 federal judgment of conviction. This Court, however, rejects petitioner's argument. Presuming a proper federal statutory authorization, the federal sentencing judge could have directed petitioner's 2011 federal sentence to run concurrently with respect to the undischarged term of the previously-imposed New York sentence.[1] The federal sentencing judge, however, could not thereby bind New York authorities to calculate petitioner's previously-imposed New York sentence/period of post-release supervision as running during the period of his federal incarceration. The concurrency directive of the federal sentencing judge could only bind federal authorities to calculate petitioner's federal sentence as running during the course of petitioner's re-incarceration in New York. Thus, in order to have implemented any

[1] It is noted that the concurrency language utilized by the federal sentencing judge and set forth in the federal sentencing judgment was couched in terms of a recommendation rather than a directive. This Court is unaware of the significance of such distinction within the federal sentencing scheme. In any event, for the purposes of this Decision and Judgment only, such concurrency language will be treated as if it were a directive.

federal sentencing order directing petitioner's federal sentence to run concurrently with respect to the undischarged term of his previously-imposed New York sentences, the federal judge would have had to direct that, upon sentencing, petitioner be committed to the custody of New York, rather than federal, authorities.[2] Petitioner, however, served the entire term of his federal sentence in the custody of federal authorities at a federal correctional facility. Accordingly, regardless of any concurrency directive of the federal sentencing judge, neither the running of petitioner's 2006 New York sentence, which was interrupted as of his April 28, 2008 conditional release to post-release supervision, nor the running of the 5-year period of post-release supervision, which was interrupted as of the October 14, 2010 delinquency date, could re-commence until he was returned to DOCCS custody on February 5, 2013.

Although this Court has rejected the only argument advanced by petitioner in connection with the challenge to his ongoing incarceration in DOCCS custody, in reviewing the various papers before it the Court perceived a potential error in the calculations underlying such incarceration. The transcript of the January 24, 2013 final parole revocation hearing, a copy of which was annexed to the Petition, indicated that the presiding ALJ imposed a 12 month delinquent time assessment. The copy of the Parole Jail Time Certificate annexed to respondent's Return as Exhibit E, however, indicated a hold of 36 months, with the expiration of such hold calculated as December 6, 2013 (apparently 36 months after the parole warrant was lodged on December 6, 2010. *See* 9

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[2] If the shoe were on the other foot and a New York sentencing court sought to impose its sentence on a defendant as running concurrently with respect to the unexpired term of a sentence previously imposed on such defendant in another jurisdiction, the concurrency order would be implemented under the provisions of Penal Law §§70.20(3), 70.25(4) and 70.30(2-a).

NYCRR §8002.6(b). *But see* Penal Law §70.45(5)(d)(iv)). Since the maximum expiration date of petitioner's 2006 determinate term has already passed, the only basis for his continued incarceration in DOCCS custody would be the delinquent time assessment. *See Hines v. Bradt*, 86 AD3d 678. Depending on the correct length of the delinquent time assessment (12 months or 36 months) petitioner may be entitled to immediate release from DOCCS custody and, therefore, the Court opted to consider this potential issue notwithstanding the fact that it was not raised in petitioner's papers. *See* CPLR §7002(a). Accordingly, the Court issued its Letter Order of September 11, 2013 directing respondent " . . . to address the length/expiration of petitioner's delinquent time assessment by submitting whatever affidavits, memoranda and/or documentary evidence is deemed appropriate . . ."

In response to the Court's Letter Order of September 11, 2013 the respondent stated that at the final parole revocation hearing "[n]either the ALJ nor the Parole Revocation Specialist nor Petitioner nor his counsel appear to have contemplated that this one year [delinquent time assessment] would result in an *immediate* release to PRS, as would have been the case if the 12 month[s] were to run in accordance with 9 NYCRR §8002.6, the date [sic] the warrant had been lodged more than two years previously on December 6, 2010." (Emphasis in original). Respondent therefore asserted that on an unspecified date an unspecified member or members of the Board of Parole "administratively recalculated" the delinquent time assessment " . . . so as to reflect the intent of the parties, namely, that it [sic] hold would run for about one year from or slightly before the date of the final revocation hearing. This resulted in the figure of 36 months . . ." DOCCS officials went on to determine that petitioner's "administratively

recalculated" 36-month delinquent time assessment would expire on December 6, 2013 (36 months after the New York parole warrant was lodged against petitioner on December 6, 2010). *See* 9 NYCRR §8002.6(b). *But see* Penal Law §70.45(5)(d)(iv).

While the participants at the January 24, 2013 final parole revocation hearing may have expressed an off-the-record intent that the delinquent time assessment would expire "one year from or slightly before the date of the final revocation hearing," or may have had such an intent in mind (although unstated) at the final parole revocation hearing, this Court finds nothing in the final parole revocation hearing transcript to support any conclusion with respect to the specific intent of the parties when they agreed to the 12-month delinquent time assessment. Rather, the presiding ALJ simply placed on the record his understanding, based up an off-the-record pre-hearing conference, "...that there is going to be a plea of guilty to amended charge number two. As a result, the delinquency date will be amended from August 14, 2010 to October 14, 2010. The Division will withdraw the remaining charges with prejudice, and pursuant to the guidelines of category one, there would be a 12 months hold." Upon inquiry from the ALJ, petitioner's counsel and the Parole Revocation Specialist expressed their agreement with the ALJ's stated understanding. Counsel for the petitioner then entered a plea of guilty on behalf of his client, such plea was accepted by the ALJ, the delinquency date was amended, the division withdrew the remaining charges with prejudice and the ALJ stated "12 months. Good luck to you, sir."

The written Parole Revocation Decision Notice form, which this Court notes includes a blank space for the ALJ to enter the "estimated delinquent time assessment expiration date," was not included as part of the record in this proceeding. In addition,

the Court notes that the record herein does not include any suggestion that petitioner and/ or his counsel received notice of and/ or an opportunity to be heard prior to the administrative recalculation of the delinquent time assessment from 12 months to 36 months.

In view of all the forgoing, this Court is constrained to find that petitioner's delinquent time assessment was unlawfully "administratively recalculated" from 12 month to 36 months. Since the "administratively recalculated" 36-month delinquent time assessment has already been calculated by DOCCS officials as expiring on December 6, 2013, the Court recognizes that its intervention at this juncture will have little, if any, practical effect. Nevertheless, the Court does find that petitioner is entitled to immediate release from DOCCS custody subject, however, to any outstanding federal immigration warrant/ detainer.

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 cost or disbursements, but only to the extend that respondent is directed to forthwith release petitioner from DOCCS custody subject to any outstanding federal immigration detainer/ warrant.

DATED: December 3, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge