Matter of Caldwell v LaClair
2016 NY Slip Op 30274(U)
February 2, 2016
Supreme Court, Franklin County
Docket Number: 2015-671
Judge: S. Peter Feldstein

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

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In the Matter of the Application of
ANTHONY CALDWELL,#13-A-1965,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2015-0374.53
INDEX # 2015-671
ORI # NY016015J

DARWIN E. LaCLAIR, Superintendent,
Franklin Correctional Facility,
Respondents.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of Anthony Caldwell, verified on July 31, 2015 and filed in the Franklin County Clerk's office on August 12, 2015. Petitioner, who is an inmate at the Franklin 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 August 17, 2015 and has received and reviewed respondent's Answer and Return, verified on September 29, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated September 29, 2015. Annexed to respondent's Answer and Return, as Exhibit S thereof, is a copy of the letter dated September 25, 2015 from Richard de Simone, Esq., Deputy Counsel in Charge, DOCCS Office of Sentencing Review, to the Plattsburgh Regional Office of the New York State Attorney General. In that letter, which will hereinafter be referred to as the "de Simone Letter," the DOCCS sentence calculation methodology with respect to petitioner's sentences is set forth in detail. The Court has also received and reviewed petitioner's Memorandum of Law in Reply to the Respondent's Return, verified on October 13, 2015 and filed in the Franklin County Clerk's office on October 21, 2015.

On November 15, 2007 petitioner was sentenced in Supreme Court, New York County, as a second drug felony offender with a prior violent felony offense, to a determinate term of 6 years, with 3 years post-release supervision, upon his conviction of the crime of Criminal Sale of a Controlled Substance 3°. He was received into DOCCS custody on January 14, 2008 certified as entitled to 158 days of jail time credit. Petitioner subsequently moved pursuant to Criminal Procedure Law §440.20 to set aside the 2007 sentence. His motion was granted and petitioner was resentenced, as a second felony drug offender, to a determinate term of 3 years, with 3 years post-release supervision. An amended Sentence and Commitment Order incorporating the terms of the resentencing was issued on May 7, 2009.

On September 25, 2009 petitioner was released from DOCCS custody to post-release parole supervision[1]. A parole violation warrant, however, was lodged against him on November 15, 2010 and petitioner's post-release supervision was ultimately revoked, with a delinquency date of February 11, 2010, following a final parole indication hearing concluded on March 16, 2011. A 12-month delinquent time assessment was imposed. On March 28, 2011 petitioner was received back into DOCCS custody, as a post-release supervision violator, certified as entitled to 133 days of parole jail time credit.

On October 20, 2011 the Appellate Division, First Department, reversed the sentencing court's decision granting petitioner's Criminal Procedure Law §440.20 motion. The appellate court directed that the original 2007 sentence (6-year determinite term with 3 years post-release supervision) be "reinstated." *People v. Caldwell*, 88 AD3d 560, 561. There is nothing in the record to suggest that petitioner was returned to the sentencing court for resentencing or that the sentencing court issued an additional amended Sentence

[1] September 25, 2009 represented the merit eligibility date associated with the 3-year determinate term of the 2009 resentence.

and Commitment Order after the determination of the Appellate Division, First Department. In addition, this Court notes that the respondent takes the position that DOCCS officials were not made aware of the October 20, 2011 appellate-level determination until on or about May 6, 2013. Thus, such officials continued to calculate petitioner's sentence based upon the 2009 amended Sentence and Commitment Order.

On November 15, 2011, upon expiration of the 12-month delinquent time assessment imposed following the March 16, 2011 final parole indication hearing, petitioner was again released from DOCCS custody to post-release supervision. He was subsequently determined to be delinquent as of August 17, 2012. On March 20, 2013 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 1½ to 3 years upon his conviction of the crime of Grand Larceny 4°. He was received back into DOCCS custody on May 3, 2013 certified as entitled to 262 days of jail time credit.[2]

As noted previously, the respondent takes the position that DOCCS officials were not made aware of the October 20, 2011 determination of the Appellate Division, First Department, reinstating petitioner's original 2007 sentence (6-year determinate term with 3 years post-release supervision) until May 6, 2013 (three days after petitioner was received back into DOCCS custody). After learning of that determination DOCCS officials recalculated the relevant sentence dates associated with petitioner's multiple (2007 and 2013) sentences. The aggregate maximum expiration date of such sentences is currently calculated as December 20, 2016, with petitioner apparently still subject to 1 year, 10 months and 12 days of post-release supervision. In addition DOCCS officials currently

[2] There is nothing in the record to suggest that any final parole revocation hearing was conducted prior to petitioner's May 3, 2013 return to DOCCS custody. Rather, the Court presumes that by reason of his 2013 conviction/sentencing petitioner's post-release supervision was revoked by operation of law with his next appearance before a Parole Board governed by the legal requirements of the new sentence. *See* Executive Law §259-i(3)(d)(iii).

calculate the conditional release date, parole eligibility date and merit eligibility dates associated with petitioner's multiple sentences as December 20, 2016, December 20, 2016 and September 19, 2016, respectively.

In this proceeding Petitioner first notes that he was never returned to the Supreme Court, New York County, for resentencing after the Appellate Division, First Department issued its October 20, 2011 determination (*People v. Caldwell*, 88 AD3d 560). Citing, *inter alia*, Criminal Procedure Law §380.20, Criminal Procedure Law §380.40(1) and *People v. Sparber*, 10 NY3d 457, Petitioner argues that he was not resentenced in accordance with law. Citing *Murray v. Goord*, 1 NY3d 29, he goes on to assert that DOCCS officials are conclusively bound by the terms of the commitment papers (Sentence and Commitment Order) accompanying the prisoner into custody and that such officials must comply with the terms of the last commitment order received. Petitioner argues, in effect, that the most recent Sentence and Commitment Order received by DOCCS officials was the May 7, 2009 order, which was issued after his Criminal Procedure Law §440.20 motion had been granted and which specified a determinate term of 3 years, with 3 years post-release supervision.

Notwithstanding Petitioner's arguments, this Court finds that DOCCS officials did not err in calculating Petitioner's sentence based upon the originally imposed (2007) 6-year determinate term, with 3 years post-release supervision, as "reinstated" by the Appellate Division, First Department, in *People v. Caldwell*, 88 AD3d 560. In this regard the Court finds that DOCCS officials properly relied upon the corrective action (reinstatement of the 2007 sentence) taken by the appellate court upon reversal of the sentencing court's determination granting Petitioner's CPL §440.20 motion. *See* Criminal Procedure Law §470.20. For what it is worth, it is noted that the sentence in question (6-year determinate term with 3 years post-release supervision) was pronounced in open

court on November 15, 2007 with the Petitioner and his attorney both present. This Court also notes that although it would have been preferable for DOCCS officials to undertake the necessary and appropriate sentence recalculations immediately upon reinstatement of the 2007 sentence by the appellate court, "[DOCCS] has a 'continuing, nondiscretionary, ministerial duty' to make accurate calculations of terms of imprisonment, a duty that requires it to correct known errors." *Patterson v. Goord*, 299 AD2d 769, 770, quoting *Cruz v. New York State Department of Correctional Services*, 288 AD2d 572, 573, *appeal dismissed* 97 NY2d 725. *See Bottom v. Goord,* 96 NY2d 870.

For the reasons set forth below, the Court next finds that DOCCS officials accurately calculated the current aggregate maximum expiration date (December 20, 2016) of Petitioner's multiple (2007/2013) sentences. Following imposition of the 2007 sentence Petitioner was received into DOCCS custody on January 14, 2008. Running the 6-year determinate term from that date (*see* Penal Law §70.30(1)), less 158 days of jail time credit, the initial maximum expiration date of the 6-year determinate term was calculated as August 5, 2013.

Upon petitioner's original September 25, 2009 release from DOCCS custody to post-release supervision the running of the 6-year determinate term was interrupted, with 3 years, 10 months and 10 days still owing to the initial maximum expiration date thereof "held in abeyance" pursuant to Penal Law §70.45(5)(a). Also as of petitioner's September 25, 2009 release, the running of the 3-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 September 25, 2012. Petitioner's post-release supervision, however, was subsequently revoked with a delinquency date of February 11, 2010. The delinquency interrupted the running of the period of post-release supervision (*see* Penal Law

§70.45(5)(d)(i)) with 2 years, 7 months and 14 days still owing to the initial September 25, 2012 maximum expiration date of that period.

Petitioner was returned to DOCCS custody as a post-release supervision violator on March 28, 2011 certified as entitled to 133 days of parole jail time credit. 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 3 years, 10 months and 10 days to 3 years, 5 months and 27 days. The 3 years, 5 months and 27 days still held in abeyance against petitioner's determinate term commenced running as of his March 28, 2011 return to DOCCS custody (*see* Penal Law §70.45(a)), with the adjusted maximum expiration date of the determinate term calculated as September 25, 2014.

Upon petitioner's November 15, 2011 release from DOCCS custody to post-release supervision the running of the 6-year determinate term was interrupted, with 2 years, 10 months and 10 days still owing to the adjusted September 25, 2014 maximum expiration date thereof "held in abeyance" pursuant to Penal Law §70.45(5)(a). Also as of petitioner's November 15, 2011 release, the running of the remaining 2 years, 7 months and 14 days of the 6-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with an adjusted maximum expiration date of that period calculated as June 29, 2014. Petitioner's post-release supervision, however, was subsequently revoked with a delinquency date of August 17, 2012. The delinquency interrupted the running of the period of post-release supervision (*see* Penal Law §70.45(5)(d)(i)) with 1 year, 10 months and 12 days still owing to the adjusted June 29, 2014 maximum expiration date of that period.

Since petitioner's 2013 sentence was imposed upon him as a second felony offender, DOCCS officials properly calculated such sentence as running consecutively, rather than

concurrently, with respect to the unexpired term of the 2007 sentence notwithstanding the fact that the 2013 sentencing court apparently did not so specify. *See People ex. rel. Gill v. Greene*, 12 NY3d 1, *cert denied sub nom Gill v. Rock*, 558 US 837. Where an individual, such as petitioner, is serving a determinate sentence and an indeterminate sentence, running consecutively, ". . . the minimum term. . . of the indeterminate sentence. . . and the term . . . of the determinate sentence . . . are added to arrive at an aggregate maximum term of imprisonment provided, however, (i) that in no event shall the aggregate maximum so calculated be less than the term or maximum term of imprisonment of the sentence which has the longest unexpired time to run . . ." Penal Law §70.30(1)(d).

Running the 2 years, 10 months and 10 days still held in abeyance against petitioner's 2007 determinate term, together with the 1 year and 6 months minimum period of petitioner's 2013 indeterminate sentence, from his May 3, 2013 return to DOCCS custody, less 262 days of jail time credit, the controlling aggregate maximum expiration date of petitioner's multiple (2007/2013) sentences was properly calculated as falling on December 20, 2016[3], with 1 year, 10 months and 12 days still owing against the original 6-year period of post-release supervision.

Notwithstanding all of the foregoing, the Court has serious concerns with respect to DOCCS's current calculation of the parole eligibility and conditional release dates associated with petitioner's multiple sentences. Penal Law §70.40(1)(b) provides, in relevant part, as follows:

> "A person who is serving one or more than one indeterminate or determinate sentence of imprisonment shall. . . be

[3] The aggregate maximum term of petitioner's multiple (2007/2013) sentences, as calculated by adding the 1½-year minimum period of the 2013 sentence to the 2 years, 10 months and 10 days previously held in abeyance against the 6-year determinate term of the 2007 sentence (less jail time credit), exceeds the 3-year maximum term of the 2013 sentence (less jail time credit). Therefore, the exception set forth in Penal Law §70.30(1)(d)(i) is not applicable.

> conditionally released. . . when the total good behavior time allowed . . . pursuant to the provisions of the correction law, is equal to the unserved portion of his or her term, maximum term or aggregate maximum term; provided, however, that . . . (ii) in no event shall a person be conditionally released prior to the date on which such person is first eligible for discretionary parole release."

In the case at bar DOCCS officials, citing Correction Law §803(5) and Correction Law §803(1)(a) and (2)(f), determined that petitioner was potentially eligible for 1 year, 4 months and 28 days of good time (1/3 of the 3-year maximum term of the 2013 indeterminate sentence equals 1 year, and 1/7 of the 2 years, 10 months and 10 days still owing to the term of the 2007 determinate sentence equals 4 months and 28 days). Subtracting 1 year, 4 months and 28 days of potentially available good time from the December 20, 2016 aggregate maximum expiration date of petitioner's multiple (2007/2013) sentences, DOCCS officials initially calculated petitioner's earliest conditional release date as July 22, 2015. Although the Court agrees with this initial calculation from a strictly mathematical standpoint, DOCCS officials also determined that petitioner would not become eligible for discretionary parole release until February 8, 2017 - after his aggregate maximum expiration date! - and that the initial calculation of petitioner's conditional release date must give way pursuant to the above-quoted provisions of Penal Law §70.40(1)(b)(ii). The Court's concerns with respect to current DOCCS calculations relate to the calculation of petitioner's parole eligibility date.

"A person who is serving one . . . indeterminate sentence of imprisonment and one . . . determinate sentence of imprisonment which run consecutively may be paroled at any time after the expiration of the sum of the minimum . . . period of the indeterminate sentence . . . and six-sevenths of the term . . . of imprisonment of the determinate sentence . . ." Penal Law §70.40(1)(a)(iv). Thus, in determining the parole eligibility date

associated with petitioner's multiple (2007/2013) sentences, DOCCS officials first calculated that 6/7 of petitioner's 2007 determinate term equals 5 years, 1 month and 18 days. They went on to calculate that as of September 25, 2009 (the date petitioner was first released from DOCCS custody to post-release supervision with the running of the underlying determinate term interrupted pursuant to Penal Law §70.45(5)(a)) petitioner still owed 2 years, 11 months and 28 days to reach 6/7 of the 6-year 2007 determinate term. Up to this point the Court agrees with DOCCS's calculations. For reasons that will be discussed below, however, DOCCS officials next determined that petitioner was entitled to no further reduction in the 6/7 of the 6-year determinate term figure for any time he spent in DOCCS custody after his first release to post-release supervision on September 25, 2009.

Referring to the above-quoted provisions of Penal Law §70.40(1)(iv), DOCCS officials took the 2 years, 11 months and 28 days figure and added it to the 1 year and 6 months minimum period of the 2013 indeterminate sentence to produce a figure of 4 years, 5 months and 28 days, which is described in the de Simone Letter as "time owed to aggregate minimum period." Running that "time owed to aggregate minimum period" from May 3, 2013 (the date petitioner was received back into DOCCS custody) less 263 days of jail time credit, DOCCS officials calculated February 8, 2017 as the parole eligibility date associated with petitioner's multiple (2007/2013) sentences. Respondent argues that petitioner's parole eligibility date cannot be later than his maximum expiration date (December 20, 2016) and, therefore, that the parole eligibility date must be deemed to be December 20, 2016. Referring back to Penal Law §70.40(1)(b)(ii), respondent also argues that petitioner's conditional release date (initially calculated as July 22, 2015) cannot precede his parole eligibility date and, therefore, must also be deemed to fall on December 20, 2016.

The Court's concerns with respect to the calculation of the parole eligibility date associated with petitioner's multiple (2007/2013) sentences (and, by extension, the calculation of his conditional release date) stems from the determination of DOCCS officials that the 2 years, 11 months and 28 days owed by petitioner against 6/7 of the 2007 determinate term (as of his initial release from DOCCS custody to post-release supervision on September 25, 2009) may not be further reduced by the time petitioner spent in DOCCS custody from March 28, 2011 (when he was returned to custody as a post-release supervision violator) to November 15, 2011 (when he was re-released to post-release supervision) and/or by the 133 days of parole jail time credited to petitioner upon his March 28, 2011 return to DOCCS custody. This DOCCS determination is purportedly rooted in Penal Law §70.45(5)(d) which provides, in relevant part, as follows:

> "(d) When a person is alleged to have violated a condition of post-release supervision and the department of corrections and community supervision has declared such person to be delinquent . . . and (iv) if the person is ordered returned to the department of corrections and community supervision, the person shall be required to serve the time assessment before being re-released to post-release supervision . . . Any time spent in custody from the date of delinquency until return to the department of corrections and community supervision shall first be credited to the maximum or aggregate maximum term of the sentence or sentences of imprisonment, but only to the extent authorized by subdivision three of section 70.40 of this article [parole jail time credit]. The maximum or aggregate maximum term of the sentence or sentences of imprisonment shall run while the person is serving such time assessment in the custody of the department of corrections and community supervision."

According to the de Simone Letter, "[t]he petitioner's return to DOCCS as a post-release supervision violator in 2011 [March 28, 2011] did not cause the six-sevenths amount to resume running or to be credited with the 133 day period of parole jail time. Penal Law §70.45(5)(d)(iv) [quoted above] specifically authorizes that time to be credited

in calculating the aggregate maximum term [of petitioner's multiple 2007/2013 sentences] but provides no authority to apply that time in calculating the aggregate minimum period[.]"

Counsel's argument notwithstanding, the Court first notes that the term "aggregate minimum period," as applied to consecutive determinate/indeterminate sentences, is not found in the relevant statutes. While Penal Law §70.30(1)(d) provides the basis for calculating the "aggregate maximum term" of consecutive determinate/indeterminate sentences, there is no reference therein to the calculation of any "aggregate minimum period" of such multiple sentences. More importantly, Penal Law §70.40(1)(a)(iv), wherein the methodology for calculating the parole eligibility date associated with a determinate sentence and a consecutive indeterminate sentence is set forth, simply states, in relevant part, that an individual with such a sentence structure ". . . may be paroled at any time after the expiration of the sum of the minimum . . . period of the indeterminate sentence . . . and six-sevenths of the term . . . of imprisonment of the determinate sentence . . ." The minimum period of petitioner's 2013 indeterminate sentence (1½ years) is not at issue and the separate calculation when he completes/completed serving 6/7 of the 2007 determinate term is relatively straightforward.

The Court finds nothing in the interplay between the provisions of Penal Law §70.40(1)(a)(iv) and Penal Law §70.45(5)(d)(iv) which would suggest that the 7-month and 17-day period from March 28, 2011 (when petitioner was returned to DOCCS custody as a post-release supervision violator to serve a 12-month time assessment) to November 15, 2011 (when he was re-released to post-release supervision upon expiration of the time assessment) and/or the 133 days of parole jail time credited to petitioner upon his March 28, 2011 return to DOCCS custody, should be excluded in the calculation of time served by petitioner against 6/7 of his 2007 determinate term for parole eligibility purposes

pursuant to Penal Law §70.40(1)(a)(iv). Pursuant to the relevant provisions of Penal Law §70.45(5)(d)(iv) both of those time periods should be credited as time served by the petitioner against the term of his 2007 determinate sentence, which was the only sentence he was serving during such periods.

With an additional period of 1 year (7 months and 17 days plus 133 days (4 months and 13 days)) subtracted from the 2 years, 11 months and 28 days petitioner still owed to reach 6/7 of his 6-year 2007 determinate term as of September 25, 2009 (according to DOCCS calculations), an adjusted figure of 1 year, 11 months and 28 days would be produced. Taking that 1 year, 11 months and 28 days figure and adding it to the 1 year and 6 months minimum period of petitioner's 2013 indeterminate sentence, a figure of 3 years, 5 months and 28 days is produced. Running that 3-year, 5-month and 28-day figure from May 3, 2013 (the day petitioner was received back into DOCCS custody), less 263 days of jail time credit, a revised calculation of February 8, 2016 (rather than February 8, 2017) as the parole eligibility date associated with petitioner's multiple (2007/2013) sentences is produced. Since petitioner's conditional release date (initially calculated as July 22, 2013), cannot precede his parole eligibility date (*see* Penal Law §70.40(1)(b)(ii)), his conditional release date must also be deemed to fall on February 8, 2016.

Since the ink on this Decision and Judgment will hardly be dry by the time petitioner becomes eligible for discretionary parole release/conditional release on February 8, 2016, the Court declines to delve into the issues associated with the calculation of petitioner's merit eligibility date.

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 extent DOCCS officials are directed to re-calculate the parole eligibility and

conditional release dates associated with petitioner's multiple (2007/2013) sentences in a manner not inconsistent with this Decision and Judgment and to promptly take such steps as are necessary and appropriate to determine whether or not petitioner should be released/conditionally released to post-release supervision in accordance therewith.

DATED: February 2, 2016 at
Indian Lake, New York

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S. Peter Feldstein
Acting Supreme Court Justice