Matter of Gbengbe v Annucci
2016 NY Slip Op 31200(U)
June 27, 2016
Supreme Court, Clinton County
Docket Number: 2015-0945
Judge: S. Peter Feldstein

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

In the Matter of the Application of
OLUSEGUN GBENGBE, #12-B-2629,
Petitioner,

DECISION, ORDER AND JUDGMENT

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

RJI No. 16-1-2015-0567.83
INDEX No. 2015-0945
ORI No. NY016015J

-against-

ANTHONY J. ANNUCCI, Acting Commissioner, New York State DOCCS, and **DAVID S. GOULD**, Cayuga County Sheriff,
Respondents.

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Olusegun Gbengbe, verified on January 5, 2016 and filed in the Clinton County Clerk's Office on January 27, 2016. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the September 2012 calculation of his jail time credit as relates to his August 2012 conviction of his instant offense. The Court issued an Order to Show Cause[1] on February 5, 2016 and has received and reviewed Respondent Annucci's Answer and Return verified on March 30, 2016, as well as Respondent Gould's Notice of Motion to Dismiss the Petition dated April 4, 2016. The Court has also considered the Reply[2] submitted by Petitioner received on May 9, 2016.

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[1]Upon review of the petition, the Court *sua sponte* added David S.Gould, Cayuga County Sheriff, as a necessary party.

[2]Although not captioned as same, the Court will also consider Petitioner's Reply as an affidavit in opposition to the motion to dismiss.

Petitioner was originally sentenced to an indeterminate term of incarceration of four (4) years to life on November 16, 2005.[3] On June 4, 2010, the Petitioner was released to parole supervision and thereafter declared delinquent on June 23, 2011. On August 8, 2011, the Petitioner's parole was revoked and he was returned to the custody of DOCCS to serve a ten (10) month time assessment. During the Petitioner's parole release, however, he committed the drug offense on or about June 12, 2011 for which he was arrested on or about December 13, 2011. Following the service of the ten (10) month time assessment, on May 12, 2012, the Petitioner was returned to parole status; however, he was then transferred to the custody of the Cayuga County Sheriff pursuant to their warrant for the new drug charge. Petitioner was sentenced by the Cayuga County Court on August 21, 2012 to a determinate term of incarceration of nine (9) years in state prison.

Petitioner argues that at the time of sentencing, he consented to the plea agreement in satisfaction of all counts of the indictment based upon the promise that he would receive jail time credit from the date of arrest, i.e. December 13, 2011, until sentencing on August 21, 2012. Petitioner asserts that this calculation is 251 days. Petitioner argues that initially, he was only credited with 118 days of jail time credit which was ultimately reduced to 9 days. Petitioner complains that DOCCS has incorrectly calculated his jail time credit based upon a misapplication of the law.

Respondent Annucci asserts that regardless of whether the Petitioner was a DOCCS inmate or a county jail inmate, the jail time credit must be first applied to the previous

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[3]The Court notes that the Petitioner was re-sentenced on this charge at least three times following the original sentence which was ultimately re-sentenced on December 1, 2009 (hereinafter referred to as the "2009 re-sentence") to be a determinate sentence of four and one-half (4 ½) years with five (5) years post release supervision.

sentence, i.e. the 2009 re-sentence, prior to application to the instant offense. Respondent Annucci refers to Penal Law §70.30(3), which reads in relevant part:

> "Jail time. The term of a definite sentence, a determinate sentence, or the maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence. In the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court or by the board of parole, the credit shall also be applied against the minimum period. The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the term or maximum term of any previously imposed sentence or period of post-release supervision to which the person is subject. Where the charge or charges culminate in more than one sentence, the credit shall be applied as follows:
>
> (b) If the sentences run consecutively, the credit shall be applied against the aggregate term or aggregate maximum term of the sentences and against the aggregate minimum period of imprisonment."

Respondent Annucci asserts that the jail time credit for the period of incarceration between August 8, 2011 until the Petitioner's release to parole supervision on May 4, 2012 is attributable to his 10 month time assessment for the 2009 re-sentence parole violation. Thereafter, the time between May 4, 2012 and August 20, 2012, the date of sentencing as well as the date of delinquency (by operation of law) is time assessed against the Petitioner's post-release supervision. The Petitioner has received nine days of jail time credit between the date of delinquency, to wit: August 20, 2012, and the date of receipt into DOCCS on August 30, 2012, which is applied towards the Petitioner's 2012 conviction.

Richard de Simone, Deputy Counsel in Charge of the Office of Sentencing Review, opines on behalf of Respondent Annucci by affirmation dated March 24, 2016 and included in Respondent's Answer and Return, that the jail time credited to the Petitioner's 2009 re-sentence was properly attributed pursuant to Penal Law §70.45(5)(d), which reads in relevant part:

> "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: (i) the declaration of delinquency shall interrupt the period of post-release supervision; (ii) such interruption shall continue until the person is restored to post-release supervision; (iii) if the person is restored to post-release supervision without being returned to the department of corrections and community supervision, any time spent in custody from the date of delinquency until restoration to post-release 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. Any time spent in custody solely pursuant to such delinquency after completion of the maximum or aggregate maximum term of the sentence or sentences of imprisonment shall be credited to the period of post-release supervision, if any; 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. In the event the balance of the remaining period of post-release supervision is six months or less, such time assessment may be up to six months unless a longer period is authorized pursuant to subdivision one of this section. The time assessment shall commence upon the issuance of a determination after a final hearing that the person has violated one or more conditions of supervision. While serving such assessment, the person shall not receive any good behavior allowance pursuant to section eight hundred three of the correction law. 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. 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. Any time spent in custody solely pursuant to such delinquency after completion of the maximum or aggregate maximum term of the sentence or sentences of imprisonment shall be credited to the period of post-release supervision, if any." Penal Law § 70.45

Respondent Annucci further asserts, via the affirmation of Mr. de Simone, that the appropriate method for the Petitioner to challenge what he believes to be a negotiated part of his plea bargain is to seek post-conviction relief pursuant to a CPL 440 motion. *See* Return Ex. D; *see also Matter of Cristostomo v. Fischer*, 93 AD3d 976. "[A] proceeding pursuant to CPLR article 78 generally does not lie to review errors claimed to have occurred in a criminal proceeding or to challenge a judgment of conviction rendered by a criminal court." *Garcha v. City Court (City of Beacon)*, 39 A.D.3d 645, 646. The Court concurs with this analysis.

Respondent Gould seeks dismissal of the petition based upon the addition of Cayuga County Sheriff David S. Gould, as well as, the failure to add the Office of the Cayuga County District Attorney or District Attorney Jon E. Budelmann as necessary parties; a failure to state a cause of action, and upon the statute of limitations. In the alternative, Respondent Gould seeks a change of venue to Cayuga County. In light of the foregoing dismissal of the petition upon the merits, the motion to dismiss by Respondent Gould is denied as moot.

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

ADJUDGED, that the petition is dismissed and, it is hereby

ORDERED, that the motion is denied as moot.

Dated: June 27, 2016
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice