

Booker v Frank
2018 NY Slip Op 33287(U)
December 19, 2018
Supreme Court, St. Lawrence County
Docket Number: 152849
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE

MESSIAH D. BOOKER, #15-A-0241,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #44-1-2018-0329.18
INDEX #152849**

-against-

**SUPERINTENDENT OF OGDENSBURG
CORRECTIONAL FACILITY LARRY FRANK
and SHERIFF, SUFFOLK COUNTY
CORRECTIONAL FACILITY,**
Respondents.

This proceeding was originated by the Petition for Writ of Habeas Corpus of Messiah D. Booker (hereinafter referred to as “Petitioner”), sworn to May 17, 2018 which was filed in the office of the St. Lawrence County Clerk on May 31, 2018. Petitioner, who is an inmate at the Ogdensburg Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision due to the calculation of jail time credit.

The Court issued an Order to Show Cause wherein the matter was converted from a petition seeking a writ of habeas corpus to a petition seeking mandamus relief pursuant to Article 78 of the CPLR. The Court has received the Answer and Return submitted by Deanna R. Nelson, Assistant Attorney General in Charge, on behalf of Respondent Larry Frank dated September 24, 2018.¹ The Court has received numerous letters from the

¹ The Court notes that there was no responsive papers received from Respondent Suffolk County Sheriff and the Court does not believe that said Respondent was properly served. As such, all references to “Respondent” will pertain to Larry Frank, Superintendent, Ogdensburg Correctional Facility alone.

Petitioner including additional arguments and “clarifications”; however, such information was not considered herein.

In sum and substance, the Petitioner argues that the Respondents have failed to credit him with sufficient jail time credit towards his 2015 sentence. Petitioner asserts that he was credited with 111 days of jail time credit for the period of October 3, 2014 until January 21, 2015; however, Petitioner alleges that he was arrested on November 4, 2013. Petitioner asserts that the sentencing judge promised him he would be afforded his jail time credit or Petitioner would be allowed to withdraw his plea. *See*, Pet. Ex. B, p. 10.

Respondent asserts that the Petitioner has received all of the jail time credit allowed pursuant to Penal Law (hereinafter referred to as “PL”) §70.30(3). Respondent argues that Petitioner is seeking to get double credit for jail time despite the fact that some of the jail time credit sought occurred prior to the arrest date of the latest conviction. Respondent further argues that the appropriate forum to challenge the plea deal would be via a CPL 440 motion to the sentencing court as the Respondent has no oversight or control over the sentence.

On November 3, 2006, Petitioner was sentenced by the Suffolk County Court as a second felony offender to a three (3) year determinate term of incarceration with a five (5) year term of post-release supervision upon the conviction of Criminal Possession of a Weapon in the Third Degree (hereinafter referred to as the “2006 sentence”). Petitioner was received by the New York State Department of Corrections² (hereinafter referred to as “DOCCS”) on November 14, 2006 and was awarded 280 days of jail time credit for the

² The New York State Department of Corrections merged with the Division of Parole to become the Department of Corrections and Community Supervision on March 31, 2011.

period of February 7, 2006 to November 13, 2006. Petitioner's initial maximum expiration date was calculated to be February 3, 2009 and he was released on such date to serve his term of post-release supervision. Petitioner's maximum post-release supervision expiration date was calculated to be February 3, 2014.

Petitioner was declared delinquent on April 22, 2009. Thereafter, on October 16, 2009, Petitioner was sentenced by the Supreme Court, Suffolk County, to a two and one-half (2 ½) year determinate sentence with a one and one-half (1 ½) year term of post-release supervision (hereinafter referred to as the "2009 sentence"). Petitioner was received by DOCCS on October 29, 2009 and he received 190 days jail time credit for the period from April 22, 2009 to October 28, 2009. As the Petitioner had completed the determinate term of his 2006 conviction, he owed 4 years 9 months and 11 days of delinquent time to the 2006 post-release supervision time, which was a larger remaining time than the post-release supervision imposed for the 2009 conviction, and was controlling. *See*, PL §70.45(5)(c). The Petitioner's adjusted maximum expiration date (incarceration) was calculated to be October 18, 2011 with an adjusted maximum post-release supervision expiration date to be calculated to be July 29, 2016.

On October 18, 2011, Petitioner was released from DOCCS custody to post-release supervision. Petitioner was thereafter declared delinquent on December 7, 2011, at which time, Petitioner owed 4 years 7 months and 22 days delinquent time to post-release supervision. On January 30, 2012, a final release revocation hearing was held and the Petitioner received a 4 month time assessment as a disposition. Petitioner was returned to DOCCS custody on February 21, 2012 and he was credited with 14 days of parole jail time from February 7 to 20, 2012. Petitioner's adjusted post-release supervision maximum

expiration was calculated to be September 29, 2016. On April 30, 2012, the Petitioner was released from DOCCS to post-release supervision and was declared delinquent as of May 20, 2012. A final release revocation hearing was held on July 9, 2012 at which the Petitioner received a 4 month time assessment. Petitioner was returned to the custody of DOCCS on July 17, 2012 and he was credited with 40 days of parole jail time for the period of June 7, 2012 to July 16, 2012. On October 9, 2012, Petitioner was released to post-release supervision at which time his adjusted post-release supervision maximum expiration date was calculated to be October 16, 2016. Petitioner was declared delinquent on February 13, 2013. Petitioner was restored to post-release supervision on April 10, 2013 and credited with 21 days of parole jail time for the period of March 20, 2013 until April 9, 2013. On August 8, 2013, Petitioner was declared delinquent and a parole violation warrant was lodged against him on November 4, 2013. At a final release revocation hearing held on December 19, 2013, the Petitioner received a disposition of a 7 month time assessment. Petitioner was received into the custody of DOCCS on January 2, 2014 and was credited with 59 days of parole jail time for the period of November 4, 2013 until January 1, 2014. Upon the Petitioner's return to DOCCS custody, his adjusted post-release supervision maximum expiration date was calculated to be February 17, 2017 insofar as he owed net delinquent time of 3 years 1 month and 15 days to post-release supervision. On October 3, 2014, the Petitioner was released from the custody of DOCCS to local custody (presumably to the custody of the Suffolk County Sheriff's Department).

On January 9, 2015, the Petitioner was sentenced by the Suffolk County Court as a second felony offender to an indeterminate term of two (2) to four (4) years of incarceration upon the conviction of Criminal Possession of a Weapon in the Third Degree (hereinafter

referred to as the “2015 sentence”). Insofar as the sentencing court did not specify how the sentence was to run, by operation of law, the sentence ran consecutively to the previous sentences. *See*, PL §70.25(2-a). Petitioner was declared delinquent on the date of sentencing and owed 2 years 1 month and 8 days delinquent time to the 2006 sentence of post-release supervision. Petitioner was received into the custody of DOCCS on January 22, 2015 at which time he received 111 days of jail time credit for the period of October 3, 2014 to January 21, 2015. Petitioner’s adjusted maximum expiration date of the aggregate sentence was determined to be September 30, 2018 and his earliest conditional release date of the aggregate sentence was determined to be May 30, 2017.

On June 9, 2017, Petitioner was sentenced by the Suffolk County Court as a second felony offender to a determinate term of five (5) years incarceration with a five (5) year term of post-release supervision upon the conviction of the crime of Attempted Burglary in the Second Degree (hereinafter referred to as the “2017 sentence”). As the sentencing court did not specify how the sentence was to run, by operation of law, the 2017 sentence ran concurrently to the 2015 sentence and consecutively to the 2006 and 2009 sentences. *See*, PL §70.25(1)(a). Pursuant to PL §70.30(1)(a) and PL §70.40(1)(a)(iii), the 2017 sentence became controlling as it contained the longest unexpired time to run. Upon receiving credit for the prison time served on the 2015 sentence, the jail time credit for the period of October 3, 2014 until January 21, 2015 and possible good time allowance (1/7 of 5 year determinate = 8 months 20 days), the adjusted maximum expiration date was calculated to be September 30, 2019 with the earliest conditional release date to be January 10, 2019.

While the Petitioner believes he was entitled to 242 days of jail time credit, same would be tantamount to receiving double credit and is not allowed pursuant to

PL§70.30(3): “...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 (emphasis added).” *See, Manley v. Annucci*, _____ AD3d _____, 2018 WL 6538228 (3d Dept. 12/13/18).

As relates to the Petitioner’s claim that the sentencing court intended to provide the Petitioner with additional jail time credit, even in contradiction of the statutes governing time calculation, the proper avenue for relief would be in the form of a CPL §440 motion to the sentencing court. *See, Brown v. Fischer*, 71 AD3d 1316 (3d Dept. 2010).

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby **ADJUDGED**, that the petition is dismissed.

Date: December 19, 2018
at Lake Pleasant, New York

S. Peter Feldstein
Acting Supreme Court Justice