

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18380
X/hu/prt

_____AD3d_____

Argued - February 4, 2008

ROBERT A. SPOLZINO, J.P.
DANIEL D. ANGIOLILLO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2006-10613

DECISION & ORDER

The People, etc., ex rel. Kenneth Harris,
appellant, v Brian Fischer, etc., respondent.

(Index No. 06-16746)

Raymond E. Kerno, Mineola, N.Y., for appellant.

Andrew M. Cuomo, Attorney General, New York, N.Y. (Roseann B. McKechnie and
Laura R. Johnson of counsel), for respondent.

In a proceeding pursuant to CPLR article 70 for a writ of habeas corpus, the appeal is from a judgment of the Supreme Court, Westchester County (Zambelli, J.), dated September 28, 2006, which denied, without a hearing, the petition and dismissed the proceeding.

ORDERED that the judgment is affirmed, without costs or disbursements.

The petitioner was convicted of robbery in the first degree in Queens County in December 1990 and was sentenced on January 17, 1991, to a term of 6 to 18 years incarceration. After he had been under parole supervision for 5 years, the petitioner was rearrested in Suffolk County in January 2005, and pleaded guilty to assault in the first degree. On September 26, 2005, he was sentenced, as a second violent felony offender, to an 11-year determinate sentence, to be followed by 5 years of post-release supervision.

The petitioner filed the instant petition for a writ of habeas corpus, asserting that officials from the Department of Correctional Services (hereinafter DOCS) improperly had deemed his 2005 sentence to run consecutively rather than concurrently to his 1991 sentence, and that he was entitled to immediate release from custody.

July 22, 2008

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Even if the petitioner were to prevail on his argument that DOCS improperly deemed his 2005 sentence to run consecutively to his 1991 sentence, the petitioner would not be entitled to immediate release from prison and, thus, habeas corpus relief is unavailable (*see People ex rel. Burr v Duncan*, 289 AD2d 898).

Accordingly, the Supreme Court properly denied, without a hearing, the petition and dismissed the proceeding.

SPOLZINO, J.P., ANGIOLILLO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court