SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KAH 09-01349

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RAY WILLIAMS, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, DEPUTY COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONAL SERVICES,
RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL),
FOR RESPONDENT-APPELLANT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Bernadette T. Romano, J.), entered October 20, 2008. The judgment, insofar as appealed from, granted the petition pursuant to CPLR article 78 and directed the New York State Department of Correctional Services to recalculate petitioner's prison term.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that the sentences he was serving should run concurrently because the sentencing court did not order them to run consecutively. In 1993 petitioner was convicted of two counts of burglary in the second degree and was sentenced to concurrent terms of imprisonment of 3 to 6 years on each count. In 1999 he again was convicted of two counts of burglary in the second degree and was sentenced to concurrent terms of imprisonment of 4 to 8 years on each count. Pursuant to Penal Law § 70.25 (2-b), the Department of Correctional Services (DOCS) calculated the sentences imposed for the 1999 conviction to run consecutively to the sentences imposed for the 1993 conviction. Supreme Court agreed with petitioner that the sentences he received for the 1999 conviction must run concurrently with the sentences he received for the 1993 conviction. Because petitioner was not entitled to immediate release, however, the court converted the proceeding to one pursuant to CPLR article 78 and directed DOCS to recalculate petitioner's prison term. Respondent appeals, contending that DOCS properly calculated the sentences imposed for petitioner's 1999 and 1993 convictions to run consecutively pursuant to Penal Law § 70.25 (2-b). We agree, and we therefore reverse the judgment insofar as appealed from and dismiss

the petition.

Section 70.25 (2-b) provides that, "[w]hen a person is convicted of a violent felony offense committed after arraignment and while released on recognizance or bail, but committed prior to the imposition of sentence on a pending felony charge, and if an indeterminate . . . sentence of imprisonment is imposed in each case, such sentences shall run consecutively." The statute further provides that a sentencing court may, in the interest of justice, order the sentences to run concurrently under certain circumstances, but it must "make a statement on the record of the facts and circumstances upon which such determination is based" (*id.*). It is undisputed that the sentencing court for the 1999 conviction did not address the issue whether the sentences imposed for that conviction were to run consecutively to or concurrently with the sentences imposed for the 1993 conviction.

In determining that the judgment insofar as appealed from must be reversed, we note the statement of the Court of Appeals that, "[i]n enacting the consecutive sentencing *mandate* of Penal Law § 70.25 (2-b), the Legislature plainly sought to combat violent criminal activity by requiring longer and stricter sentences for additional violent felonies committed while a felon was allowed to be free on recognizance or bail" (*People v Garcia*, 84 NY2d 336, 341 [emphasis added]). The Court of Appeals has thereafter stated that, "when a court is required by statute to impose a sentence that is consecutive to another, and the court does not say whether its sentence is consecutive or concurrent, it is deemed to have imposed the consecutive sentence the law requires" (*People ex rel. Gill v Greene*, 12 NY3d 1, 4, *cert denied* ___ US ___, 130 S Ct 86).

The court here concluded that Penal Law § 70.25 (2-b) could not apply because that subdivision "was not exempted out of the requirements of section 70.25 (1)." Section 70.25 (1) provides that, as a general rule, sentences "shall run either concurrently or consecutively with respect to each other and the undischarged term or terms in such manner as the court directs at the time of sentence." If the court fails to specify the manner in which the sentence is to run, the default rule is that the sentence will run concurrently with all other terms (§ 70.25 [1] [a]). As the court correctly noted, subdivision (2-b) is not included in the opening clause of section 70.25 (1), which sets forth the exceptions to the applicability of section 70.25 (1). We conclude, however, that the omission of subdivision (2-b) in that opening clause was simply a legislative oversight. Although the Legislature amended the opening clause to include subdivision (2-a) when that subdivision was added in 1978 (*see* L 1978, ch 481, §§ 22-23) and to include subdivision (5) when that subdivision was added in 1981 (*see* L 1981, ch 372, §§ 1-2), it neglected to do so when it added subdivision (2-b) in 1982 (*see* L 1982, ch 559, § 1), and when it added subdivisions (2-c) through (2-g) in later years. It is apparent, however, that the legislative intent was to require consecutive sentences under subdivision (2-b) where the court failed to make an explicit determination with respect thereto (*see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 92;

People v Santi, 3 NY3d 234, 243). The default rule pursuant to subdivision (1) (a) that sentences run concurrently where the court does not specify otherwise does not apply in this case because subdivision (2-b) mandates consecutive sentences, absent mitigating circumstances that the court did not find here (*see generally Gill*, 12 NY3d at 6).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court