

Lebron v Smith

2004 NY Slip Op 30194(U)

October 20, 2004

Supreme Court, New York County

Docket Number: 0403679/2002

Judge: Joan Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:HON. JOAN A. MADDEN
Justice

PART 11

ELVIN LEBRON,

INDEX NO. :403679/02

Petitioner,

MOTION DATE:

- v -

SANDRA LEWIS SMITH, DEPUTY COMMISSIONER OF N.Y.D.O.C.,

MOTION SEQ. NO.:003

Respondent.

MOTION CAL. NO.:

The following papers, numbered 1 to _____ were read on this motion for renewal and reargument

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [] Yes [x] No

In this Article 78 proceeding, petitioner Elvin Lebron, who is pro se, seeks renewal and reargument of this court's decision and order dated April 3, 2003 ("the original decision"), which granted in part petitioner's request to compel respondent the Deputy Commissioner of the New York City Department of Corrections to credit him with additional jail time but denied the petition insofar as it sought relief under New York's Freedom of Information Law ("FOIL"), Public Officers Law article 6. As set forth below, the motion is denied, despite the absence of opposition.

Petitioner, who is an inmate in a state correctional facility, was convicted on December 14, 1994 of Manslaughter in the First Degree, Robbery in the First Degree and Criminal Possession of a Weapon in the Third Degree. In this proceeding, Lebron sought additional credit for the jail time he served while in the custody of the NYCDOC. Specifically, petitioner alleged that while the NYCDOC credited petitioner with 461 days, he is entitled to 487 days credit.¹ Following the submission of the petition, NYCDOC conducted an investigation and, as a result, recalculated petitioner's jail credit for time served in its custody at 468 days, and informed petitioner of the results of its investigation, and the manner in which it calculated his time. Petitioner responded by letter dated October 11, 2002, in which he admitted to erroneously calculating his time, but asserted that he was entitled to 474 days credit for his time in NYCDOC custody.² By letter dated November 18, 2002, NYCDOC found that petitioner was entitled to one more day of jail credit, or 469 days, and stated the basis for recalculating his time, and copied petitioner on the letter. On that date, NYCDOC also certified that petitioner had served 469 days in NYCDOC custody.

Thus, the issue on the underlying petition was whether NYCDOC failed to credit petitioner with five additional days of jail time. By decision, order and judgment dated April 3, 2003, this court found that petitioner was entitled to credit for time served in NYCDOC custody on April 4, 1993 and April 5, 1993, and respondent should recalculate petitioner's jail credits accordingly. However, the court found that petitioner's arguments that he his entitled to credit for various other days was not supported with sufficient proof. In addition, in reply, petitioner sought for the first time credit for time purportedly served while in NYCDOC custody on October 19, 1992, October 20, 1992 and December 7, 1992. As these days were not included in the petition, the court found that the request could not be considered

Petitioner now moves to renew and reargue the court's April 3, 2003 decision, arguing

¹The petition alleges that although respondent credited petitioner for time served in NYCDOC custody from 10/6/93-1/10/93 (or 461 days) he is also entitled credit for an additional 26 days as petitioner was also in custody on the following dates: 2/15/93-2/26/93; 4/1/93-4/7/93; 9/22/93-9/27/93; 10/5/93; and 1/10/95.

²In his letter, petitioner asserts that he is entitled to additional credit for time served in NYCDOC custody on the following dates: 2/23/93-2/24/93; 4/1/93-4/5/93; 9/22/93-9/25/93; 10/5/93; and 1/10/95.

that (1) the court should have considered his arguments raised for the first time in reply with respect to October 19, 1992, October 20, 1992 and December 7, 1992, (2) the proof submitted in support of his argument that he is entitled to credit for September 22, 1993 and October 5, 1993 was sufficient.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided.” William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992) . In contrast, a motion to renew is "based upon new facts not offered on the prior motion that would change the prior determination." CPLR 2221(e). It is well-settled that a motion to renew must be based on newly discovered evidence not previously available. See Johnson v. Coombe, 236 AD2d 669 (3d Dept 1997).

Under the standard for either reargument or renewal, petitioner is not entitled to relief. The court correctly refused to consider arguments and proof submitted for the first time on reply. See, Zelnik v Bidermann Industries U.S.A., Inc., 242 AD2d 227, 232 (1st Dept 1997)(“a contention raised for the first time in reply papers is not cognizable”). And, petitioner has offered no reason for failing to submit the proof with the initial petition. In any event, upon review of the record, the court notes that petitioner has never requested from NYCDOC that he receive credit for October 19, 1992, October 20, 1992 and December 7, 1992. Accordingly, the issue is not ripe for review under Article 78. See Federation of Mental Health Centers v. DeBuono, 275 AD2d 557, 562 (3d Dept 2000)(where administrative determinations have not been made, a matter is not ripe for Article 78 review).

With respect to the proof relied on by petitioner to obtain credit for September 22, 1993 and October 5, 1993, the court notes that this proof was submitted for the first time in reply. Moreover, the record reveals that NYCDOC specifically considered such proof and found that it was either invalid or not in keeping with the official records. See Letter dated November 18, 2002 from Associate Staff Analyst for NYCDOC, Exhibit B to Verified Answer and Opposition to Petition. Under these circumstances, it cannot be said that the agency’s calculation of

petitioner's jail credit was arbitrary or capricious.

Petitioner also argues that the original decision did not address allegations that his two former attorneys failed to provide him with certain documents. While petitioner is required to demonstrate under FOIL that the documents sought were not previously provided to him or his counsel, or that they are no longer available to him (Lebron v. Morales, 271 A.D.2d 241 (1st Dept 2000) lv. denied, 95 NY2d 760 (2000); see, also, Matter of Brightley v Lai, 266 A.D.2d 131 (1st Dept 1999)), private attorneys are not subject to FOIL and Article 78 relief cannot be sought against them.

In view of the above, it is

ORDERED that the motion to renewal and reargue is denied.

DATED: October 20, 2004



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
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