

Matter of Dong Chong v Annucci

2007 NY Slip Op 31567(U)

June 8, 2007

Supreme Court, Albany County

Docket Number: 0652906/2007

Judge: George B. Ceresia

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publication.

The petitioner, an inmate at Fishkill Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination dated May 16, 2006 with regard to the calculation of his sentence. Petitioner argued there, as he does here, that he is entitled to a reduction of his sentence pursuant to former Penal Law § 70.30 (1) (c) (i). Specifically, petitioner argues that his aggregate maximum sentence should be thirty years.

On February 6, 1996 petitioner was sentenced to three consecutive terms of imprisonment: eight to twenty four years for attempted murder 2nd degree, a class B felony; five to fifteen years for attempted robbery in the 1st degree, a class C felony; and one to three years for criminal possession of a weapon 3rd degree, a class D felony. This resulted in an aggregate term of fourteen to forty-two years. Petitioner argues that his forty-two year aggregate maximum sentence should have been reduced, under former Penal Law § 70.30 (1) (c) (i), to thirty years. Respondent maintains that the petitioner's sentence was subject to a cap of fifty years, and that because his sentence did not exceed fifty years, he not entitled to any sentencing reduction.

Former Penal Law § 70.30 (1) (c) (L. 1983, c. 199) recited as follows:

“(i) Except as provided in subparagraph (ii) or (iii) of this paragraph, the aggregate maximum term of consecutive sentences imposed for two or more crimes, other than two or more crimes that include a class A felony, committed prior to the time the person was imprisoned under any of such sentences shall, if it exceeds twenty years, be deemed to be twenty years, unless one of the sentences was imposed for a class B felony, in which case the aggregate maximum term shall, if it exceeds thirty years, be deemed to be thirty years. Where the aggregate maximum term of two or more consecutive sentences is reduced

by calculation made pursuant to this paragraph, the aggregate minimum period of imprisonment, if it exceeds one-half of the aggregate maximum term as so reduced, shall be deemed to be one-half of the aggregate maximum as so reduced;

“(ii) Notwithstanding subparagraph (i) of this paragraph, the aggregate maximum term of consecutive sentences imposed for the conviction of two violent felony offenses committed prior to the time the person was imprisoned under any of such sentences and one of which is a class B violent felony offense, shall, if it exceeds forty years, be deemed to be forty years;

(iii) Notwithstanding subparagraphs (i) and (ii) of this paragraph, the aggregate maximum term of consecutive sentences imposed for the conviction of three or more violent felony offenses committed prior to the time the person was imprisoned under any of such sentences and one of which is a class B violent felony offense, shall, if it exceeds fifty years, be deemed to be fifty years; * * *” (Penal Law § 70.30 [1] [c], L 1983 c 199).

Respondent points out, and it is undisputed, that each of petitioner’s three crimes was a violent felony as defined under Penal Law § 70.02. He asserts that since one of them was a Class B violent felony (attempted murder 2nd degree), his sentence was subject to former Penal Law § 70.30 (1) (c) (iii).

The petitioner argues that former Penal Law § 70.30 (1) (c) (iii) cannot apply to him because his convictions arose out of the same criminal transaction. He relies upon a Legislative Memorandum which, in discussing the adoption of L. 1983, c. 1999, appears to indicate that the then-existing law applied in a situation where a defendant is convicted of “two or more unrelated felonies” (see Legislative Memorandum of Senator Michael J. Tully, L. 1983, c. 1999). The Court has examined Penal Law § 70.30 (1) (c) as it existed

immediately prior to the enactment of L. 1983, c. 199. The predecessor statute did not make any reference to “unrelated felonies” (see L. 1980, c. 176).

The Court is aware that Penal Law § 70.30 was amended in 1995, as relevant here, to re-designate Penal Law § 70.30 (1) (c) as Penal Law § 70.30 (1) (e) (see L. 1995, c. 3, § 13, effective October 1, 1995)¹. Notably, the petitioner entered a plea of guilty to his crimes on January 16, 1996, and was sentenced on February 6, 1996. Irrespective of which version of the statute is deemed applicable, the same result obtains, since each version, former Penal Law § 70.30 (1) (c) (iii) (see L. 1983, c. 1999) or current Penal Law § 70.30 (1) (e) (vi) (see L. 1995, c. 3, § 13), provides for a sentencing reduction where the aggregated maximum of all consecutive sentences exceeds fifty years. None of the versions of Penal Law § 70.30 (1) (c) make mention of “unrelated felonies” or “unrelated crimes” or contains a reference to the “same criminal transaction”.

The Court is mindful that in dealing with matters of statutory construction and/or legislative interpretation, “where the statute is clear and unambiguous on its face, the legislation must be interpreted as it exists” (Doctors Council v NYCERS, 71 NY2d 669, 674

¹Penal Law § 70.30 (1) (e) (vi) recites as follows:

“(vi) Notwithstanding subparagraphs (i) and (iv) of this paragraph, the aggregate maximum term of consecutive sentences, all of which are indeterminate or all of which are determinate sentences, imposed for the conviction of three or more violent felony offenses committed prior to the time the person was imprisoned under any of such sentences and one of which is a class B violent felony offense, shall, if it exceeds fifty years, be deemed to be fifty years”

[1988]; see also, Matter of Judge Rotenberg Educational Center v Maul, 91 NY2d 298, 303 [1998]). “Absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute” (id.). ““Where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used”” (Mtr. Raritan Dev Corp. v Silva, 91 NY2d 98, 107, quoting Patrolmen’s Benevolent Assn. V City of New York, 41 NY2d 205, 208, and citing Doctors Council v NYCERS, supra)

In this instance, as noted, neither version of Penal Law § 70.30 makes mention of “unrelated felonies” or otherwise contains a requirement that the offenses not be a part of the same criminal transaction. In addition, to the extent that the petitioner seems to suggest that the imposition of consecutive sentences was improper, it is clear that the sentencing judge purposely (and correctly) directed that the sentences be consecutive to one another. That precise issue was reviewed by the Appellate Division, which upheld the imposition of consecutive sentences (see People v Chong, 247 AD2d 211 [1st Dept., 1998], lv to app denied 91 NY2d 971).

Moreover, and apart from all of the foregoing, even if petitioner’s argument were found to have merit (the argument being that because petitioner’s consecutive sentences arose from the same criminal transaction former Penal Law § 70.30 [1] [c] [iii] does not apply to him), it would only establish that he is not entitled to a sentencing reduction under any portion of former Penal Law § 70.30 (1) (c), including former Penal Law § 70.30 (c) (1)

(i).

The Court finds that petitioner’s sentence was not subject to a reduction under either version of Penal Law § 70.30: former Penal Law § 70.30 (1) (c) or current Penal Law § 70.30 (1) (e) (see Matter of Flowers v Miller, 284 AD2d 618 [3rd Dept., 2001]).

The Court has reviewed and considered petitioner’s remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure; is not affected by an error of law; and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

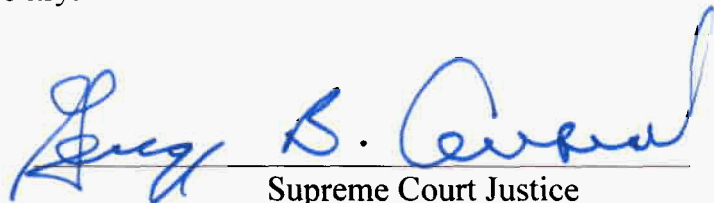
Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the Respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: June 8, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated October 24, 2006, Petition, Supporting Papers and Exhibits

2. Respondent's Answer dated January 11, 2007, Supporting Papers and Exhibits
3. Petitioner's Reply Verified January 26, 2007