

Matter of Mitchell v Sears

2007 NY Slip Op 32022(U)

June 25, 2007

Supreme Court, Franklin County

Docket Number: 0000809/2007

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

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In the Matter of the Application of
MARC DARLING MITCHELL, #93-R-3044,
Petitioner,

For Judgment Pursuant to Article 70
Of the Civil Practice Law and Rules

**DECISION AND JUDGMENT
RJI #16-1-2007-0337.085
INDEX #07-0809
ORI# NY016015J**

- against -

LAWRENCE SEARS, Superintendent,
Franklin Correctional Facility,

Respondent.

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The Court has before it the petition for a writ habeas corpus of Marc Darling Mitchell, which was filed in the Franklin County Clerk's office on June 19, 2007. Petitioner, who is an inmate at the Franklin Correctional Facility, purports to challenge his continued incarceration in the custody of the New York State Department of Correctional Services. The papers before the Court will be considered as an *ex parte* request for the issuance of a writ of habeas corpus or Order to Show Cause in a habeas corpus proceeding. For the reasons set forth below, however, the Court declines to issue such a writ or order.

On March 12, 2003, the petitioner was sentenced in Westchester County Court, to a controlling, indeterminate sentence of imprisonment of 4 to 12 years upon his convictions of the crimes of Assault 1^o (three counts) and Criminal Possession of Stolen Property 3^o. The petitioner was subsequently released from DOCS custody to parole supervision but, as stated in the petition, “. . . violated parole out of state in North Carolina, on August 13, 2002 by catching a new [federal] case.” (Emphasis in original.)

The petitioner was convicted on January 28, 2003, in federal court and sentenced to a term of 54 months in a federal penitentiary. The petitioner also alleges that on April 23, 2003, or April 24, 2003, a New York parole violation warrant was lodged against him while in federal custody in Petersburg, Virginia. The petitioner was returned to DOCS custody, after serving his federal sentence, on October 24, 2006, certified as entitled to 46 days of parole jail time credit. At or about that time DOCS calculated that the maximum expiration date of petitioner's underlying Westchester County sentence fell on September 2, 2007. Notwithstanding the foregoing the petitioner maintains that his properly calculated maximum expiration date fell on June 4, 2007. The Court, however, finds petitioner's assertion to be patently without merit.

According to the petitioner, as of his August 13, 2002, arrest in North Carolina, he had 17 months and 9 days remaining to the completion of his parole. Petitioner's entire claim of entitlement to release from DOCS custody on June 4, 2007, is set forth in paragraph six (?) (A) on page three of his petition as follows:

“Since petitioner's parole warrant had been executed to petitioner Eight (8) months and Eleven (11) days (April 24th, 2003) into remaining Seventeen (17) and nine (9) days on parole, at revocation hearing petitioner's time should have been assessed for Eight (8) months and Twenty Eight (28) days and not the entire Seventeen (17) months and Nine (9) days. Whether the parole time was to be assessed from the date of [the New York parole violation warrant's] 'issuance' [April 23, 2003] or the date it was 'executed' at Petersburg Federal Facility [April 24, 2003] petitioner's time should have been assessed from one of those two days or dates. Since it wasn't petitioner's assessment exceeds by Two (2) months and Twenty Eight (28) days past the maximum release date.”

Although the precise line of petitioner's reasoning in the above-quoted portion of the petition eludes the Court, it is clear from the allegations set forth in the petition and

the exhibits annexed thereto that petitioner's maximum expiration date has been properly calculated as September 2, 2006.

The petitioner's original maximum expiration date, calculated prior to his parole release, was January 22, 2004. The petitioner was declared delinquent on January 28, 2003, the date he was convicted in federal court. The running of petitioner's underlying Westchester County sentence was, therefore, interrupted as of January 28, 2003, and that interruption continued until the petitioner was returned to DOCS custody on October 24, 2006. *See* Penal Law §70.40(3)(a). As noted previously, the petitioner was certified as entitled to 46 days of parole jail time credit (Penal Law §70.40(3)(c)).¹ As of the January 28, 2003, delinquency date, the petitioner owed 11 months and 24 days to the original maximum expiration date of January 22, 2004.² After subtracting the 46 days of parole jail time credit DOCS properly computed that petitioner owed 10 months and 8 days to his maximum expiration date. When that 10 months and 8 days is added as of petitioner's return to DOCS custody on October 24, 2006, the revised maximum expiration date of September 2, 2006, is produced.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

¹The petitioner does not specifically challenge the computation of jail time credit. Although the exhibits attached to the petition do not specify how those 46 days were calculated, the Court presumes that the parole jail time credit represents the time between petitioner's release from federal custody and his return to DOCS custody.

²The 17 months and 9 days figure referenced in the petition represents the difference between petitioner's August 13, 2002, arrest and the original maximum expiration date of January 22, 2004. This figure was rendered irrelevant since the petitioner's final delinquency date was ultimately established as January 28, 2003, the date of petitioner's conviction. The modification in the delinquency date from August 13, 2002, to January 28, 2003, inured to the benefit of the petitioner.

ORDERED and ADJUDGED, that petitioner's request for the issuance of a writ of habeas corpus or Order to Show Cause in a habeas corpus proceeding is denied; and it is further

ORDERED and ADJUDGED, that the petition is dismissed.

Dated: June 25 , 2007 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court