

People v Patterson

2007 NY Slip Op 32454(U)

June 13, 2007

Supreme Court, New York County

Docket Number: 0011194/1995

Judge: Edward J. McLaughlin

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 93

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THE PEOPLE OF THE STATE OF NEW YORK,

— against —

**Decision On Motion
To Set Aside Sentence**

TRENT PATTERSON,

SN Ind. 11194/95

Defendant.

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EDWARD J. McLAUGHLIN, J.:

The question posed by this postjudgment motion is whether federal due process requires that a defendant’s sentence be served concurrently to a prior undischarged prison sentence when neither the sentencing court nor the commitment order states that the sentence shall be served consecutively as required by Penal Law 70.25 (2-a). This court finds that the federal constitution does not require that a sentence must run concurrently with an undischarged prison term when the sentencing court does not specify that the sentence is to be served consecutively. Defendant’s motion is therefore denied.

BACKGROUND

On June 9, 1997, a jury found defendant guilty of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree. On November 19, 1997, the court sentenced defendant, as a second felony offender, to an indeterminate prison term of from 5

to 10 years on each count, to be served concurrently with each other. During sentencing, the court did not state whether those sentences were to run concurrently with or consecutively to the undischarged prison term for defendant's prior conviction for robbery in the third degree. The commitment order also did not specify how the drug sentences should run in relation to the undischarged prison sentence for robbery. After sentencing, the Department of Correctional Services computed defendant's sentences so that defendant served the drug sentences consecutively to his sentence for robbery.

Defendant argues that the Department of Correctional Services has illegally computed his sentences. Relying on *Earley v Murray* (451 F3d 71 [2d Cir], *reh denied*, 462 F3d 147 [2006]), he contends that the sentence computation violates his right to due process under the federal constitution because the sentencing court did not pronounce that the drug sentences were to be served consecutively to the robbery sentence.

LAW

Under state law, the Department of Correctional Services correctly computed defendant's sentences. Defendant was sentenced on the drug offenses as a second felony offender under Penal Law 70.06 at a time when he was subject to an undischarged prison sentence imposed in 1991 for a conviction of robbery in the third degree. By law, the sentencing court was required to impose the drug

sentences to run consecutively to the robbery sentence (*see* PL 70.25 [2-a]). The sentencing court’s failure to explicitly pronounce that the drug sentences were to run consecutively to the undischarged robbery sentence does not require that the sentences run concurrently (*see In re Santiago v Van Zandt*, 236 AD2d 728, 729 [3d Dept 1997] [in such cases there is “no need for the court to make an express provision that the newly imposed sentence run consecutive to . . . [the] undischarged sentence”]).

This court finds no precedent establishing a federal constitutional right to serve a prison sentence concurrently with an undischarged sentence when the sentencing court is silent about how whether the imposed sentence is to be served concurrently or consecutively to the undischarged sentence. For decades, the federal courts had followed the rule that a sentence was presumed to be served concurrently “with other federal sentences then imposed or previously imposed” (*United States v Wenger*, 457 F2d 1082, 1083 [2d Cir 1972]; *see United States v Daugherty*, 269 US 360 [1926]). But this federal presumption was a common-law rule that could be altered by statute (*see McDonald v Lee*, 217 F2d 619, 622 [5th Cir 1954], *vacated as moot*, 349 US 948 [1955]). Moreover, some states follow a rule that presumes a sentence will be served consecutively to a sentence imposed for a different crime in a separate case (*see People v Sandoval*, 974 P2d 1012, 1014 [Colo App 1998]). Because source of the federal presumption rule is the

common law rather than the federal constitution, each state may devise its own rule about how a sentence must be served when the sentencing court does not specify if the sentence will run concurrently or consecutively to any undischarged sentence (*cf. Earley v Murray*, 451 F3d at 76, n 1 [finding that the federal due process clause prohibits the Department of Correctional Services from adding a term of postrelease supervision to a sentence when the sentencing court fails to impose such a term]).

Defendant's argument is not supported by *People v Richardson* (100 NY2d 847 [2003]). In that case, the Court of Appeals held that the defendant's sentence ran concurrently with his undischarged prison sentence because the sentencing court did not specify that the sentence was to run consecutively. But in that case, unlike in this case, the defendant was not sentenced pursuant to any of the predicate felony offender statutes listed in Penal Law 70.25 (2-a). Consequently, Penal Law 70.25 (2-a) did not apply, and the defendant's sentence ran concurrently by operation of law under Penal Law 70.25 (1) (a). Because the defendant here was sentenced as a predicate felony offender, his sentences ran consecutively by operation of law under Penal law 70.25 (2-a).

For the reasons stated above, defendant's motion is denied.

Dated: June 13, 2007

J. [Signature]