STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
TYWAN JONES, #06-B-3396,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #44-1-2007-0777.053
INDEX #126169
ORI # NY044015J

-against-

BRIAN FISCHER, Chairman,
New York State Board of Parole,
VINCENT F. DEMARCO, Suffolk County
Sheriff, and **DEBRA JOY,** Director,
Temporary Release Program,
Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Tywan Jones, verified on November 13, 2007, and stamped as filed in the St. Lawrence County Clerk's office on November 19, 2007. Petitioner, who is an inmate at the Ogdensburg Correctional Facility, seeks an order of this Court directing that he be credited with approximately 270 days of jail time allegedly spent incarcerated in Suffolk County and/or the Willard Drug Treatment Campus, against a three-year determinate term of imprisonment imposed by Supreme Court, Suffolk County, on December 4, 2006. In addition, the petitioner seeks an order of this Court directing that he be immediately enrolled in the DOCS Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program as allegedly directed by the aforementioned sentencing court pursuant to Penal Law §60.04(6). The Court issued an Order to Show Cause on December 4, 2007, and has received and reviewed the Answer of the state respondents (Fischer and Joy), verified on February 1, 2008, as well as petitioner's Reply thereto, filed

in the St. Lawrence County Clerk's office on February 13, 2008. The Court has also received and reviewed the Answer of the county respondent (DeMarco) verified on February 15, 2008. The Court has received no Reply thereto from the petitioner.

On July 3, 2003, the petitioner was sentenced in Suffolk County Court, as a second felony offender, to an indeterminate sentence of imprisonment of 3 to 6 years upon his conviction of the crime of Attempted Criminal Sale of a Controlled Substance 3°. He was received into DOCS custody on July 14, 2003, certified as entitled to 67 days of jail time credit. On January 29, 2004, the petitioner was released to parole supervision after completion of the DOCS shock incarceration program.

The running of petitioner's 2003 Suffolk County sentence was first interrupted by a declaration of delinquency on June 1, 2005. On September 13, 2005, however, the petitioner was restored to parole supervision credited with 82 days of parole jail time credit (Penal Law §70.40(3)(c)) covering the period from June 23, 2005, to September 12, 2005. Thus, the only time lost against petitioner's 2003 Suffolk County sentence was the period from June 1,, 2005 to June 23, 2005.

The running of petitioner's 2003 Suffolk County sentence was interrupted for a second time when he was declared delinquent on February 14, 2006. The petitioner, however, was restored to parole supervision on April 10, 2006, credited with 55 days of parole jail time covering the period from February 14, 2006, to April 9, 2006. Petitioner's second delinquency thus resulted in no time lost against his 2003 Suffolk County sentence.

On June 9, 2006, the petitioner was arrested (at the Willard Drug Treatment Campus?) and taken into custody by local officials from Suffolk County, apparently in

connection with a criminal offense committed on January 27, 2006, while petitioner was at liberty under parole supervision. On December 4, 2006, the petitioner was sentenced in Suffolk County Court, as a second felony offender, to a determinate term of imprisonment of three years (with two years post-release supervision) upon his conviction of the crime of Criminal Sale of a Controlled Substance 5°. The petitioner was received into DOCS custody on December 11, 2006, having spent the entire period from June 9, 2006, through December 10, 2006, in the custody of Suffolk County officials. However, he was only certified as entitled to seven days of jail time credit (Penal Law §70.30(3)) against his 2006 sentence, covering the period from December 4, 2006 through December 10, 2006.

Apparently as a result of petitioner's 2006 conviction and sentencing, in connection with a new felony committed while under parole supervision, the petitioner's parole was revoked by operation of law and a final delinquency date of December 4, 2006 (the date of conviction) was established. *See* Executive Law §259-i(3)(d)(iii) and 9 NYCRR §8004.3(g). The running of petitioner's 2003 Suffolk County sentence thus proceeded, without interruption, from April 10, 2006, when he was restored to parole supervision following his second delinquency, until the third delinquency date of December 4, 2006.

Penal Law §70.30(3) provides, in relevant part, as follows:

> "The term of a . . . determinate sentence . . . imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as the result of the charge that culminated in the sentence . . . The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the . . . maximum term of any previously imposed sentence . . ." (emphasis added).

Since the time petitioner spent incarcerated in Suffolk County from his June 9, 2006, arrest to his December 4, 2006, delinquency date constituted part of and was credited against the maximum term of the previously imposed 2003 Suffolk County sentence, the Court finds that petitioner was not entitled to any jail time credit against his 2006 Suffolk County sentence for that period. *See Canada v. McGinnis*, 36 AD2d 830, *aff'd* 29 NY2d 853 and *Parker v. Endee*, 268 AD2d 823.

The petitioner also claims entitlement to credit against his 2006 Suffolk County sentence for time spent at the Willard Drug Treatment Campus prior to his June 9, 2006, arrest and incarceration in Suffolk County. The Court finds, however, that the petition is fatally lacking in detail with respect to the dates of and/or circumstances surrounding petitioner's confinement at Willard. In any event, with the exception of the brief period from June 1, 2005, when the petitioner was first declared delinquent, to June 23, 2005, when an 82-day period of parole jail time credit commenced, petitioner's 2003 Suffolk County sentence was either running or covered by parole jail time credit from its July 14, 2003, commencement through petitioner's December 4, 2006, third delinquency. From the very limited information in the record before it, moreover, the Court finds it unlikely that petitioner's confinement at Willard could have dated back to June of 2005. It appears likely, therefore, that during petitioner's confinement at Willard his 2003 Suffolk County sentence was either running or, if interrupted, subject to a grant of parole jail time credit.

Turning to the CASAT issue, it is alleged in paragraph 20 of the petition that when petitioner was sentenced in Suffolk County on December 4, 2006, the sentencing court issued an order pursuant to Penal Law §60.04(6) directing DOCS ". . . to enroll Petitioner into the CASAT program 'provided that he satisfies the statutory eligibility criteria for

enrollment in such program' (see Exhibit I)." The exhibits annexed to the petition include a copy of the December 4, 2006, Suffolk County sentence and commitment order. Although the "REMARKS" section of that order contains the notation "THE COURT DIRECTS THE CASAT PROGRAM, IF ELIGIBLE," the petitioner's exhibits did not include any separate order pursuant to Penal Law §60.04(6). This Court, therefore, is unable to determine the source of the quote found in paragraph 20 of the petition. The respondents, however, admit the allegations set forth in paragraph 20 of the petition and the Court therefore finds that a Penal Law §60.04(6) order was, in fact, issued in connection with petitioner's sentencing.

The CASAT program was designed ". . . to prepare chemically dependant inmates for a return to the community, to reduce recidivism by providing education and counseling focused on continuing abstinence from all mood altering substances, and to encourage participation in self-help groups." 7 NYCRR §1950.1. Under DOCS regulations CASAT is a three-phase program with Phase 1 occurring in a DOCS alcohol and substance abuse treatment correctional annex. Such a facility is defined in Correction Law §2(18) as "[a] medium security correctional facility consisting of one or more residential dormitories which provide intensive alcohol and substance abuse treatment services to inmates who: (i) are otherwise eligible for temporary release, or (ii) stand convicted of a felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law, and are within six months of being an eligible inmate as that term is defined in subdivision two of section eight hundred fifty-one of this chapter including such inmates who are participating in such program pursuant to subdivision six of section 60.04 of the penal law." Phase 2 of CASAT involves ". . . a transitional period in a community reintegration

component, which would include transfer to a work release facility for employment and placement in appropriate community-based programs . . ." 7 NYCRR §1950.2(b). CASAT Phase 3, in turn, consists of ". . . an aftercare component in the community under parole supervision, which will provide for an orderly community transition for participants granted release by the parole board." 7 NYCRR §1950.2(c).

Outside of the Penal Law §60.04(6) context, DOCS is vested with the sole administrative responsibility for placing inmates in the CASAT program and for the transition of inmates who have successfully completed Phase 1 of the program into Phase 2.[1] Under DOCS regulations, again outside the context of Penal Law §60.04(6), inmates can not be placed in CASAT Phase 1 unless they have already been approved for work release or presumptive work release. 7 NYCRR §1950.3(a)(5). Thus, under the DOCS regulatory scheme, inmates who successfully complete CASAT Phase 1 can transition into CASAT Phase 2 without a further determination of work release eligibility. In theory, there should be no instances where an inmate successfully completes CASAT Phase 1 but is unable to proceed onto Phase 2 because he or she is not eligible for work release. Ultimately, an otherwise eligible inmate may only be deemed unsuitable for presumptive work release based upon his or her crime of commitment, criminal history, custodial adjustment or outstanding warrants/detainees. 7 NYCRR §1951.1(c)(4).

Penal Law §60.04(6) provides, in relevant part, as follows:

> "When the court imposes a sentence of imprisonment which requires a commitment to the state department of correctional services upon a person who stands convicted of a controlled substance or a marijuana offense, the

[1]DOCS obviously does not exercise administrative control over inmates moving on to CASAT Phase 3 since participants in Phase 3 must first be granted release from DOCS custody by the Parole Board.

> court may, upon motion of the defendant in its discretion, issue an order directing that the department of correctional services enroll the defendant in the comprehensive alcohol and substance abuse treatment program in an alcohol and substance abuse correctional annex as defined in subdivision eighteen of section two of the correction law, provided that the defendant will satisfy statutory eligibility criteria for participation in such program. Notwithstanding the foregoing provisions of this subdivision, any defendant to be enrolled in such program pursuant to this subdivision shall be governed by the same rules and regulations promulgated by the department of correctional services, including without limitation those rules and regulations establishing requirements for completion and those rules and regulations governing discipline and removal from the program."

In the case at bar the petitioner's temporary release program application (presumptive work release) was allegedly approved at the facility level, but denied by the DOCS central office on an unspecified date for unspecified reasons. The petitioner did not take an administrative appeal from the central office denial determination. This proceeding ensued.

The petitioner maintains that he met the only statutory eligibility requirement for enrollment in the CASAT program. Thus, ". . . Petitioner contends that NYSDOCS decision to deny him [CASAT] enrollment was no more than a failure to perform a duty enjoined upon it by law." The respondents do not dispute that petitioner is statutorily eligible to be considered for participation in the CASAT program. Nor, apparently, do they dispute that the sentencing court's CASAT order mandates petitioner's enrollment in Phase 1 of the CASAT program. Citing a pair of unreported decisions of the Supreme Court, Albany County (*Ostrander v. Joy*, Albany County Index #6787-07, January 7, 2008, and *Bullock v. Joy*, Albany County Index #8548-06, July 10, 2007), however, the respondents maintain that "[a]lthough Penal Law §60.04(6) authorizes the court to direct the defendant's enrollment in CASAT, it does not allow the court to determine when such

participation shall commence; in the absence of such delegation to the court, the determination remains at the discretion of DOCS." The respondents then assert that petitioner's enrollment in CASAT Phase 1 ". . . is expected to occur six to 12 months before his tentative Merit Eligibility date of January 28, 2009 . . ."

The Court's review of the statutory language leads it to conclude that the sentencing court's authority to direct DOCS to enroll a defendant in the CASAT program is indeed limited to Phase 1 of such program. In this regard the Court notes that the relevant language of Penal Law §60.04(6) merely specifies that the sentencing court has authority to direct ". . . that the department of correctional services enroll the defendant in the comprehensive alcohol and substance abuse treatment program in an alcohol and substance abuse correctional annex as defined in subdivision eighteen of section two of the correction law . . ." (Emphasis added). Only Phase 1 of the CASAT program takes place in an alcohol and substance abuse treatment correctional annex. *Compare* 7 NYCRR §1950.2(a) *with* 7 NYCRR §1950.2(b) and (c). In addition, Corrections Law §2(18), which sets forth the definition of an alcohol and substance abuse treatment correctional annex, characterizes the period of court-ordered drug abuse treatment authorized under Penal Law §60.04(6) as "corrections based." The Court, moreover, finds the language of Penal Law §60.04(6) –to the extent the statute provides that notwithstanding its provisions, a defendant to be enrolled in the CASAT program is to be governed by DOCS rules and regulations establishing requirements for "completion" of the program– can logically be read as requiring DOCS administrative approval for work release or presumptive work release before an inmate placed in the CASAT program pursuant to Penal Law §60.04(6) can be temporarily released from DOCS custody for CASAT Phase 2 participation. Finally,

the Court notes that Corrections Law §2(18) goes on to provide, in relevant part, that "[n]otwithstanding any other provision of law, any person who has successfully completed no less than six months of intensive alcohol and substance abuse treatment services in one of the department's eight designated alcohol and substance abuse treatment correctional annexes . . . may be transferred to a program operated by or at a residential treatment facility . . ." (Emphasis added).

Although the statutory language is frustratingly vague and does leave room for conflicting interpretation, this Court is simply not persuaded that the enactment of Penal Law §60.04(6) (L 2004, ch 738, §20) was intended to empower a sentencing court to make a final, irrevocable determination, at sentencing, as to the suitability of a defendant/inmate for temporary release from DOCS custody to participate in Phase 2 of the CASAT program at some future date, thereby divesting DOCS of its statutory authority to make such a discretionary determination at or about the time of the proposed release. (Correction Law §852(1) and 7 NYCRR Parts 1900 and 1951). Notwithstanding the foregoing, where, as here, a sentencing court has directed DOCS to enroll a defendant/inmate in the CASAT program pursuant to the provisions of Penal Law §60.04(6), this Court concludes that no lawful basis exists for DOCS to delay such defendant/inmate's enrollment in CASAT Phase 1, once he or she reaches statutory eligibility, even if DOCS denied such inmate's application for temporary work release or presumptive work release. In reaching this conclusion the Court finds that it is simply not persuaded that the language of Penal Law §60.04(6), which authorizes a sentencing court to direct CASAT enrollment ". . . provided that the defendant will satisfy statutory eligibility criteria for participation in such program," can be logically construed as

authorizing DOCS officials to delay CASAT enrollment of a defendant/inmate up to two years beyond his or her reaching statutory eligibility.

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

ADJUDGED, that the petition is granted, without cost or disbursements, but only to the extent that the respondent is directed to forthwith enroll petitioner in Phase 1 of the CASAT program in accordance with the provisions of this Decision and Judgment.

Dated: June 9 , 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice