

Matter of Moore v Yelich
2008 NY Slip Op 32337(U)
August 22, 2008
Supreme Court, Franklin County
Docket Number: 0000438/2008
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN
X

In the Matter of the Application of
KEVIN S. MOORE, SR., #01-B-0608
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #16-1-2008-0136.028
INDEX # 2008-0438
ORI # NY016015J

-against-

BRUCE YELICH, Superintendent,
Bare Hill Correctional Facility, and **GEORGE**
ALEXANDER, Chairman, New York State
Board of Parole/Chief Executive
Officer, New York State Division of
Parole,

Respondents.

X

This proceeding was originated by the Petition for Writ of Habeas Corpus of Kevin S. Moore, Sr., verified on March 23, 2008, and stamped as filed in the Franklin County Clerk's office on March 25, 2008. Petitioner, who was an inmate at the Bare Hill Correctional Facility when he commenced this proceeding but who has since been conditionally re-released from DOCS custody to post-release supervision, challenged his continued incarceration in the custody of the New York State Department of Correctional Services. The Court issued an Order to Show Cause on April 2, 2008. By Decision and Order dated May 19, 2008, the Court denied respondents' motion to dismiss and converted this proceeding into a proceeding for judgment pursuant to CPLR Article 78. The motion to dismiss had been based upon petitioner's April 30, 2008, conditional release from DOCS custody to post-release supervision. The Court has since received and reviewed respondents' Answer and Return, verified on May 23, 2008, as well as respondents' Letter Memorandum of May 23, 2008. Although the Court received no

formal reply thereto, by letter dated July 20, 2008, petitioner advised chambers that he was being held in local custody in Onondaga County in connection with allegations that he had violated the conditions of post-release supervision. In the absence of any evidence that petitioner has been returned to DOCS custody as a post-release supervision violator the Court will consider this matter in its present context as a CPLR Article 78 proceeding.

On March 12, 2001, the petitioner was sentenced in Onondaga County Court, as a second felony offender, to a determinate term of imprisonment of 6 years upon his conviction of the crime of Robbery 2^o. Robbery 2^o is a class C violent felony offence under the provisions of Penal Law §70.02(1)(b). Neither the sentence and commitment order nor the sentencing minutes makes reference to any period of post-release supervision (Penal Law §70.45). DOCS nevertheless computed petitioner's sentence as including a five year period of post-release supervision. The petitioner was conditionally released from DOCS custody to post-release parole supervision on November 10, 2006. The petitioner's post-release supervision, however, was revoked following a final parole revocation hearing conducted on February 7, 2008. A delinquency date of January 17, 2007, was sustained and a 15-month delinquent time assessment imposed. The petitioner was returned to DOCS custody, as a post-release supervision violator, on February 13, 2008. This proceeding was commenced on March 25, 2008. On April 30, 2008, the petitioner was re-conditionally released from DOCS custody to post-release parole supervision.

The petitioner maintains, in effect, that DOCS lacked authority to impose any period of post-release supervision inasmuch as the sentencing court failed to do so. This Court agrees. *See Garner v. New York State Department of Correctional Services*, 10

NY3d 358, *People v. Sparber*, 10 NY3d 457 and *Smiley v. Department of Correctional Services*, 52 AD3d 978. Notwithstanding the foregoing, the respondents cite both *Garner* and *Sparber* and assert that this proceeding should be transferred to the sentencing court (Onondaga County Court) for a determination of the proper corrective action to be taken vis a vis its 2001 sentence.

Sparber involved five defendants who had all been convicted of violent felonies following pleas or jury verdicts. Although each of the *Sparber* defendants was sentenced to a determinate term of imprisonment, the sentencing judge in each case failed to mention post-release supervision (Penal Law §70.45) at sentencing. DOCS officials nevertheless computed each of the *Sparber* defendants' sentences as including periods of post-release supervision. After noting that the imposition of some period of post-release supervision was mandated by statute (Penal Law §§70.00(6) and 70.45(1)), the *Sparber* court went on to find that “. . . the procedure by which these sentences were imposed was flawed because the PRS component was not ‘pronounced’ as required by CPL 380.20 and 380.40.” 10 NY3d 457, 469-470. The *Sparber* court also found, however, that “[t]he sole remedy for a procedural error such as this is to vacate the sentence and remit for a resentencing hearing so that the trial judge can make the required pronouncement.” *Id.* at 471. (citation omitted). Accordingly, the underlying orders of the Appellate Division, First Department, affirming the various defendants' convictions and sentences were modified by the Court of Appeals by remitting to the appropriate sentencing courts for re-sentencing, to include the proper pronouncement of the appropriate period of post-release supervision and, as so modified, affirmed.

This Court finds no basis to deny petitioner relief in the nature of prohibition. In

this regard it is noted that the five *Sparber* defendants were sentenced, none earlier than 2002, to determinate terms of imprisonment ranging from 14 to 25 years. It is apparent that none of the *Sparber* defendants had completed serving their determinate terms of imprisonment and, therefore, even in the absence any lawfully imposed periods of post-release supervision, remained lawfully incarcerated pursuant to such terms. The petitioner in the case at bar, on the other hand, completed serving the 6 year determinate term imposed in 2001 and thus only remains subject to the 5-year period of post-release supervision unlawfully imposed, administratively, by DOCS officials. In these circumstances this Court finds that relief in the nature of prohibition is available to the petitioner. *See Garner v. New York State Department of Correctional Services*, 10 NY3d 358.

As far as any transfer to the Onondaga County Court is concerned, it is noted that the Court of Appeals in *Sparber* considered defendants' direct appeals from orders of the Appellate Division, First Department, affirming their underlying convictions and sentences. As such, the Court of Appeals was specifically authorized by statute to modify the intermediate appellate court orders (*see* Criminal Procedure Law §470.35(3)) and to direct the sentencing courts to take corrective action. *See* Criminal Procedure Law §§ 470.40(1) and 470.20. In this proceeding, however, where the legality of the administrative imposition and enforcement of a period of post-release supervision is at issue, the Court is without specific statutory authority to transfer the matter at hand to a coordinate level court for corrective action. The suggestion of the respondent to the contrary notwithstanding, this Court infers no such authority from the provisions of CPLR §103(c) and/or 104.

The petitioner in *Garner*, like the defendants in *Sparber* and the petitioner in the case at bar, was sentenced to a determinate term of imprisonment but the sentencing court failed to impose the statutorily mandated period of post-release supervision. The period of post-release supervision, however, was administratively added by DOCS officials. After a period of time the *Garner* petitioner, like the petitioner in the case at bar, was conditionally released to post-release supervision. Mr. Garner commenced a CPLR Article 78 proceeding challenging DOCS's authority to administratively add the period of post-release supervision to his sentence. The denial of Mr. Garner's petition was affirmed by the Appellate Division, Third Department, which found that "[a]s respondents [including DOCS] are only enforcing, not imposing, a part of petitioner's sentence which was automatically included by statute, they have not performed any judicial function, making prohibition an unavailable remedy." 39 AD2d 1019. The Court of Appeals reversed the Third Department in *Garner* on the same day it decided *Sparber*. According to the Court of Appeals in *Garner*, "[a]s we explained today in . . . *Sparber* . . . the combined command of CPL 380.20 and 380.40 is that the sentencing judge - and only the sentencing judge - is authorized to pronounce the PRS component of a defendant's sentence . . . [P]etitioner is clearly entitled to the relief that he seeks because DOCS's imposition of the PRS term contravenes the CPL's express mandate that sentencing is a judicial function and, as such, lies beyond DOCS's limited jurisdiction over inmates and correctional institutions . . ." 10 NY3d 358, 362 (citation omitted). It is instructive to note that the Court of Appeals in *Garner*, which was not exercising direct appellate jurisdiction with respect to Mr. Garner's underlying sentence and conviction, merely prohibited DOCS from imposing the period of post-release supervision but did not

purport to refer the matter to Mr. Garner's sentencing court. Instead, the Court of Appeals in *Garner* stated in the footnote that its holding was "...without prejudice to any ability that either the People or DOCS may have to seek the appropriate re-sentencing of a defendant in the proper forum." *Id.* at 363 (citation omitted). Accordingly, while this Court rejects respondent's suggestion that it transfer this matter to the Onondaga County Court, this Decision and Judgment is rendered without prejudice to any ability that either the People or DOCS may have to seek the appropriate re-sentencing of the petitioner in the proper forum. *See Id.*

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 costs or disbursements, but only to the extent that respondents are prohibited from imposing on petitioner and/or enforcing against petitioner the administratively imposed period of post-release supervision; and it is further

ADJUDGED, that this Decision and Judgment is issued without prejudice to any ability that either the People or DOCS may have to seek petitioner's re-sentencing in the proper forum.

DATED: August 22 , 2008, at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Justice