

<b>Matter of Capron v Virts</b>
2008 NY Slip Op 32517(U)
September 15, 2008
Supreme Court, Wayne County
Docket Number: 0064834/2008
Judge: Dennis M. Kehoe
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STATE OF NEW YORK  
SUPREME COURT WAYNE COUNTY

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In the Matter of the Petition of

JOHN CAPRON,

Relator

DECISION

For a Judgment pursuant to CPLR Article 70,

-against-

Index No. 64834

BARRY VIRTIS, Superintendent  
Wayne Correctional Facility

-and-

NEW YORK STATE DIVISION OF PAROLE

Respondents.

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Simon K. Moody, Esq.  
Attorney for Relator

New York State Attorney General  
Benjamin A. Bruce, Esq.  
Assistant Attorney General  
Attorneys for Respondents

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On April 4, 2008, the Relator John Capron, by his attorney, filed this  
Petition seeking a Writ of Habeas Corpus, alleging that the Department of  
Correctional Services (DOCS) had inappropriately added a five year period

of post-release supervision to the eight year determinate sentence imposed on him by the County Court of Cayuga County on June 22, 2000, on the charge of Robbery in the Second Degree. The Relator completed the determinate portion of his sentence on February 29, 2008, and he was released to five (5) years of post-release supervision. Shortly thereafter, the Relator allegedly violated the terms of his release by consuming alcohol. He was arrested pursuant to Parole Violation Warrant #589006, charging the Relator with having violated the Conditions of his Parole Release. The Relator was subsequently released on his own recognizance by this Court, pending final determination of this matter, based on recent case law developments which are discussed below.

The Relator now challenges the legality of his detention as a result of the execution of the Parole Violation Warrant, based on his contention that the trial court's failure to impose a period of post-release supervision at the time of sentence cannot be administratively rectified by DOCS. A review of the sentencing minutes confirms that post-release supervision was not a component of the sentence imposed by the trial court; likewise, the Sentence and Commitment Order dated June 22, 2000 contains no reference to such a period of supervision. Nevertheless, upon the

Relator's release from incarceration, DOCS added the five year period of supervision to the Relator's sentence and required him to sign Special Conditions of Release on March 3, 2008. The Relator now maintains that he had reached the maximum expiration date of his sentence, and were it not for the execution of the parole warrant, based on the improper modification of his sentence by DOCS, he would not have been illegally detained. Therefore, the Relator maintains that the warrant should be vacated, and he should remain at liberty.

In response, the Attorney General maintains that, since the imposition of a period of post-release supervision is mandatory in these circumstances under Penal Law §70.45(1), such a period is therefore automatically included in the sentence, whether or not it is expressly imposed by a court at sentencing. The State's position is that DOCS did not modify the Relator's sentence, but merely enforced a statutorily-required part of his determinate sentence. Therefore, the Relator is not entitled to immediate release, as he has an adequate remedy in the form of a motion under Article 440 of the Criminal Procedure Law.

Subsequent to oral argument, the Court of Appeals handed down two highly relevant decisions, Matter of Elliott Garner v NYS Department of

Correctional Services, et al, 10 NY3d 358 (2008) and People v Sparber, 10 NY3d 457 (2008). The Court stated that DOCS is not permitted to administratively add a mandatory period of post-release supervision, which may only be pronounced by a sentencing judge. However, in Sparber, the Court added that, since post-release supervision is a statutory component of a determinate sentence, the sole remedy is remittal to the trial court for re-sentencing.

However, all the defendants involved in the above cases were still incarcerated on their original sentences. Here the Relator had served his determinate sentence and had been released to parole supervision. There is nothing in this decision to prevent the trial court from vacating the Relator's sentence and re-sentencing him (see e.g. People ex. rel. Hernandez v Superintendent of Oneida Correctional Facility, et al, 20 Misc 3d 627 (2008)). However, the Court notes that correspondence in its file indicates that the Cayuga County District Attorney has been contacted by the Attorney General and has stated that the office has no intention of making such an application to the trial court for re-sentencing. Therefore, the issue of remittal appears to be moot.


Decisions of the Fourth Department issued subsequent to Garner

and Sparber have held that, based on those opinions, a petitioner is indeed entitled to habeas corpus relief if the period of post-release supervision has been added by DOCS to a sentence imposed upon a defendant who has completed his period of incarceration. In People ex rel Foote v Piscioti, 51 AD3d 1407 (2008), the Appellate Division held that, since only a judge may impose such a sentence, the actions of DOCS in so acting were improper, and therefore, the Writ was sustained and the petitioner was discharged from custody.

Therefore, having examined this recent line of cases, this Court finds that the Relator's Writ of Habeas Corpus is sustained. The parole violation warrant is hereby vacated, and the Relator is released from any further detention.

Counsel for the Relator is directed to submit an order in accordance with this Decision.

Dated: September 15, 2008  
Lyons, New York



Honorable Dennis M. Kehoe  
Acting Supreme Court Justice