

**Matter of Bueno v New York State Dept. of  
Correctional Servs.**

2008 NY Slip Op 32525(U)

February 11, 2008

Supreme Court, Albany County

Docket Number: 0645407/2008

Judge: George B. Ceresia

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CPLR Article 78 proceeding to review a determination which denied his request to credit his sentence with an additional period of one year and twenty two days of jail time for the period of October 27, 2002 through November 18, 2003.

The dispute arises from the inter-play of sentences arising from two different indictments, one in New York County and one in Bronx County. On January 6, 2003, the petitioner was sentenced in New York County to a determinate term of three and one half years for attempted assault in the first degree. On January 30, 2003 the petitioner was received by the Department of Correctional Services (“DOCS”). New York City credited the petitioner with ninety five days of jail time for the period of October 27, 2002 through January 30, 2003. On November 18, 2003 the petitioner was sentenced in Bronx County to a determinate sentence of three and one half years for burglary in the first degree, to run consecutively with the earlier sentence but nunc pro tunc from October 27, 2002.

The sentencing judge made the following comment at the November 18, 2003 sentencing in Bronx County:

“This was an agreed upon sentence which I agreed to sentence the defendant to three and a half years as a determinate term and five years of post release supervision to run consecutively to the sentence he received, the three and a half years under Indictment 4169 of ‘02 in New York County.

“I also directed that the sentence here run non pro tunc to October 27, of ‘02, that is it is my intention that the defendant receive full credit for all time he has served since October 27, 2002, the date of this arrest, notwithstanding that he has this other case and regardless of whether he was sentenced in that other case or held on the other case.

“Again, to be clear, the Court’s intention is the defendant receive all time credit from October 27<sup>th</sup> to today, October 27 of ‘02 to today, which is more than a year credit on the sentence I am imposing now, regardless of his status on any other case or on this case, non pro tunc October 27, 2002 is the sentence, three and a half years determinate term, five years post release supervision and a permanent order of protection is signed by the Court.”

In the Court’s view, the Bronx County sentence engenders an irreconcilable conflict in that it recites that it is to be served consecutively to the term imposed in New York County, while purporting to grant full credit (in addition to the ninety five-day jail time credit from October 27, 2002 to January 29, 2003) for all time served on the New York County sentence.

Penal Law § 70.30 recites, in part, as follows:

“1. Indeterminate or determinate sentences. An indeterminate or determinate sentence of imprisonment commences when the prisoner is received in an institution under the jurisdiction of the state department of correctional services. Where a person is under more than one indeterminate or determinate sentence, the sentences shall be calculated as follows: []

(c) If the defendant is serving two or more determinate sentences of imprisonment which run consecutively, the terms of the determinate sentences are added to arrive at an aggregate maximum term of imprisonment, provided, however, that the aggregate maximum term of imprisonment shall be subject to the limitations set forth in paragraphs (e) and (f) of this subdivision, where applicable.

“3. 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 a 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 term . . . of any previously imposed sentence . . . to which the person is subject*. Where the charge or charges culminate in more than one sentence, the credit shall be applied as follows:

(a) If the sentences run concurrently, the credit shall be applied against each such sentence;

(b) If the sentences run consecutively, the credit shall be applied against the aggregate term or aggregate maximum term of the sentences and against the aggregate minimum period of imprisonment.” (emphasis supplied)

It has been held that where an individual is serving time under a prior conviction, time served is part of his first sentence, and may not be credited against a subsequently imposed sentence (see Canada v McGinnis, 36 AD2d 830 [2d Dept., 1971] *aff’d* 29 NY2d 853 1971]; see also Kalamis v Smith, 42 NY2d 191 [1977]).

Inasmuch as the Bronx County term was directed to run consecutively to the New York County term, the Court finds that the respondent followed the appropriate provisions of the Penal Law in computing petitioner’s sentence. While the petitioner was properly given jail time credit for the period of time from October 27, 2002 to January 29, 2003, he was not entitled to further credit for the period after he was delivered into state custody on the New York County sentence (which occurred on January 30, 2003).

The Court has reviewed and considered petitioner’s remaining arguments and

contentions and finds them to be without merit.<sup>1</sup>

The Court finds that the determination was not made in violation of lawful procedure; is not affected by an error of law; and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

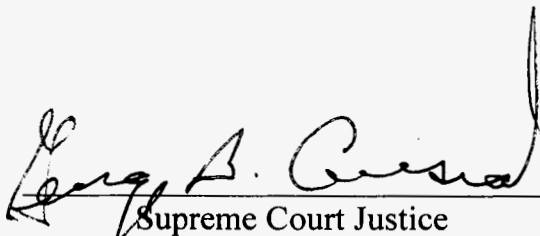
Accordingly it is

**ORDERED and ADJUDGED**, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the Respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

**ENTER**

Dated: February 11, 2008  
Troy, New York

  
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Supreme Court Justice  
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated August 23, 2007, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated September 14, 2007, Supporting Papers and Exhibits
3. Petitioner's Reply dated September 24, 2007

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<sup>1</sup>The Court is aware that in February 2007 the petitioner made a motion pursuant to CPL § 440.20 to set aside te Bronx County sentence as illegally imposed. He requested in that application that the sentencing judge correct the sentence to direct that it run concurrently with the term imposed in New York County. The motion was denied in a decision dated July 9, 2007. The sentencing judge found that there was no error in the sentence which he imposed, and specifically found that he properly directed that it run consecutively with the term imposed in New York County. The sentencing judge indicated that the defendant was actually challenging the implementation of his sentence by the respondent, rather than its validity.