Matter of Grant v Fischer
2008 NY Slip Op 32538(U)
September 9, 2008
Supreme Court, Albany County
Docket Number: 0359707/2008
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JAMAL GRANT,

Petitioner,

-against-

BRIAN S. FISCHER, as Acting Commissioner, New York State Department of Correctional Services, and HON. CHARLES TEJADA, Justice of the Supreme Court, New York County,

Respondents,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-07-ST7742 Index No. 3597-07

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of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The inmate-petitioner commenced the above-captioned CPLR Article 78 proceeding

to challenge the action of the respondent in administratively adding a period of post-release supervision to his sentence pursuant to Penal Law § 70.45 in a situation where the trial judge failed to do so at the time sentence was pronounced[1]. The Court, by decision/order/judgment dated December 5, 2007, granted the cross-motion of the respondent to dismiss the petition relying upon Third Department decisions in Matter of Deal v Goord (8 AD3d 769 [2004]) and Matter of Garner v New York State Department of Correctional Services (39 AD3d 1019 [2007]).

In late December of 2007 the Third Department overruled its holdings in Deal and Garner (see Matter of Dreher v Goord, 46 AD3d 1261). The Court in Dreher stated: "while DOCS has some role in correcting an unlawful sentence, the courts are responsible for actually imposing a correct sentence. 'The only cognizable sentence is the one imposed by the judge. Any alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect'" (Matter of Dreher v Goord, supra, at 1262 quoting Earley v Murray, 451 F3d 71, 75 [2d Cir 2006], cert denied Burhire v Earley, 127 S Ct 3014, 168 L. Ed. 2d 752 [2007], and citing People v Duncan, 42 AD3d 470, 471 [2nd Dept., 2007]).

In the meantime, the petitioner in the Garner case (39 AD3d 1019, supra) was granted

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[1]The petitioner was sentenced on November 18, 2004, after trial and as a second felony offender, to the following terms of imprisonment: 25 years for attempted murder, second degree; 25 years for assault, first degree; three and one half to seven years for criminal possession of a weapon, third degree (two counts); and 15 years for criminal possession of a weapon, second degree. The trial court issued an amended commitment on May 5, 2005 to reflect that one of the two indeterminate terms of three and one half years to seven years imposed for criminal possession of a weapon in the third degree had been modified to a three year determinate term. On neither occasion did the trial judge mention post-release supervision. The judgment of conviction was affirmed in People v Grant (43 AD3d 800 [1st Dept., 2007]).

leave to appeal to the Court of Appeals (see Matter of Garner v Department of Correctional Services, 9 NY3d 809 [2007). On April 29, 2008 the Court of Appeals issued decisions in a pair of cases involving the issue of post-release supervision including, as relevant here, Garner v Department of Correctional Services (10 NY3d 358, 2008 NY Slip Op 3947).[2] The Court of Appeals held that the New York State Department of Correctional Services may not add a period of post-release supervision to an inmate's sentence, where the sentencing judge did not do so.

Thereafter, by decision/order dated May 15, 2008 the undersigned granted petitioner's application to renew in the instant proceeding, based, in part, upon the recent Court of Appeals decision in Garner (supra). As a part of the relief granted in that decision/order, the Court denied respondent's cross-motion to dismiss, vacated the Court's decision/order/judgment dated December 5, 2007 which had dismissed the petition, and directed the respondent to serve and file an answer within twenty (20) days. The respondent has now served an answer. The respondent maintains that the petition should not be granted, and that instead, the matter should be referred to the sentencing judge for imposition of a period of post-release supervision.

Since the Court of Appeals' pronouncement in Garner (Garner v Department of Correctional Services, 10 NY3d 358, supra) the Third Department Appellate Division has followed the Court of Appeals in holding that only the sentencing judge may impose post-release supervision as a component of a sentence (see Matter of Marino v Fisher, 52 AD3d

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[2]The other decision issued was People v Sparber (10 NY3d 457, 2008 NY Slip Op 3946).

985 [2008]; Matter of Smiley v Department of Correctional Services, 52 AD3d 978 [2008]).

Now that issue has been joined, the Court finds that the relief requested in the petition should be granted (see Garner v Department of Correctional Services, 10 NY3d 358, supra; Matter of Marino v Fisher, 52 AD3d 985 [3d Dept., 2008]; Matter of Smiley v Department of Correctional Services, 52 AD3d 978 [3d Dept.,2008]). To the extent that the respondent maintains that the Court should deny the application and remand that matter to the sentencing judge for re-sentencing (an action strenuously objected to by the petitioner), the Court observes that the State Legislature recently adopted a procedural mechanism to carry out this very purpose (see L 2008, c 141, approved June 30, 2008). Under the legislation (as relevant here), in situations where an inmate should have, but did not receive a period of post-release supervision as a part of his or her sentence, the Department of Correctional Services is required to so advise the district attorney of the county of conviction, as well as the county sheriff and the court (see id., amending Corrections Law § 601-a, and adopting Corrections Law § 601-d).

The Court concludes that the petition must be granted, and that the respondent be directed to eliminate any reference to post-release supervision administratively imposed by the respondent, subject however, to imposition of post-release supervision by the sentencing judge in accordance with Corrections Law §§ 601-a and 601-d.

As was the case when the Court dismissed the petition in its decision/order/judgment dated December 5, 2007, the Court declines to award costs to the prevailing party. With respect to the foregoing, consideration has been given to the Court's long-standing policy of

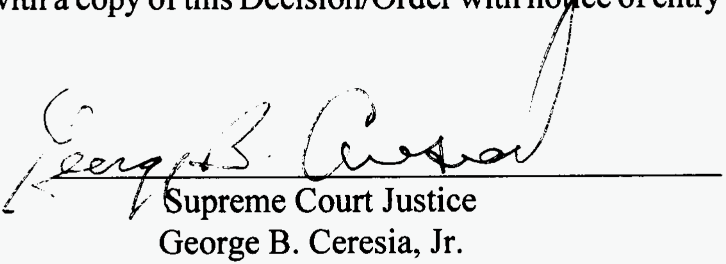
not awarding costs in inmate CPLR Article 78 proceedings in situations where the respondent prevails. In addition, consideration was given to the fact that petitioner's right to the relief which he ultimately receives in the instant proceeding only became clear after a significant change in state decisional case law precedent, upon which the respondent could properly rely.

Accordingly it is

ORDERED and ADJUDGED, that the petition is granted without costs, to the limited extent that respondent is directed to vacate and expunge from petitioner's sentence the period of post-release supervision which was administratively added to petitioner's sentence by the respondent, but shall not vacate and expunge any period of post-release supervision imposed by the sentencing court pursuant to Corrections Law §§ 601-a and 601-d.

This will constitute the decision/order/judgment of the Court. All papers are returned to the attorney for the petitioner 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: September 9, 2008
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Petitioner's Notice of Motion To Renew dated January 16, 2008 (Returnable February 4, 2008), Supporting Papers and Exhibits
2. Affirmation of Michael J. Keane, Assistant Attorney General dated January 27, 2008
3. Answer and Affirmation of Michael J. Keane, Esq., dated June 13, 2008.