

Matter of Styles v Rabsatt

2008 NY Slip Op 32737(U)

September 30, 2008

Supreme Court, St. Lawrence County

Docket Number: 127686

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE
X

In the Matter of the Application of
ANDREW STYLES, #87-A-4358,
Petitioner,

For a Judgment Pursuant to Article 70
Of the Civil Practice Law and Rules

DECISION & JUDGMENT
RJI #44-1-2008-0333.21
INDEX # 127686
ORI #NY044015J

-against-

CALVIN O. RABSATT, Superintendent,
Riverview Correctional Facility,
Respondent.

X

This proceeding was commenced by the Petition for a Writ of Habeas Corpus of Andrew Styles, verified on May 18, 2008, and filed in the St. Lawrence County Clerk's office on May 20, 2008. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Correctional Services. The Court issued an Order to Show Cause on May 23, 2008, and has received and reviewed respondents' Return, verified July 18, 2008, as well as petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on July 31, 2008.

On March 21, 1977, petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of imprisonment of 5 to 10 years upon his conviction of the crime of Robbery 2°. On November 18, 1977, he was sentenced in Supreme Court, New York County, as a predicate felony offender, to an indeterminate term of 10 years to 20 years for Robbery 1°. The Court directed that this term was to run consecutively to the prior sentence. He was received into DOCS custody

on November 23, 1977, certified as entitled to 498 days of jail time credit for the period between July 13, 1976 and November 22, 1977. Petitioner was released to parole supervision on July 9, 1986. He was declared delinquent by the Division of Parole as of December 15, 1986. On May 18, 1987, petitioner was sentenced in Supreme Court, New York County, as a second violent felony offender (Penal Law §70.04), to an indeterminate sentence of imprisonment of 7½ years to 15 years upon his conviction of the crime Robbery 2°. Petitioner was received back into DOCS custody on May 27, 1987, certified as entitled to 163 days of jail time credit for the period between December 15, 1986 and May 26, 1987.

As far as the aggregation of petitioner's sentences is concerned, the Court finds that DOCS officials improperly calculated the May 18, 1987, sentence as running consecutively, rather than concurrently, with respect to the undischarged aggregate terms of the 1977 sentences. Although petitioner was sentenced on May 18, 1987, as a second violent felony offender (Penal Law §70.04), the sentencing court did not specify whether its indeterminate sentence would run concurrently or consecutively with respect to the undischarged aggregate terms of petitioner's previously-imposed indeterminate sentences.

Penal Law §70.25(1)(a) provides, in relevant part, as follows:

“1. Except as provided in subdivisions . . . two-a . . . of this section . . . when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence or sentences imposed by the court shall run either concurrently or consecutively with respect to . . . the undischarged term or terms in such manner as the court directs at the time of sentence. If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run as follows:

(a) An indeterminate . . . sentence shall run concurrently with all other terms . . .” (Emphasis added).

Penal Law §70.25(2-a) in turn provides that where, as here, an indeterminate sentence of imprisonment is imposed pursuant to Penal Law §70.04 on a second violent felony offender “. . . and such person is subject to an undischarged indeterminate . . . sentence of imprisonment imposed prior to the date on which the present crime was committed, the court must impose a sentence to run consecutively with respect to such undischarged sentence.”

The Appellate Division, Third Department, has held that a sentence imposed pursuant to Penal Law §70.04 on a second violent felony offender was statutorily mandated to run consecutively with respect to undischarged term of a previously imposed sentence notwithstanding the sentencing court’s silence on the point. *See Soriano v. New York State Department of Correctional Services*, 21 AD3d 1233 and *Parilla v. Goord*, 274 AD2d 820. *See also Gray v. Goord*, 37 AD3d 904, *Moore v. Goord*, 34 AD3d 909, *lv den* 8 NY3d 807 and *Myles v. Smith*, 32 AD3d 1142. In *People ex rel Gill v. Greene*, 48 AD3d 1003, however, the Third Department moved in another direction. In spite of an identical statutory mandate that a sentencing court impose a second felony offender sentence (Penal Law §70.06) as running consecutively with respect to the unexpired term of a previously imposed sentence, the *Gill* court ruled that DOCS had no authority to, in effect, correct a sentencing court’s error by calculating a second felony offender sentence as running consecutively where the sentencing court failed to so direct. The Third Department recently re-affirmed the vitality of *Gill* in *Ettari v. Fischer*, 54 AD3d 460. This Court finds that DOCS officials may not calculate

petitioner's May 18, 1987, indeterminate sentence as running consecutively, rather than concurrently, with respect to the undischarged term of his prior indeterminate sentences.

When calculated concurrently it is clear that the maximum expiration date of petitioner's multiple sentences has been reached. Penal Law §70.30(1)(a) provides, in relevant part, that where a defendant is serving two indeterminate sentences of imprisonment, running concurrently, "[t]he maximum . . . terms of the indeterminate sentences . . . shall merge in and be satisfied by discharge of the term which has the longest unexpired time to run . . ." Applying this statutory provision, the maximum expiration date of petitioner's merged sentences is controlled by the unexpired portion of the 30-year aggregate maximum term of his 1977 indeterminate sentences.

In this regard the Court notes that DOCS officials, taking into account the 498 days of jail time credit, initially calculated the maximum expiration date of petitioner's 1977 aggregate sentences as July 9, 2006. Although the running of petitioner's 1977 aggregate sentences was interrupted from the time he was declared delinquent on December 15, 1986, until he was received back into by DOCS custody on May 27, 1987. (*see Penal Law §70.40 (3)(a) and Davidson v. State Department of Correctional Services*, 53 AD3d 741, that interruption would only have had the effect of pushing back the maximum expiration date of petitioner's 1977 aggregate sentences from July 9, 2006, to December 21, 2006. It is thus clear that when the 1987 sentence is calculated as running concurrently, rather than consecutively, with respect to the unexpired aggregate term of the 1977 sentences, petitioner's maximum expiration date has already passed.

Notwithstanding the foregoing, this Decision and Judgment is rendered without prejudice to any ability that either the people or DOCS may have to seek the re-

sentencing of the petitioner in the proper forum. *See Garner v. New York State Department of Correctional Services*, 10 NY3d 358.

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

ADJUDGED, that the petition is granted, with out cost or disbursements, and the respondent is directed to immediate release the petitioner from DOCS custody; and it is further

ADJUDGED, that this judgment is rendered without prejudice to any ability that either the people or DOCS may have to seek the re-sentencing of the petitioner in the proper forum.

Dated: September 30, 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice