

<b>Matter of Goodson v New York State Dept. of Correctional Servs.</b>
2008 NY Slip Op 32926(U)
September 30, 2008
Supreme Court, Franklin County
Docket Number: 2008-0035
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  
**JEFFREY GOODSON, #07-A-1685,**  
Petitioner,

For a Judgment Pursuant to Article 78  
Of the Civil Practice Law and Rules

**DECISION & JUDGMENT  
RJI #16-1-2008-0025.04  
INDEX # 2008-0035  
ORI #NY016015J**

-against-

**NEW YORK STATE DEPARTMENT  
OF CORRECTIONAL SERVICES,**

Respondent.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Jeffrey Goodson and stamped as filed in the Franklin County Clerk's office on January 8, 2008. Petitioner, who is now an inmate at the Mt. McGregor Correctional Facility, is challenging the time computation associated with his current incarceration in DOCS custody. The Court issued an Order to Show Cause on January 16, 2008, and has received and reviewed respondents' Return, verified February 29, 2008, together with a Letter Memorandum of that date. By Letter Order dated March 5, 2008, the Court directed the litigants to supplement their papers by addressing the impact, if any, of *People ex rel Gill v. Greene*, 48 AD3d 1003, decided by the Appellate Division, Third Department, on February 28, 2008. In response thereto the Court has received and reviewed correspondence from Assistant Attorney General Glennon, dated March 21, 2008, which included a copy of letter to him from Richard DeSimone, Esq., Associate Counsel in charge of the DOCS Office of Sentencing Review.

The Court has also received and reviewed additional correspondence, pertinent to the issue herein, from the petitioner dated March 26, 2008, April 10, 2008, and May 13 2008.

On June 23, 1983, the petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to consecutive indeterminate terms of imprisonment of 6 to 12 years and 3 to 6 years upon his convictions of the crimes of Robbery 2<sup>o</sup> and Criminal Possession of a Weapon 3<sup>o</sup>. He was received into DOCS custody on July 1, 1983, certified as entitled to 364 days of jail time credit. The petitioner was conditionally released to parole supervision on July 1, 1991. He was declared delinquent as of February 1, 1992, the date he committed a crime which ultimately led to his being sentenced on January 27, 1993 in Supreme Court, New York County, as a second felony offender, to an indeterminate term of 4 to 8 years upon his conviction of the crime of Attempted Robbery 1<sup>o</sup>. The sentence and commitment order is silent regarding petitioner's 1983 sentences. The petitioner was credited with 424 days of jail time when he was received back into DOCS custody on April 2, 1993.

Petitioner was re-released to parole supervision on January 22, 2002. On March 5, 2003, he was declared delinquent and on April 22, 2004, he was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate term of 1 1/2 to 3 years upon his conviction, of the crime of Attempted Burglary 3<sup>o</sup>. In the remarks section of the sentence and commitment order it was stated as follows: "Sentence of parole supervision if OK with D.O.C. Court has no objection if sentence to run concurrent with parole time." Petitioner was received back into DOCS custody on April 30, 2004, credited with 422 days of jail time. He was released to the Willard Drug

Treatment Campus, but was declared delinquent as of May 3, 2005. The petitioner was restored to parole supervision as of July 19, 2005, credited by the Division of Parole with 74 days of parole jail time.

Petitioner was declared delinquent again as of May 10, 2006. On March 13, 2007, he was sentenced in Supreme Court New York County, as a second felony offender, to an indeterminate term of 2 to 4 years upon his conviction of the crime of Grand Larceny 4<sup>o</sup>. The sentence and commitment is silent with respect to petitioner's prior sentences. The petitioner was again received into DOCS custody on March 27, 2007, credited with 320 days of jail time.

The Court finds that DOCS officials improperly determined that petitioner's 1993, 2004 and 2007 sentences must be calculated as running consecutively, rather than concurrently, with respect to prior undischarged terms. Although on each occasion petitioner was sentenced as a second felony offender (Penal Law §70.06), the sentencing courts did not clearly specify whether their indeterminate sentences would run consecutively or concurrently with respect to undischarged terms.

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 §70.06 on a second 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.”

Based upon the above-quoted statutory provisions the Appellate Division, Third Department, repeatedly held that a sentence imposed pursuant to Penal Law §70.06 on a second 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 e.g. Batista v. Walsh*, 48 AD3d 845, *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 the statutory mandate that a sentencing court impose a second felony offender sentence 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, moreover, recently re-affirmed the vitality of *Gill* in *Ettari v. Fischer*, 54 AD3d 460.

This Court finds that the respondent must be prohibited from calculating petitioner’s 1993, 2004 and/or 2007 indeterminate sentences as running consecutively, rather than concurrently, with respect to the undischarged terms of prior indeterminate

sentences. 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, without cost or disbursements, but only to the extent that the respondent is prohibited from calculating petitioner's 1993, 2004 and/or 2007 indeterminate sentences as running consecutively, rather than concurrently, with respect to any undischarged terms of prior indeterminate sentences; 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.

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S. Peter Feldstein  
Acting Supreme Court Justice