

**Matter of Spencer v Yelich**

2008 NY Slip Op 33455(U)

December 11, 2008

Supreme Court, Franklin County

Docket Number: 2008-1139

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  
**EDWIN SPENCER, #95-B-2110,**  
Petitioner,

for Judgment Pursuant to Article 70  
of the Civil Practice Law and Rules

**DECISION AND JUDGMENT**  
**RJI #16-1-2008-0358.94**  
**INDEX # 2008-1139**  
**ORI # NY016015J**

-against-

**BRUCE S. YELICH,** Superintendent,  
Bare Hill Correctional Facility,  
Respondent.

**X**

This is a habeas corpus proceeding that was originated by the Petition for Writ Habeas Corpus of Edwin Spencer, verified on July 25, 2008, and stamped as filed in the Franklin County Clerk's office on July 29, 2008. Petitioner, who is an inmate at the Bare Hill 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 August 12, 2008, and has received and reviewed respondent's Return, dated September 26, 2008. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on October 7, 2008, as well as petitioner's additional Reply thereto, filed in the Franklin County Clerk's office on October 9, 2008, and his Response to the Attorney General's Affirmation, filed in the Franklin County Clerk's office on October 10, 2008.

On January 5, 1993, the petitioner was sentenced in Onondaga County Court, as a predicate felon, to an indeterminate sentence of imprisonment of 3-6 years upon his conviction of the crime of Attempted Robbery 2°. He was received into DOCS custody on January 19, 1993, certified as entitled to 148 days of jail time credit. At that time DOCS

officials calculated the maximum expiration and conditional release dates of petitioner's sentence to be August 20, 1998, and August 20, 1996, respectively.

On November 21, 1994, the petitioner absconded from temporary release and subsequently committed an additional felony offense. On October 17, 1995, he was sentenced in Onondaga County Court, as a predicate felon, to an indeterminate sentence of imprisonment of 6-12 years upon his conviction of the crime of Robbery 1<sup>o</sup>. Neither the 1995 sentencing minutes nor the 1995 commitment order specified whether the 1995 sentence should be calculated as running concurrently or consecutively with respect to the undischarged term of petitioner's 1993 sentence. The petitioner was received back into DOCS custody on October 23, 1995, certified as entitled to 286 days of jail time credit. DOCS officials calculated petitioner's 1995 sentence as running consecutively with respect to the unexpired term of his 2003 sentence. After aggregating the 3 years, 8 months and 29 days still owed in connection with the 1993 sentence with the 12 year maximum term of the 1995 sentence and applying jail time credit, DOCS officials computed the maximum expiration and conditional release dates of petitioner's sentences to be October 5, 2010 and October 5, 2004, respectively.

On November 10, 2003, the petitioner was sentenced in Franklin County Court, as a second felony offender, to an indeterminate sentence of imprisonment of 1 1/2-3 years upon his conviction of the crime of Attempted Promoting Prison Contraband 1<sup>o</sup>. The sentencing judge specifically stated that this sentence “. . . shall be served consecutively to the time the defendant presently owes the Department of Correctional Services.” Notwithstanding the foregoing, the sentence and commitment order generated in connection with the 2003 sentencing did not specify whether such sentence was to be concluded as running concurrently or consecutively with respect to the unexpired terms of petitioner's prior sentences. DOCS calculated petitioner's 2003 sentence as running

consecutively with respect to the unexpired terms of the previously imposed sentences and computed both petitioner's maximum expiration and conditional release dates to be October 5, 2015.

The Court finds that DOCS officials improperly determined that the October 17, 1995, sentence must be calculated as running consecutively, rather than concurrently, with respect to the prior undischarged term. Although petitioner was sentenced on October 17, 1995, as a predicate felon, presumably pursuant to Penal Law §70.06, the 1995 sentencing court did not specify whether its indeterminate sentence would run concurrently or consecutively with respect to the undischarged term of petitioner's previously-imposed indeterminate sentence. 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 or determinate 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 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, moreover, recently re-affirmed the vitality of *Gill* in *Ettari v. Fischer*, 54 AD3d 460.

Despite the above ruling, the petitioner is not entitled to immediate release from DOCS custody. Penal Law §70.30(1)(a) provides, in relevant part, that where a defendant is serving more than one indeterminate sentence 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 . . .” Under the circumstances of this case the maximum expiration date of petitioner's merged (concurrent) 1993 and 1995 sentences would clearly be controlled by the 12-year maximum term of his 1995 sentence. With that 12-year maximum term calculated as commencing on October 23, 1995, when petitioner was received back into DOCS custody, and 286 days of jail time credit subtracted, a maximum expiration date of January 7, 2007, would be produced.

To the extent petitioner's 2003 sentence is properly calculated as running consecutively with respect to the undischarged merged maximum term of petitioner's prior sentences, it is clear that petitioner's re-calculated aggregate maximum term would not yet have been reached. As noted previously, even with petitioner's 1995 sentence calculated as running concurrently with respect to the unexpired term of his 1993 sentence, a merged maximum expiration date of January 7, 2007, would be produced. Adding the consecutive 3-year maximum term of petitioner's 2003 sentence thereto, an aggregated maximum expiration date of January 7, 2010, would be produced.

Turning next to the details of petitioner's 2003 sentence, a discrepancy exists between the sentencing minutes, which clearly indicate that such sentence is to run consecutively, and the sentence and commitment order, which is silent on the point. That discrepancy renders the 2003 sentence subject, upon application in the proper forum, to be vacated and the matter remitted for clarification/re-sentencing. *See People v. Butchino*, 47 AD3d 966, *People v. Gray*, 11 AD3d 821 and *People v. Ingram*, 263 AD2d 959. In the context of this proceeding, however, where petitioner seeks immediate discharge from DOCS custody, the Court finds no basis to disturb the calculation of petitioner's 2003 sentence as running consecutively with respect to the undischarged term(s) of petitioner's previously imposed sentence(s). The New York State Court of Appeals emphasized, albeit in a different context, the unique judicial responsibility associated with sentencing when it rejected the argument that a "... clerk's preparation and execution of a commitment sheet, bearing the judge's name, constitutes a proper sentencing pronouncement." *People v. Sparber*, 10 NY3d 457, 470. This Court also notes that irregularities or defects in proceedings for commitment pursuant to a judgment of conviction do not constitute grounds for the discharge of a petitioner from DOCS custody

as long as there is a valid judgment of conviction underlying the commitment. *See People ex rel Harrington v. McMann*, 23 AD2d 940.

Subject to whatever rights the people or petitioner may have to seek clarification of the discrepancy between the 2003 sentencing minutes and 2003 commitment order in a proper forum, this Court finds the unambiguous pronouncement of the 2003 sentencing court sufficient to preclude petitioner's claim of entitlement to immediate release from DOCS custody based upon an assertion that the 2003 sentence must be computed as running concurrently with respect to his prior undischarged terms.

Although a habeas corpus relief is unavailable under the facts and circumstances of this case, the Court finds that a conversion of this habeas corpus proceeding into a proceeding for judgment pursuant to Article 78 of the CPLR (CPLR §103(c)) is warranted in view of the impact on petitioner's sentence calculations arising from the determination that respondent improperly calculated his 1995 sentence as running consecutively, rather than concurrently, with respect to the unexpired term of the 1993 sentence. Notwithstanding the foregoing, this Decision and Judgment is rendered without prejudice to any ability that either the People or DOCS may have to seek 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 this Habeas Corpus proceeding is converted into a proceeding for judgment pursuant to Article 78 of the CPLR; and it is further

**ADJUDGED**, that the petition is granted, without costs or disbursements, but only to the extent that the respondent's determination to calculate petitioner's 1995 sentence as running consecutively, rather than concurrently, with respect to the

undischarged term of his previously imposed sentence is annulled and the respondent is directed to re-calculate petitioner's 1995 sentence as running concurrently with respect to said undischarged term; 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 re-sentencing of the petitioner in the proper forum.

**DATED:** December 11, 2008, at  
Indian Lake, New York

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S. Peter Feldstein  
Acting Supreme Court Judge