

Matter of Stevens v Fischer

2009 NY Slip Op 31865(U)

July 30, 2009

Supreme Court, Albany County

Docket Number: 1635-09

Judge: George B. Ceresia

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This opinion is uncorrected and not selected for official publication.

George B. Ceresia, Jr., Justice

The petitioner, an inmate at the Adirondack Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review his sentence calculation. In a pre-answer motion pursuant to CPLR 3211 (a) (7), the respondent moves to dismiss the petition for failure to state a cause of action.

On October 24, 2007, Supreme Court, Richmond County (Meyer, J.), sentenced the petitioner as a second felony offender to a determinate term of two years for Attempted Criminal Sale of a Controlled Substance with a two year period of post-release supervision. The Sentence and Order of Commitment were silent with regard to whether this sentence would run concurrently or consecutively with undischarged time the petitioner had remaining from a prior 2003 sentence. When the petitioner was taken into custody by the Department of Correctional Services (DOCS) for the 2007 sentence, pursuant to Penal Law § 70.25 (2-a), DOCS calculated the petitioner's 2007 sentence to run consecutively to the prior undischarged time.

After the petitioner received a copy of his time computation sheet in November 2007, he unsuccessfully attempted to contact different staff members at the correctional facility in which he was then housed and at his current facility to have the computation changed so that his current sentence would run concurrently with the prior undischarged time. According to the petitioner, he attempted to initiate the Inmate Grievance process but was informed that the issue was not subject to that process. He then commenced this CPLR article 78

proceeding to challenge his time computation, relying, in part, on People ex rel. Gill v Greene, 48 AD3d 10003 (3d Dept 2008), revd 1 NY3d 1 (2009). Pursuant to CPLR 3211 (a) (7), the respondent moves to dismiss the petition on the grounds it fails to state a cause of action.

Here, as to the petitioner's contention that Penal Law § 70.25 (1) (a) applies, that argument is unavailing. That section provides:

Except as provided in subdivisions two, two-a and five of this section, when multiple sentences of imprisonment are imposed on a person at the same time, or 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 each other and 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 supplied)."

Further, Penal Law § 70.25 (2-a) provides:

When an indeterminate or determinate sentence of imprisonment is imposed pursuant to section 70.04, 70.06, 70.08, 70.10, subdivision three or four of section 70.70, subdivision three or four of section 70.71 or subdivision five of section 70.80 of this article, and such person is subject to an undischarged indeterminate or determinate 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.

In this matter, the record establishes that the petitioner was convicted as a second felony offender (see Penal Law § 70.06). Thus, the petitioner falls under the ambit of Penal

Law § 70.25 (2-a). Therefore, Penal Law § 70.25 (1) (a) is inapplicable to the circumstances presented here. Applying section 70.25 (2-a) to the petitioner's sentence, he was sentenced to a determinate sentence as a second felony offender, which crime was committed after the prior undischarged sentence was imposed. Accordingly, under section 70.25 (2-a), the petitioner's 2007 sentence should run consecutively to the prior undischarged sentences.

Further, as the respondent contends, the petitioner's reliance on the Third Department's holding in People ex rel. Gill v Greene (48 AD3d 10003 [3d Dept 2008], revd 1 NY3d 1 [2009], supra) to argue that only a Court can impose a consecutive sentence per section 70.25 (2-a) lacks merit since the Court of Appeals reversed that case. In People ex rel. Gill, the Court of Appeals held that "when a court is required by statute to impose a sentence that is consecutive to another, and the court does not say whether its sentence is consecutive or concurrent, it is deemed to have imposed the consecutive sentence the law requires" (12 NY3d at 1). The Court of Appeals further explained:

"We read the words of Penal Law § 70.25 (2-a) – 'the court must impose a sentence to run consecutively with respect to such undischarged sentence' – to mean that any sentence imposed by the court shall run consecutively to the undischarged sentence, whether the sentencing court says so or not. . . . Section 70.25 (a) says that as a general rule – with exceptions that include cases subject, as this one is, to section 70.25 (2-a) – sentences 'shall run either consecutively or concurrently . . . in such manner as the court directs at the time of sentence.' The statute goes on to provide a default rule: 'If the court does not specify the manner in which a sentence imposed by it is to run,' the sentences shall run concurrently in certain classes of cases, and consecutively in others. But where, as in this case, the court has no choice about which kind of sentence to impose, no default rule for interpreting the court's silence is provided by the statute, because none is necessary. The court is simply deemed to have complied with the statute (id. at 2)."

Although the Sentencing Court was silent whether the sentence was to run concurrently with or consecutively to the undischarged prior sentences, Penal Law § 70.25 (2-a) requires it to run consecutively. Since DOCS properly deemed the Court to have applied section 70.25 (2-a), it correctly calculated petitioner's 2007 sentence "as being consecutive to his previous undischarged sentence[] (id.).” Accordingly, there is no legal basis to support the petitioner's claim that the respondent improperly calculated his sentence. Thus, the Court grants the respondent's motion to dismiss the petition for failure to state a cause of action.

Accordingly, it is

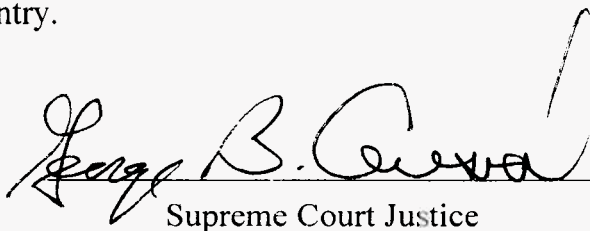
ORDERED that respondent's motion to dismiss is granted; and it is further

ORDERED and ADJUDGED that the petition is hereby dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered to the County Clerk for filing. The signing of this decision/order/judgment and delivery of a copy of the decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: July 30, 2009
Troy, New York



Supreme Court Justice

George B. Ceresia, Jr.

Papers Considered:

1. Order to Show Cause dated March 11, 2009;
2. Petition verified February 19, 2009, with exhibits annexed;
3. Notice of Motion dated May 11, 2009;
4. Affirmation of C. Harris Dague, Esq. affirmed May 11, 2009, with exhibits annexed.