

Matter of Ross v New York State Dept. of Correctional Servs.
2009 NY Slip Op 31893(U)
August 20, 2009
Supreme Court, Franklin County
Docket Number: 2009-0657
Judge: S. Peter Feldstein
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN
X

In the Matter of the Application of
NORMAN ROSS, #04-B-1083,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

**DECISION AND JUDGMENT
RJI #16-1-2009-0240.64
INDEX # 2009-0657
ORI #NY016015J**

-against-

**NYS 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 Norman Ross, verified on May 1, 2009, and filed in the Franklin County Clerk's office on May 11, 2009. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the time computation associated with his current incarceration in DOCS custody. More specifically, petitioner is challenging the alleged administrative imposition of the period of post-release supervision in connection with his controlling 2004 determinate sentence. The Court issued an Order to Show Cause on May 19, 2009, and has received and reviewed respondent's Answer, including *in camera* material, verified on June 24, 2009, supported by the Affirmation of Kelly L. Munkwitz, Esq, Assisstant Attorney General, dated June 24, 2009 (the Munkwitz Affirmation), as well as by the affidavit of Helene C. Antonelli, sworn to on June 24, 2009. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on July 29, 2009.

On March 31, 2004, petitioner was sentenced in Erie County Court to a controlling determinate term of 9 years upon his convictions of two counts of the crimes of Attempted Assault 1°. Attempted Assault 1° is a Class C violent felony offense under

the provisions of Penal Law §70.02(1)(b) and (a). Petitioner was received into DOCS custody on April 20, 2004, certified as entitled to 8 months and 20 days of jail time credit. At that time DOCS officials computed the maximum expiration and conditional release dates of petitioner's controlling 9-year determinate sentence to be July 29, 2012, and April 15, 2011, respectively. In addition, and notwithstanding the fact that neither petitioner's sentence and commitment order nor his sentencing minutes makes reference to any period of post-release supervision (Penal Law §70.45), DOCS computed petitioner's controlling sentence as including a 5-year period of post-release supervision.

In paragraph 11 of the petition it is alleged that DOCS officials “. . . failed to comply with the agreed upon sentence imposed by Erie County Court . . . Therefore denying and violating petitioner's right to the agreed upon plea agreement. Petitioner was sentenced to a definite 9 year sentence with no post-release supervision. Nowhere in the record does it mention post-release supervision being part of the plea.” Citing *Garner v. New York State Department of Correctional Services*, 10 NY3d 358, petitioner also asserts that only the sentencing judge is authorized to pronounce the post-release supervision component of a determinate sentence. Petitioner ultimately seeks an order of this Court directing “. . . specific performance of the 9 year definite [determinate] term without the post-release supervision imposed illegally by N.Y. S. D.O. C. S.” In the alternative, petitioner seeks an opportunity to withdrawal his guilty plea.

At the time petitioner was sentenced Penal Law §70.45(1) provided, in relevant part, that “[e]ach determinate sentence also includes, as a part thereof, an additional period of post-release supervision.” Penal Law §70.45(1), as added by L 1998, ch 1, §15. In paragraph 17 of the Munkwitz Affirmation the respondent acknowledges, however, that the Court of Appeals in *Garner* held “. . . that DOCS may not administratively add

a mandatory period of PRS [post-release supervision] . . . [O]nly the sentencing judge may pronounce the PRS component of a defendant's determinate sentence." It is therefore clear that at this juncture that petitioner is not subject to any lawfully imposed period of post-release supervision associated with his 2004 determinate sentence. Nevertheless, the Court of Appeals in *Garner* made it clear in a footnote that its decision was rendered " . . . without prejudice to any ability that either the People or DOCS may have to seek the appropriate resentencing of a defendant in the proper forum." 10 NY3d 358, 363 (citation omitted).

After the Court of Appeals handed down its decision in *Garner* on April 29, 2008, Correction Law §601-d was added by L 2008, ch 141, §5, effective June 30, 2008. This statute established a procedural framework for the potential resentencing of defendants whose convictions required a mandatory post-release supervision component that was not pronounced by the sentencing court. This Court notes that the resentencing procedures set forth in the relevant provisions of Correction Law §601-d(2) are initiated by notice to the sentencing court by the New York State Department of Correctional Services.

Citing "the extremely large numbers" of DOCS inmates requiring PRS resentencing notification pursuant to Correction Law §601-d(2), as well as a "Memorandum of Understanding" between the New York State Office of Court Administration and DOCS, respondent asserts that petitioner has not yet been scheduled for such notification since his " . . . earliest release date is April 15, 2011." Notwithstanding the foregoing, it is also asserted in paragraph 36 of the Munkwitz Affirmation that Correction Law §601-d " . . . is based upon the premise that post-release supervision assessed by DOCS will remain in effect pending the return of such cases [as petitioner's] to the sentencing courts."

Citing the unreported July 8, 2008, decision of the Supreme Court, Albany County in *Solano v. New York State Department of Correctional Services* (Albany County Index No. 8507-07) respondent takes the position that this proceeding should be dismissed pending resentencing proceedings in Erie County Court. The *Solano* court found that although DOCS exceeded its jurisdiction in unilaterally adding a period of post-release supervision that had not been pronounced by the sentencing judge, the legislature “remedied the situation” by enacting Correction Law §601-d. It was determined that the *Solano* petitioner, who had been released from DOCS custody to the administratively imposed period of post-release supervision, “. . . must remain on PRS pending DOCS, Parole, and the sentencing judge’s compliance with the new statute [Correction Law §601-d].” This Court, however, respectfully disagrees with the conclusion reached in *Solano*.

The Court rejects any suggestions that the enactment of Corrections Law §601-d was based upon the premise that a period of post-release supervision unlawfully imposed, administratively, by DOCS officials remains in effect pending the completion of resentencing proceedings in the sentencing court. Not only is the statute devoid of any language supporting such a premise, Correction Law §601-d(8) specifically provides, in relevant part, that “. . . [n]othing in this section shall affect the power of any court to hear, consider and decide any petition, motion or proceeding pursuant to . . . article . . . seventy-eight of the civil practice law and rules . . .” While the Court rejects respondent’s assertion that this proceeding should be dismissed pending compliance with the resentencing procedures set forth in Correction Law §601-d, this Decision and Judgment is rendered without prejudice to any ability that either the People or DOCS may have to seek the resentencing of petitioner in the proper forum.

Although the Court is mindful of the enormous administrative difficulties associated with the efforts of DOCS officials to identify inmates potentially affected by *Garner* and to initiate resentencing proceedings pursuant to Correction Law §601-d(2) with respect to those inmates, such difficulties cannot serve to validate the administratively imposed periods of post-release supervision pending resentencing determinations of the sentencing courts. Citing *Garner*, the Appellate Division, Third Department recently held that in administratively imposing a period of post-release supervision without judicial pronouncement thereof “ . . . DOCS acted outside its jurisdiction” and such administratively imposed period of post-release supervision “ . . . had no effect.” *People ex rel Turner v. Sears*, 63 AD3d 1404 (other citation omitted). In any event, and notwithstanding the aforementioned administrative difficulties, the fact remains that the timing of the initiation of resentencing proceedings in cases such as this is ultimately controlled by DOCS.

Even in the absence of a legally enforceable period of post-release supervision associated with his 2004 determinate sentence, petitioner is not eligible for conditional release from DOCS custody until April 15, 2011. This Court trusts that resentencing proceedings can be initiated and completed in Erie County Court sufficiently in advance of that date. It will be the responsibility of the sentencing court to determine whether or not petitioner should be resentenced to include a term of post-release supervision. *See* Correction Law §601-d(5) and Penal Law §70.85. If necessary at that juncture the sentencing court would also be called upon to consider any application by petitioner to withdraw his underlying plea.

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 costs or disbursements, but only to the extent that the administrative imposition of a 5-year period of post-release supervision associated with petitioner's 2004 determinate sentence is vacated; and it is further

ADJUDGED, that this Decision and Judgment is rendered without prejudice to any ability that either the People or DOCS may have to seek resentencing of petitioner in the proper forum.

Dated: August 20, 2009, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice