Matter of Wright v Loiodice

2009 NY Slip Op 31908(U)

July 9, 2009

Supreme Court, New York County

Docket Number: 654-09

Judge: George B. Ceresia

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[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of
GERALD WRIGHT, 02-A-6770,

Petitioner,

-against-

M. LOIODICE, IRC; ROBERT ERCOLE, SUPERINTENDENT; BRIAN FISHER, COMMISSIONER; ANTHONY J. ANNUCCI, ASST. EXEC. COMM.; RICHARD DE SIMONE, COUNSEL; KAREN BELLAMY, DIRECTOR,

Respondents,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-09-ST10007 Index No. 654-09

Appearances:

Gerald Wright, 02-A-6770
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State of New York
Attorney For Respondent
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(Justin C. Levin, Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

[* 2]

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Green Haven 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 respondents move to dismiss the petition for failure to state a cause of action. The petitioner opposes the motion.

On December 2, 2002, Supreme Court, Kings County (Feldman, J.), sentenced the petitioner as a persistent violent felony offender to a term of 25 years to life for Burglary, Second Degree – a crime committed in 2001. The Sentence and Order of Commitment were silent whether this sentence would run concurrently or consecutively with undischarged time the petitioner had remaining from prior sentences. When the petitioner was taken into custody by the Department of Correctional Services (DOCS) for the 2002 sentence, pursuant to Penal Law § 70.25 (2-a), DOCS calculated the petitioner's 2002 sentence to run consecutively to the prior undischarged time.

In 2008, after other efforts to have his sentence calculation changed to have the 2002 sentence run concurrently with the prior undischarged time, the petitioner filed a grievance, relying, in part, on People ex rel. Gill v Greene, 48 AD3d 10003 (3d Dept 2008), revd 1 NY3d 1 (2009). After administrative appeals and review, on October 8, 2008, the Central Office Review Committee (CORC) of the Inmate Grievance Program denied the grievance in a decision that provided: "It is the position of the Department of Correctional Services that People ex rel. Gill v Greene was decided incorrectly and an appeal is being sought; this

Department's position regarding Penal Law 70.25 (2-a) is expected to remain unchanged in the interim" (CORC Determination [dated 10-8-08], Petition, Exhibit E).

The petitioner commenced this CPLR article 78 proceeding to challenge that determination. Pursuant to CPLR 3211 (a) (7), the respondents move to dismiss the petition on the grounds it fails to state a cause of action. The petitioner opposes the motion.

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 petitioner was convicted as a persistent

violent felony offender (see Penal Law § 70.08). Thus, 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 petitioner's sentence, petitioner was sentenced to an indeterminate sentence as a persistent violent felony offender, which crime was committed after the prior undischarged sentences were imposed. Accordingly, under section 70.25 (2-a), petitioner's 2002 sentence should run consecutively to the prior undischarged sentences.

Further, as respondents contend, petitioner's reliance upon 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), is misplaced since the Court of Appeals reversed the Appellate Division. 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 with regard to 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 2002 sentence "as being consecutive to his previous undischarged sentence[] (id.)." Therefore, petitioner's challenge to the determination at issue here fails to state a cause of action.

As to petitioner's response to the motion to dismiss, this Court declines his invitation to effectively overrule or ignore the Court of Appeal's holding in People ex rel. Gill v Greene. This Court is bound by that Court of Appeal's decision (accord Mohen v Stepanov, 59 AD3d 502, 504 [2d Dept 2009]; Mountain View Coach Lines, Inc. v Storms, 102 AD2d 663, 664 [2d Dept 1984]), which effectively puts to rest the arguments raised by petitioner in his response papers (see People ex rel. Gill v Greene, 12 NY3d 1 [2009], supra). Thus, the Court grants respondent's motion to dismiss the petition for failure to state a cause of action. Accordingly, it is

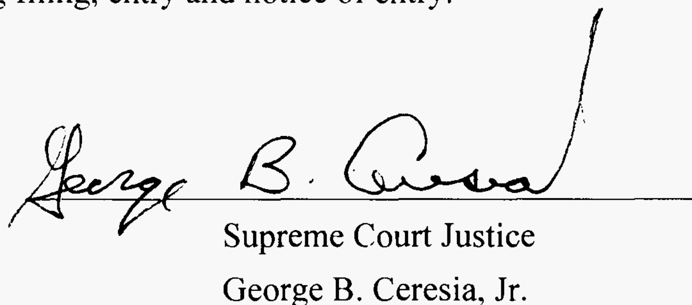
ORDERED that respondents' motion to dismiss is granted; and it is further

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 respondent. All other papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk, or directly to the County Clerk. The signing of this decision/order/judgment shall 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 9, 2009
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order to Show Cause dated January 29, 2009;
2. Petition verified January 5, 2009, with exhibits annexed;
3. Letter dated February 23, 2009;
4. Notice of Motion dated March 31, 2009;
5. Affirmation of Justin C. Levin, Esq. affirmed March 31, 2009, with exhibits annexed;
6. Affidavit of Gerald Wright sworn to April 8, 2009.