

Matter of Ortiz v Bellnier

2009 NY Slip Op 32684(U)

November 13, 2009

Supreme Court, Franklin County

Docket Number: 2008-1924

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
FRANCISCO ORTIZ, #07-R-0229,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #16-1-2008-0723.215
INDEX # 2008-1924
ORI #NY016015J**

-against-

J. F. BELLNIER, Superintendent,
Upstate Correctional Facility,
Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Francisco Ortiz, verified on December 9, 2008, and filed in the Franklin County Clerk's office on December 19, 2008. Petitioner, who is now an inmate at the Auburn Correctional Facility, is challenging the time computation associated with his ongoing incarceration in DOCS custody. The Court issued an Order to Show Cause on January 5, 2009, and has received and reviewed Respondent's Answer, including *in camera* Exhibits B and C, verified on February 20, 2009, and supported by the Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General, dated February 20, 2009. Although petitioner was granted an extension to May 29, 2009, to submit a Reply, no Reply was filed. By Letter Order dated August 28, 2009, the respondent was directed to supplement the record in this proceeding. The Court has since received and reviewed a copy of a September 14, 2009, letter, with exhibits, to Assistant Attorney General Munkwitz from Richard de Simone, Esq., Associate Counsel in Charge, DOCS Office of Sentencing Review (the de Simone Letter). The Court has also received and reviewed additional correspondence from petitioner dated September 27, 2009, but not received in chambers until October 15, 2009.

On November 2, 2005, petitioner was sentenced in Supreme Court, New York County, as a second violent felony offender, to a determinate term of 5 years, with 5 years post-release supervision, upon his conviction of the crime of Criminal Possession of a Weapon 3°. The criminal activity underlying petitioner's New York County conviction also constituted a violation of a term of federal supervision to which petitioner was subject and approximately one month after imposition of state sentence, on December 5, 2005, petitioner was sentenced in United States District Court, Southern District of New York, to a 24-month term of federal incarceration to run concurrently with the previously-imposed New York County sentence. A review of the federal sentencing minutes, which were annexed to the petition, reveals that it was the specifically stated intent of the federal sentencing judge that petitioner not be incarcerated for any period of time beyond the previously-imposed term of the New York County sentence. Rather, the federal sentencing judge stated that it was her understanding that petitioner would enter (or re-enter?) state custody following the federal sentencing and serve the 2-year federal term in state custody at the same time he was serving the 5-year state term. According to the federal sentencing judge, "[i]f by some miracle you [petitioner] get out of there [state custody] in less than two years you'll have to do some time in federal custody."

Petitioner's custodial status between the imposition of the state sentence on November 2, 2005, and the imposition of the federal sentence on December 5, 2005, was initially viewed with some uncertainty by this Court. Although the petition included no specific allegations with respect to such custodial status, the Court's review of the federal sentencing minutes revealed multiple assertions, made by both petitioner and his counsel, that petitioner had already commenced serving his state sentence and had been transported to the federal sentencing from the Downstate Correctional Facility. In respondent's answering papers, however, it was asserted that petitioner was not received

into DOCS custody until January 18, 2007, after he had already completed serving the federal term. Accordingly, by Letter Order dated August 28, 2009, counsel for the respondent was “. . .directed to supplement the record in this proceeding, through the submission of such affidavit(s) and/or documentary evidence as you deem appropriate, with respect to the issue of whether petitioner was, in fact, received into DOCS custody at the Downstate Correctional Facility, or any other facility, prior to his December 5, 2005, federal sentencing.” In response thereto the de Simone Letter states that both the New York City Department of Correction (NYC DOC) and the Federal Bureau of Prisons (BOP) were consulted and computer printouts of those entities’ incarceration records were obtained. The de Simone Letter goes on to report that after the November 2, 2005, New York County sentence was imposed petitioner remained in NYC DOC custody until November 15, 2005. Although NYC DOC records do not specify the entity to which custody of the petitioner was transferred on that date, BOP records show that petitioner was incarcerated in BOP custody at the Metropolitan Detention Center in Brooklyn from November 14, 2005 to October 12, 2006. According to BOP records petitioner remained in BOP custody, at various federal facilities, until December 29, 2006, when his federal sentence was completed and he was released into the custody of local officials in Bowen County Texas. Petitioner was received back into NYC DOC custody on January 5, 2007, and was then transferred into state DOCS custody on January 18, 2007.

Although petitioner’s responding letter of September 27, 2009 asserts that “[i]t was the responsibility of the [state or city?] Department of Corrections...transition division to retrieve and transfer me into State custody as ordered by the federal court judge,” no allegations are made challenging the custodial time line set forth in the de Simone Letter. Accordingly, this Court finds that petitioner was not received into state

DOCS custody, following imposition of his November 2, 2005 New York County sentence, until January 18, 2007.

Penal Law §70.30(1) provides, in relevant part, that a “. . .determinate sentence of imprisonment commences when the prisoner is received an institution under the jurisdiction of the state department of correctional services.” Relying on this statute, respondent asserts that DOCS officials properly calculated petitioner’s 5-year determinate term as commencing to run on January 18, 2007, when he was initially received into state DOCS custody. Respondent further asserts that DOCS officials properly applied the 27 days of jail time credit to which petitioner was certified as entitled and properly calculated the maximum expiration and conditional release dates of the 5-year determinate term as December 20, 2011, and March 31, 2011, respectively.

This Court finds that DOCS officials properly relied upon the relevant provisions of Penal Law §70.30(1) in determining the commencement date of the running of petitioner’s 5-year determinate term. The Court likewise finds that DOCS officials properly applied the 27 days of jail time credit certified to them by NYC DOC pursuant to Correction Law §600-a. In this regard it is noted that DOCS officials are bound by jail time credit calculations certified by NYC DOC officials and can neither add nor subtract therefrom. *See Neal v. Goord*, 34 AD3d 1142. Accordingly, in the absences of any allegation of an arithmetic error, it is apparent that state DOCS officials correctly calculated, at least in a technical sense, petitioner’s maximum expiration and conditional release dates. Notwithstanding the forgoing, however, it is equally apparent that some form of error, at some governmental level¹, frustrated the clearly-expressed intentions of

¹ Although petitioner can perhaps be faulted for not bringing suit to compel his transfer to state DOCS custody after it became apparent that his confinement in BOP custody was continuing after federal sentencing, it is clear that the failure to transfer him into state DOCS custody after the state or federal sentencing was not the result of any error on his part.

the federal sentencing judge by causing petitioner to effectively serve his federal sentence in federal custody consecutive to, rather than in state custody concurrent with, the previously imposed New York County sentence.

The November 2, 2005, New York County Sentence and Commitment Order directed the Commissioner of the NYC DOC to deliver petitioner to the custody of state DOCS. Notwithstanding that directive, it is apparent petitioner was instead delivered into federal custody in connection with the pending federal charges. Although the record before this Court does not specify, it is certainly possible that in doing so NYC DOC officials acted pursuant to some a previously-issued federal detainer. It remains clear, however, that at the very least after petitioner was sentenced in federal court on December 5, 2005, he should have been promptly returned to NYC DOC custody and then transferred to state DOCS custody to serve his concurrent state and federal sentences.

Given the unusual facts and circumstances of this case, as set forth above, this Court is simply unable to countenance a result whereby petitioner, through no direct fault of his own, is effectively required to serve his federal sentence as if it was directed to run consecutively with respect to the previously-imposed state sentence when, in fact, the contrary intention of the federal sentencing judge was so clearly stated. Accordingly this Court finds that the respondent, as a representative of state DOCS, should be directed to credit petitioner's 2005 New York County Sentence with the time petitioner spent incarcerated in federal custody after the imposition of the state sentence. *See Musto v. Sielaff*, 194 AD2d 491, *Rodriguez v. McMickens*, 133 Misc 2d 154 and *Jain v. Goord, et al* (Supreme Court, Saratoga County, Index No. 2000-3543, December 11, 2001).

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 respondent is directed to credit against petitioner's 2005 New York County sentence the time spent by the petitioner in federal custody between November 15, 2005, and December 29, 2006; and it is further

ADJUDGED, that the respondent is further directed to re-compute the maximum expiration and conditional release dates of petitioner's 2005 New York County sentence in light of the additional time credit provided for in this Decision and Judgment.

Dated: November 13, 2009, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice