Matter of Singleton v New York State Div. of Parole
2009 NY Slip Op 32800(U)
November 30, 2009
Supreme Court, St. Lawrence County
Docket Number: 131480
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
ALLEN SINGLETON, #01-A-4283,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #44-1-2009-0521.37
INDEX #131480
ORI # NY044015J

NEW YORK STATE DIVISION OF PAROLE,
Respondent,

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Allen Singleton, verified on July 27, 2009, and filed in the St. Lawrence County Clerk's office on August 5, 2009. Petitioner, who is an inmate at the Riverview Correctional Facility, seeks an order of this Court vacating the February 3, 2009, revocation of his parole based upon the alleged failure to serve him with "Notice of an Amended Decision . . ." Petitioner also seeks a court order vacating the 7 month and 25 day "enhancement" of his "Maximum Time Assessment," as well as a court order directing respondent to provide additional parole jail time credit for the 49 days petitioner allegedly spent incarcerated in the State of Maine. The Court issued an Order to Show Cause on August 11, 2009, and has received and reviewed respondent's Answer and Return, including Confidential Exhibits B, D, and F, verified on October 2, 2009. The Court has also received and reviewed petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on October 14, 2009.

[* 2]

On June 26, 2001, petitioner was sentenced in Supreme Court, Kings County, to a controlling determinate term of 5 years, without pronouncement of any period of post-release supervision (Penal Law §70.45), upon his conviction of the crime of Robbery 1°. He was received into DOCS custody on August 1, 2001, certified as entitled to 308 of jail time credit. At that time DOCS officials calculated the maximum expiration date of the determinate term to be September 23, 2005.

On January 3, 2005, petitioner was released from DOCS custody to an administratively imposed 5-year period of post-release supervision. As of that release date petitioner still owed 8 months and 20 days to the maximum expiration date of his determinate term. More than three years after his release from DOCS custody to the administratively-imposed 5-year period of post-release supervision petitioner was re-sentenced in Supreme Court, Kings County to the identical 5-year determinate term but this time with a judicially imposed 5-year period of post-release supervision. The re-sentencing court directed the re-sentence to run *nunc pro tunc* to June 26, 2001 (the original sentencing date). Following re-sentencing petitioner was released to ongoing post-release parole supervision.[1]

On January 21, 2009, petitioner was served at the Somerset County (Maine) Jail with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in four separate respects. Parole Violation Charge #3 alleged that petitioner " . . . violated rule #3 of the rules governing Parole, in that he left the State of New York, and was present in the State of Maine - Somerset County on 12/26/08, as

[1] The record before this Court is unclear as to petitioner's custodial status at the time of re-sentencing.

attested to by his arrest at said jurisdiction . . ." A preliminary hearing was waived and the final parole revocation hearing was conducted at Rikers Island on February 2, 2009.

At the outset of petitioner's final hearing the presiding Administrative Law Judge (ALJ) stated as follows: "According to the information before me, you owe zero on your sentence and one year, one month and twenty days on post-release supervision."[2] A guilty plea was ultimately entered with respect to Parole Violation Charge #3 and the remaining three charges were withdrawn. Petitioner's parole was revoked, with a modified delinquency date of December 26, 2008, and the ALJ directed that petitioner be held to his maximum expiration date. The ALJ's written Parole Revocation Decision Notice stated that there was no time remaining on the undischarged portion of the underlying determinate sentence but that the time remaining on the undischarged portion of the 5-year period of post-release supervision was 1 year and 7 days as of the December 26, 2008, modified delinquency date.

Petitioner was received back into DOCS custody on February 13, 2009, certified as entitled to 25 days of parole jail time credit (Penal Law §70.40(3)(c)). At that time DOCS officials calculated his maximum expiration date to be October 15, 2010. The document perfecting petitioner's administrative appeal from the parole revocation determination was timely received by the Division of Parole Appeals Unit, after an extension had been granted, on July 7, 2009. Less than one month later petitioner commenced this proceeding by filing his petition in the St. Lawrence County Clerk's office on August 5, 2009.

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[2] The 1 year, 1 month and 20 day period referred to by the ALJ was obviously based upon a projected November 13, 2008, delinquency date that would have been applicable had petitioner been found guilty of violating Parole Violation Charge #1.

Referencing the ALJ's written Parole Revocation Decision Notice, petitioner first asserts that " . . .the Division of Parole 'Notified' the petitioner that his maximum Time assessment was '**1 Year, 0 Months and 7 Days** to expiration of his P.R.S. [post-release supervision] Term.' At no point, has the petitioner been notified of anything other than this, by the Division of Parole. This would make all parties involved in the petitioner's re-incarceration, bound by the Notice and Decision served upon petitioner." (Emphasis in original). Petitioner also asserts that he elected to enter a guilty plea, and thereby waived his right to a final parole revocation hearing, " . . . based upon information that his maximum time exposure was **1 Year 0 Months and 7 Days** to his Maximum. Any enhancement of those terms is highly prejudicial to the petitioner and clearly infringes upon his rights to present evidence favorable to himself." (Emphasis in original). Finally, petitioner asserts that the respondent failed to certify his entitlement to 49 days of parole jail time credit for the time he spent in custody from December 26, 2008, when he was arrested in the state of Maine, to February 13, 2009, when he was received back into DOCS custody. According to petitioner, this time spent in custody was based solely upon the issuance of a New York parole violation warrant.

The respondent does not address the arguments advanced by petitioner on the merits. Rather, it asserts that the petition must be dismissed based upon petitioner's failure to exhaust administrative remedies. In this regard the Court notes that the relevant provisions of CPLR §7801 provide that an Article 78 proceeding " . . . shall not be used to challenge a determination . . . which . . . can be adequately reviewed by appeal . . . to some other body or officer . . ." Executive Law §259-i(4) and 9 NYCRR Part 8006, moreover, establish an administrative appeal framework for challenging various aspects

of the parole revocation process. In the case at bar, where the document perfecting petitioner's administrative appeal was received by the Division of Parole Appeals Unit on July 7, 2009, the Appeals Unit had until November 7, 2009, to issue its findings and recommendation. *See* 9 NYCRR §8006.4(c).

The dispute underlying this proceeding obviously stems from the discrepancy between the oral/written statements of the ALJ to the effect that petitioner owed no time against his 5-year determinate term as of the December 26, 2008, delinquency date and the ultimate determination of DOCS officials that petitioner still owed 8 months and 20 days against such determinate term as of the delinquency date.

Although the ALJ was authorized by statute/departmental regulation to make a final determination imposing a delinquent time assessment (*see* Executive Law §259-i(3)(f)(x) and 9 NYCRR §8005.20), she had no authority to make a binding determination with respect to the amount of time petitioner still owed on the underlying 5-year determinate term nor did she have the authority to make a binding determination as to the maximum expiration date of the determinate term and/or period of post-release supervision. The authority to undertake these sentence calculations is vested in the New York State Department of Correctional Services (DOCS). DOCS, however, is not a party to this proceeding and its calculation of petitioner's maximum expiration date is not at issue herein. In any event, the methodology underlying DOCS's calculations appears to be straightforward. When petitioner was released from DOCS custody to post-release parole supervision on January 3, 2005, with 8 months and 20 days still owed to the September 23, 2005, maximum expiration date of the determinate term, the running of such term was interrupted and the 8 month and 20 day remaining portion thereof was

statutorily held in abeyance until petitioner either successfully completed the period of post-release supervision or was sooner returned to DOCS custody. *See* Penal Law §70.45(5)(a). Thus, as of petitioner's December 26, 2008, delinquency date he still owed 8 months and 20 days against the 5-year term of the 2001 determinate sentence.[3]

In the case at bar the ALJ did not impose a 1 year and 7 day delinquent time assessment but, rather, a "hold to maximum" assessment. Even at the end of the written Parole Revocation Decision Notice, where the form calls for the entry of the "[e]stimated delinquent time assessment expiration date," the ALJ simply entered "Maximum Expiration date." To the extent petitioner contends that notwithstanding the forgoing the delinquent time assessment imposed by the ALJ must be construed as limited to the 1 year and 7 day time period concededly owed against the 5-year period of post-release supervision as of the December 26, 2008, delinquency date, excluding any time still owing against the underlying 5-year determinate term, the Court agrees with respondent that this contention is premature inasmuch as petitioner failed to exhaust administrative remedies prior to commencing this proceeding. To the extent petitioner contends, that he was denied his right to a final parole revocation hearing since the plea of guilty to Parole Violation Charge #3 was prompted by the ALJ's statement that petitioner owed no time against his 5-year determinate term, the Court likewise finds such contention to be premature inasmuch as petitioner failed to exhaust administrative remedies prior to commencing this proceeding.

[3] When 25 days of parole jail time credit are applied against the 8 month and 20 day period (*see* Penal Law §70.45(5)(d)(iv)) the alleged 7 month and 25 day "enhancement" of petitioner's delinquent time assessment becomes apparent.

Petitioner's reliance on *People ex rel Sumter v. O'Connell*, 10 AD3d 823, to excuse his failure to exhaust administrative remedies is misplaced. The *Sumter* petitioner alleged that he never received the written Parole Revocation Decision Notice following his final parole revocation hearing. The Appellate Division, Third Department, noting Mr. Sumter's statutory entitlement to have such notice made available(Executive Law §259-i(3)(f)(xi)), found "[a]s a matter of fundamental due process, petitioner was entitled to the prompt receipt of that statement so that he might have an informed basis upon which to seek review; neither the failure to pursue an administrative appeal nor the absence of prejudice will foreclose our review of that claim. . ." *Id* at 825 (citations omitted). In the case at bar, however, there is no clear allegation that petitioner did not timely receive a copy of the written Parole Revocation Decision Notice signed by the ALJ on February 2 (or 3 ?), 2009. Rather, as alluded to previously, the petitioner merely appears to assert that such written notice did not support the imposition of a delinquent time assessment in excess of the 1 year and 7 days concededly owed against the 5-year period of post-release supervision as of the December 26, 2008, delinquency date and that some sort of additional or amended notice would have been required to sustain any "enhancement" of the limited delinquent time assessment. The petitioner in this proceeding thus challenges the interpretation of the written Parole Revocation Decision Notice whereas the *Sumter* petitioner challenged the complete failure to provide him with a copy of that document. This Court finds that the due process implications of the later scenario, which obviated Mr. Sumter's need to exhaust administrative remedies through the administrative appeals process, are not applicable in the case at bar.

Notwithstanding the forgoing, this Court finds petitioner's final contention - that the respondent failed to certify his entitlement to 49 days of parole jail time credit - was not reviewable on administrative appeal and, therefore, must be considered in this proceeding. In this regard it is noted that the New York State Board of Parole is authorized by statute (Executive Law §259-c(12))to certify to DOCS officials the amount of an inmate's parole jail time credit. This statutory authority is not directly related to the parole revocation process and the Court finds nothing in Executive Law §259-i(4) or 9 NYCRR Part 8006 to suggest that the Board's exercise of its authority to certify the amount of parole jail time credit is subject to review on administrative appeal. For the reasons set forth below, however, the Court finds that the petitioner is not entitled to any parole jail time credit in addition to the 25 days already certified and applied.

Penal Law §70.40(3)(c) provides as follows:

> "(c) Any time spent by a person in custody from the time of delinquency to the time of service of the sentence resumes shall be credited against the term or maximum term of the interrupted sentence, provided:
> (i) that such custody was due to an arrest or surrender based upon the delinquency; or
> (ii) that such custody arose from an arrest on another charge which culminated in a dismissal or an acquittal; or
> (iii) that such custody arose from an arrest from another charge which culminated in a conviction, but in such case, if a sentence of imprisonment was imposed, the credit allowed shall be limited to the portion of the time spent in custody that exceeds the period, term or maximum term of imprisonment imposed for such conviction."

The record in this proceeding amply demonstrate that petitioner's December 26, 2008, arrest in the State of Maine was not based upon a New York parole delinquency/parole violation warrant but, rather, as the result of a new criminal offense (Aggravated Forgery) allegedly committed in Maine. Petitioner was ultimately convicted of an unspecified offense and was sentenced to a 30-day term in the Somerset County

(Maine) Jail, with a release date of January 19, 2009. Although it appears that a New York parole violation warrant was lodged as a detainer against petitioner at the Somerset County Jail on or about December 29, 2008, it is clear that petitioner only became eligible for parole jail time credit, pursuant to Penal Law §70.40(3)(c)(iii), as of January 19, 2009, when his Maine sentence terminated. It is obvious, moreover, that the 25-day parole jail time credit already certified and applied against the undischarged portion of the interrupted 2001 determinate term covered the period from January 19, 2009, to February 13, 2009, when petitioner was returned to DOCS custody and the running of the determinate term re-commenced.

Based upon all of the above, it is, therefore, the Decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: November 30, 2009, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice