Matter of Sturgis v Fischer
2009 NY Slip Op 32801(U)
November 20, 2009
Supreme Court, St. Lawrence County
Docket Number: 131536
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
DEVON STURGIS, #99-B-1882,

Petitioner,

for Judgment Pursuant to Article 70
of the Civil Practice Law and Rules

-against-

DECISION AND JUDGMENT
RJI #44-1-2009-0556.42
INDEX #131536
ORI # NY044015J

BRIAN FISCHER, Commissioner,
NYS Department of Correctional Services, and
NYS DIVISION OF PAROLE,

Respondents.

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This habeas corpus proceeding was originated by the Petition of Devon Sturgis, verified on August 9, 2009, and filed in St. Lawrence County Clerk's office on August 13, 2009. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Correctional Services. The Court issued an Order to Show Cause on August 19, 2009, and has received and reviewed respondents' Return, including Confidential Exhibit L, verified on September 25, 2009. The Court has also received and reviewed petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on October 6, 2009.

On July 6, 1999, petitioner was sentenced in Chemung County Court, as a second felony offender, to a 3-year determinate term and a concurrent indeterminate sentence 5 to 10 years upon his convictions of the crimes of Criminal Possession of a Weapon 3° and Criminal Sale of Controlled Substance 3°. He was received into DOCS custody on August 30, 1999, certified as entitled to 267 days of jail time credit. At that time DOCS officials calculated the maximum expiration and parole eligibility dates of petitioner's multiple sentences to be December 2, 2008, and December 2, 2003, respectively.

Although neither the sentencing minutes nor the sentence and commitment order referenced the judicial imposition any period of post-release supervision (Penal Law §70.45) in connection with the determinate term, DOCS officials administratively imposed a 5-year period of post-release supervision.

Petitioner was initially released from DOCS custody to post-release parole supervision on September 2, 2005. He was subsequently declared delinquent, however, as of February 9, 2006. Petitioner received a "revoke and restore to Willard Drug Treatment Campus program" disposition and was received back into DOCS custody, presumably to await transfer to Willard, on March 8, 2006, certified as entitled to 26 days of parole jail time credit. After attending the Willard program, petitioner was released therefrom to community-based post-release parole supervision on June 22, 2006. Petitioner was declared delinquent, for a second time, as of October 23, 2006, and on May 23, 2007, he was returned to DOCS custody as a post-release supervision violator, certified as entitled to 81 days of parole jail time credit.

By Decision and Order dated October 23, 2007, the Chemung County Court granted petitioner's CPL Article 440 motion and, upon consent of the People, modified the 1999 sentence by judicially imposing the minimum 1½-year period of post-release supervision in connection with petitioner's 3-year determinate term.

Petitioner was again released from DOCS custody to post-release parole supervision on September 3, 2008, but was declared delinquent as of September 12, 2008. His parole was subsequently revoked and it was directed that he be held to his maximum expiration date. Petitioner was received back into DOCS custody on February 10, 2009, as a post-release supervision violator, certified as entitled to 151 days of parole jail time credit. At that time DOCS officials determined the maximum expiration

date of petitioner's multiple sentences and 1 ½-year period of post-release supervision to be October 11, 2010. This proceeding ensued.

Prior to the October 23, 2007, judicial modification of petitioner's 1999 determinate sentence DOCS clearly lacked authority to calculate the determinate sentence as including any period of post-release supervision since the 1999 sentencing court failed to impose any such period. *See Garner v. New York State Department of Correctional Services*, 10 NY3d 358, *People v. Sparber*, 10 NY3d 457 and *Smiley v. Department of Correctional Services*, 52 AD3d 978. In addition, the Appellate Division, Third Department, has held that a releasee " . . . could not validly be incarcerated for violating a term of postrelease supervision which was not properly imposed." *State v. Randy M.*, 57 AD3d 1157,1159, *lv den* 11 NY3d 921 (citations omitted). For the reasons set forth below, however, this Court finds the facts and circumstances in the case at bar to be distinguishable from those confronted in *Randy M.* and ultimately concludes that the petitioner herein is not entitled to immediate release from DOCS custody.

Randy M., like the petitioner in this case, was released from DOCS custody to parole supervision subject to a 5-year period of post-release supervision unlawfully imposed administratively. At the time of Randy M.'s March 20, 2003, release, however, he owed less than 9 months to the December 6, 2003, maximum expiration date of his underlying sentences. Thus, when Randy M. was re-incarcerated in August of 2007 for violating the conditions of his release the only underpinning for such re-incarceration was his violation of the unlawfully imposed period post-release supervision. When the petitioner in the case at bar was first released from DOCS custody to parole supervision on September 2, 2005, he still owed 3 years and 3 months to the December 2, 2008, maximum expiration date of his multiple sentences. Thus, when petitioner was re-

incarcerated on May 23, 2007, his underlying sentences, rather than the illegally-imposed period of post-release supervision, could serve as the basis for such a re- incarceration. Put another way, even if petitioner was never made subject to the administratively-imposed period of post-release supervision, his release from DOCS custody to parole supervision was still subject to revocation upon a violation of the conditions of release and he could still be lawfully re-incarcerated up to the maximum expiration date of the underlying sentences. Since petitioner was not, in fact, incarcerated beyond such maximum expiration date, and since DOCS officials have adjusted his sentence calculations to reflect the October 23, 2007, judicial imposition of a 1½-year period of post-release supervision, it matters little whether the prior revocation of petitioner's release from DOCS custody was termed a revocation of post-release supervision or, rather, simply a revocation of parole or conditional release. Accordingly, this Court finds that the administrative imposition of the period of post-release supervision prior to the October 23, 2007, judicial modification of petitioner's 1999 determinate sentence, while a nullity, does not serve as a basis to support petitioner's claim of entitlement to immediate release from DOCS custody.

Petitioner also claims entitlement to immediate release from DOCS custody based upon his assertion that the October 23, 2007, sentence modification order of the Chemung County Court was unlawfully pronounced without him being physically present. This Court finds, however, that whatever the ultimate merits, or lack thereof, of this claim, habeas corpus relief is ordinarily unavailable where the issue sought to be raised in the habeas corpus proceeding has been, or could have been, raised on direct appeal or in the context of a CPL Article 440 motion. *See People ex rel Barnes v. Allard,* 25 AD3d 893, *lv den* 6 NY3d 714, *People ex rel Robinson v. Superintendent of Clinton Correctional*

Facility, 8 AD3d 794, *app dis, lv den* 3 NY3d 700, *cert den* 125 S.Ct. 1081 *and People ex rel Govan v. Bennett*, 304 AD2d 996, *lv den* 100 NY2d 508. In the case at bar, petitioner's challenge to the legality of the October 23, 2007, sentence modification order could have been advanced either on direct appeal therefrom or in the context of a CPL Article 440 motion addressed to the Chemung County Court. *See People ex rel Dushain v. Ercole,* 64 AD3d 669, *lv den* ___ NY3d___, 2009 N.Y. Slip Op. 86472, and *People ex rel Maye v. Schenectady County Court*, 63 AD3d 1471. The Court, moreover, finds nothing in the petition supporting a departure from traditional orderly procedure. *See Keitt v. McMann*, 18 NY2d 257.

Finally, this Court rejects petitioner's assertion that his February 9, 2006, parole delinquency must be canceled pursuant to the provisions of Executive Law §259-i(3)(a)(i). The relevant provisions of the statute clearly relate to a " . . . drug treatment program mandated by the board of parole as an alternative to presumptive release or parole or conditional release revocation, or the revocation of post-release supervision . . ." (Emphasis added). *See* 9 NYCRR §8004.3(e)(2). The record in the case at bar, however, indicates that petitioner's parole release was revoked following a contested final parole revocation hearing conducted on March 1, 2006, but the presiding Administrative Law Judge, apparently with the consent of the representative of the Division of Parole, directed restoration to the Willard program pursuant to 9 NYCRR §8005.20(c)(1). The delinquency cancellation provisions of Executive Law §259-i(3)(a)(i) are, therefore, not applicable under the facts and circumstances of this case. *See* 9 NYCRR §8004.3(f). For what it is worth, the Court notes that the merged maximum term of petitioner's 1999 sentences was reduced by 26 days of parole jail time credit covering most, if not all, of the time from petitioner's February 9, 2006, delinquency date to March 8, 2006, when he was

received back into DOCS custody to await transfer to Willard. In addition, the entire time period petitioner spent in DOCS/Willard custody from March 8, 2006, until his release to community-based post-release supervision on June 22, 2006, was ultimately credited by DOCS officials against petitioner's 1½-year period of post-release supervision. Thus, even without the cancellation of delinquency sought by petitioner, he did receive credit for the time periods in question.

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 20, 2009, at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court