

**Matter of Douglas v New York State Dept. of
Correctional Servs.**

2010 NY Slip Op 31780(U)

July 9, 2010

Supreme Court, St. Larence County

Docket Number: 132721

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
EDDIE DOUGLAS, #06-R-4737,

Petitioner,

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

**AMENDED
DECISION AND JUDGMENT
RJI #44-1-2010-0024.02
INDEX #132721
ORI # NY044015J**

-against-

**NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, NEW YORK
STATE DIVISION OF PAROLE, and NEW YORK
CITY DEPARTMENT OF CORRECTION,**

Respondents.

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This proceeding was originated by the Petition for a Writ of Habeas Corpus of Eddie Douglas, filed in the St. Lawrence County Clerk’s office on January 13, 2010. Petitioner, who is an inmate at the Ogdensburg Correctional Facility, purported to challenge his continued incarceration in the custody of the New York State Department of Correctional Services. The Court issued an Order to Show Cause on January 20, 2010 and as a part thereof this proceeding was converted into a proceeding for judgment pursuant to Article 78 of the CPLR. An Amended Order to Show Cause was issued on February 17, 2010. The Court has since received and reviewed the Answer of the respondent New York State Department of Correctional Services, including confidential Exhibit B, verified on April 2, 2010. The Court has received no answering papers from the respondent New York City Department of Correction. The Court has also received and reviewed petitioner’s Reply, received directly in chambers on May 17, 2010 and intended to be filed in the St. Lawrence County Clerk’s office simultaneously with this Decision and Judgment.

On September 19, 2003 petitioner was sentenced in Supreme Court, Queens County, to an indeterminate sentence of 1 to 3 years upon his conviction of the crime of Aggravated Criminal Contempt. He was received into DOCS custody on September 29, 2003, certified as entitled to 119 days of jail time credit. At that time DOCS officials calculated petitioner's initial maximum expiration date to be May 29, 2006.

On May 27, 2005 petitioner was conditionally released from DOCS custody to parole supervision. On September 27, 2005, however, he was arrested in connection with new criminal charges and taken into local custody in New York City. Following a final parole revocation hearing conducted on December 19, 2005, petitioner's conditional release was revoked with a sustained delinquency date of September 27, 2005. As of the delinquency date petitioner still owed 8 months and 2 days against the maximum term of his 2003 sentence. A delinquent time assessment of time served plus three months was apparently imposed. When the delinquent time assessment expired on March 20, 2006 petitioner, who was still in the custody of the respondent New York City Department of Correction in connection with the pending criminal charges, was restored to conditional release status with 164 days of parole jail time credit (Penal Law §70.40(3)(c)) covering the period from October 7, 2005, when the parole violation warrant was lodged, through March 19, 2006.¹ On June 8, 2006 petitioner was discharged from conditional release

¹ This Court has reservations with respect to the determination certifying parole jail time credit for the period from October 7, 2005 to March 19, 2006. To the extent relevant to this proceeding, parole jail time credit is authorized for time spent in custody from the delinquency date to the resumption of the underlying sentence "... provided ... that such custody was due to an arrest or surrender based upon the delinquency ..." Penal Law §70.45(3)(c)(i). It appears from the record in this proceeding, however, that during the entire time period covered by the parole jail time credit certificate petitioner was held in local custody as a result of his September 27, 2005 arrest in connection with new criminal charges. Under such circumstances, the certification of parole jail time credit is questionable. See *People v. Hanna*, 219 AD2d 792. Nevertheless, petitioner does not challenge the parole jail time credit certification in this proceeding and, in any event, the New York State Board of Parole (the entity that is authorized to certify parole jail time credit under Executive Law §259-c(12)) is not a party to this proceeding. The Court therefore finds no basis to address its parole jail time credit concerns.

upon reaching the maximum expiration of his 2003 sentence. Notwithstanding such discharge, petitioner still remained in the custody of the respondent New York City Department of Correction in connection with the pending criminal charges.

On October 26, 2006 petitioner was sentenced in Supreme Court, Queens County, as a “[v]iolent felony offender with prior nonviolent felony offense,” to a determinate term of 5 years with 5 years post-release supervision and a concurrent indeterminate sentence of 1½ to 3 years upon his convictions of the crimes of Burglary 2° and Criminal Contempt 1°. The initial sentence and commitment order stated that petitioner was sentenced as a “[s]econd felony offender.” That sentence and commitment order, however, was “AMENDED TO REFLECT VFO WITH PRIOR NONVIOLENT FELONY.”

Petitioner was received back into DOCS custody on November 7, 2006, initially certified by the respondent New York City Department of Correction as entitled to 409 days of jail time credit (Penal Law §70.30(3)) covering the period from his September 27, 2005 arrest through November 6, 2006.² At that time DOCS officials calculated the maximum expiration and conditional release dates of petitioner’s 2006 sentence(s) as September 22, 2010 and January 2, 2010, respectively. More than three years later, on December 4, 2009, the respondent New York City Department of Correction issued an amended jail time certificate reducing petitioner’s jail time credit to 151 days. According to a printout accompanying the amended certificate, “[t]he period from September 27, 2005 to June 8, 2006 for a total of 255 days were credited to a previous imposed sentence as per New York State DOCS.”³ This proceeding ensued.

² The time period in question encompasses 406, rather than 409 days. The initial jail time credit certification, however, also includes 3 days of “Additional Jail Time” of unknown origin.

³ 255 days subtracted from 406 days equals 151 days. The amended jail time certificate does not specify what happened to the 3 days of “Additional Jail Time” included in the initial certification.

In paragraph 12 of the petition the following is alleged: “On December 9, 2009, the petitioner was informed by the Inmate Records Coordinator’s office . . . that his legal date computation has been amended to reflect that he still owes 8 months and 2 days to his prior term of parole . . . which the petitioner contends is in error . . .” Citing the subsequently reversed decision of the Appellate Division, Third Department in *People ex rel Gill v. Greene*, 48 AD3d 1003, *rev’d* 12 NY3d 1, petitioner focuses on the issue of whether his controlling 2006 sentence should be calculated as running concurrently or consecutively with respect to his 2003 sentence. This Court notes, however, that under both the initial and amended methodologies employed by DOCS officials to calculate the maximum expiration/conditional release dates of petitioner’s 2006 sentence(s) there is no purported undischarged time factored in from petitioner’s 2003 sentence. Indeed, the December 9, 2009 memorandum from the Inmate Records Coordinator at the Ogdensburg Correctional Facility, alluded to by petitioner, clearly states that the recalculation of petitioner’s sentence was based upon the issuance of the amended jail time certificate rather than the inclusion of any undischarged time from petitioner’s 2003 sentence. At this juncture, therefore, the concurrent versus consecutive controversy addressed in *Gill* is a non-issue in this proceeding.

Despite the fact that petitioner does not appear to understand the basis for the December 2009 recalculation of his sentence by DOCS officials, this Court, in view of the abruptness of the recalculation (coming more than 3 years after the issuance of the initial sentence calculation) as well as the obvious negative impact of the recalculation on petitioner’s maximum expiration and conditional release dates, finds it appropriate to examine such recalculation.

DOCS officials initially calculated the controlling 5-year determinate term of petitioner’s 2006 sentences (*see* Penal Law §70.30(1)(a)) as running from November 7,

2006, when petitioner was received back into DOCS custody. *See* Penal Law §70.30(1). Subtracting the 409 days of jail time credit initially certified by New York City DOC officials, a maximum expiration date of September 22, 2010 was produced. Subtracting therefrom 8 months and 20 days of potentially available good time (six-sevenths of the 5-year determinate term; *see* Penal Law §70.40(1)(d)(i)), a conditional release date of January 2, 2010 was produced. Upon receipt of the amended jail time certificate DOCS officials recalculated petitioner's 2006 sentence(s), again calculating the controlling 5-year determinate term as running from November 7, 2006. Subtracting the 151 days of jail time credit most recently certified by New York City DOCS officials, an adjusted maximum expiration date of June 5, 2011 was produced. Subtracting therefrom 8 months and 20 days of potentially available good time, an adjusted conditional release date of September 15, 2010 was produced.

Although, as will be addressed later, there is one relatively minor flaw in the amended certification of jail time credit, the Court finds the amended certificate to be conceptually sound to the extent time credited against petitioner's previously imposed 2003 sentence was no longer included in the calculation of jail time credit. *See* Penal Law §70.30(3), *Jeffrey v. Ward*, 44 NY2d 812 and *Villanueva v. Goord*, 29 AD3d 1097. In the case at bar the 164-day period from October 7, 2005 through March 19, 2006 was encompassed in the certification of parole jail time credit and, therefore, applied against the interrupted term of petitioner's 2003 sentence. *See* Penal Law §70.40(3)(c)). In addition, the 81-day period from March 20, 2006 (when petitioner was restored to conditional release status) through June 8, 2006 (when petitioner was discharged from conditional release upon the maximum expiration of his 2003 sentence) was properly credited against the maximum term of petitioner's 2003 sentence since it represented, at least in theory, time spent conditionally released from DOCS custody under parole

supervision. The combined total of these two time periods (164 days plus 81 days = 245 days) was thus properly excluded from the amended jail time credit calculation. This brings the Court to the minor flaw in the jail time credit calculation alluded to previously.

To the extent the computer printout attached to the amended jail time certificate referenced the excluded 255-day period from September 27, 2005 to June 8, 2006 as time credited to a previously imposed sentence (petitioner's 2003 sentence), the Court finds that the period of time purportedly credited to the previously imposed sentence was overstated by 10 days. In this regard it is noted that the 164-day period of parole jail time credit did not commence until October 7, 2005, when the parole violation warrant was lodged against petitioner who had been held in local custody since September 27, 2005 following his arrest on new criminal charges. Thus, the 10-day period from September 27, 2005 through October 6, 2005⁴ was never credited against the maximum term of petitioner's 2003 sentence and, therefore, should have been included in the amended jail time certificate.

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 New York State Department of Correctional Services is directed to recalculate the maximum expiration and conditional release dates of petitioner's 2006 sentence based upon 161, rather than 151, days of jail time credit.

Dated: July 9, 2010 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court

⁴ The original Decision and Judgment of June 23, 2010 erroneously referred to “. . . the 10-day period from September 27, 2005 through October 6, 2006.” (Emphasis added). This Amended Decision and Judgment was issued solely to correct that error.