

Matter of Thornwell v NYS Div. of Parole

2010 NY Slip Op 32488(U)

September 7, 2010

Supreme Court, St. Lawrence County

Docket Number: 133625

Judge: S. Peter Feldstein

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE

----- X

In the Matter of the Application of
FLETCHER THORNWELL, #06-R-3753,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #44-1-2010-0317.18
INDEX #133625
ORI # NY044015J**

-against-

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

----- X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Fletcher Thornwell, verified on April 29, 2010 and filed in the St. Lawrence County Clerk’s office on May 11, 2010. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging the time computation associated with his current incarceration in DOCS custody. The Court issued an Order to Show Cause on May 14, 2010 and has received and reviewed respondents’ Answer and Return, including Confidential Exhibits B and C, verified on July 30, 2010. The Court has received no Reply thereto from petitioner.

On July 6, 2006 petitioner was sentenced in Supreme Court, New York County, as a second felony offender under the name Charles Lark, to concurrent indeterminate sentences of 2 to 4 years each upon his convictions of two counts of the crime of Criminal Contempt 1°. On August 18, 2006 petitioner was sentenced in Supreme Court, Bronx County, as a second felony offender, to a determinate term of 2 years, with 2 years post-release supervision, upon his conviction of the crime of Criminal Sale of a Controlled

Substance 5°. The Bronx County sentence was directed to run concurrently with the sentences imposed in New York County the prior month. Petitioner was received into DOCS custody on August 29, 2006 certified as entitled to 469 days of jail time credit.

Under the provisions of Penal Law §70.30(1)(a), the maximum terms of petitioner's concurrent indeterminate sentences and the term of his concurrent determinate sentence "... shall merge in and be satisfied by discharge of the term which has the longest unexpired time to run . . ." Since the 4-year maximum term of either indeterminate sentence had a longer unexpired time to run than the 2-year term of the determinate sentence, DOCS officials properly calculated the merged maximum term of petitioner's multiple concurrent sentences to be 4 years. Running those 4 years from August 29, 2006, the date petitioner was received into DOCS custody (*see* Penal Law §70.30(1)) and subtracting 469 days of jail time credit, the original maximum expiration date of petitioner's multiple sentences was properly calculated as May 14, 2009. The additional 2-year period of post-release supervision, of course, would still have to be addressed.

Petitioner was initially released from DOCS custody to post-release parole supervision on January 14, 2008. Such release interrupted the running of petitioner's underlying sentences with the remaining portion of the merged maximum term of such sentences "held in abeyance" until petitioner successfully completed the period of post-release supervision or was sooner returned to DOCS custody. *See* Penal Law §70.45(5)(a). As of petitioner's January 14, 2008 initial release to post-release parole supervision, DOCS officials properly determined the maximum expiration date of the 2-year period of post-release supervision to be January 14, 2010, with 1 year, 4 months and 00 days held

in abeyance as the remaining portion of the merged maximum term of petitioner's underlying sentences.

Petitioner's post-release supervision was initially revoked, with a delinquency date of August 15, 2008, following a final parole revocation hearing. The petitioner had apparently been taken into custody on September 6, 2008 pursuant to a parole violation warrant. The running of petitioner's period of post-release supervision was interrupted as of the August 15, 2008 delinquency date (*see* Penal Law §70.45(5)(d)(i)) with 7 months and 1 day (January 14, 2008 to August 15, 2008) credited against the 2-year period of post-release supervision, thus leaving 1 year, 4 months and 29 days remaining on such period.

Petitioner was restored to post-release supervision for placement at the Willard Drug Treatment Campus as of November 19, 2008. Petitioner was credited with 74 days of parole jail time covering the period from September 6, 2008, when he was taken into custody, to November 19, 2008, when he was restored to post-release supervision. The 74 days of parole jail time were properly credited against the 1 year, 4 months and 00 days previously held in abeyance against the merged maximum term of petitioner's sentences (*see* Penal Law §70.45(5)(d)(iii)), effectively reducing the time held in abeyance to 1 year, 1 month and 16 days.

Petitioner's post-release supervision was revoked for a second time, with a delinquency date of December 8, 2008, following a final parole revocation hearing. The Administrative Law Judge (ALJ) presiding at the final hearing imposed a 9-month delinquent time assessment estimated to expire on September 8, 2009. The running of petitioner's period of post-release supervision was interrupted as of the December 8,

2008 delinquency date (*see* Penal Law §70.45(5)(d)(i)) with 19 days (November 19, 2008 to December 8, 2008) credited against the remaining 1 year, 4 months and 29 days of post-release supervision, thus leaving 1 year, 4 months and 10 days remaining on such period.

Petitioner was returned to DOCS custody as a post-release supervision violator on December 31, 2008, credited with 24 days of parole jail time covering the period from the December 8, 2008 delinquency date to his December 31, 2008 return to DOCS custody. The 24 days of parole jail time were properly credited against the 1 year, 1 month and 16 days remaining in abeyance against the merged maximum term of petitioner's multiple sentences (*see* Penal Law §70.45(5)(d)(iv)), effectively reducing the time held in abeyance to 1 year and 22 days.

Petitioner was again released from DOCS custody to post-release parole supervision upon the expiration of the delinquent time assessment on September 8, 2009. Such release again interrupted the running of petitioner's underlying multiple sentences with the 8 months and 7 days petitioner spent incarcerated from December 31, 2008 to September 8, 2009 properly credited against the 1 year and 22 days previously held in abeyance against the merged maximum term of petitioner's multiple sentences, effectively reducing the time held in abeyance to 4 months and 15 days.

Petitioner apparently failed to report to supervising parole officials on his September 8, 2009 release date and absconded from parole supervision at that time. He was ultimately taken into custody on a parole warrant on February 17, 2010. Petitioner's post-release supervision was revoked, with a delinquency date of September 8, 2009, following a final parole revocation hearing. The ALJ presiding at the final hearing

imposed a 9-month delinquent time assessment estimated to expire on November 17, 2010 (9 months after petitioner was taken into custody on February 17, 2010). Since petitioner was determined to be delinquent as of September 8, 2009 - the same day he was released from DOCS custody to post-release supervision - the remaining 1 year, 4 months and 10 days owed by petitioner against the 2-year period of post-release supervision was not reduced.

Petitioner was returned to DOCS custody as a post-release supervision violator on March 5, 2010, credited with 16 days of parole jail time credit covering the period from February 17, 2010, when petitioner was taken into custody on the parole warrant, to March 5, 2010, when he was returned to DOCS custody. The 16 days of parole jail time were properly credited against the 4 months and 15 days remaining in abeyance against the merged maximum term of petitioner's multiple sentences (*see* Penal Law §70.45(5)(d)(iv)), effectively reducing the time held in abeyance to 3 months and 29 days.

The running of the remaining 3 months and 29 days held in abeyance against the merged maximum term of petitioner's multiple sentences, calculated as re-commencing upon his March 5, 2010 return to DOCS custody, was completed on July 4, 2010. Petitioner's ongoing incarceration after that date must be credited to the 1 year, 4 months and 10 days owed by petitioner against the 2-year period of post-release supervision. *See* Penal Law §70.45(5)(d)(iv). Thus, at this time, DOCS officials have correctly determined the maximum expiration date of petitioner's period of post-release supervision to be November 13, 2011. Notwithstanding the foregoing, petitioner remains tentatively eligible for re-release from DOCS custody to post-release supervision on November 17, 2010, upon the expiration of the most recently imposed delinquent time assessment.

Accordingly, the Court finds no error in the respondents' calculation of the maximum expiration and tentative release dates of petitioner's multiple sentences and period of post-release supervision.

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: September 7, 2010 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court