

| |
|--|
| Matter of McFadden v Fischer |
| 2011 NY Slip Op 31114(U) |
| April 7, 2011 |
| Supreme Court, Franklin County |
| Docket Number: 2010-1175 |
| 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 FRANKLIN
X

In the Matter of the Application of
SHAVAR McFADDEN, #06-R-2286,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2010-0458.96
INDEX # 2010-1175
ORI #NY016015J

-against-

BRIAN S. FISCHER, Commissioner,
NYS Department of Correctional Services,
ANDREA EVANS, Chief Executive Officer,
NYS Division of Parole and Chairwoman,
NYS Board of Parole, and the **NEW YORK CITY**
DEPARTMENT OF CORRECTION,
Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Shavar McFadden, filed in the Franklin County Clerk's office on September 14, 2010. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the computation of jail time credit associated with his current sentence of incarceration in DOCS custody. The Court issued an Order to Show Cause on September 16, 2010 and has received and reviewed the Answer of the respondents Fischer and Evans (the State Respondents), verified on November 30, 2010, supported by the Affirmation of C. Harris Dague, Esq., Assistant Attorney General, dated November 30, 2010. The Court has also received and reviewed the Affirmation in Opposition of Michael J. Pocchia, Esq., Assistant General Counsel, New York City Department of Correction, dated December 7, 2010 and submitted on behalf of the respondent New York City Department of Correction (the City Respondent). The Court has also received and

reviewed petitioner's Reply to the answering papers of the State Respondents and City Respondent, filed in the Franklin County Clerk's office on January 3, 2011.

By Letter Order dated January 25, 2011 the State Respondents were directed to supplement their answering papers to clarify an apparent discrepancy in the record then before the Court. In response thereto the Court has received and reviewed correspondence from counsel for the State Respondents, with exhibits, dated March 4, 2011.

On April 28, 2006 petitioner was sentenced in Supreme Court, Queens County, 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 3^o. He was received into DOCS custody on May 24, 2006 certified by the City Respondent as entitled to 111 days of jail time credit. Running the 2-year determinate term from that date, less 111 days of jail time credit, DOCS officials determined the initial maximum expiration date of petitioner's 2006 sentence to be February 2, 2008.

On January 11, 2007 petitioner was conditionally released from DOCS custody to post-release parole supervision. Upon petitioner's conditional release the running of the 2-year determinate term was statutorily interrupted with the 1 year and 21 days still owing to the maximum expiration date of such term "held in abeyance." *See* Penal Law §70.45(5)(a). Also upon petitioner's January 11, 2007 conditional release, the running of the 2-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the maximum expiration date of that period initially calculated as January 11, 2009.

Petitioner was first declared delinquent as of August 21, 2007. The delinquency interrupted the running of the period of post-release supervision (*see* Penal Law §70.45(5)(d)(i)) with 1 year, 4 months and 20 days still owing to the initial maximum expiration date of such period. Petitioner was restored to post-release supervision on

September 22, 2007 certified by the New York State Board of Parole as entitled to 11 days of parole jail time credit. *See* Penal Law §70.40(3)(c) and Executive Law §259-c(12). The parole jail time credit was applied against the interrupted 2006 determinate term (*see* Penal Law §70.45(5)(d)(iii)), reducing the time previously held in abeyance against such term from 1 year and 21 days to 1 year and 10 days. The 1 year, 4 months and 20 days still owing against petitioner's 2-year period of post-release supervision re-commenced running upon his September 22, 2007 restoration to post-release supervision (*see* Penal Law §70.45(5)(d)(ii)) producing an adjusted post-release supervision maximum expiration date of February 12, 2009.

On December 7, 2007, while petitioner was at liberty subject to post-release parole supervision, he was arrested in connection with new criminal charges and held in local custody by the City Respondent until December 13, 2007 when he was apparently released on his own recognizance. Petitioner remained at liberty subject to post-release supervision until September 15, 2008 when he was apparently taken into custody by the City Respondent pursuant to a parole violation warrant. A final parole revocation hearing was conducted on December 11, 2008 and at the conclusion of that hearing petitioner's post-release parole supervision was revoked with a modified delinquency date of November 13, 2008. The delinquency interrupted the running of the period of post-release supervision (*see* Penal Law §70.45(5)(d)(i)) with 2 months and 29 days still owing to the adjusted maximum expiration date of such period. Petitioner was returned to DOCS custody, as a post-release supervision violator, on January 15, 2009 certified as entitled to 63 days of parole jail time credit. The parole jail time credit was applied against the interrupted 2006 determinate term (*see* Penal Law §70.45(5)(d)(iii)), further reducing the time previously held in abeyance against such term from 1 year and 10 days to 10 months and 7 days.

The 10 months and 7 days still held in abeyance against petitioner's 2006 determinate term re-commenced running upon his January 15, 2009 return to DOCS custody. *See* Penal Law §70.45(5)(a). Petitioner thus completed service of that determinate term on or about November 22, 2009. As of November 22, 2009 the 2 months and 29 days still owing against the 2-year period of post-release supervision re-commenced running (*see* Penal Law §70.45(5)(d)(iv)) and the maximum expiration date thereof would have been reached on or about February 21, 2011. In the meantime, on February 23, 2009, after he had been returned to DOCS custody as a post-release supervision violator and while he was still serving the 2006 determinate term, petitioner was transferred into the custody of the City Respondent to await disposition of the pending criminal charges.

On November 30, 2009 petitioner was sentenced in Supreme Court, Queens County, as a second drug felony offender, to a determinate term of 2 years, with 1½ years post-release supervision, upon his conviction of the crime of Criminal Sale of a Controlled Substance 3^o.¹ The criminal act underlying such conviction had been committed on December 7, 2007. Although petitioner's 2009 determinate sentence, imposed upon him as a second felony drug offender, was mandated to run consecutively with respect to the undischarged term(s) of any previously imposed sentence notwithstanding the sentencing court's failure to so specify (*see* Penal Law §70.25(2-a) and *People ex rel Gill v. Greene*, 12 NY3d 1), petitioner had already completed serving the 2-year 2006 determinate term prior to the imposition of his 2009 sentence. Thus, the maximum expiration date of

¹ The 2009 Sentence and Commitment Order originally specified that the 2009 sentence would run concurrently with respect to the undischarged term of petitioner's 2006 sentence. Petitioner, however, was re-sentenced on March 3, 2010 to an identical 2-year determinate term, with 1½ years post-release supervision, but with the concurrency language deleted. For the purposes of this Decision and Judgement the Court will refer to petitioner's 2009 sentence/2010 re-sentence as his 2009 sentence. *See* Penal Law §70.30(5).

petitioner's 2-year 2009 determinate term is calculated simply by running such term from November 30, 2009, when it was imposed, to produce a maximum expiration date of November 29, 2011. The time remaining against the 2-year 2006 period of post-release supervision as of petitioner's November 30, 2009 sentencing date (approximately 2 months and 21 days) statutorily merged with, and will be satisfied by discharge of the 1½-year period of post-release supervision imposed in connection with his 2009 determinate term. *See* Penal Law §70.45(5)(c).

Petitioner asserts that he is entitled to jail time credit (Penal Law §70.30(3)) against his 2009 determinate term for the time periods he spent in the custody of the City Respondent from December 7, 2007 (arrest) to December 13, 2007 (release on his own recognizance) and from February 23, 2009 (transfer from State to City custody) to November 30, 2009 (sentencing). Under the relevant provisions of Penal Law §70.30(3) “[t]he term of . . . a determinate sentence . . . imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of a charge of that culminated in the sentence . . . The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the term . . . of any previously imposed sentence or period of post-release supervision to which the person is subject.”

The first period of time for which petitioner seeks jail time credit (December 7, 2007 to December 15, 2007) occurred after his September 22, 2007 restoration to the period of post-release supervision associated with his 2006 determinate sentence and before the November 13, 2008 delinquency date that interrupted the running of that period of post-release supervision. Petitioner is therefore not entitled to jail time credit for the time period in question since such time period was already credited against the

previously-imposed 2006 period of post-release supervision. See *Villanueva v. Goord*, 29 AD3d 1097.

The second time period for which petitioner seeks credit (February 23, 2009 to November 30, 2009) occurred after January 15, 2009, when petitioner was received back into DOCS custody as a post-release supervision violator and, as alluded to previously, his 2006 determinate term (and later his 2006 period of post-release supervision), recommenced running. Petitioner's February 23, 2009 transfer from State to City custody to await a disposition of pending criminal charges, moreover, did not interrupt the running of his 2006 determinate term or, later, his 2006 period of post-release supervision. Petitioner is therefore not entitled to jail time credit for the time period in question since it was already credited against the term of his previously-imposed 2006 determinate sentence and 2006 period of post-release supervision. See *Canada v. McGinnis*, 29 NY2d 853, *affg* 36 AD2d 830.

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: April 7, 2011 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice