

Matter of Richards v Charlebois

2011 NY Slip Op 31406(U)

May 19, 2011

Sup Ct, St. Lawrence County

Docket Number: 135501

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
STEVEN RICHARDS, #09-B-0383,

Petitioner,

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

**DECISION AND JUDGMENT
RJI #44-1-2011-0120.07
INDEX #135501
ORI # NY044015J**

-against-

ANN CHARLEBOIS, Superintendent,
Ogdensburg Correctional Facility,

Respondent.

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This proceeding was originated by the Petition For Writ of Habeas Corpus of Steven Richards, verified on February 12, 2011 and filed in the St. Lawrence County Clerk’s office on February 16, 2011. Petitioner, who is an inmate at the Ogdensburg 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 February 24, 2011 and has received and reviewed respondent’s Answer/Return, including Confidential Exhibit D, dated April 8, 2011. The Court has also received and reviewed petitioner’s Reply thereto (denominated Verified Answer/Return), filed in the St. Lawrence County Clerk’s office on April 19, 2010.

On February 2, 1996 petitioner was sentenced in Monroe County Court, as a second felony offender, to a controlling indeterminate sentence of 10 years to life upon his convictions of the crimes of Criminal Sale of a Controlled Substance 2°, Criminal Sale of a Controlled Substance 3° (3 counts) and Criminal Possession of a Controlled Substance 3° (4 counts). He was received into DOCS custody on February 16, 1996 certified as entitled to 40 days of jail time credit. Petitioner’s initial parole eligibility date was

calculated as January 5, 2006 and he was released from DOCS custody to parole supervision on that date.

On June 20, 2008, almost two and one-half years after his parole release, petitioner was arrested in connection with new criminal charges and taken into local custody. On June 24, 2008, while still in local custody, petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in nine separate respects. Parole Violation Charge #5 alleged that on June 20, 2008 petitioner was found to be in possession of a debit card without the permission of his parole officer. A preliminary parole revocation hearing was waived and a final hearing was conducted on October 16, 2008. At the final hearing petitioner pled guilty to Parole Violation Charge #5 and the remaining charges were withdrawn. Petitioner's parole was revoked, with a modified delinquency date of June 20, 2008, and a delinquent time assessment of time served plus three months was imposed. It was estimated by the Administrative Law Judge that petitioner's time assessment would expire on January 16, 2009.¹

On January 17, 2009, while still confined in local custody pending disposition of the new criminal charges, petitioner was restored to parole supervision originally credited with 211 days of parole jail time (Penal Law §70.40(3)(c)) covering the period from

¹ Although the "DECISION" portion (part IV) of the written Parole Revocation Decision Notice indicates the imposition of a 7-month delinquent time assessment, the "ANALYSIS" portion (part IV) of the notice indicates that the ALJ imposed a delinquent time assessment of time served plus 3 months. The Court notes that three months from the October 16, 2008 final parole revocation hearing is January 16, 2009.

June 20, 2008 through January 16, 2009.² On January 27, 2009 petitioner was sentenced in connection with the new criminal charges in Supreme Court, Monroe County, as a second felony offender, to a controlling indeterminate sentence of 2 to 4 years upon his convictions of the crimes of Attempted Identity Theft 1^o (four counts) and Forgery 2^o (four counts). He was received back into DOCS custody on February 3, 2009 certified by the Monroe County Sheriff as entitled to 228 days of jail time credit (Penal Law §70.30 (3)) covering the period from June 20, 2008 through February 2, 2009.

On February 3, 2009 a Notice of Final Declaration of Delinquency by Board of Parole was issued, notifying petitioner “. . . that, based on the new conviction and in accordance with Executive Law 259(1)(3)(d)(iii) [should read 259-i(3)(d)(iii)], the Board of Parole has issued a final declaration of delinquency with a delinquency date of 1/27/09. The time from the established date of delinquency to your scheduled maximum expiration of sentence, on the previous conviction, may be added, by the Department of Correctional Services, to the maximum expiration term of your new sentence.” Notwithstanding the foregoing, upon petitioner’s return to DOCS custody he was apparently provided with a computer-generated sentence calculation printout based solely upon the 2009 sentence. That printout showed a maximum expiration date of June 14, 2012, a conditional release date of February 14, 2011, a parole eligibility date of June 14, 2010 and a merit eligibility date of February 12, 2010. Shortly thereafter, however, a revised sentence calculation printout, incorporating petitioner’s 1996 sentences, was issued. The updated printout

² Parole jail time credit was ultimately reduced to 0 days after the time period covered by the certification of parole jail time credit was included in the jail time credit certified in connection with a subsequently imposed sentence.

showed a maximum expiration date of life, no conditional release date, a parole eligibility date of June 14, 2010 and a merit eligibility date of February 12, 2010.

Petitioner asserts that he is being unlawfully held in DOCS custody beyond his February 14, 2011 conditional release date. In this regard petitioner stresses that he was restored to parole supervision upon the expiration of the delinquent time assessment prior to the imposition of his 2009 sentence.

The Court initially finds that even if petitioner were to ultimately prevail with respect to the assertion that his properly computed conditional release fell on February 14, 2011, he would not thereby be entitled to immediate release from DOCS custody so as to support habeas corpus relief. *See People ex rel Price v. West*, 30 AD3d 852, *People ex rel Vasquez v. Fillion*, 22 AD3d 991 and *People ex rel Daniels v. Beaver*, 303 AD2d 1025. This Court, moreover, finds no basis to convert this proceeding into a proceeding for judgment pursuant to Article 78 of the CPLR since, for the reasons set forth below, petitioner's claim that his properly calculated conditional release date fell on February 14, 2010 is without merit.

Since petitioner's 2009 sentence was imposed upon him as a second felony offender, DOCS officials properly computed such sentence as running consecutively, rather than concurrently, with respect to the undischarged term of his 1996 sentence. *See Penal Law §70.25(1) and (2-a) and People ex rel Gill v. Greene*, 12 NY3d 1. When an individual, such as defendant, is subject to two, consecutive indeterminate sentences, "... the minimum periods of imprisonment are added to arrive at a aggregate minimum period of imprisonment equal to the sum of all the minimum periods, and the maximum terms are added to arrive at an aggregate maximum term equal to the sum of all the

maximum terms . . .” Penal Law §70.30(1)(b). With the aggregation of his 1996 and 2009 indeterminate sentences pursuant to Penal Law §70.30(1)(b), petitioner is deemed to be serving a single, aggregated sentence of imprisonment. *See People v. Buss*, 11 NY3d 553 at 557.

Since the life maximum term of petitioner’s 1996 sentence can not, in any meaningful sense, be added to, the Court finds that the maximum term of petitioner’s aggregated 1996/2009 sentence remains life. Since a person, such as petitioner, serving an indeterminate sentence with a maximum term of life is ineligible for good time allowance against such maximum term (*see* Correction Law §803(1)(a)), the Court finds that DOCS officials properly determined petitioner is not eligible for conditional release since his total good time allowance can never be equal to the unserved portion of his maximum term, as required for conditional release eligibility pursuant to Penal Law §70.40(1)(b). *See People ex rel Randall v. Walsh*, 81 AD3d 1015.

Since petitioner already completed serving the minimum period of his 1996 indeterminate sentence, the minimum period of his aggregated 1996/2009 indeterminate sentence is effectively the two-year minimum period of the 2009 sentence. Running that two-year period from February 3, 2009, and subtracting 228 days of jail time credit, the parole eligibility date associated with petitioner’s aggregated 1996/2009 indeterminate sentence was properly computed as June 14, 2010. Applying the merit time allowance set forth in Correction Law §803(1)(d), DOCS officials properly determined the merit parole eligibility date associated with petitioner’s aggregated 1996/2009 indeterminate sentence to be February 12, 2010. Unlike the statutory framework for determining conditional release eligibility, petitioner is not barred from parole eligibility or merit

parole eligibility by reason of the life maximum term of his aggregated 1996/2009 sentence.

Finally, this Court ascribes no significance to the fact that petitioner's 2009 sentence was imposed after petitioner was restored to parole supervision upon completion of the delinquent time assessment imposed following the October 16, 2008 final parole revocation hearing. In this regard it is noted that petitioner's 2009 conviction/sentencing provided an additional, independent basis for the revocation of his parole, by operation of law, pursuant to Executive Law §259-i(3)(d)(iii).

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: May 19, 2011 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court