

Matter of Nelson v Fischer

2011 NY Slip Op 32991(U)

November 9, 2011

Sup Ct, Albany County

Docket Number: 3018

Judge: George B. Ceresia Jr

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 ALBANY

In The Matter of OMAR NELSON,

Petitioner,

-against-

BRIAN FISCHER,

Respondents,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-11-ST2739 Index No. 3018

Appearances: Omar Nelson
 Inmate No. 03-B-0437
 Petitioner, Pro Se
 Collins Correctional Facility
 P.O. Box 490
 Collins, NY 14034-0490

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Cathy Y. Sheehan,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Collins Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review the computation of his sentence. With respect to a threshold issue, the petitioner maintains that respondent's answer, served on August 1, 2011,

was untimely. The Court observes that under CPLR 7804 (c) answering papers must be served at least five days before the return date. The return date was Friday, August 5, 2011. Inasmuch as July 31, 2011 was a Sunday, respondent was afforded until the next succeeding business day to serve his papers (see General Construction Law § 25-a; Jones v Coughlin, 125 AD2d 883 [3d Dept., 1986]; Dimovich v Talev, 248 AD2d 951 [4th Dept., 1998]). Thus, the Court finds that respondent's answer was timely served. Apart from the foregoing, the petitioner the Court observes that the petitioner served a reply, which the Court has considered.

Turning to the merits, on February 7, 2003 the petitioner was sentenced in Otsego County Court to a term of 3 to 9 years for criminal sale of a controlled substance in the fourth degree ("2003 conviction"). He was given credit for 149 days of jail time for the period between September 25, 2002 and February 20, 2003. He was released to parole supervision on March 17, 2005, and was declared delinquent as of July 5, 2005. He was restored to parole supervision on September 15, 2005 and credited with 63 days of parole jail time served between July 14, 2005 and September 14, 2005. The petitioner was declared delinquent as of June 27, 2006, and restored to parole supervision on November 2, 2006. He was credited with 38 days of parole jail time between September 25, 2006 and November 1, 2006. He was declared delinquent as of April 3, 2007¹. A violation warrant was lodged by the Division of Parole on April 30, 2007. At the final parole revocation hearing held on July 9, 2007 an 11 month time assessment was imposed. The petitioner was returned to the New

¹The original delinquency date of March 27, 2007 was modified to April 3, 2007 (see Parole Revocation Decision Notice dated July 10, 2007).

York State Department of Correctional Services (“DOCS”) on July 18, 2007. He was credited with 79 days of parole jail time for the period between April 30, 2007 and July 17, 2007. On July 28, 2008 the petitioner was sentenced in Suffolk County Court as a second felony offender, upon conviction of the crime of attempted criminal possession of a controlled substance third degree, to a 4 year determinate term with a 2 year period of post-release supervision (“2008 conviction”).

The petitioner argues that he is entitled to jail time credit for the period of March 30, 2008 to July 28, 2008, the period when he was housed in Suffolk County Jail with respect to his 2008 conviction. He supports this argument by pointing out that the 11 month time assessment imposed on July 10, 2007 by the Division of Parole expired on March 30, 2008. In his view, since he was not restored to parole after March 30, 2008, he was then being held solely on the charges which culminated in the 2008 conviction - thereby entitling him to jail time against the 2008 sentence. It is well settled that jail time may not be earned towards a future sentence while a prior sentence is still running (see Penal Law 70.30 [3]; Matter of Mena v Fischer, 84 AD3d 1611 [3d Dept., 2011]; Matter of Villaneuva v Goord, 29 AD3d 1097 [3d Dept., 2006]; Matter of Hot v New York State Department of Correctional Services, 79AD3d 1383, 1384 [3rd Dept., 2010]). Inasmuch as the petitioner’s 2003 sentence had not expired, during the period between March 30, 2008 and July 28, 2008 he was still serving time with respect to the 2003 conviction, and properly received credit for this time against his 2003 sentence. He was not entitled to a second credit for the same period of time against his 2008 sentence.

Turning to petitioner’s argument that the two sentences must run concurrently rather

than consecutively, the petitioner argues that because the sentencing judge was silent with respect to the issue, they must run concurrently. Penal Law § 70.25 (2-a) recites as follows:

“When an indeterminate or determinate sentence of imprisonment is imposed pursuant to section 70.04, 70.06, 70.07, 70.08, 70.10, subdivision three or four of section 70.70, subdivision three or four of section 70.71 or subdivision five of section 70.80 of this article, or is imposed for a class A-I felony pursuant to section 70.00 of this article, and such person is subject to an undischarged indeterminate or determinate sentence of imprisonment imposed prior to the date on which the present crime was committed, *the court must impose a sentence to run consecutively with respect to such undischarged sentence.*” (Penal Law 70.25 [2-a] effective until September 1, 2011, emphasis supplied)

A review of the 2008 sentence and commitment reveals that the petitioner was convicted as a second felony offender. As such, the sentence was imposed under Penal Law § 70.06 and must run consecutively to the prior sentence (see People ex rel. Gill v Green, 12 NY3d 1, 5 [2009], cert. denied Gill v Rock, 130 S Ct 86, 175 L Ed 2d 59 [2009]). In addition, the same Court held that where the sentencing court fails to expressly direct whether a sentence imposed under Penal Law § 70.06 will run consecutively or concurrently with a prior sentence, the subsequent sentence, by operation of law, will run consecutively to the prior sentence, and the Department of Corrections may properly interpret Penal Law 70.25 (2-a) in this manner (see id.).

The Court has reviewed and considered petitioner’s remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute

an abuse of discretion. The Court concludes that the petition must be dismissed.

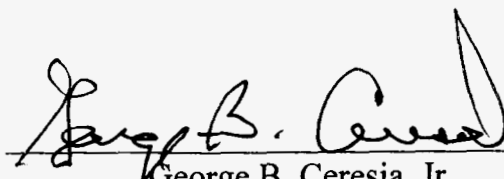
Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: November 9, 2011
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated, Petition, Supporting Papers and Exhibits
2. Answer Dated July 28, 2011, Supporting Papers and Exhibits
3. Petitioner's Reply dated August 7, 2011