

Matter of Griffin v Yelich
2011 NY Slip Op 33220(U)
July 14, 2011
Supreme Court, Franklin County
Docket Number: 2011-299
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN
X

In the Matter of the Application of
CASIMIR GRIFFIN, #01-R-1365,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2011-0136.28
INDEX # 2011-299
ORI # NY016015J

-against-

BRUCE S. YELICH, Superintendent,
Bare Hill Correctional Facility,
Respondent.

X

This proceeding was originated by the Petition for a Writ of Habeas Corpus of Casimir Griffin, verified on March 26, 2011 and filed in the Franklin County Clerk's office on March 29, 2011. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the time computation associated with his ongoing incarceration in DOCS custody. The Court issued an Order to Show Cause on April 4, 2011 and has received and reviewed respondent's Return, dated May 13, 2011. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on June 17, 2011.

Insofar as is relevant to this proceeding, on November 26, 2001, while he was already an inmate in DOCS custody from a prior conviction, petitioner was sentenced in Orange County Court to a determinate term of 7 years, with 3 years post-release supervision, upon his conviction of the crime of Assault 2^o.¹ Running the 7 year

¹ The record in this proceeding includes three Sentence and Commitment Orders associated with petitioner's November 26, 2001 conviction. The original order specified a determinate term of 7 years, with 5 years post-release supervision. The most recently issued Sentence and Commitment Order, dated October 28, 2008, specified a determinate term of 7 years, with 3 years post-release supervision. The "REMARKS" section of the October 28, 2008 Sentence and Commitment Order contains the following

determinate term from the date of sentencing, less 16 days of jail time credit, DOCS officials initially calculated the maximum expiration date of petitioner's 7-year determinate term as November 9, 2008.

On March 7, 2008 petitioner was released from DOCS custody to post-release parole supervision. As of that date the running of petitioner's 3-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the maximum expiration date thereof originally calculated as March 7, 2011. As of March 7, 2008 the running of petitioner's underlying 7-year determinate term was interrupted with the remaining 8 months and 2 days owed to the originally calculated maximum expiration date thereof held in abeyance pending petitioner's successful completion of the period of post-release supervision or his return to DOCS custody. *See* Penal Law §70.45(5)(a).

Petitioner's conditional release to post-release parole supervision was first revoked, with a sustained delinquency date of December 21, 2009, following a final parole revocation hearing conducted on February 11, 2010. As of that delinquency date the running of petitioner's period of post-release supervision was interrupted (*see* Penal Law §70.45(5)(d)(i)) with 1 year, 2 months and 16 days still owing to the originally calculated maximum expiration date thereof. Although the Administrative Law Judge (ALJ) presiding in petitioner's February 11, 2010 final parole revocation hearing imposed a 12-month delinquent time assessment, it was specified that if petitioner entered and successfully completed the 90-day Willard Drug Treatment program the disposition of the final parole revocation hearing would “. . .be modified forthwith to a decision of revoke

notation: “This sentence is to run Nunc Pro Tunc to original sentence dated 11-26-01 as per attached amended Sentence & Commitment dated 1-07-02.”

and restore - time served and you [petitioner] will be released from state prison and restored to supervision in the community.”

Petitioner was returned to DOCS custody, as a post-release supervision violator, on February 22, 2010, certified as entitled to 63 days of parole jail time credit (Penal Law §70.40(3)(c)), apparently covering the period from petitioner’s December 21, 2009 delinquency date until his return to DOCS custody. The parole jail time credit was applied against the interrupted 2001 determinate term (*see* Penal Law §70.45(5)(d)(iv)), reducing the time previously held in abeyance against such term from 8 months and 2 days to 5 months and 29 days.

Petitioner completed the Willard program and on July 13, 2010 he was re-released from DOCS custody to post-release parole supervision. Presumably in response to a modified revoke and restore disposition associated with the February 11, 2010 final parole revocation hearing,² DOCS officials re-commenced the running of petitioner’s period of post-release supervision effective as of his return to DOCS custody on February 22, 2010. Running the 1 year, 2 months and 16 days still owed against the original computed maximum expiration date of the 3-year period of post-release supervision from February 22, 2010, an adjusted maximum expiration date of the period of post-release supervision was calculated as May 8, 2011.

Petitioner’s conditional re-release to post-release parole supervision was revoked, with a modified delinquency date of October 4, 2010, following a final parole revocation hearing conducted on February 22, 2011. As of that delinquency date the running of

² The record herein does not include a copy of any modified order.

petitioner's period of post-release supervision was again interrupted (*see* Penal Law §70.45(5)(d)(i)) with 7 months and 4 days still owing to the May 8, 2011 adjusted maximum expiration date thereof. The ALJ presiding at the February 22, 2011 final parole revocation hearing imposed a delinquent time assessment directing that petitioner be held to his maximum expiration date.

Petitioner was re-returned to DOCS custody, as a post-release supervision violator, on March 1, 2011 certified as entitled to 148 days of parole jail time credit, apparently covering the period from petitioner's October 4, 2010 delinquency date until his return to DOCS custody. The parole jail time credit was applied against the interrupted 2001 determinate term (*see* Penal Law §70.45(5)(d)(iv)), reducing the time previously held in abeyance against such term from 5 months and 29 days to 1 month and 1 day. The 1 month and 1 day still held in abeyance against petitioner's 2001 determinate term recommenced running upon his March 1, 2011 return to DOCS custody. *See* Penal Law §70.45(5)(a). Only after petitioner completed serving that 1 year and 1 day period did the running of the 7 months and 4 days still owed to the adjusted maximum expiration date of the 3-year period of post-release supervision recommence, with petitioner remaining in DOCS custody pursuant to the delinquent time assessment imposed following the February 22, 2011 final parole revocation hearing. *See* Penal Law §70.45(5)(d)(iv). DOCS officials thus determined the current maximum expiration date of petitioner's 2001 determinate term, including the 3-year period of post-release supervision, as November 6, 2011 (1 month and 1 day owed against the 7-year determinate term plus 7 months and 4 days owed against the 3-year period of post-release supervision running, in sequence,

from petitioner's March 1, 2011 return to DOCS custody). The Court finds no error in these calculations.

To the extent petitioner specifically alleges that he was not given "credit" for the 4 months and 12 days he spent at Willard, the Court finds such allegation to be without merit. Although the Court is unable to determine from the record precisely when petitioner was at Willard, his time at that facility/program must have occurred between February 22, 2010, when he was return to DOCS custody as a post-release supervision violator for the first time, and July 13, 2010, when he was re-released from DOCS custody to post-release parole supervision. As alluded to previously, that entire period of time, indeed the entire period of time from February 22, 2010 until the October 4, 2010 delinquency date, was properly applied by DOCS officials against petitioner's 3-year period of post-release supervision.

The Court also rejects petitioner's specific assertion that he was not credited for the 4 months and 28 days petitioner spent at the Orange County Jail following his second parole violation. That time period represents the entire 148 days of parole jail time certified by the New York State Board of Parole (Executive Law §259-c(12)) and properly applied by DOCS officials against the time held in abeyance on petitioner's 7-year determinate term pursuant to Penal Law §70.45(5)(d)(iv).

Citing L 2008, ch 141, petitioner asserts that in his Reply that the provisions of Penal Law §70.45(5)(d)(iv) are not applicable to his case since the statutory provision in question was enacted after he was sentenced. The Court finds, however, that the petitioner is simply wrong on this point. Penal Law §70.45(5)(d)(iv) was part of the original codification of Penal Law §70.45 enacted under L 1998, ch 1, §15 and applicable

to offenses committed on or after September 1, 1998. L 1998, ch 1, §44. The only amendment to Penal Law §70.45(5)(d)(iv) is unrelated to the issues raised in this proceeding. *See* L 2007, ch 56, pt E, §5. L 2008, ch 141, cited by petitioner, amended Penal Law §70.45(1) in a manner not relevant to this proceeding. *See Id* at §3.

Finally, the Court notes that on the written Parole Revocation Decision Notice form, prepared by the ALJ presiding at petitioner's February 22, 2011 final parole revocation hearing, the portion of the form captioned "Time Remaining on Undischarged Portion of Sentence [7-year determinate term] as of the sustained delinquency date [October 4, 2010]" was left blank and the portion of the notice form captioned "Time Remaining on Undischarged Portion of Post-Release Supervision as of the sustained delinquency date" was filed in as 0 years, 5 months and 4 days. Both of these entries are erroneous. As of the October 4, 2010 modified delinquency date petitioner still owed 5 months and 29 days (held in abeyance) against his 7-year determinate term, although that figure was subsequently reduced to 1 year and 1 day upon application of 148 days of parole jail time credit. In addition, as of the October 4, 2010 modified delinquency date petitioner owed 7 months and 4 days (not 5 months and 4 days) to the adjusted maximum expiration date of the 3-year period of post-release supervision. It is also noted that the Parole Revocation Decision Notice sets forth the ALJ's estimate that the delinquent time assessment would expire on May 8, 2011.³

³ The May 8, 2011 date appears to reflect the running of the 7 months and 4 days still owed to the adjusted maximum expiration date of petitioner's 3-year period of post-release supervision from the October 4, 2010 modified delinquency date. The estimate, however, fails to take into account the 5 months and 29 days held in abeyance against petitioner's underlying 7-year determinate term as of the modified delinquency date.

To the extent anything in the petition might be construed as assertions that the respondent was bound by the ALJ's statements with regard to the time remaining on the undischarged portion of the underlying determinate term, the time remaining on the undischarged portion on the period of the post-release supervision and/or the estimated expiration date of the delinquent time assessment, the Court rejects such assertions. While the ALJ presiding at petitioner's February 22, 2011 final parole revocation hearing, acting as an appointed representative of the New York State Board of Parole, was authorized to issue a determination revoking petitioner's post-release supervision and imposing a delinquent time assessment (*see* Executive Law §§259-d(1) and 259-i(3)(f)(x)(D)), neither the New York State Board of Parole nor the presiding ALJ had any statutory or regulatory authority to make binding determinations with respect to the time remaining on the undischarged portion of petitioner's underlying determinate sentence, the time remaining on the undischarged portion of petitioner's period of post-release supervision and/or the expiration date of the delinquent time assessment. All of these sentence calculation functions fall within the authority of the New York State Department of Correctional Services and that department is not bound by the findings/estimates of the presiding ALJ.

This point underscores the Court's ongoing concern regarding the pitfalls associated with settlement negotiations at final parole revocation hearings where findings, tentative findings and/or estimates are made with respect to the amount of time an alleged parole violator will remain in DOCS custody before reaching the maximum expiration date of his/her underlying sentence(s). This concern is particularly relevant where, as here, the alleged parole violator was sentenced to a determinate term of

imprisonment (with a period of post-release supervision), released from DOCS custody to post-release supervision and later charged with violating the conditions of his/her release. Such situations often result in complicated sentence calculations involving the interplay between the running/interruption of the underlying determinate term and the running/interruption of the period of post-release supervision.

Although the Court, in an appropriate case, might be called upon to consider whether a plea agreement at a final parole revocation hearing was so tainted by misunderstandings with respect to the impact of a guilty plea/agreed upon time assessment on the length of the alleged violator's exposure to further DOCS incarceration so as to render such agreement unenforceable, it would appear that remittal to the Board of Parole, rather than immediate release from DOCS custody, would be the proper remedy if the Court so found. In any event, petitioner has not raised such issue in this proceeding and, indeed, the Division/Board of Parole is not a named respondent herein.

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: July 14, 2011 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge