Matter of Leshore v Doldo

2012 NY Slip Op 30915(U)

January 10, 2012

Supreme Court, St. Lawrence County

Docket Number: 136992

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
VERNON LESHORE,#11-R-2116,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2011-0661.29
INDEX #136992
ORI # NY044015J

-against-

NUNZIO DOLDO, Acting Superintendent,
Gouverneur Correctional Facility, and **BRIAN**
FISCHER, Commissioner, NYS Department
of Corrections and Community Supervision,

Respondents.

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This proceeding was originated by the Petition For Writ of Habeas Corpus of Vernon Leshore, verified on August 22, 2011 and filed in the St. Lawrence County Clerk's office on September 9, 2011. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. The Court issued an Order to Show Cause on September 15, 2011 and a Supplemental Order to Show Cause on November 2, 2011. The Court has since received and reviewed respondents' Return, including Confidential Exhibits C and D, verified on November 23, 2011, as well as petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on December 21, 2011.

On January 8, 2003 petitioner was sentenced in Supreme Court, Queens County, as a second felony offender, to an indeterminate sentence of 4½ to 9 years upon his conviction of the crime of Criminal Sale of a Controlled Substance 3°, a class B felony offense defined in Article 220 of the Penal Law. He was received into DOCCS custody on January 31, 2003 and presumptively released therefrom to parole supervision (*see*

Correction Law §806 and 7 NYCRR Part 2200) on April 28, 2005. His presumptive release was revoked, however, with a sustained delinquency date of August 17, 2007, following a final parole revocation hearing conducted on November 16, 2007. The Administrative Law Judge presiding at petitioner's final hearing imposed a 15-month delinquent time assessment estimated to expire on November 24, 2008. Petitioner was received back into DOCCS custody on February 15, 2008 with a "tentative release date" of November 24, 2008.

Although the record is not clear, this Court presumes that petitioner was, in fact, re-released from DOCCS custody to parole supervision on November 24, 2008. On or about June 30, 2010, however, he was arrested and taken into local custody in connection with new criminal charges. On January 4, 2011, in the absence of any parole violation proceedings undertaken in the aftermath of the incident underlying petitioner's June 30, 2010 arrest, the Division of Parole issued a "Final Discharge" certificate, apparently as a result of the November 24, 2010 mandatory merit termination of petitioner's sentence pursuant to Executive Law §259-j(3-a), as it then existed.

Executive Law §259-j(3-a), as amended by L 2008, ch 486, § 1, effective August 5, 2008, read, in relevant part, as follows: "The division of parole must grant termination of sentence after three years of unrevoked presumptive release or parole to a person serving an indeterminate sentence for a class A felony offense defined in article two hundred twenty of the penal law, and must grant termination of sentence after two years of unrevoked presumptive release or parole to a person serving an indeterminate sentence for any other felony offense defined in article two hundred twenty . . . of the penal law."

Prior to the enactment of L 2008, ch 486, §1, Executive Law §259-j(3-a) read in identical fashion except without either reference to "presumptive release."[1]

On June 6, 2011 petitioner was sentenced in Supreme Court, Nassau County, as a second felony offender, to an indeterminate sentence of 2 to 4 years upon his conviction of the crime of Attempted Assault 2°. Petitioner was received into DOCCS custody on June 17, 2011 initially certified by the Nassau County Sheriff's Department as entitled to 352 days of jail time credit covering the period from petitioner's June 30, 2010 arrest through June 16, 2011. Exhibits attached to petitioner's Reply, however, suggest that on October 21, 2011, after this proceeding had been commenced, an amended jail time credit certificate was issued reducing petitioner's entitlement of jail time credit to 163 days covering the period from January 5, 2011 - the day after the issuance of the certificate discharging petitioner from parole - to June 16, 2011.

In the petition it is argued, in effect, that as of April 28, 2007 - two years after his presumptive release - petitioner should have been discharged from parole upon the mandatory merit termination of his 2003 sentence pursuant to Executive Law §259-j(3-a), as it existed on April 28, 2007. Thus, according to petitioner, he was unlawfully subject to parole violation proceedings in connection with the incident(s) underlying the August 17, 2007 delinquency date and unlawfully returned to DOCCS custody, as a presumptive release violator, on February 15, 2008.

Respondents initially counter that petitioner's claim of entitlement to immediate release from DOCCS custody ignores the fact that a new indeterminate sentence of 2 to

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[1] The Court notes that Executive Law §259-j(3-a) was deleted by L 2011, ch 62, Part C, Subpart A, §38-g, effective March 31, 2011. However, the substance of the former Executive Law §259-j(3-a), as it existed after the 2008 amendment, was re-codified into newly-enacted Correction Law §205(4) pursuant to L 2011, ch 62, Part C, Subpart A, §32, also effective March 31, 2011.

4 years was imposed against him on June 6, 2011. While petitioner insists in his Reply that the new sentence has not been ignored, it is clear to the Court that the imposition of the new sentence precludes habeas corpus relief even if petitioner's argument with respect to mandatory merit termination of his 2003 sentence prevailed. Under that scenario petitioner would presumably be entitled to 352 days of jail time credit against his 2011 sentence covering the entire period from his June 30, 2010 arrest until his return to DOCCS custody on June 17, 2011. Running the 4-year maximum term of the 2011 sentence from June 17, 2011, less 352 days of jail time credit, a maximum expiration date of June 24, 2014 would be produced. Thus, even if this Court were to determine that petitioner's 2003 sentence should have been terminated as of April 28. 2007 and, therefore, that the subsequent parole violation should be vacated, petitioner's ongoing incarceration in DOCCS custody pursuant to the unchallenged June 6, 2011 conviction/sentencing precludes habeas corpus relief. *See People ex rel Brown v. New York State Division of Parole*, 70 NY2d 391 and *People ex rel Donald v. O'Flynn*, 303 AD2d 953.

Under the circumstances herein the Court declines to convert this habeas corpus proceeding into a proceeding for judgment pursuant to Article 78 of the CPLR. The argument that the pre-2008 amendment version of Executive Law §259-j(3-a) should be construed as applicable to presumptive releasees was already advanced by petitioner, but rejected, in the context of a habeas corpus proceeding brought in Bronx County. *People ex rel Leshore v. Warden, Anna M. Cross Center, et al*, Bronx County Index Number 250696-07, December 24, 2007. That determination would bar on, *res judicata* grounds, re-litigation of the same issue in a subsequent CPLR Article 78 proceeding. It is also noted that after petitioner's habeas corpus proceeding was decided in Bronx County, the Appellate Division, Third Department expressly determined that the pre-2008

amendment version of Executive Law §259-j(3-a) was not applicable to presumptive releasees. *See Sweeney v. Dennison*, 52 AD3d 882. This Court notes that the determination of the Appellate Division, Third Department, in *Sweeney* represents the reversal of a lower court determination cited by petitioner in his Reply.

The issue of whether the 2008 amendment to Executive Law §259-j(3-a) should be applied retroactively to the February 12, 2005 effective date of the originally enacted Executive Law §259-j(3-a)(*see People ex rel Rosa v. Warden, Edgecombe Correctional Facility*, 80 AD3d 525) is not raised in this proceeding. In any event, any effort by petitioner to effectively compel the conversation of post-June 30, 2010 sentence time, apparently applied by DOCCS officials against his 2003 sentence, into additional jail time credit against his 2011 sentence must be pursued in the context of proceeding where the Nassau County Sheriff's Department is a party. *See Neal v. Goord*, 34 AD3d 1142.

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: January 10, 2012, at
Indian Lake, New York

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S. Peter Feldstein
Acting Justice, Supreme Court