

Matter of Broome v Fischer

2012 NY Slip Op 32722(U)

October 29, 2012

Supreme Court, Wyoming County

Docket Number: 21,138-11

Judge: Mark H. Dadd

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At a term of Supreme Court held in and for
the County of Wyoming, at the Courthouse
in Warsaw, New York, on October 29, 2012.

PRESENT: HONORABLE MARK H. DADD
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT : COUNTY OF WYOMING

In the Matter of the Application of
KARL BROOME, #08-B-0540, *Petitioner*

v.

Index No. 21,138-11

BRIAN FISCHER, Commissioner, NYS Department
of Corrections and Community Supervision, *Respondent*

For the Petitioner
WYOMING COUNTY-ATTICA LEGAL
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For the Respondent
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MEMORANDUM AND JUDGMENT

By amended petition pursuant to Article 78 of the CPLR verified on July 27, 2012, Karl Broome challenges the respondent's computation of his sentence. The amended petition incorporates by reference the petitioner's original petition verified October 21, 2011. Petitioner is represented by counsel assigned by the order to show cause dated November 18, 2011. The

respondent requests that the amended petition be denied upon the answer, dated September 12, 2012, which incorporates by reference the respondent's May 2, 2012, answer to the petitioner's original petition.

The petitioner is incarcerated pursuant to an aggregate sentence that he received from the Onondaga County Court on February 6, 2008 for his conviction on one count of Criminal Sale of a Controlled Substance in the Third Degree, four counts of Criminal Possession of a Controlled Substance in the Third Degree, and one count of Criminal Possession of a Controlled Substance in the Fourth Degree. The Court imposed six, concurrent, four-year determinate prison terms, each followed by a one-year period of Post Release Supervision [PRS]. The respondent took custody of the petitioner on February 22, 2008. The initial calculation of the petitioner's sentence, after the subtraction of the 95 days that the petitioner had spent in the Onondaga County Jail upon the charges, resulted in a maximum expiration date for the prison term of November 16, 2011, a merit eligibility date of September 20, 2010, and a conditional release date of April 18, 2011.

The petitioner states in his original petition that he, in fact, was granted all of the merit time and good behavior credits for which he was eligible. He claims that he would have been released to PRS on September 20, 2010, had he not at that time refused to sign the certificate of release that he was offered. According to the petitioner, he initially refused to sign the certificate because it contained what he believed to be an inaccurate calculation of his PRS term, and because it contained a condition – that he “Report immediately to Syracuse” – which he did not wish to accept. On January 4, 2011, however, he changed his mind and agreed to sign the certificate of release because, he states, he was “in too much pain to argue.”

The petitioner was then initially released to PRS on January 7, 2011. He was later declared to be delinquent as of January 12, 2011, however. Then, after being “restored” to PRS pending transfer to the Willard Drug Treatment Campus on April 18, 2011, he was again declared delinquent as of April 28, 2011, thereafter returning to the custody of the respondent on May 19, 2011. Subsequently released to PRS once again on December 30, 2011, the

petitioner was most recently returned to the respondent's custody as a PRS violator on April 29, 2012, after being declared delinquent as of the day of his release.

The petitioner contends that his sentence should be calculated as if he began to serve his PRS term the day that he became eligible for merit release on September 20, 2010. This is not correct. Pursuant to the terms of Penal Law §70.45(5)(a), a PRS term commences upon release, not upon eligibility for release. Therefore, when the petitioner was initially released to PRS on January 7, 2011, the respondent correctly calculated the one-year PRS term as running from that day to an expected PRS maximum expiration date of January 7, 2012. Also, since the petitioner remained in custody until January 7, 2011, all of the time that he spent in prison prior to that date must be credited to the unexpired determinate prison term, not to the PRS term which had yet to commence. Thus, upon the petitioner's release on January 7, 2011, the respondent correctly calculated that he had 10 months and 9 days remaining to be served on the determinate term. In accordance with §70.45(5)(a), these 10 months and 9 days were held in abeyance pending the petitioner's completion of the PRS term.

Between January 7, 2011 and the petitioner's return to State custody on May 19, 2011, the petitioner spent 116 days in jail – January 13, 2011 to April 17, 2011, and April 28, 2011 to May 18, 2011. When recalculating the petitioner's sentence following his return to State custody on May 19, 2011, the respondent correctly credited these 116 days of "parole jail time" to the petitioner's determinate term pursuant to Penal Law §70.40(3)(c), then leaving him with 6 months and 13 days to serve to complete it. This calculation resulted in a maximum expiration date for the determinate term of December 2, 2011. The respondent also recalculated the delinquent time owed on the PRS term, reducing it by 15 days – 5 days for the period from his release date of January 7, 2011 to his delinquency date of January 12, 2011, and by 10 days for the period from his release date of April 18, 2011 to his delinquency date of April 28, 2011. This left the petitioner with 11 months and 15 days still to serve under PRS. Calculating the remaining PRS term based upon a commencement date of December 2, 2011 – the maximum expiration date calculated for the petitioner's determinate prison term – the respondent arrived

at an adjusted PRS maximum expiration date of November 17, 2012.

As noted above, the petitioner remained in prison from May 19, 2011, until he was again released to PRS on December 30, 2011, only to be declared delinquent again as of the same day. Following his December release, he did not actually return again to the custody of the respondent until March 29, 2012, when he began to serve a time assessment for violating PRS. After the petitioner's return to the respondent's custody, the respondent made the current calculation of the sentence. Because the petitioner's determinate prison term expired on December 2, 2011, the current calculation credits the PRS term with the 90 days that the petitioner spent in jail between December 30, 2011, and March 29, 2012. This is in accordance with Penal Law §70.45(5)(d) which requires that "[a]ny time spent in custody solely pursuant to such delinquency after completion of the maximum or aggregate maximum term of the sentence or sentences shall be credited to the period of post-release supervision, if any."

The current calculation results in a present PRS Maximum Expiration date of November 16, 2012. In his May 2, 2012 letter, submitted as an exhibit to the answer, Richard de Simone, Esq., the respondent's Associate Counsel in Charge of the Office of Sentencing Review, describes the method used to make this calculation. The most recent delinquency date of December 30, 2011, was subtracted from the previous adjusted PRS maximum expiration date of November 17, 2012, yielding 10 months and 17 days of delinquent time owed to PRS. From this, the 90 days of parole jail time were subtracted leaving 7 months and 17 days net delinquent time owed to PRS. These 7 months and 17 days were then added to the date of the petitioner's most recent return to the respondent's custody – March 29, 2012 – resulting in the present PRS maximum expiration date of November 16, 2012.

In the amended petition, the petitioner's attorney argues that the respondent has failed to account for the 28 days that the petitioner remained in prison between the expiration of his determinate prison term on December 2, 2011, and his most recent release to PRS on December 30, 2011. The amended petition asserts that, in making the current calculation, the "Respondent did not credit that 28 days toward anything." This contention ignores the fact that

the present PRS maximum expiration date has been calculated on the basis of the previous adjusted PRS maximum expiration date of November 17, 2012. It must be recalled that this date, November 17, 2012, was arrived at by adding 11 months and 15 days – the delinquent time owed to PRS as of May 19, 2011 – to the maximum expiration date calculated for the petitioner’s determinate prison term – December 2, 2011. Thus, by using the previous adjusted PRS maximum expiration date as the starting point for the current calculation, the respondent has, in fact, credited the 28 days in question to the PRS term. The initial subtraction of the most recent delinquency date – December 30, 2011 – from the previous PRS maximum expiration date – November 17, 2012 – has the effect of reducing the petitioner’s delinquent time owed to PRS by precisely 28 days – from 11 months and 15 days to 10 months and 17 days. The additional subtraction of 90 days of jail time then yields 7 months and 17 days of net delinquent time owed to PRS which, to reiterate, when added to March 29, 2012, results in the present PRS maximum expiration date of November 16, 2012.

The Court finds that the respondent’s current calculation of the petitioner’s sentence is correct.

NOW, THEREFORE, it is hereby

ORDERED that the petition is denied.

DATED: October 29, 2012



Acting Supreme Court Justice