

Matter of McCarthy v Fischer

2012 NY Slip Op 32807(U)

October 30, 2012

Supreme Court, Franklin County

Docket Number: 2012-42

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
TYRONE McCARTHA, #10-A-4287,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

**DECISION AND JUDGMENT
RJI #16-1-2012-0017.08
INDEX # 2012-42
ORI #NY016015J**

-against-

BRIAN S. FISCHER, Commissioner,
New York State Department of Corrections
and Community Supervision, and **DR. SCHIRO**,
Commissioner, NYC Department of Corrections,
Respondents.

X

The Court has before it the Amended Petition for judgment pursuant to Article 78 of the CPLR of Tyrone McCartha, dated May 20, 2012, received directly in chambers on May 24, 2012 and filed in the Franklin County Clerk's office on May 30, 2012. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the time computation associated with his ongoing incarceration in DOCCS custody. An Order to Show Cause was issued on May 25, 2012. The Court has since received and reviewed the Answer and Return of the respondent Fischer, verified on July 27, 2012, as well as the Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge, dated July 27, 2012 and submitted on behalf of the respondent Fischer. The Court has also received and reviewed petitioner's Reply thereto, verified on August 16, 2012 and filed in the Franklin County Clerk's office on August 20, 2012.¹

¹ In the Amended Petition only Brian S. Fischer, Commissioner, New York State Department of Corrections and Community Supervision, was named as a respondent. Since, however, DOCCS authorities are bound by the jail time certified by local authority (County Sheriff or Commissioner, NYC Department

On September 2, 1997 petitioner was sentenced in Supreme Court, New York County, to a controlling indeterminate sentence of 7 to 14 years upon his convictions of the crimes of Robbery 1^o and Attempted Murder 2^o. He was received into DOCCS custody on September 26, 1997 certified as entitled to 333 days of jail time credit. At that time DOCCS officials calculated the maximum expiration date of petitioner's merged sentences as October 22, 2010.

Petitioner was conditionally released from DOCCS custody to parole supervision on August 22, 2006. On or about December 9, 2008, however, a New York parole violation warrant was lodged against petitioner in Louisiana as a detainer. As of December 16, 2008, following extradition from Louisiana, petitioner was held in local custody in New York City pursuant to the underlying parole warrant. A final parole revocation hearing was conducted at Rikers Island on December 29, 2008. As a result of the final hearing petitioner's release was revoked, with a sustained delinquency date of November 10, 2008, and a 12-month delinquent time assessment was imposed. On January 22, 2009 petitioner apparently spent one day in local custody in Westchester County in connection with new criminal charges stemming from act(s) committed while under parole supervision but unrelated to the parole violation.

of Correction) and can neither add nor subtract from the time so certified (*see* Correction Law §600-a, *Neal v. Goord*, 34 AD3d 1142 and *Torres v. Bennett*, 271 AD2d 830), this Court, in the Order to Show Cause of May 25, 2012, directed that Dr. Dora Schriro, Commissioner, NYC Department of Correction, be added as an additional respondent. Unfortunately, although it appears that petitioner spent some time in local custody in New York City, the Certificate of Jail Time Credit/Amended Certificate of Jail Time Credit at issue in this proceeding was issued by the Westchester County Sheriff, rather than the NYC Commissioner. Thus, although the respondent Schriro submitted no answering papers in this proceeding, it is difficult to envision that she could have submitted any thing of relevance other than informing the Court that she issued no Certificate of Jail Time Credit in connection with petitioner. Rather than holding the disposition of this proceeding in abeyance pending service on, and the receipt of answering papers from, the Westchester County Sheriff, the Court finds it appropriate to rely upon the arguments with respect to jail time credit advanced by respondent Fischer.

On March 18, 2009 petitioner was returned to DOCCS custody, as a conditional release violator, and was untimely determined to be entitled to 97 days of parole jail time credit (Penal Law §70.40(3)(c)) covering the period from December 10, 2008 through March 17, 2009, less one day (January 22, 2009). Less than three weeks later, on April 6, 2009, petitioner was apparently transferred to local custody in Westchester County in connection with an additional set of criminal charges stemming from act(s) committed while under parole supervision but unrelated to the parole violation. On December 16, 2009, upon expiration of the 12-month delinquent time assessment imposed following the December 29, 2008 final parole revocation hearing, petitioner was re-released from DOCCS custody to parole supervision but still held in local custody in Westchester County in connection with the pending criminal charges.

On August 20, 2010 petitioner was sentenced in Westchester County Court, as a second felony offender, to a determinate term of 7 years, with 5 years post-release supervision, upon his conviction of the crime of Burglary 2^o. He was received back into DOCCS custody on September 3, 2010 initially certified by the Westchester County Sheriff as entitled to 262 days of jail time credit covering January 22, 2009 as well as the period from December 16, 2009 (when petitioner was paroled to local custody) through September 2, 2010. Upon petitioner's return to DOCCS custody a Notice of Final Declaration of Delinquency by Board of Parole was issued notifying him that based upon the August 20, 2010 Westchester County conviction a final declaration of delinquency had been issued, with a delinquency date of August 20, 2010, pursuant to Executive Law §259-i(3)(d)(iii). On September 16, 2010 an amended Jail Time Certificate was issued by the Westchester County Sheriff reducing petitioner's entitlement to jail time credit from 262

days to 15 days covering January 22, 2009 as well as the period from August 20, 2010 (delinquency date) through September 2, 2010.

This Court initially rejects petitioner's contention that his 2010 determinate sentence should have been calculated as running concurrently, rather than consecutively, with respect to the unexpired maximum term of his 1997 indeterminate sentence. Since the 2010 sentence was imposed upon petitioner as a second felony offender (Penal Law §70.06), DOCCS officials properly calculated such sentence as running consecutively, rather than concurrently, with respect to the undischarged maximum term of the 1997 sentence notwithstanding the 2010 sentencing court's failure to so specify. *See People ex rel Gill v. Greene* 12 NY3d 1, *rev'g* 48 AD3d 1003, *cert. denied sub nom Gill v. Rock*, 130 S. Ct. 86, and *Lagas v. New York State Department of Correctional Services*, 78 AD3d 1344, *lv den* 16 NY3d 703, *cert. denied* 131 S. Ct. 2951.

Citing *Sparago v. New York State Board of Parole*, 132 AD2d 881, *mod* 71 NY2d 943, petitioner asserts an entitlement to additional jail time credit from April 6, 2009 (when he was apparently transferred from DOCCS custody to local custody in Westchester County in connection with the criminal charges that resulted in the 2010 sentence) to the August 20, 2010 delinquency date. The calculation of jail time credit is controlled by Penal Law §70.30(3) which provides, in relevant part, as follows:

“The term of . . . a determinate sentence . . . imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence . . . The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the . . . maximum term of any previously imposed sentence . . .” (Emphasis added).

In the case at bar, however, the entire time period from April 6, 2009 to August 20, 2010 was credited against the maximum term of petitioner's previously-imposed 1997 indeterminate sentence.

With respect to that portion of the time period from April 6, 2009 to December 16, 2009 (when petitioner was re-released from DOCCS custody to parole supervision but still held in local custody in Westchester County pursuant to the pending criminal charges), petitioner was not under parole supervision but, rather, actually serving his 1997 sentence. Petitioner's presence in local custody in Westchester County from April 6, 2009 to December 16, 2009 simply represented an accommodation whereby a DOCCS inmate serving a previously imposed sentence is transferred to local custody to facilitate the disposition of additional criminal charges pending in the local jurisdiction. In such circumstances, the Court of Appeals has long held that parole jail time credit is not available with respect to the sentence ultimately imposed in connection with the additional charges. *See Canada v. McGinnis*, 36 AD2d 830, *aff'd* 29 NY2d 853 and *Kalamis v. Smith*, 51 AD2d 859, *aff'd* 42 NY2d 191 at 195-200.

The facts and circumstances in *Sparago* are fundamentally distinguishable from those in the case at bar, at least up until December 16, 2009, since Mr. Sparago sought jail time credit for a period of time he spent on parole that was uninterrupted by a delinquency. The Appellate Division, Third Department, in *Sparago* found, in effect, that the time period should not be considered as "credited" against a previously-imposed sentence within the meaning of Penal Law §70.30(3) since "[s]uch a crediting . . . occurs when the previously imposed sentence is duly interrupted [by a parole delinquency], with jail time accruing during the period of interruption." 132 AD2d 881 at 883.

With respect to the time period from December 16, 2009 to the August 20, 2010 delinquency date, the limiting interpretation of the Penal Law §70.30(3) proscription against double crediting enunciated by the Appellate Division, Third Department, in *Sparago*, as quoted in the preceding paragraph, might arguably be applicable.² This Court notes, however, that although the Third Department issued its decision in *Sparago* more than 25 years ago, the relevant holding therein remains uncited in any officially-reported case. More importantly, since 1987 the Appellate Division, Third Department, has issued a number of decisions at odds with the relevant rationale expressed in *Sparago*. See *Booker v. Laffin*, 98 AD3d 1213, *Murphy v. Wells*, 95 AD3d 1575, *lv den* 19 NY3d 811, *People ex rel Moultrie v. Yelich*, 95 AD3d 1571 and *DuBois v. Goord*, 271 AD2d 874.

This Court ultimately concludes that the proscription against double crediting set forth in Penal Law §70.30(3) is applicable with respect to the entire time period (April 6,

² In addition to its determination with respect to the jail time credit issue, the Appellate Division in *Sparago* also determined that Mr. Sparago's most recently imposed (1984) sentence had to run consecutively with respect to the undischarged term of his previously imposed (1980) sentence. It also found that Mr. Sparago's ". . . maximum release date was properly calculated by aggregating the undischarged portion of the 1980 maximum and the 1984 maximum." 132 AD2d 881 at 882. There is nothing in the Court of Appeals decision in *Sparago* (71 NY2d 943) to suggest that such court was called upon to review the determination of the Appellate Division, Third Department, with respect to the jail time credit issue. After noting that the Appellate Division had reversed Supreme Court with regard to the jail time credit issue, the Court of Appeals further noted that "[t]he Appellate Division agreed with Supreme Court on the issue now before us, however, holding that because petitioner's sentences were to run consecutively . . . they had to be aggregated . . . It [the Appellate Division] did not address which aggregation method used by respondents was proper, but implicitly held the recalculated sentence was computed using the correct method. We agree with the Appellate Division that petitioner's sentences had to be aggregated, but disagree, under these facts, as to the aggregation method which should be used." 71 NY2d 943 at 945 (citations omitted) (emphasis added). Indeed, the Court of Appeals' only specific mention of the jail time credit issue occurred after it set forth its reasoning with respect to the sentence aggregation issue, stating as follows: "This [aggregation] method not only effectuates the stipulation which provided petitioner's parole would not be revoked, but also credits him with the 217 days of jail time to which the Appellate Division found him entitled." *Id* at 946. It is therefore the finding of this Court (Supreme Court, Franklin County) that the *Sparago* holding with respect to the jail time credit issue, as well as the rationale underlying that holding, is that of the Appellate Division, Third Department, rather than the Court of Appeals.

2009 to August 20, 2010) for which petitioner seeks additional jail time credit. Accordingly, this Court finds no error in the current certification of petitioner's entitlement of jail time credit against his August 20, 2010 determinate sentence.

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: October 30, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice