

Matter of Wray v Jock
2013 NY Slip Op 30212(U)
February 4, 2013
Sup Ct, Franklin County
Docket Number: 2012-978
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
NATHAN WRAY, #07-A-0334,

Petitioner,

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

-against-

DECISION AND JUDGMENT

RJI #16-1-2012-0461.111

INDEX # 2012-978

ORI #NY016015J

E. JOCK, Coordinator, Inmate Records,
ANDREA EVANS, Chairwoman, New York
State Board of Parole, **BRUCE YELICH**,
Superintendent, Bare Hill Correctional Facility,
and **BRIAN FISCHER**, Commissioner, NYS
Department of Corrections and Community
Supervision,

Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Nathan Wray, verified on October 10, 2012, and filed in the Franklin County Clerk's office on October 31, 2012 . Petitioner, who was an inmate at the Bare Hill Correctional Facility, is challenging the time computation associated with his current incarceration in DOCCS custody. The Court issued an Order to Show Cause on November 13, 2012 and has received and reviewed respondents' Answer, verified on December 20, 2012 and supported by the December 20, 2012 Affirmation of Kristen Quaresimo, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's Reply thereto, dated January 4, 2013 and filed in the Franklin County Clerk's office on January 7, 2013.

On January 9, 2007 petitioner was sentenced in Albany County Court to a determinate term of 3 years, with 2 years post-release supervision, and a consecutive indeterminate sentence of 2 to 4 years upon his convictions of the crimes of Attempted

Criminal Possession of a Controlled Substance 3° and Attempted Assault 2°. He was received into DOCCS custody on January 18, 2007 certified as entitled to 94 days of jail time credit. At that time DOCCS officials calculated the aggregate maximum term of petitioner's determinate and indeterminate sentences as 5 years (*see* Penal Law §70.30(1)(d)) and further calculated the original maximum expiration date of such sentences as October 13, 2011. These calculations are not at issue in this proceeding.

On May 23, 2011 petitioner was released from DOCCS custody to post-release supervision. Upon such release the running of petitioner's 5-year aggregate maximum term was interrupted, with the 4 months and 20 days still owing to the original maximum expiration date thereof "held in abeyance" pursuant to Penal Law §70.45(5)(a). Also as of petitioner's May 23, 2011 release, the running of his 2-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the maximum expiration date of that period initially calculated as May 23, 2013. Petitioner's post-release supervision, however, was revoked, with a delinquency date modified from October 17, 2011 to November 16, 2011. The modified delinquency interrupted the running of petitioner's period of post-release supervision (*see* Penal Law §70.45(5)(d)(i)) with 1 year, 6 months and 7 days still owed to the originally-calculated May 23, 2013 maximum expiration date of such period.

On December 16, 2011 petitioner was restored to post-release supervision at the Willard Drug Treatment program, certified as entitled to 30 days of parole jail time credit (Penal Law §70.40(3)(c)) covering the period from his November 16, 2011 modified delinquency date to his restoration to parole supervision. The parole jail time credit was applied against the interrupted 2007 determinate/indeterminate aggregate maximum term (*see* Penal Law §70.45(5)(d)(iv)), reducing the time previously held in abeyance against such term from 4 months and 20 days to 3 months and 20 days.

As of petitioner's December 16, 2011 restoration to post-release supervision at Willard, the running of the time still remaining against his period of post-release supervision (1 year, 6 months and 7 days) re-commenced, with the adjusted maximum expiration date of the period of post-release supervision calculated as June 23, 2013. Petitioner's post-release supervision, however, was again revoked, with a delinquency date of January 11, 2012 and an 11-month delinquent time assessment was imposed. This second delinquency again interrupted the running of petitioner's period of post-release supervision, with 1 year, 5 months and 12 days still owed to the June 23, 2013 adjusted maximum expiration date of such period.

Petitioner was returned to DOCCS custody as a post-release supervision violator on February 16, 2012, certified as entitled to 36 days of parole jail time credit covering the period from his January 11, 2012 delinquency date to his return to custody. The parole jail time credit was applied against the interrupted 2007 determinate/indeterminate aggregate maximum term, reducing the time previously held in abeyance against such term from 3 months and 20 days to 2 months and 14 days. The 2 months and 14 days still held in abeyance against petitioner's 2007 determinate/indeterminate aggregate maximum term recommenced running as of his February 16, 2012 return to DOCCS custody (*see* Penal Law §70.45(a)), with the aggregate maximum expiration date of such term reached as of April 30, 2012. As of that date the 1 year, 5 months and 12 days still owing against petitioner's 2-year period of post-release supervision re-commenced running (*see* Penal Law §70.45(5)(d)(iv)) with the maximum expiration date thereof to be reached on October 12, 2013.

Petitioner remained incarcerated in DOCCS custody after April 30, 2012 pursuant to the 11-month delinquent time assessment. Such time assessment, however, apparently expired on December 11, 2012 and on that date petitioner was again released from DOCCS

custody to post-release supervision. As noted previously, the maximum expiration date of the period of post-release supervision is currently calculated as October 12, 2013.

The Court finds no error in DOCCS's calculations of petitioner's relevant sentencing dates. To the extent petitioner argues that respondents failed to implement the one-month delinquency date modification associated with his first parole violation, the Court finds that this argument is belied by the record. The running of petitioner's underlying 2007 sentence was not calculated as being interrupted until the November 16, 2011 modified delinquency date and the one month time period from the modified delinquency date to petitioner's restoration to parole supervision on December 16, 2011 was properly applied as parole jail time credit against the interrupted 2007 determinate/indeterminate aggregate maximum term rather than against the period of post-release supervision. *See* Penal Law §70.45(5)(d)(iv). In addition, petitioner's assertions to the contrary notwithstanding, that is clear to the Court that the determination of good behavior allowances pursuant to Correction Law §803 has nothing to do with the current sentence calculations.

Finally, the Court rejects petitioner's argument that DOCCS officials unlawfully overrode the directives of the sentencing judge. According to petitioner, the sentencing judge determined that petitioner would serve an aggregate maximum term of 5 years, which would expire on October 13, 2011, but that he was not found to be in violation of parole until November 16, 2011, after the maximum term had already expired. Petitioner, however, ignores the fact that in addition to the 5-year aggregate maximum term the sentencing judge also imposed a 2-year period of post-release supervision and that the running of the underlying 5-year aggregate maximum term was statutorily interrupted when he was released from DOCCS custody to post-release supervision. *See* Penal Law §70.45(5)(a). Pursuant to the statutory scheme set forth in Penal Law §70.45, as

described throughout this Decision and Judgment, the aggregate maximum term of petitioner's underlying sentences and his period of post-release supervision never ran at the same time. Had petitioner completed the period of post-release supervision with time still remaining held in abeyance against the underlying aggregate maximum term, he would have been entitled to have such remaining time "... credited with and diminished by such period of post-release supervision." Penal Law §70.45(5)(d). It is therefore ultimately within the control of the post-release supervision releasee to determine, through his/her behavior while subject to post-release supervision, whether or not the time held in abeyance on underlying sentence(s) would effectively run concurrently with, or consecutively to, the period of post-release supervision. As far as the petitioner in this proceeding is concerned, the fact that he will effectively end up serving the entire aggregate maximum term of his 2007 sentences consecutively with respect to the 2-year period of post-release supervision is the result of his multiple post-release supervision violations rather than any illegal sentence calculation on the part of DOCCS officials.

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: February 4, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice