

Matter of Ashley v Evans

2013 NY Slip Op 32918(U)

October 28, 2013

Sup Ct, Franklin County

Docket Number: 2013-521

Judge: S. Peter Feldstein

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

X

In the Matter of the Application of
RANDALL ASHLEY, #12-A-3063,
Petitioner,

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

DECISION AND JUDGMENT

RJI #16-1-2013-0249.73

INDEX # 2013-521

ORI #NY016015J

-against-

ANDREA W. EVANS, Chairwoman,
NYS Board of Parole, and **BRIAN S. 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 Randall Ashley, with Exhibits #1, 2 and 3, verified on June 10, 2013 and filed in the Franklin County Clerk's office on June 14, 2013. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the timeliness of the September 12, 2011 service upon him of a Notice of (Parole) Violation/Violation of Release Report. Petitioner is also challenging the time computation - specifically, the failure to establish a merit eligibility date - associated with his current incarceration in DOCCS custody. The Court issued an Order to Show Cause on June 19, 2013 and has received and reviewed respondents' Answer and Return, verified on August 9, 2013 and supported by the August 9, 2013 Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge. The Court has also received and reviewed petitioner's Reply thereto, sworn to on August 28, 2013 and filed in the Franklin County Clerk's office on September 3, 2013.

On December 8, 2005 petitioner was sentenced in Sullivan County Court to a determinate term of 7 years, with 3 years post-release supervision, upon his conviction of the crime of Criminal Possession of a Weapon 3^o under Penal Law §265.02(4). This Court notes that at the time petitioner committed the underlying criminal offense (March 9, 2005), as well as at the time of his conviction/sentencing, Criminal Possession of a Weapon 3^o under Penal Law §265.02(4) was designated as a class D violent felony offense pursuant to Penal Law §70.02(1)(c).¹

Petitioner was conditionally released from DOCCS custody to post-release parole supervision on March 4, 2011. On Thursday September 8, 2011, however, petitioner was arrested in connection with new criminal charges and confined in local custody at the Orange County Jail. On Monday September 12, 2011 he was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in seven respects. A preliminary hearing was waived and petitioner's final parole revocation hearing was ultimately adjourned to the K Calendar pending disposition of the new criminal charges.

On June 26, 2012 petitioner was sentenced in Orange County Court, as a second felony offender², to a determinate term of 6 years, with 3 years post-release supervision, upon his conviction of the crime of Criminal Possession of a Controlled Substance 3^o. He was received back into DOCCS custody on July 10, 2012 certified as entitled to 306 days

¹ Effective November 1, 2006, Penal Law §265.02(4) was repealed and the proscription against the conduct underlying the repealed subdivision (4) was transferred to the statute defining Criminal Possession of a Weapon 2^o (Penal Law §265.03(3)). *See* L 2006, ch 742, §§1 and 2. Thus, although Criminal Possession of a Weapon 3^o under Penal Law §265.02(4) is not currently designated as a class D violent felony offense, it was so designated at the time petitioner was sentenced in 2005. *See* L 2007, ch 7, §32.

² Although petitioner was originally sentenced on June 26, 2012, the second felony offender designation was not added until an amended Sentence and Commitment order was issued on August 6, 2012.

of jail time credit against the 2012 Orange County sentence covering the time period from his September 8, 2011 arrest to July 10, 2012. Upon petitioner's return to DOCCS custody a Notice of Final Declaration of Delinquency by Board of Parole was issued, notifying him “. . . that, based on the new [2012 Orange County] conviction and in accordance with Executive Law 259-i(3)(d)(iii), the Board of Parole has issued a final declaration of delinquency with a delinquency date of 9/8/11.”

In this proceeding petitioner first argues, in effect, that parole authorities violated the provisions of Executive Law §259-i(3)(c)(iii) by failing to serve him with the Notice of Violation/Violation of Release Report within three days after execution of the underlying warrant on September 8, 2011. Executive Law §259-i(3)(c)(iii) provides, in relevant part, that “[t]he alleged violator shall, within three days of the execution of the warrant, be given written notice of the time, place and purpose of the [preliminary] hearing . . .” In computing the statutory period, however, the day the parole warrant was executed is not counted. *See* General Construction Law §20 and *People ex rel Gray v. Campbell*, 241 AD2d 723. Excluding September 8, 2011, the date the parole warrant was executed, parole official would ordinarily have had until September 11, 2011 to serve the requisite papers. September 11, 2011, however, fell on a Sunday and General Construction Law §25-a provides, in relevant part, that “[w]hen any period of time, computed from a certain day, within which or after which . . . an act is . . . required to be done, ends on a . . . Sunday . . . such act may be done on the next succeeding business day . . .” The Court finds, therefore, that petitioner was timely served with the Notice of Violation/Violation of Release Report on Monday, September 12, 2011. *See People ex rel Atkinson v. Warden of Rikers Island Correctional Facility*, 201 AD2d 271 and *People ex rel Frost v. Meloni*, 124 AD2d 1032, *lv denied* 69 NY2d 606.

The only other argument advanced by petitioner is that DOCCS officials erroneously determined that he is not eligible to receive a merit time allowance pursuant to Correction Law §803(1)(d). The Court notes, however, that a merit time allowance can only be earned against a determinate sentence imposed pursuant Penal Law §§ 70.70 or 70.71. *See* Correction Law §803(1)(d)(i). Insofar as is relevant to this proceeding, Penal Law §70.70 addresses sentences of imprisonment to be imposed upon a “felony drug offender,” defined in that statute as “. . . a defendant who stands convicted of any felony, defined in article two hundred twenty . . . of this chapter [the Penal Law] other than a class A felony.” Penal Law §70.70(1)(a).³

Although petitioner’s 2012 Orange County determinate sentence was imposed upon him as a second felony offender, he clearly qualified as a “felony drug offender,” within the meaning of Penal Law §70.70(1)(a) with respect to the underlying conviction (Criminal Possession of a Controlled Substance 3^o, a class B felony offense defined in Article 220 of the Penal Law) and the 6-year determinate sentence was imposed pursuant to Penal Law §70.70(2)(a)(i). It is clear, however, that petitioner’s 2005 Sullivan County sentence was not imposed pursuant to Penal Law §70.70 inasmuch as the conviction underlying that sentence was for Criminal Possession of a Weapon 3^o rather than an offense defined in Penal Law Article 220 or 221. The 7-year Sullivan County determinate term was imposed upon petitioner, as a violent felony offender (class D violent felony offense), apparently pursuant to Penal Law §70.02(3)(c).

When petitioner was conditionally released to post-release parole supervision on March 4, 2011 he still owed 1 year to the originally-computed March 4, 2012 maximum

³ Penal Law §70.71 addresses sentences of imprisonment to be imposed upon a “felony drug offender,” defined in that statute as “. . . a defendant who stands convicted of any class A felony as defined in article two hundred twenty of this chapter [the Penal Law].”

expiration date of the 2005 sentence. That 1-year time period, moreover, was properly held in abeyance until (under the facts and circumstances of this case) his return to DOCCS custody on July 10, 2012. *See* Penal Law §70.45(5)(a). Thus, when the 2012 sentence was imposed upon petitioner, as a second felony offender (Penal Law §70.06), he still owed 1 year against the term of the previously-imposed 2005 sentence. Since the 2005 sentence was imposed prior to the date that the crime underlying petitioner's 2012 sentence was committed (September 8, 2011), DOCCS officials properly calculated the 2012 sentence as running consecutively, rather than concurrently, with respect to the undischarged term (1 year) of petitioner's 2005 sentences, notwithstanding the 2012 sentencing court's failure to so specify. *See* Penal Law §70.25(1) and (2-a), *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.

Under the relevant provisions of Penal Law §70.30(1)(c) where, as here, an individual “. . . is serving two . . . determinate sentences of imprisonment which run consecutively, the terms of the determinate sentences are added to arrive at a aggregate maximum term of imprisonment . . .” Upon the aggregation of petitioner's consecutive determinate terms (2005 and 2012) pursuant to Penal Law §70.30(1)(c), he is deemed to be serving a single determinate term and remains subject to both sentences for the duration of the aggregate term. *See People v. Buss*, 11 NY3d 553 and *People v. Delk*, 59 AD3d 733. This Court therefore finds that DOCCS officials properly determined that petitioner is not eligible for a merit time allowance since he is still serving the 2005 sentence imposed upon his conviction of the crime of Criminal Possession of a Weapon 3^o (Penal Law §265.02(4), then defined as a class D violent felony offense) pursuant to Penal Law §70.02(3)(c).

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 28, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice