

Matter of Peter v Annucci
2013 NY Slip Op 32920(U)
October 29, 2013
Sup Ct, Franklin County
Docket Number: 2013-894
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
MICHAEL F. PETER, #10-B-1855,
Petitioner,

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

DECISION AND JUDGMENT

RJI #16-1-2013-0469.116

INDEX # 2013-894

ORI #NY016015J

-against-

ANTHONY J. ANNUCCI, Acting Commissioner,
NYS Department of Corrections and Community
Supervision,

Respondent.

X

The Court has before it the Petition for judgment pursuant to Article 78 of the CPLR of Michael F. Peter, verified on September 20, 2013 and filed in the Franklin County Clerk's office on October 18, 2013. Petitioner, who is an inmate at the Chateaugay Correctional Facility, is challenging the time computation associated with his ongoing incarceration in DOCCS custody. More specifically, petitioner asserts an entitlement to 148 days of parole jail time credit which, if implemented, would change the maximum expiration date of his underlying sentence from April 14, 2014 to November 16, 2013. The papers before the Court will be considered as an *ex parte* request for the issuance of an Order to Show Cause in a CPLR Article 78 proceeding. For the reasons set forth below, however, the Court declines to issue such an order.

Petitioner is apparently subject to an indeterminate sentence of 2 to 4 years. He was originally received into DOCCS custody on June 21, 2010 certified as entitled to 213

days of jail time credit. The maximum expiration date of the indeterminate sentence was originally calculated as November 17, 2013.

On December 6, 2012, while at liberty under parole supervision, petitioner was arrested in connection with new criminal charges and a parole violation warrant was lodged against him in local custody. Petitioner's parole was subsequently revoked, following a final hearing, with a modified delinquency date of December 6, 2012. It was directed that he be held to the maximum expiration date of the underlying indeterminate sentence. As of the modified delinquency date, petitioner owed 11 months and 11 days to the originally-calculated November 17, 2013 maximum expiration date of such sentence.

On May 2, 2013 petitioner was sentenced in Utica City Court in connection with the new criminal charges to time served upon his conviction of the crime of Possession Burglars Tools, a class A misdemeanor defined in Penal Law §140.35. The Utica City Court Certificate of Disposition, a copy of which is annexed to the Petition as Exhibit H, does not specify whether the time served sentence is to run consecutively or concurrently with respect to the undischarged term of the underlying indeterminate sentence.

On May 3, 2013 petitioner was received back into DOCCS custody originally certified as entitled to 148 days of parole jail time credit covering the entire period petitioner spent in local custody from his December 6, 2012 arrest through May 2, 2013. On August 7, 2013, however, an amended parole jail time certificate was issued eliminating all parole jail time credit against petitioner's underlying indeterminate sentence.

Petitioner's arguments to the contrary notwithstanding, it is clear that petitioner is not entitled to any parole jail time credit for the time period from December 6, 2012 through May 2, 2013. Penal Law §70.40(3)(c), provides, in relevant part, as follows:

“ Any time spent by a person in custody from the time of delinquency to the time service of the sentence resumes shall be credited against the . . . maximum term of the interrupted sentence, provided:

(i) that such custody was due to an arrest or surrender based upon the delinquency; or

(ii) that such custody arose from an arrest on another charge which culminated in a dismissal or an acquittal; or

(iii) that such custody arose from an arrest on another charge which culminated in a conviction, but in such case, if a sentence of imprisonment was imposed, the credit allowed shall be limited to the portion of the time spent in custody that exceeds the period, term or maximum term of imprisonment imposed for such conviction.”

Since the time petitioner spent in local custody arose from his arrest on new criminal charges which resulted in a conviction and the imposition of a sentence that did not exceed the time spent in local custody, parole jail time credit is not statutorily available. Nevertheless, even in the absence of entitlement to statutory parole jail time credit, the petitioner would be entitled to a judicially-crafted credit against the maximum term of his underlying indeterminate sentence if the Utica City Court sentence was calculated as running concurrently, rather than consecutively, with respect to the undischarged term of the indeterminate sentence. *See Campbell v. Fischer*, 82 AD3d 1562 and *Midgley v. Smith*, 63 AD2d 223. Under the relevant provisions of Penal Law §70.25(1)(b), however, “. . . when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence or sentences imposed by the court shall

run either concurrently or consecutively with respect to . . . the undischarged term or terms in such manner as the court directs at the time of sentence. If the court does not specify the manner in which a sentence imposed by it is to run . . . [a] definite sentence shall run concurrently with any sentence imposed at the same time and shall be consecutive to any other term.” In the absence of any documentation tending to indicate that the Utica City Court directed its sentence to run concurrently with respect to the undischarged term of the previously-imposed indeterminate sentence, this Court finds that DOCCS officials properly determined that petitioner’s 2013 Utica City Court sentence must be calculated as running consecutively, rather than concurrently, with respect to such undischarged term. Petitioner, therefore, is not entitled to any credit against his 2010 sentence(s) for local jail time served in connection with his 2013 Utica City Court sentence.

“DOC[C]S has a ‘continuing, nondiscretionary, ministerial duty’ to make accurate calculations of terms of imprisonment, a duty that requires it to correct known errors.” *Patterson v. Goord*, 299 AD2d 769, 770, quoting *Cruz v. New York State Department of Correctional Services*, 288 AD2d 572, 573, *app dis* 97 NY2d 725. *See Bottom v. Goord*, 96 NY2d 870. This Court finds such duty likewise attaches to DOCCS in carrying at its statutory obligation to certify the amount of parole jail time credit to which a parole violator is entitled. *See* Correction Law §201(11). The Court therefore rejects petitioner’s assertion that the original, erroneously-issued certification of entitlement to 148 days of parole jail time credit serves as documentation that the Utica City Court sentence was designated to run concurrently with respect to the undischarged term of the indeterminate sentence.

Finally, to the extent anything in the petition might be construed as contending that the plea agreement in Utica City Court included a stipulation that the definite sentence would run concurrently with respect to the undischarged term of the indeterminate sentence but that the Certificate of Disposition erroneously failed to reflect that portion of the agreement, this Court finds that such contention must be addressed on motion to the Utica City Court. *See People v. Gray*, 11 AD3d 821 and *People ex rel Davidson v. Kelly*, 193 AD2d 1140.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that petitioner's request for the issuance of an Order to Show Cause in a CPLR Article 78 proceeding is denied; and it is further

ADJUDGED, that the petition is dismissed without prejudice.

Dated: October 29, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice