

**Matter of Mobley v NYS Dept. of Correctional
Servs./Community Supervision**

2014 NY Slip Op 30851(U)

March 14, 2014

Supreme Court, Albany County

Docket Number: 5818-13

Judge: Jr., George B. Ceresia

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This opinion is uncorrected and not selected for official publication.

Mineola, NY 11501
(Sara K. Schwartz, Deputy County Attorney
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate housed at the Ulster Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review the computation of his sentence. Turning first to an objection in point of law, respondent New York State Department of Corrections and Community Supervision (“DOCCS”) alleges that the petitioner failed to acquire personal jurisdiction over it, through timely service of the order to show cause, petition and supporting papers. Failure of an inmate to satisfy the service requirements set forth in an order to show cause requires dismissal for lack of jurisdiction absent a showing that imprisonment prevented compliance (see Matter of Gibson v Fischer, 87 AD3d 1190 [3d Dept., 2011]; Matter of DeFilippo v Fischer, 85 AD3d 1421, 1421 [3d Dept., 2011]; Matter of Pettus v New York State Dept. of Corr. Serv., 76 AD3d 1152 [3rd Dept., 2010]; Matter of Ciochenda v Department of Correctional Services, 68 AD3d 1363 [3rd Dept., 2009]; People ex rel. Holman v Cunningham, 73 AD3d 1298, 1299 [3rd Dept., 2010]). In this instance, the order to show cause required that the order to show cause, petition and supporting papers be served by mail, addressed to the respondents on or before December 13, 2013. DOCCS has submitted the affidavit of Patricia E. Dallmann-Weaver, employed in the Counsel’s Office of DOCCS as an Administrative Assistant. Ms. Dallmann-Weaver indicates that whenever papers are served upon Commissioner Brian Fischer’s Office or DOCCS the papers are forwarded to designated staff after review by her supervisor, Deputy Counsel Nancy J.

Heywood. It is the responsibility of appropriate staff to forward these documents to the Office of the Attorney General, along with a letter requesting representation on behalf of the respondents. Ms. Dallmann-Weaver avers that she made a search of the files in the Counsel's Office to determine whether any legal papers relating to the above-captioned action had been served upon DOCCS. She indicates that as of January 15, 2014 no papers had been received.

The petitioner submitted an affidavit of service which does not demonstrate that any papers were mailed to DOCCS. Rather, the affidavit of service recites that the petitioner sent the papers to the Inmate Records Coordinator at the Ulster Correctional Facility, where he is housed. This method of service is confirmed in his reply affidavit.¹ The Court finds that the petitioner failed to comply with the service requirements set forth in the order to show cause. Nor did he demonstrate that imprisonment prevented compliance with the service requirements set forth in the order to show cause. Accordingly because the petitioner did not acquire jurisdiction over this respondent, the objection in point of law must be upheld and the petition dismissed as against DOCCS. For this reason, the Court does not reach the merits of the petition with respect to computation of petitioner's sentence by DOCCS.

With respect to that portion of the petition which seeks to challenge the computation of the amount of jail time credit certified by the Nassau County Correctional Center, as stated in Penal Law § 70.30 (3):

¹In paragraph 5 of his reply affidavit the petitioner indicates that he mailed the papers to the "Inmate Records Coordinator Office, Ulster County Correctional Facility, P.O. Box 800, Napanoch, NY 12458".

“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 term or maximum term of any previously imposed sentence or period of post-release supervision to which the person is subject.” (Penal Law § 70.30 [3])

The Nassau County Correctional Center indicates that the petitioner was arrested on drug charges on February 2, 2009 and admitted into the Nassau County Correctional Center on February 3, 2009. He was transferred to DOCCS on March 30, 2010. As such, it credited the petitioner with 421 days of jail time. The Court finds that the computation of jail time credit was correct. The Court concludes that the petition must be dismissed as against Nassau County Correctional Center.

The Court observes that the petitioner has named the New York State Division of Parole as a separate respondent. For this reason, the Court will review the relevant facts, as they pertain to the Division of Parole. On April 16, 2002 the petitioner was sentenced by the Nassau County Supreme Court as a second violent felony offender to a 7 year determinate term and a 5 year period of post release supervision for burglary 2nd degree (the “2002 sentence”). He was received by DOCCS on May 10, 2002. The Nassau County Correctional Center credited him with 340 days of jail time for the period of June 5, 2001 to May 9, 2002. On May 29, 2007 the petitioner was released to post-release supervision.

The petitioner was declared delinquent by the Division of Parole effective February 3, 2009 by reason of an arrest on new charges. After imposition of a 12 month time

assessment, he was restored to post-release supervision by the Division of Parole, effective February 5, 2010. Notably however, he thereafter remained in the custody of the Nassau County Correctional Center on the pending new charges by reason that he was unable to post bail. The petitioner was ultimately sentenced on March 19, 2010 with respect to the new charges to a five year determinate sentence with 1 ½ years post release supervision (the “2010 sentence”).

Prior to imposition of the 2010 sentence, the Division of Parole had applied a credit to the petitioner’s 2002 sentence of 366 days² of parole jail time for the period in local custody between February 4, 2009 and February 4, 2010. The crimes resulting in the 2010 sentence were committed on January 30, 2009 and February 2, 2009. For this reason, the 2010 sentence ran consecutively to the 2002 sentence by operation of Penal Law § 70.25 (2-a). The petitioner was received by DOCCS on March 30, 2010. The record reveals that the petitioner received full credit against the determinate portion of his 2010 sentence for the 421 days of jail time certified by Nassau County Correctional Center. As a consequence of the foregoing the Division of Parole then rescinded the 366 day parole jail time credit which it had previously applied to petitioner’s 2002 sentence.

Penal Law § 70.45 (5) (d) recites:

(d) When a person is alleged to have violated a condition of post-release supervision and the department of corrections and community supervision has declared such person to be delinquent: (i) the declaration of delinquency shall interrupt the period of post-release supervision; (ii) such interruption shall

²The 366 days of parole jail time was a part of the 421 days of jail time certified by the Nassau County Correctional Center.

continue until the person is restored to post-release supervision; (iii) *if the person is restored to post-release supervision without being returned to the department of corrections and community supervision, any time spent in custody from the date of delinquency until restoration to post-release supervision shall first be credited to the maximum or aggregate maximum term of the sentence or sentences of imprisonment, but only to the extent authorized by subdivision three of section 70.40 of this article.* (emphasis supplied, see Penal § 70.45)

As set forth in Penal Law § 70.40 (3) (c):

“(c) 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 term or maximum term of the interrupted sentence, provided: []

(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.*” (emphasis supplied, see Penal Law § 70.40)

In this instance, the jail time credit did not exceed the determinate term imposed on the 2010 sentence. Focusing solely on the actions of the Division of Parole, the Court finds nothing improper with regard to the actions of the Division of Parole in rescinding the 366 day parole jail time credit applied to petitioner’s 2002 sentence inasmuch as the same credit was included in the jail time applied to the determinate portion of petitioner’s 2010 sentence. For this reason, he was not entitled to a credit for jail time against the post-release supervision portion of his 2002 sentence.

The Court has reviewed and considered petitioner’s remaining arguments and contentions and finds them to be without merit.

In summary, the Court finds that petitioner failed to acquire personal jurisdiction over

the respondent DOCCS, and for this reason alone the petition must be dismissed as to this respondent. The Court further finds that with regard to the Nassau County Correctional Center and the New York State Division of Parole, the petitioner failed in his burden to demonstrate that the determination of either respondent was made in violation of lawful procedure, affected by an error of law, irrational, arbitrary and capricious, or constituted an abuse of discretion. The Court concludes that the petition must be dismissed.

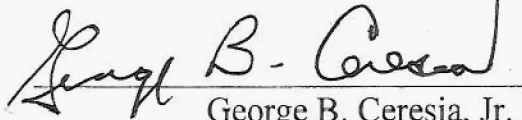
Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: March 14, 2014
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated November 11, 2013, Petition, Supporting Papers and Exhibits
2. Answer of NYS DOCCS Dated January 16, 2014, Supporting Papers and Exhibits
3. Answer of Nassau County Correctional Center dated January 10, 2014
4. Petitioner's Reply sworn to January 26, 2014