

Matter of Dacey v LaClair
2014 NY Slip Op 33051(U)
May 15, 2014
Supreme Court, Franklin County
Docket Number: 2014-58
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
DAVID DACEY, #10-A-1600,
Petitioner,

for Judgment Pursuant to Article 70
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #16-1-2014-0033.05
INDEX # 2014-58
ORI # NY016015J

-against-

DARWIN E. LaCLAIR, Superintendent,
Franklin Correctional Facility,
Respondent.

X

This proceeding was originated by the Petition for a Writ of Habeas Corpus of David Dacey, verified on January 22, 2014 and filed in the Franklin County Clerk's office on January 28, 2014. Petitioner, who was an inmate at the Franklin Correctional Facility but has been released to post-release supervision, challenged his then ongoing incarceration in the custody of the New York State Department of Corrections and Community Supervision. The Court issued an Order to Show Cause on February 5, 2014 and has received and reviewed respondent's Return, dated March 27, 2014. No Reply thereto has been received from petitioner.

Although it is asserted that petitioner is being held in DOCCS custody past the maximum expiration date of his underlying sentences¹, the Court is unable to discern from his papers any cogent sentence calculation methodology supporting this assertion.

¹ Petitioner was re-released from DOCCS custody to post-release supervision on March 19, 2014. While this development has clearly rendered petitioner's claim of entitlement to immediate release from DOCCS custody moot, the outright dismissal of this proceeding is not warranted since a favorable resolution of the issues advanced by petitioner would obviously impact the maximum expiration date of his underlying sentences and thus alter the time frame of his post-release parole supervision. *See People ex rel Speights v. McKoy*, 88 AD3d 1039 and *People ex rel Howard v. Yelich*, 87 AD3d 772.

As detailed below, moreover, the Court ultimately concludes that DOCCS officials have properly and accurately calculated the current maximum expiration date of the period of post-release supervision associated with petitioner's merged determinate/indeterminate sentences as August 18, 2014 and, in addition, that DOCCS officials have properly and accurately determined that 6 months and 21 days remain "held in abeyance" against the maximum term of petitioner's merged determinate/indeterminate sentences.

On March 30, 2010 petitioner was sentenced in Ulster County Court to a determinate term of 2 years, with 2 years post-release supervision, upon his conviction of the crime of Criminal Sale of a Controlled Substance 3°. He was also sentenced on that date to a concurrent indeterminate sentence of 1 to 3 years upon his conviction of the crime of Felony DWI. Petitioner was received into DOCCS custody on April 6, 2010 certified as entitled to 68 days of jail time credit. At that time DOCCS officials calculated the original maximum expiration date of petitioner's merged sentences as January 27, 2013, subject, however, to the 2-year period of post-release supervision.

On October 13, 2011 petitioner was released from DOCCS custody to post-release parole supervision. Upon petitioner's release the running of the 3-year maximum term of his merged sentences was statutorily interrupted with 1 year, 3 months and 14 days still owing to the originally computed January 27, 2013 maximum expiration date "held in abeyance." *See* Penal Law §70.45(5)(a). Also upon petitioner's October 13, 2011 release, the running of the 2-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the initial maximum expiration date of that period calculated as October 13, 2013.

Petitioner was first declared delinquent as of April 9, 2012. The delinquency interrupted the running of the period of post-release supervision (*see* Penal Law §70.45(5)(d)(i)) with 1 year, 6 months and 4 days still owing to the initial maximum expiration date of such period. Petitioner was restored to post-release supervision on May 22, 2012 certified as entitled to 43 days of parole jail time credit (Penal Law §70.40(3)(c)). The parole jail time credit was applied against the maximum term of petitioner's merged sentences (*see* Penal Law §70.45(5)(d)(iii)), reducing the time previously held in abeyance against such maximum term from 1 year, 3 months and 14 days to 1 year, 2 months and 1 day. The 1 year, 6 months and 4 days still owing against petitioner's 2-year period of post-release supervision re-commenced running upon his May 22, 2012 restoration to post-release supervision (*see* Penal Law §70.45(5)(d)(ii)) producing an adjusted post-release supervision maximum expiration date of November 26, 2013.

Petitioner was next declared delinquent as of November 13, 2012. The delinquency interrupted the running of the period of post-release supervision (*see* Penal Law §70.45(5)(d)(i)) with 1 year, 0 months and 13 days still owing to the adjusted maximum expiration date of such period. Petitioner was restored to post-release supervision on February 5, 2013 certified as entitled to 39 days of parole jail time credit (Penal Law §70.40(3)(c)). The parole jail time credit was applied against the maximum term of petitioner's merged sentences (*see* Penal Law §70.45(5)(d)(iii)), reducing the time previously held in abeyance against such maximum term from 1 year, 2 months and 1 day to 1 year, 0 months and 22 days. The 1 year, 0 months and 13 days still owing against petitioner's 2-year period of post-release supervision re-commenced running upon his

February 5, 2013 restoration to post-release supervision (*see* Penal Law §70.45(5)(d)(ii)) producing a re-adjusted post-release supervision maximum expiration date of February 18, 2014.

Petitioner was declared delinquent for a third time as of September 19, 2013. The delinquency interrupted the running of the period of post-release supervision (*see* Penal Law §70.45(5)(d)(i)) with 4 months and 29 days still owing to the re-adjusted maximum expiration date of such period. Petitioner was returned to DOCCS custody as a post-release supervision violator on November 12, 2013 certified as entitled to 54 days of parole jail time credit (Penal Law §70.40(3)(c)). The parole jail time credit was applied against the maximum term of petitioner's merged sentences (*see* Penal Law §70.45(5)(d)(iii)), reducing the time previously held in abeyance against such maximum term from 1 year, 0 months and 22 days to 10 months and 28 days. The 10 months and 28 days still held in abeyance against petitioner's merged sentences re-commenced running upon his November 12, 2013 return to DOCCS custody (*see* Penal Law §70.45(5)(a)), producing an adjusted maximum expiration date of October 10, 2014.

As noted previously, on March 19, 2014 petitioner was re-released from DOCCS custody to post-release parole supervision. Upon petitioner's re-release the running of his merged sentences was statutorily interrupted with 6 months and 21 days still owing to the adjusted October 10, 2014 maximum expiration date thereof "held in abeyance." *See* Penal Law §70.45(5)(a). Also upon petitioner's March 19, 2014 re-release, the running of the remaining 4 months and 29 days of his period of post-release supervision re-commenced (*see* Penal Law §70.45(d)(ii)) with the re-adjusted maximum expiration date of that period calculated as August 18, 2014.

Pursuant to the statutory scheme set forth in Penal Law §70.45, as described throughout this Decision and Judgment, the merged 3-year maximum term of petitioner's determinate/indeterminate sentences and the 2-year period of post-release supervision never run at the same time. Had petitioner completed (without violation) the period of post-release supervision following his initial October 13, 2011 release, the 1 year, 3 months and 14 days originally held in abeyance against the maximum term of his merged sentences would have been “. . . credited with and diminished by such period of post-release supervision.” Penal Law §70.45(5)(b). In that scenario, the 2-year credit authorized under Penal Law §70.45(5)(b) would have more than covered the time originally held in abeyance against the maximum term of petitioner's merged sentences and, thus, such sentences, as well as the period of post-release supervision, would have effectively concluded as of October 13, 2013.

It is ultimately within the control of the post-release supervision releasee to determine, through his/her behavior while subject to post-release supervision, whether the time held in abeyance on his/her underlying sentence(s) will 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 at least a portion of the merged maximum term of his 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.

Even at this late date petitioner can take at least partial advantage of the Penal Law §70.45(5)(b) credit. The maximum expiration date of petitioner's 2-year period of post-

release supervision is currently calculated as August 18, 2014 and 6 months and 21 days remain “held in abeyance” against the merged maximum term of his underlying sentences. If there are no additional post-release supervision violations, the Penal Law §70.45(5)(b) credit can be applied against the remaining time “held in abeyance” as of August 18, 2014.

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: May 15, 2014 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge