

Matter of Gonzalez v Yelich

2014 NY Slip Op 33052(U)

October 17, 2014

Supreme Court, Franklin County

Docket Number: 2013-124

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 GONZALEZ, #11-A-4850,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #16-1-2013-0044.14
INDEX # 2013-124
ORI # NY016015J**

-against-

BRUCE S. YELICH, Superintendent,
Bare Hill Correctional Facility,
Respondent.

X

This proceeding was originated by the Petition for Writ of Habeas Corpus of Michael Gonzalez, verified on January 25, 2013 and filed in the Franklin County Clerk's office on February 5, 2013. Petitioner, who is now an inmate at the Adirondack Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. The resolution of petitioner's challenge brings into play relatively complex calculations involving sentences imposed against petitioner in Queens County (2003), Queens County (2011) and Nassau County (2012). The complexity of this case is exacerbated by the fact that two of the underlying sentences (Queens County 2011 and Nassau County 2012) were the subject of re-sentencing proceedings after the commencement of this habeas corpus proceeding. The Court issued an Order to Show Cause on February 19, 2013 and has received and reviewed respondent's Return, dated March 21, 2013, as well as petitioner's Reply thereto, dated March 28, 2013 and filed in the Franklin County Clerk's office on April 2, 2013.

By Letter Order dated May 16, 2013 the litigants were directed to supplement their submissions by addressing the issue described in such order. In response thereto the

Court has received and reviewed petitioner's Supplement to Writ of Habeas Corpus, including exhibits, dated May 31, 2013 and filed in the Franklin County Clerk's office on June 4, 2013, as well as the June 7, 2013 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General, with exhibits, submitted on behalf of the respondent.

By Letter Order dated September 19, 2013 the litigants were directed to supplement their submissions by addressing an additional issue described in such order. In response thereto the Court has received and reviewed a copy an October 3, 2013 letter, with exhibits, from Richard deSimone, Esq., Associate Counsel in Charge, DOCCS Office of Sentencing Review, to Glen Francis Michaels, Esq., Assistant Attorney General in Charge, Plattsburgh Regional Office of the New York State Attorney General. The Court has also received and reviewed petitioner's October 11, 2013 letter to chambers, filed in the Franklin County Clerk's office on October 16, 2013.

After having been advised by petitioner that on December 9, 2013 he was re-sentenced in connection with a July 22, 2011 Queens County sentence, this Court, by Letter Order dated January 27, 2014, directed the litigants to submit such additional memoranda as they deemed fit addressing the issue of how, if at all, the December 9, 2013 re-sentencing affected the sentence calculations that are the subject of this habeas corpus proceeding. In response thereto the Court has received and reviewed petitioner's undated letter to chambers, filed in the Franklin County Clerk's office on February 5, 2014, as well as the February 11, 2014 Supplemental Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge, which incorporated by reference a February 4, 2014 letter to him from Richard deSimone, Esq., Associate Counsel in Charge, DOCCS Office of Sentencing Review.

After petitioner was re-sentenced on August 7, 2014 in connection with an August 16, 2012 Nassau County sentence, which potentially affected the sentence calculations that are the subject of this habeas corpus proceeding, the Court received and reviewed petitioner's Letter Memorandum of August 22, 2014, filed in the Franklin County Clerk's office on August 26, 2014, as well as the September 17, 2014 Supplemental Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge, which incorporated by reference a September 10, 2014 letter to him from Richard deSimone, Esq., Associate Counsel in Charge, DOCCS Office of Sentencing Review.

On April 22, 2003 petitioner was sentenced in Supreme Court, Queens County, to an indeterminate sentence of 3 to 9 year upon his conviction of the crime of Criminal Possession of a Controlled Substance 3^o. He was received into DOCCS custody on April 29, 2003 certified as entitled to 56 days of jail time credit. At that time the original maximum expiration date of petitioner's 2003 sentence was calculated as March 3, 2012. After petitioner was received into DOCCS custody on April 29, 2003 his sentence calculation history steadily grew more and more complicated. He was released from DOCCS custody to parole supervision on five separate occasions but was found delinquent after each release. Much of petitioner's sentence calculation history is not germane to the disposition of this proceeding. In considering the issues before it, the Court will jump to March 8, 2010, when petitioner was released from DOCCS custody to parole supervision for the fifth time. The maximum expiration date of petitioner's 2003 sentence (adjusted as the result of four prior parole delinquencies) was calculated at that time as September 11, 2013. Petitioner was later found delinquent (for the fifth time) as of March 11, 2010. As of that delinquency date he still owed 3 years and 6 months to the

September 11, 2013 adjusted maximum expiration date of the 2003 Queens County sentence.

On March 24, 2010, while apparently still at liberty under parole supervision, petitioner committed a new criminal offense and was taken into local custody. On February 27, 2011 he was restored to parole supervision but remained in local custody pending disposition of the new criminal charges. It was ultimately determined that petitioner was entitled to no parole jail time credit (*see* Penal Law §70.40(3)(c)) for the period from the March 11, 2010 delinquency date to the February 27, 2011 restoration date. Thus, as of petitioner's February 27, 2011 restoration to parole supervision, the re-adjusted maximum expiration date of his 2003 sentence was calculated as August 27, 2014 (3 years and 6 months from February 27, 2011). On April 27, 2011, while still held in local custody in connection with the new criminal charges, petitioner committed an additional new criminal offense.

On July 22, 2011 petitioner was sentenced in Supreme Court, Queens County, as a second felony offender, to an indeterminate sentence of 2 to 4 years upon his conviction of the crime of Criminal Possession of a Forged Instrument 2^o. The 2011 sentence stemmed from the criminal offense committed by petitioner on March 24, 2010. Jumping ahead for a moment, on December 9, 2013 petitioner was re-sentenced in connection with the 2011 Queens County sentence to an indeterminate sentence of 1½ to 4 years with no reference to second felony offender status. The revised sentence and commitment order specified that the re-sentence was to run concurrently with respect to the undischarged terms of the 2003 Queens County sentence and a sentence imposed in Nassau County on August 16, 2012 (to be discussed in the next paragraph).

Petitioner was found delinquent as of the original July 22, 2011 sentencing date. As of that delinquency date petitioner still owed 3 years, 1 month and 5 days to the August 27, 2014 re-adjusted maximum expiration date of his 2003 sentence. On October 28, 2011 petitioner was received back into DOCCS custody ultimately certified as entitled to 584 days of jail time credit against the 2011 Queen County sentence covering the entire period from his March 24, 2010 arrest through October 27, 2011.

On August 16, 2012 petitioner was sentenced in Nassau County Court, as a second felony offender, to an indeterminate sentence of 1½ to 3 years upon his conviction of the crime of Attempted Promoting Prison Contraband 1°. Petitioner's 2012 sentence stemmed from the criminal offense he committed while in local custody on April 27, 2011. Jumping ahead for a moment again, on August 7, 2014 petitioner was re-sentenced in connection with the 2012 Nassau County sentence to "TIME SERVED" (with no reference to second felony offender status).

With petitioner having been re-sentenced on August 7, 2014 (in connection with his 2012 Nassau County sentence) to time served, it is not disputed that such sentence plays no direct role in the calculation of the current maximum expiration date of petitioner's concurrent Queens County sentences (2003 and 2011/2013(re-sentence)). In examining the interplay between the Queens County sentences it is noted that under the relevant provisions of Penal Law §70.30(1)(a), where an individual, such as petitioner, is subject to more than one indeterminate sentence running concurrently, "[t]he maximum . . . terms of the indeterminate sentences . . . shall merge in and be satisfied by discharge of the term which has the longest unexpired time to run[.]"

Running the 4-year maximum term of petitioner's 2011 sentence/2013 re-sentence from October 28, 2011 (the date he was received back into DOCCS custody), less 584 days of jail time credit against such sentence, a maximum expiration date of March 18, 2014 would be produced. Running the 3 years, 1 month and 5 days still owed by petitioner to the re-adjusted maximum expiration date of his 2003 sentence from October 28, 2011, a new re-adjusted maximum expiration date of December 3, 2014 would be produced. Since the 9-year maximum term of petitioner's 2003 sentence thus had a longer unexpired time to run than the 4-year maximum term of his 2011 sentence (less jail time credit), DOCCS officials properly determined that the 2003 sentence was controlling and that the merged maximum expiration date of petitioner's 2003/2011 sentences (including the 2013 re-sentence) was December 3, 2014.

To the extent petitioner argues that he is entitled to 584 days of credit (jail time?/parole jail time?) against his 2003 sentence, covering the entire period from his March 24, 2010 arrest to his October 28, 2011 return to DOCCS custody as a parole violator, the Court, for the reasons set forth below, rejects such argument.

The calculation of jail time credit is controlled by Penal Law §70.30(3) which provides, in relevant part, as follows:

“ . . . [T]he maximum term of an indeterminate 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 . . . ”

Where, as here, a criminal defendant is confined in local custody within the City of New York, jail time credit is calculated by the New York City Commissioner of Correction and certified to the New York State Department of Correctional Services upon transfer of the defendant/inmate from local to state custody after sentencing. *See* Correction Law §600-a. State DOCCS authorities are bound by the jail time certified by the city commissioner and can neither add nor subtract from the time so certified. *See Neal v. Goord*, 34 AD3d 1142, *Torres v. Bennett*, 271 AD2d 830 and *Jarrett v. Coughlin*, 136 Misc 2d 981.

The New York City Commissioner of Correction has certified to DOCCS officials that petitioner is entitled to 56 days of jail time credit against the 2003 Queens County sentence and 584 days of jail time credit against the 2011 Queens County sentence. The respondent is bound by these certifications and, therefore, to the extent the petition includes a claim of entitlement to jail time credit in excess of that certified to DOCCS by the New York City Commissioner of Correction, such claim must fail since petitioner did not name the city Commissioner as a respondent in this proceeding. *See Neal v. Goord*, 34 AD3d 1142. In any event, since the 584 days petitioner spent in local custody from March 24, 2010 through October 27, 2011 came after petitioner's 2003 Queens County sentence commenced running on April 29, 2003 (when he was initially received into DOCCS custody), he is clearly not entitled to an additional 584 days of jail time credit against the maximum term of his 2003 Queens County sentence. *See Thomas v. Moody*, 85 Misc 2d 666.

Parole jail time credit is a credit against the term or maximum term of an interrupted sentence for the time spend by a parolee in custody from the date of delinquency until the resumption 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.” Penal Law §70.40(3)(c).

Since the 584-day time period petitioner spent in local custody from March 24, 2010 through October 27, 2011 was due to his arrest on new criminal charges - rather than a parole delinquency - and such charges ultimately culminated in a conviction and the imposition of a sentence of imprisonment (2011 Queens County sentence) with a maximum term (4 years) in excess of 584 days, it is clear that petitioner is not entitled to parole jail time credit against his interrupted 2003 sentence for any portion of the 584-day period.

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 17, 2014 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge