

Matter of Jackson v Annucci

2014 NY Slip Op 33056(U)

September 11, 2014

Supreme Court, Franklin County

Docket Number: 2014-334

Judge: S. Peter Feldstein

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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
DESMOND JACKSON, #12-A-5601,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2014-0170.33
INDEX # 2014-334
ORI #NY016015J

-against-

ANTHONY J. ANNUCCI, Commissioner,
NYS Department of Corrections and Community
Supervision, and **BRUCE YELICH**, Superintendent,
Bare Hill Correctional Facility,

Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Desmond Jackson, verified on April 17, 2014 and filed in the Franklin County Clerk's office on May 2, 2014. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the determination (allegedly rendered in April of 2014) finding him unsuitable for participation in the DOCCS Shock Incarceration Program. An Order to Show Cause was issued on May 7, 2014 and the Court has since received and reviewed respondents' Answer and Return, verified on June 24, 2014 and supported by the June 24, 2014 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's Reply thereto, dated July 7, 2014 and filed in the Franklin County Clerk's Office on July 9, 2014.

On December 11, 2012 petitioner was sentenced in Rensselaer County Court, as a second felony offender, to a determinate term of 2 years, with 1½ years post-release supervision, upon his conviction of the crime of Criminal Sale of a Controlled Substance

5^o ¹. On December 20, 2012 petitioner was received in DOCCS custody at the Downstate Facility where he was screened for participation in the DOCCS Shock Incarceration Program. *See* 7 NYCRR §1800.5. By decision dated January 3, 2013 petitioner was found to be “Disqualified/Reason (40-12 reason code).” According to counsel for the respondents, the 40-12 reason code identified the basis for the disqualification as petitioner’s “risk to the public.” Less than two months later, on February 27, 2013, petitioner was sentenced in Warren County Court, as a second felony offender, to a determinate term of 7 years, with 3½ years post-release supervision, upon his conviction of the crime of Criminal Possession of a Controlled Substance 3^o under Penal Law §220.16(1) (possession of a narcotic drug with intent to sell). The Warren County sentence was directed to run concurrently with respect to the undischarged term of the previously imposed 2012 Rensselaer County sentence. The current maximum expiration, conditional release and merit eligibility dates of petitioner’s merged sentence have been computed by DOCCS officials as February 28, 2019, February 28, 2018 and February 28, 2017, respectively.

On or about March 12, 2014 petitioner met with an Offender Rehabilitation Coordinator (ORC) at the Bare Hill Correctional Facility and requested that he be enrolled in the DOCCS Shock Incarceration Program.² By memo dated April 7, 2014 ORC Castine - obviously referencing the January 3, 2013 screening determination from Downstate - advised petitioner that “[y]ou were reviewed for Shock and deemed unsuitable.”

¹ Although the Rensselaer County Sentence and Commitment Order specified that the sentence would run “CONCURRENTLY with 7 years determinate in Warren Co.,” petitioner was not sentenced in Warren County until after the Rensselaer County sentence was imposed.

² The Court presumes that this request was verbal.

Petitioner followed up with an April 10, 2014 letter addressed to Deputy Superintendent Vann at Bare Hill. Deputy Superintendent Vann referred petitioner's letter to S. Dupree, SORC, for review and response. By memorandum dated April 23, 2014 petitioner was advised as follows:

“IN REGARD TO YOUR MEMO DATED 4/10/14 CONCERNING PARTICIPATION IN THE SHOCK PROGRAM, A REVIEW OF YOUR FILE INDICATES THAT YOU WERE APPROPRIATELY SCREENED FOR THE SHOCK PROGRAM AT DOWNSTATE CF ON 1/13[sic]/13. THE DETERMINATION AT THAT TIME WAS TO DEEM YOU DISQUALIFIED DUE TO PUBLIC RISK. THIS WAS THE FINAL DECISION IN THIS MATTER AND AS YOU SHOULD BE AWARE, THESE DECISIONS ARE NOT APPEALABLE.”

This proceeding ensued.

Correction Law §865(1) sets forth the definition of an “eligible inmate” for DOCCS Shock Incarceration Program purposes. One element of “eligible inmate” definition that is particularly relevant to this proceeding is that an inmate sentenced to a determinate term of imprisonment - like the petitioner - must “...become eligible for conditional release within three years...” The Court notes, however, that an inmate's status as an “eligible inmate,” as that term is defined in Correction Law §865(1), only entitles such inmate to apply to the Shock Incarceration Screening Committee for permission to participate in the DOCCS Shock Incarceration Program. *See* Correction Law §867(1). “If the shock incarceration screening committee determines that an inmate's participation in the shock incarceration program is consistent with the safety of the community, the welfare of the applicant and the rules and regulations of the department, the committee shall forward the application to the commissioner or his designee for approval or disapproval.” Correction Law §867(2). “Participation in the shock incarceration program

shall be a privilege. Nothing contained in this article may be construed to confer upon any inmate the right to participate or continue to participate therein.” Correction Law §867(5).

When petition was received into DOCCS custody on December 20, 2012 he was only subject to the 2-year determinate term imposed by the Rensselaer County Court. Thus, he clearly met the previously-discussed element of the Correction Law §865(1) “eligible inmate” definition which requires an inmate serving a determinate term of imprisonment to be within three years of his conditional release date. Notwithstanding the foregoing, the screening committee at Downstate effectively determined that petitioner’s participation in the shock incarceration program was not consistent with the safety of the community. After petitioner was sentenced in Warren County to a concurrent determinate term of 7 years and his maximum expiration, condition release and merit eligibility dates were computed as February 28, 2019, February 28, 2018, and February 28, 2017, respectively, any potential challenge to the January 3, 2013 determination of the Shock Incarceration Screening Committee at Downstate was effectively rendered moot since petitioner was no longer an “eligible inmate” for Correction Law §865(1) purposes.

There is nothing in the record to suggest that the December 2012/January 2013 deliberations of the Shock Incarceration Screening Committee at Downstate were prompted by petitioner’s application to participate in the shock program. Rather, as alluded to previously, it appears that such deliberations were the result of an automatic,

internal screening process with respect to inmates initially received into DOCCS custody.³
See 7 NYCRR §1800.5.

In view of all of the above, the Court finds that the January 3, 2013 determination of the Shock Incarceration Screening Committee at the Downstate Facility does not bar petitioner from applying to participate in the shock incarceration program upon his re-attaining “eligible inmate” status. Petitioner takes the position that he re-attained such status on February 28, 2014, when he came within three years of his February 28, 2017 merit eligibility date. However, a copy of a June 26, 2014 memo to petitioner from D. Raville, ORC, attached to petitioner’s Reply, suggests that petitioner will not re-attain “eligible inmate” status until “...36 months to your earliest release (not including merit) therefore 3 years to your CR [Conditional Release date] 2/28/2018 = 2/2015...” The potential issue of whether petitioner re-attained Correction Law §865(1) “eligible inmate” status on February 28, 2014 or, rather, that he will not re-obtain such status until February 28, 2015 is not currently before with the Court and, therefore, will not be resolved at this juncture. Although petitioner is free to submit an application to participate in the DOCCS Shock Incarceration Program, based upon his position that he re-attained “eligible inmate” status on February 28, 2014, the Court finds that neither his verbal request to ORC Castine nor his April 10, 2014 letter to Deputy Superintendent Vann constituted such an application. It is also noted that neither ORC Castine nor

³ Indeed, the screening form generated at Downstate (Exhibit D annexed to respondents’ Answer and Return) indicates that the review of petitioner’s records commenced on December 21, 2012. Since petitioner did not arrive at Downstate until December 20, 2012 it is almost certain that the screening of petitioner for participation in the DOCCS Shock Incarceration Program at that time was not the result his application to participate in the program.

Deputy Superintendent Vann is authorized to issue any determination with respect to any application to participate in a DOCCS Shock Incarceration Program.

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: September 11, 2014 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice