Matter of Flowers v Office of Sentencing Review-NYSDOCCS
2015 NY Slip Op 30427(U)
January 8, 2015
Supreme Court, Albany County
Docket Number: 1513-14
Judge: Jr., George B. Ceresia

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JOE NATHAN FLOWERS,

Petitioner,

-against-

OFFICE OF SENTENCING REVIEW - NYSDOCCS,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-14-ST5711 Index No. 1513-14

Appearances: Joe Nathan Flowers
Inmate No. 11-B-3414
Petitioner, Pro Se
Mid-First Correctional Facility
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Marcy, NY 13403-0216

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently housed at Mid-First Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review the computation of his sentence. The issue concerns a state sentence imposed in 2012, which the Court directed

should run concurrently to a prior federal sentence.

On August 19, 2011 the petitioner was sentenced by Monroe County Court to a 7 year determinate sentence and 10 year period of post release supervision for the crime of course of sexual conduct against a child in the second degree ("2011 state sentence"). He was received into custody by the New York State Department of Corrections and Community Supervision ("DOCCS") on November 14, 2011. At that time Monroe County Sheriff's Department credited him with 126 days of jail time for September 25, 2010 to October 2, 2010 and July 19, 2011 to November 13, 2011.

On September 6, 2012 the petitioner was sentenced in United States District Court, Western District of New York to an 84 month term of imprisonment and 20 year period of supervised release for the crime of transportation of a minor with intent to engage in criminal sexual activity (the "federal sentence"). The Court directed that this sentence run consecutively to the 2011 state sentence.

On September 7, 2012, the petitioner was sentenced in Monroe County Court to a term of 1 1/3 to 4 years for criminal sexual act in the third degree (the "2012 state sentence"). The Court directed that this sentence run consecutively to the 2011 state sentence, but concurrently with the federal sentence.

Turning first to a threshold issue, the respondent's original answer dated August 1, 2014 raised an objection in point of law that the petition failed to state a cause of action. On August 4, 2014 the petitioner, by letter, submitted an amended petition, requesting that it be considered by the Court. The respondent, by letter, opposed the amendment but also, on September 2, 2014, served an answer to the amended petition. The Court is mindful that a party desiring to amend or supplement a pleading in a CPLR Article 78 proceeding must

obtain leave of the Court (see CPLR 7804 [d], last sentence; Matter of Gomez v Fischer, 101 AD3d 1195, 1196 [3d Dept., 2012]). The Court is also mindful that, ordinarily, leave to amend a pleading should be freely given (see Kimso Apartments, LLC v Gandhi, ___ NY3d ___, 2014 NY Slip Op. 08219 [November 25, 2014]; Edenwald Contracting Co. v. City of New York, 60 NY2d 957 [1983]; Murray v. City of New York, 43 NY2d 400; Ward v. City of Schenectady, 204 AD2d 779 [3d Depart., 1994]). This, however, does not mean that motions to amend are to be granted simply for the asking. There must be some demonstration of merit to the proposed amendment (see, Dodge v. Victory Markets, 199 AD2d 917, 919-920 [3rd Dept., 1993]; see also, Mathiesen v. Mead, 168 AD2d 736 [3rd Dept., 1990]). A motion to amend will be denied where the cause of action or defense is plainly lacking in merit (see Matter of Prendergast v Kingston City School District, 242 AD2d 773, 774-775 [3rd Dept.,1997]). The motion should be made upon the affidavit of a party having personal knowledge of the facts and circumstances (McDermott v. Village of Menands, 74 AD2d 661 [3rd Dept., 1980]; Polak v Schwenk, 115 AD2d 142 [3rd Dept., 1985]; Martin v County of Madison, 88 AD2d 162 [3rd Dept., 1982]). Delay alone does not warrant denial of a motion for leave to amend unless such delay is coupled with substantial prejudice to the nonmoving party (see Kimso Apartments, LLC v Gandhi, supra; Duquette v Oliva, 75 AD3d 727, 728 [3rd Dept., 2010]; Edenwald Contr. Co. v City of New York, supra; New York State Health Facilities Assn. v Axelrod, 229 AD2d 864, 866 [3rd Dept., 1996]). Prejudice means "loss of a special right, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment" (New York State Health Facilities Assn. v Axelrod, supra, at 866; see, Smith v Industrial Leasing Corp., 124 AD2d 413, 414).

In this instance the respondent, as noted, has served an answer to the amended petition. The amended petition does not significantly change petitioner's theory of pleading, or the relief which he seeks[1]. The proposed amendment is not plainly lacking merit. There is no showing of prejudice (particularly as evidenced by respondent's service of an answer to the amended petition). Under the circumstances, the Court will grant petitioner's informal application to serve and file an amended petition, and will consider the amended petition, as well as respondent's answer to the amended petition.

Turning to the merits, upon imposition of the 2012 state sentence, DOCCS combined that sentence with the 2011 state sentence, resulting in a single aggregate state sentence. The petitioner maintains that this was improper; that the two state sentences should have remained separate; and that when he reaches his initial conditional release date of July 7, 2017 (computed on his 2011 state sentence), he should be transferred to federal custody so that he could serve the 2012 state sentence concurrently with his federal sentence.

Respondent calculated petitioner's sentence in the following manner:[2]

	06-00-00	6/7 of 7 year determinate term of 2011 sentence
+	01-04-00	minimum period of consecutive 2012 sentence
	07-04-00	aggregate minimum period
-	00-04-06	126 days of jail time
	06-11-24	to serve on aggregate minimum period
	+2011-11-14	received by DOCCS
	2018-11-07	current Parole Eligibility date

	07-00-00	7-year determinate term of 2011 sentence
+	01-04-00	maximum term of consecutive 2012 sentence

[1]Although the original petition is indeed confusing, when read together with annexed exhibits, it may be construed as attempting to allege that DOCCS improperly merged the two state sentences, and that the petitioner is entitled to have his 2012 state sentence run concurrently with the federal sentence.

[2]All dates are set forth as years-months-days.

	08-04-00	aggregate maximum term
-	00-04-06	126 days of jail time
	07-11-24	to serve on aggregate maximum term
+	2011-11-14	received by DOCCS
	2019-11-07	current Maximum Expiration date
-	01-00-00	possible good time
	2018-11-07	earliest Conditional Release date

"Underlying Penal Law § 70.30 is the proposition that concurrent sentences and consecutive sentences yield single sentences, either by merger or by addition" (People v Buss, 11 NY3d 553, 557 [2008]). As pointed out by the respondent, under Penal Law § 70.30 (1) (d), where a defendant is serving one or more indeterminate sentences of imprisonment and one or more determinate sentences of imprisonment which run consecutively, the minimum term of the indeterminate sentence and term of the determinate sentence are added to arrive at an aggregate maximum term (see Penal Law § 70.30 [1] [d]).[3] As respondent points out, petitioner's state sentences (as combined) now have one parole eligibility date, one conditional release date, and one maximum expiration date. Petitioner's former conditional release date of July 7, 2017 and his former maximum expiration date of July 7, 2018 (both calculated on his 2011 state sentence, without regard to his subsequently imposed 2012 state sentence) have been replaced by dates in the combined state sentence (supra). With regard to his conditional release date the respondent, citing Correction Law § 803, also points out that whether or not an inmate will actually receive good time credit is a matter within the sound discretion of DOCCS. It is argued that there is no guarantee that

[3]Similarly, a person serving one or more indeterminate sentences of imprisonment and one or more determinate sentences of imprisonment which run consecutively, may be paroled at any time after expiration of the sum of the minimum or aggregate minimum period of the indeterminate sentences and six-seventh of the aggregate term of the determinate sentence or sentences (see Penal Law § 70.40 [1][a] [iv]).

an inmate will receive full credit (or any credit) for good behavior. This, of course, is correct (see Correction Law § 803 [4]; Matter of Reed v Fischer, 54 AD3d 1088, 1088-1089 [3d Dept., 2008]; Matter of Staples v Goord, 263 AD2d 943, lv denied 94 NY2d 755).

The respondent also makes reference to § 3585 of Title 18 of the United States Code, which recites "[a federal] sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served." (18 USC § 3585 [a]). In this respect, the respondent has no control or authority with respect to when the federal sentence would commence.

The petitioner makes reference to a Program Statement of the United States Department of Justice, Federal Bureau of Prisons, OPI: CPD, Number 5160.50 ("Program Statement", annexed as Exhibit H to respondent's answer to the amended petition). The Program Statement contains paragraph 9, entitled "Concurrent Service of Federal and State Sentences". Paragraph 9 sets forth procedures to enable inmates who are subject to state and federal concurrent sentences to receive federal credit for serving time in a non-federal institution. The procedures include a review process conducted by the federal Bureau of Prisons, requiring consideration of many discretionary factors, including the recommendation of the federal sentencing judge.

The only Penal Law provision with regard to undischarged prison sentences in a foreign jurisdiction is Penal Law § 70.30, paragraph 2-a, which recites, in part, as follows:

> "Undischarged imprisonment in other jurisdiction. Where a person who is subject to an undischarged term of imprisonment imposed at a previous time by a court of another jurisdiction is sentenced to an additional term or terms of imprisonment by a court of this state, to run concurrently with such undischarged term, such additional term or terms shall be deemed to

> commence when the said person is returned to the custody of the appropriate official of such other jurisdiction where the undischarged term of imprisonment is being served. []"

It is well settled that once an individual has been committed to the State Department of Correctional Services, such department has a duty to retain jurisdiction over the individual until the completion of his or her State sentence (Torres v Bennett, 271 AD2d 830, 831-832 [3d Dept., 2000]), citing People ex rel. McLeod v New York State Div. of Parole, 193 AD2d 942, 943-944, lv denied 82 NY2d 655). With regard to petitioner's request to be transferred to federal custody, an inmate has no right to select the correctional facility in which he will be incarcerated (see Torres v Bennett, supra, at 831 citing Matter of Partee v Bennett, 253 AD2d 950 [3d Dept., 1998]); or to determine the order in which multiple sentences will be served (People ex rel. McLeod v New York State Div. of Parole, supra, at 943). Of great significance here, it has been held that "Penal Law § 70.30 (2-a) does not apply at all unless the defendant has been returned to the actual custody of the other jurisdiction in which he [or she] is subject to an undischarged term of imprisonment" (People ex rel. McLeod v New York State Div. of Parole, 193 AD2d 942, 943 [3d Dept., 1993]). Phrased differently, "if a defendant is not returned to custody of the other jurisdiction, then he [or she] is not entitled to the benefits of [Penal Law 70.30 [2-a]" (Witteck v Superintendent of Wallkill Correctional Facility (65 AD2d 249 [3d Dept., 1979], at 251). In this instance, because the petitioner has not been delivered into federal custody for the purpose of serving his federal sentence Penal Law § 70.30 (2-a) has no application. All other relevant provisions of the Penal Law, however, do remain applicable. The federal Program Statement (supra) does not operate to override the provisions of Penal Law.

In the Court's view, the respondent properly computed respondent's sentence in

compliance with the provisions of the New York Penal Law (see Penal Law §§ 70.30 [1][d][4], 70.40 [1] [a] [iv][5]). There being no error on the part of DOCCS, the petitioner is not entitled to an order directing DOCCS to recalculate his sentence. Nor is he entitled to an order in this proceeding directing that he be transferred to federal custody (see Torres v Bennett, 271

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[4]Penal Law § 70.30 (1) (d) recites:

> "1. An indeterminate or determinate sentence of imprisonment commences when the prisoner is received in an institution under the jurisdiction of the state department of corrections and community supervision . Where a person is under more than one indeterminate or determinate sentence, the sentences shall be calculated as follows: []
>
> > (d) If the defendant is serving one or more indeterminate sentences of imprisonment and one or more determinate sentence of imprisonment which run consecutively, the minimum term or terms of the indeterminate sentence or sentences and the term or terms of the determinate sentence or sentences are added to arrive at an aggregate maximum term of imprisonment []" (Penal Law § 70.30)

[5] Penal Law § 70.40 [1] [a] [iv] recites:

> "1. Indeterminate sentence. (a) Release on parole shall be in the discretion of the state board of parole, and such person shall continue service of his or her sentence or sentences while on parole, in accordance with and subject to the provisions of the executive law and the correction law. []
>
> > (iv) A person who is serving one or more than one indeterminate sentence of imprisonment and one or more than one determinate sentence of imprisonment which run consecutively may be paroled at any time after the expiration of the sum of the minimum or aggregate minimum period of the indeterminate sentence or sentences and six-sevenths of the term or aggregate term of imprisonment of the determinate sentence or sentences." (Penal Law § 70.40)

AD2d 830 supra[6]; People ex rel. McLeod v New York State Div. of Parole, 193 AD2d 942, supra, at 943-944[7]). As noted in McLeod, if the petitioner believes that his incarceration in New York is inconsistent with the intent of the sentencing court, he should make application to that court to modify his commitment order to direct that he be delivered into the custody of federal court (People ex rel. McLeod v New York State Div. of Parole, supra, at 944).[8]

For all the foregoing reasons, the Court finds that he is not entitled to an order directing that his sentence be re-computed; or that he be transferred to federal custody on July 7, 2017.

The Court has reviewed and considered petitioner's remaining arguments and found them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute an abuse of discretion. The Court concludes that the amended petition must be dismissed.

Accordingly it is

ORDERED, that petitioner's informal application to amend his petition is granted,

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[6]In the Torres case, the Court held that where an inmate's state sentences were directed by the state sentencing judge to run concurrently with a prior federal sentence, he was not entitled to a court order directing transfer to federal custody (Torres v Bennett, supra)

[7]In McLeod, the Court denied petitioner's application to be returned to North Carolina in a situation where his New York State sentence was directed to run concurrently with his prior North Carolina sentence (see People ex rel. McLeod v New York State Div. of Parole, supra).

[8]A review of the sentence and commitment with regard to the 2012 state sentence reveals that while it recites that the sentence imposed will run concurrently with the federal sentence, no provision is made for delivery of the petitioner into federal custody. The only directive with regard to physical custody is that he is "committed to the custody of [] NYSDOCS until released in accordance with the law []", and he "be held until the judgment of this court is satisfied." The record before the Court does not contain the sentencing minutes for the 2012 state sentence.

as set forth above; and it is

ORDERED and ADJUDGED, that the amended 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: January 8, 2015
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated April 3, 2014, Petition, Supporting Papers and Exhibits
2. Respondent's Answer Dated July 23, 2014, Supporting Papers and Exhibits
3. Petitioner's Letter dated August 4, 2014 and Amended Petition
4. Respondent's Letter dated August 4, 2014 Opposing Petitioner's Request To Amend the Petition
5. Petitioner's Letter dated August 7, 2014 and Exhibits
6. Respondent's Answer To Amended Petition dated September 2, 2014, Supporting Papers and Exhibits
7. Petitioner's Response to Respondent's Answer Sworn to September 19, 2014 and Exhibits