Matter of Mateo v LaClair
2015 NY Slip Op 31289(U)
May 13, 2015
Supreme Court, Franklin County
Docket Number: 2015-106
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
RAFAEL MATEO,#06-R-4133,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2015-0061.15
INDEX # 2015-106
ORI # NY016015J

-against-

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

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This proceeding was originated by the Petition for Writ of Habeas Corpus (denominated "AFFIDAVIT IN SUPPORT FOR WRIT OF HABEAS CORPUS") of Rafael Mateo, verified on November 16, 2014 and ultimately filed in the Franklin County Clerk's office on February 5, 2015[1]. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging his continued 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 11, 2015 and has received and reviewed respondent's Answer and Return, verified on March 17, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated March 17, 2015. No Reply thereto has been received from petitioner.

The essential facts underlying this proceeding are not in dispute. On September 13, 2006 petitioner was sentenced in Supreme Court, Bronx County, to a determinate term

[1] Petitioner apparently first filed his papers in Albany County but such papers were returned to petitioner on or about January 23, 2015 with the instruction that they should be submitted to Supreme Court, Franklin County.

of 6 years, with 3 years post-release supervision, upon his conviction of the crime of Criminal Sale of a Controlled Substance 2°. He was received into DOCCS custody on September 27, 2006. On January 2, 2009 petitioner was released from the Fulton Correctional Facility in conjunction with his participation in a DOCCS Temporary Release Program. He was scheduled to return to Fulton on January 7, 2009 but failed to do so. In the meantime, on January 5, 2009, petitioner was arrested and taken into custody by federal authorities. On October 23, 2009 he was sentenced in United States District Court for the Southern District of New York to a term of 100 months, with 4 years supervised release, upon his conviction of the federal offense of Conspiracy to Distribute and Possess with Intent to Distribute Cocaine Base. Petitioner's federal sentence was subsequently reduced to 70 months. On February 3, 2014 petitioner was released from federal custody and returned to State DOCCS Custody. At or about that time DOCCS officials re-calculated the maximum expiration date of petitioner's 2006 state sentence as December 30, 2016.

Citing Criminal Procedure Law §430.10 and *State ex rel Hammer v. Keane*, 143 Misc 2d 132, *aff'd in part sub nom. People ex rel Hammer (Miller) v. Keane,* 171 AD2d 895 (2nd Dept.), *lv denied* 78 NY2d 863, petitioner argues that DOCCS officials unlawfully failed to provide credit against his 2006 state sentence for the time he spent incarcerated in federal custody from January 7, 2009 to February 3, 2014. For the reasons set forth below, however, the Court rejects this argument.

The running of petitioner's 2006 sentence commenced on September 27, 2006 when he was received into DOCCS custody. *See* Penal Law §70.30(1). Criminal Procedure Law §430.10 provides as follows: "Except as otherwise specifically authorized by law,

when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of sentence has commenced." Notwithstanding the foregoing, in January of 2009 Penal Law §70.30(7) provided, in relevant part, as follows:

> "7. Absconding from temporary release or furlough program. When a person who is serving a sentence of imprisonment is permitted to leave an institution to participate in a program of work release or furlough program as such term as defined in section six hundred thirty-one of the correction law . . . fails to return to the institution . . . at or before the time prescribed for his return, such failure shall interrupt the sentence and such interruption shall continue until the return of the person . . . to an institution under the jurisdiction of that department [the New York State Department of Correctional Services, now the Department of Corrections and Community Supervision] . . ."

The lower court in *Hammer* (Supreme Court, Westchester County) found, under facts and circumstances similar to those in the case at bar, that the inmate's state sentence continued to run during the period of his federal incarceration. In this regard the lower court found that the sentence interruption provisions of Penal Law §70.30(7) were not applicable. More specifically, the lower court in *Hammer* found that the effect of such sentence interruption provisions were " . . . circumscribed by [the statute's] introductory title - 'Absconding from temporary release.' An absconder in violation of a temporary release program is one who intentionally and voluntarily fails to return to the institution of his confinement (*see*, Correction Law §856(2); Penal Law §§ 205.16, 205.17)). Patently, [the *Hammer*] petitioner did not abscond since his failure to return was due to the arrest by Federal authorities." 143 Misc 2d at 133. This aspect of the lower court determination in *Hammer* was affirmed on direct appeal to the Appellate Division, Second Department. *People ex rel Hammer (Miller) v. Keane*, 171 AD2d 895, *lv denied* 78 NY2d 863.

If *Hammer* represented the only appellate authority with respect to the issue at hand this Court would be constrained to accept the argument advanced by petitioner herein. The Appellate Division, Third Department (whose rulings are binding on this Court), however, has specifically declined to follow the holding of the Appellate Division, Second Department, in *Hammer*. *See People ex rel Pughe v. Parrott*, 302 AD2d 823. In *Pughe* the Appellate Division, Third Department, rejected inmate's Pughe's argument " . . . that the use of the word 'absconding' in the subdivision's [Penal Law §70.30(7)] heading suggests that the failure to return must be intentional, because an 'absconding' is defined elsewhere as '[a]ny inmate who is found to have intentionally failed to return' (Correction Law §856(2))." *Id* at 824. The Appellate Division went on to explain the rejection of Inmate Pughe's argument as follows:

> " . . . [T]he text of the statute here unequivocally provides for the interruption of a sentence when the person 'fails to return' without any element of intent (Penal Law § 70.30(7)). We also note this well-accepted rule of statutory construction: 'While a heading may clarify or point the meaning of an imprecise or dubious provision, it may not alter or limit the effect of unambiguous language in the body of the statute itself' . . . Because the courts in [*Hammer*] ignored this maxim, we decline to following the holding of that case and instead conclude that the subdivision's heading does not limit its application to persons who intentionally fail to return to custody . . . Accordingly, we hold that Penal Law § 70.30(7) unambiguously provides for sentence interruption whenever a person on temporary release fails to return regardless of whether the failure is intentional . . ." *Id* at 824-825 (citations omitted).

See Maccio v. Goord, 4 AD3d 688.

In the case at bar this Court, based upon the determinations of the Appellate Division, Third Department, in *Pughe* and *Maccio,* rejects petitioner Mateo's argument that his 2006 sentence must be calculated as continuing to run during the time he spent incarcerated in federal custody from January 7, 2009 to February 3, 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 13, 2015 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge