

**Matter of Demery v Stanford**

2015 NY Slip Op 31291(U)

January 14, 2015

Supreme Court, Franklin County

Docket Number: 2014-313

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  
**IVY DEMERY, #02-A-5399,**  
Petitioner,

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

**DECISION AND JUDGMENT  
RJI #16-1-2014-0153.30  
INDEX # 2014-313  
ORI #NY016015J**

-against-

**TINA STANFORD,** Chairwoman,  
NYS Board of Parole,  
Respondent.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Ivy Demery, verified on April 23, 2014 and filed in the Franklin County Clerk's office on April 25, 2014. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the delinquent time assessment imposed following his final parole revocation hearing.

The Court issued an Order to Show Cause on May 2, 2014 and has received and reviewed respondent's Answer and Return, verified on August 4, 2014 and supported by the August 4, 2014 Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge. The Court has also received and reviewed petitioner's three-page, undated Letter Reply, received directly in chambers on August 13, 2014 and intended to be filed in the Franklin County Clerk's office simultaneously with this Decision and Judgment. By Letter Order dated November 3, 2014 the parties were directed to supplement their papers to address a point of concern detailed in the order. In response thereto, the Court has received and reviewed petitioner's Letter

Memorandum of December 8, 2014, received directly in chambers on December 9, 2014 and intended to be filed in the Franklin County Clerk's office simultaneously with this Decision and Judgment. The Court also received and reviewed the December 18, 2014 letter from counsel for the respondent, a copy of which was filed in the Franklin County Clerk's office on December 19, 2014.

On September 23, 2002 petitioner was sentenced in Ulster County Court to a determinate term of 5 years, with 5 years post-release supervision, upon his conviction of the crime of Assault 1<sup>o</sup>. He was initially received into DOCCS custody on October 11, 2002 certified as entitled to 299 days of jail time credit. At that time DOCCS officials calculated the maximum expiration date of petitioner's 5-year determinate term as December 11, 2006.

On March 21, 2006 petitioner was conditionally released from DOCCS custody to post-release supervision in North Carolina. Upon such release the running of petitioner's 5-year determinate term was interrupted with 8 months and 20 days still owing to the original maximum expiration date thereof "held in abeyance" pursuant to Penal Law §70.45(5)(a). Also as of petitioner's March 21, 2006 release, the running of his 5-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the maximum expiration date of the period initially calculated as March 21, 2011.

On April 15, 2006 - less than one month after his conditional release from DOCCS custody to post-release parole supervision - petitioner committed a new criminal offense in South Carolina. A Violation Release Report was issued by parole authorities in New York on May 6, 2006. In that report petitioner was charged with violating the conditions of his release in four separate respects. Parole Violation

Charge #3 alleged, in relevant part, that petitioner “. . . violated Rule #8 of the Conditions of his Release in that on 4/15/06, in Dillon County, South Carolina, the subject shot to death a 19-year-old male . . .”

On May 31, 2007 petitioner was sentenced in South Carolina, after a plea, to an 8-year term of imprisonment upon his conviction of the crime of Voluntary Manslaughter. New York Parole officials issued a Supplemental Violation of Release Report on July 23, 2007 charging petitioner with an additional parole violation based upon the South Carolina conviction.

On January 14, 2013 - presumably after petitioner completed serving his term of incarceration in South Carolina and was returned to local custody in New York - a Final Parole Revocation Hearing was conducted at the Ulster County Jail. At the final hearing petitioner, who was represented by counsel, entered into an agreement whereby he pled guilty to Parole Violation Charge #3 with separate recommendations to be made with respect to the delinquent time assessment. The parole violation specialist then placed the following on the record:

“We note the instant offense conviction of Assault, Second Degree<sup>[1]</sup>, whereby Mr. Demery was involved in a fight at a local bar, struck a male with a sharp object, causing lacerations. Your honor, he has an assaultive background. He was out on parole for less than a month, for that conviction, when he was involved in this incident, in the state of North [should be South] Carolina, where he had no business being <sup>[2]</sup>, and that he shot and killed a nineteen-year-old victim, in the parking lot of a convenience store down there. He is clearly a risk to society, and we ask that he be held to his maximum expiration.”

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<sup>1</sup> According to the Sentence and Commitment Order annexed to respondent’s Return as part of Exhibit A, petitioner was convicted of Assault 1°.

<sup>2</sup> Petitioner’s post release parole supervision was being supervised in the state of North Carolina and the incident of April 15, 2006 occurred outside of that jurisdiction, in South Carolina.

Counsel for the petitioner recommended that a two-year delinquent time assessment be imposed and deferred to petitioner to relate his version of the events of April 15, 2006. The petitioner then placed the following on the record:

“ . . . [W]e went to the store to use the bathroom. When my sister was in the bathroom, an altercation started. It didn't have nothing to do with us. When she was coming out of the store, the gunshots were already being fired. I got dragged into this against my own will. They were shooting in the car. The dude shot my friend in the head, for no reason. I was shot twice, and I was a victim in this case. The dude that was doing the shooting, I was trying to get him with my hands. This dude, Anthony, got killed. The next thing I know they're looking for me for a murder charge. I had no gun or nothing . . . I was just there using the bathroom, and I was shot twice, and my homeboy was shot in the head, for no reason at all. I was doing what I was suppose to be doing. I was not causing no trouble. I was in the wrong place, at the wrong time. I did seven years . . . Recommending the two years, that was hard to recommend that. Look at what I've been through.”

The presiding Administrative Law Judge (ALJ) sustained Parole Violation Charge #3 and the remaining charges were withdrawn. Petitioner's post-release supervision was revoked with a delinquency date of April 15, 2006 and a delinquent time assessment was imposed directing that petitioner be held to his maximum expiration date. The results and disposition of the parole revocation proceedings were affirmed on administrative appeal and this proceeding ensued.

As of the April 15, 2006 delinquency date the running of petitioner's period of post-release supervision was interrupted (*see* Penal Law §70.45(5)(d)(i)) with 4 years, 11 months and 6 days still owed to the initially-calculated March 21, 2011 maximum expiration date of such period. Petitioner was received back into DOCCS custody, as a post-release supervision violator, on February 5, 2013 certified as entitled to 57 days of parole jail time credit (Penal Law §70.40(3)(c)). The parole jail time credit was applied against the interrupted 2002 determinate term (*see* Penal Law

§70.45(5)(d)(iv)), reducing the time previously held in abeyance against such term from 8 months and 20 days to 6 months and 23 days. The 6 months and 23 days still held in abeyance against petitioner's 2002 determinate term re-commenced running as of his February 5, 2013 return to DOCCS custody (*see* Penal Law §70.45(5)(a)), with the maximum expiration date of the determinate term presumably reached on/or about August 28, 2013. Only as of August 28, 2013 did the 4 years, 11 months and 6 days still owed against petitioner's 5-year period of post-release supervision re-commence running (*see* Penal Law §70.45(5)(d)(iv)) with the maximum expiration date of the period of post-release supervision to be reached on August 4, 2018.

In challenging the delinquent time assessment imposed at his final parole revocation hearing petitioner asserts that such time assessment effectively covered a period of 5 years and 8 months<sup>3</sup>. Citing Penal Law §70.45(1) and Executive Law §259-i(3)(f)(x)(D), petitioner argues that “[t]he time assessment of 68 months [5 years and 8 months] for a violation of condition of **5 years Post-release Supervision** was unauthorized and illegal, where assessment was longer than Petitioner Post-release Supervision Term of 5 years.” The Court notes that Penal Law §70.45(1) provides, in relevant part, that “. . . a violation of any condition of supervision occurring at any time during such period of post-release supervision shall subject the defendant to a further period of imprisonment up to the balance of the remaining period of post-release supervision, not to exceed five years . . .” Similarly, Executive Law §259-i(3)(f)(x)(D) provides, in relevant part, that upon sustaining a parole violation charge

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<sup>3</sup> Using petitioner's methodology the actual time would be 5 years, 7 months and 26 days. That total is arrived at by adding 8 months and 20 days (held in abeyance against the 5-year determinate term as of petitioner's conditional release) to 4 years, 11 months and 6 days (owed against the 5-year determinate term as of the sustained delinquency date).

at a final parole revocation hearing the presiding officer (ALJ) is authorized, “in the case of persons released to a period of post-release supervision, [to] direct the violator’s reincarceration up to the balance of the remaining period of post-release supervision, not to exceed five years . . .”

Although respondent opposed petitioner’s argument on this point in his original answering papers, in the December 18, 2014 letter to chambers from counsel the following is stated: “Respondents, for the purposes of this proceeding only, no longer contest the position of Petitioner that the statutory language of Penal Law §70.45(1) and Executive Law §259-i(3)(f)(x)(D) limits Petitioner’s total period of reincarceration on the instant violation to five years, with such five year term (i) including both the remaining time he owes on his underlying determinate sentence of incarceration and the remaining time he owes to post-release supervision; and (ii) commencing on the date of the final revocation hearing [January 14, 2013].” (Emphasis in original). By way of a footnote in his December 18, 2014 letter, counsel pointed out that “Penal Law §70.45(5)(d)(iv) provides in pertinent part that the ‘time assessment shall commence upon the issuance of a determination after a final hearing that the person has violated one or more conditions of supervision.’ ” Notwithstanding the foregoing, since there is nothing in respondent’s papers to suggest that DOCCS officials have actually calculated/established a date upon which the delinquent time assessment is to expire pursuant to counsel’s concession (presumably January 14, 2018) the Court will direct such calculation.

To the extent the petition might be construed as also including a non-statutory claim that the original delinquent time assessment (hold to maximum expiration date, effectively almost 5 years and 8 months) was excessive, the Court rejects such

argument. While a specific parole violation charge may be sustained only if such charge is supported by a preponderance of the evidence adduced at the final hearing (Executive Law §259-i(3)(f)(viii)), judicial review of the Board's judgment as to what should be done once a parole violation is established or admitted is extremely limited. Where the reviewing court concludes that a delinquent time assessment imposed against a parole violator is "clearly disproportionate to the offense and completely inequitable in light in the surrounding circumstances," such time assessment may be overturned. *See Lord v. State of New York Executive Department Board/Division of Parole*, 263 AD2d 945, lv den 94 NY2d 753, rearg den 95 NY2d 826, quoting *Kostika v. Cuomo*, 41 NY2d 673, 676.

Stated otherwise, "the test is whether such punishment is 'so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness.'" *Pell v. Board of Education*, 34 NY2d 222, 233 (citations omitted). According to the Court of Appeals in *Pell*, "...a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct...of the individual, or to the harm or risk of harm...to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of the others in like situations..." *Id* at 234.

The limited nature of judicial review of dispositive parole board action, following an established or admitted violation, is underscored by the 2004 decision of the Appellate Division, Third Department, in *Fryar v. Travis*, 11 AD3d 761. According to the *Fryar* court:

" 'Judicial review of Board action with respect to a finding of parole violation is admittedly narrow and limited. Even more limited is judicial review of the Board's judgment as to what it should do about the violation. Once the violation is established or admitted, the exercise of discretion in determining whether or not parole should be revoked, represents a very high form of expert regulatory and administrative judgment and the expert

appraisal of the Parole Board in this area can be regarded as almost unreviewable'' (*People ex rel Backer v. Follette*, 33 AD2d 1052, 1053 (1970), quoting *Hyser v. Reed*, 318 F2d 225, 240 (1963), *cert denied* 375 US 957 (1963)).” 11 AD3d 761, 761-762.

*Fryer* dealt specifically with the propriety of designating a parole violator as a Category 1 violator, but it was subsequently cited by the Appellate Division, Third Department, in connection with its review a Parole Board’s decision to impose a 48-month time assessment. *See Williams v. Travis*, 20 AD3d 622. Although the *Williams* court remanded to the Board for reconsideration of the 48-month time assessment, its decision was clearly based upon the fact that the Board expressly relied upon an inaccurate recitation of Mr. Williams’ criminal record. No similar factual error is at issue in this proceeding.

Given the narrow scope of judicial review with respect to the length of a delinquent time assessment imposed upon the revocation of parole (here, post-release supervision), the Court finds no basis to overturn the hold to maximum expiration date delinquent time assessment in the case at bar, as modified in accordance with the provisions of this Decision and Judgment. At the time of the April 15, 2006 South Carolina incident petitioner had been at liberty under post-release parole supervision for less than one month from his 2002 Ulster County conviction/sentencing with respect to the violent felony offense Assault 1°. At the January 14, 2013 final parole revocation hearing petitioner plead guilty to Parole Violation Charge #3, admitting that he shot a 19-year man to death in South Carolina on April 15, 2006. This Court is aware of petitioner’s claims of mitigation expressed by him at the final hearing and has read the South Carolina sentencing transcript annexed to the Petition as Exhibit A. Although it appears that petitioner might have interposed a self-defense claim with respect to the murder charges faced in South Carolina, he instead pled guilty to the reduced - but still very serious -

charge of Voluntary Manslaughter, thus foreclosing any evidentiary give and take with respect to any self-defense claim. In view of the foregoing the Court simply finds no basis to conclude that the delinquent time assessment in the case at bar, as modified in this proceeding, is clearly disproportionate with respect to the sustained parole violation charge and/or completely inequitable in light of surrounding circumstances.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

**ADJUDGED**, that the petition is granted, without cost or disbursements, but only to the extent that respondent is directed, upon her consent, to modify the delinquent time assessment by capping same at five years commencing on January 14, 2013.

**Dated:** January 14, 2015 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice