Matter of Clark v Frank
2015 NY Slip Op 31512(U)
July 16, 2015
Supreme Court, St. Lawrence County
Docket Number: 145380
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
JAMEL CLARK,#14-R-0661,
Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2015-0175.08
INDEX # 145380
ORI # NY044015J

-against-

LARRY FRANK, Superintendent,
Ogdensburg Correctional Facility,
Respondent.

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The Court has before it the Petition (denominated Affidavit in Support of Order to Show Cause) of Jamel Clark, sworn to on March 9, 2015 and filed in the St. Lawrence County Clerk's Office on March 13, 2015. Petitioner, who is an inmate at the Ogdensburg Correctional Facility, is challenging the calculation of his February 25, 2014 determinate sentence as running consecutively - rather than concurrently - with respect to "any parole time or violation of parole time owed." The Court issued an Order to Show Cause on March 18, 2015 and has received and reviewed respondent's Answer and Return, verified on May 15, 2015. The Court has also received and reviewed petitioner's Reply thereto, verified on May 22, 2015 and filed in the St. Lawrence County Clerk's office on May 28, 2015.

On April 21, 1994 petitioner was sentenced in Supreme Court, Kings County, as a persistent violent felony offender, to a controlling indeterminate sentence of 10 years to life upon his conviction of the crime of Robbery 2° (two counts). He was released from DOCCS custody to parole supervision on February 4, 2004 but was subsequently declared delinquent, restored to parole supervision and declared delinquent (for a second time) as of July 31, 2012. On February 25, 2014 petitioner was sentenced in Supreme Court, Kings

County, as a second felony drug offender (Penal Law §70.70(1)(b)) previously convicted of a violent felony (Penal Law §70.70(4)), to a determinate term of 6 years, with 1½ years post-release supervision, upon his conviction of the crime of Criminal Possession of a Controlled Substance 3°. The criminal offense underlying petitioner's 2014 conviction was committed on June 17, 2011. Although the 2014 Sentence and Commitment Order does not specifically direct that petitioner's sentence run either concurrently or consecutively with respect to the undischarged term of his 1994 sentence, the "REMARKS" section of the order contains the following notation: "THE COURT RECOMMENDS THAT THIS SENTENCE RUN CONCURRENTLY TO ANY PAROLE TIME OR VIOLATION OF PAROLE TIME OWED."

Petitioner is challenging the determination of DOCCS officials to calculate the 2014 sentence as running consecutively - rather than concurrently - with respect to the undischarged term of the 1994 sentence. Penal Law §70.25(1) provides, in relevant part, as follows: "Except as provided in [subdivision] . . . two-a . . . of this section . . . when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence . . . imposed by the court shall run either concurrently or consecutively with respect to . . . the undischarged term . . . in such manner as the court directs at the time of sentence. If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run as follows: [A] . . . determinate sentence shall run concurrently with all other terms . . ." (Emphasis added). Penal Law §70.25(2-a) in turn provides, in relevant part, that when a " . . . determinate sentence of imprisonment is imposed pursuant to . . . subdivision . . . four of §70.70 . . . of this article [Penal Law Article 70] . . . and such person is subject to an undischarged indeterminate . . . sentence of imprisonment imposed prior to the date on which the present crime was committed,

the court must impose a sentence to run consecutively with respect to such undischarged sentence." Since the 2014 sentence was imposed against petitioner pursuant to Penal Law §70.70(4) and since the 1994 sentence was imposed prior to the date the crime underlying petitioner's 2014 sentence was committed, the 2014 sentencing court was statutorily mandated to impose its determinate sentence as running consecutively, rather than concurrently, with respect to the undischarged term of the 1994 sentence.

Notwithstanding the foregoing, DOCCS officials are conclusively bound by the contents of the sentence and commitment order accompanying an inmate into state custody. *See Murray v. Goord*, 1 NY3d 29 and *McCullaugh v. DeSimone*, 111 AD3d 1011. Thus, where a sentencing judge is mandated pursuant to Penal Law §70.25(2-a) to impose a sentence to run consecutively with respect to the undischarged term of a previously-imposed sentence but nevertheless directs his/her sentence to run concurrently with respect to such undischarged term, DOCCS officials are bound to calculate the running of the multiple sentences in accordance with the sentencing court's order. *See Greaves v. State*, 35 Misc 3d 290. In that situation the only recourse for DOCCS officials is to bring the erroneously-imposed/illegal sentence to the attention of the sentencing court, defense counsel and district attorney pursuant to the provisions of Correction Law §601-a and await corrective action. Where, however, the sentencing judge is mandated pursuant to Penal Law §70.25(2-a) to impose a sentence to run consecutively with respect to the undischarged term of a previously-imposed sentence but nevertheless fails to specify whether his/her sentence is to run consecutively or concurrently with respect to such undischarged term, DOCCS officials may properly calculate the newly-imposed sentence as running consecutively as required by statute. *See Ettari v. Fischer*, 13 NY3d 850, *revg*

54 AD3d 460, and *People ex rel Gill v. Greene*, 12 NY3d 1, *revg* 48 AD3d 1003, *cert. denied sub nom Gill v. Rock*, 558 US 837.[1]

In the case at bar the February 25, 2014 Sentence and Commitment Order of the Supreme Court, Kings County, does not include any language constituting an order that its determinate sentence is to run either concurrently or consecutively with respect to the unexpired term of the 1994 sentence. In this regard the Court finds that the language set forth under the "REMARKS" heading in the 2014 Sentence and Commitment Order to the effect that the sentencing court "RECOMMENDS" that the sentence "RUN CONCURRENTLY TO ANY PAROLE TIME OR VIOLATION OF PAROLE TIME OWED" must be taken at face value as a mere non-binding recommendation. The determination of DOCCS officials to calculate petitioner's 2014 sentence as running consecutively, rather than concurrently, with respect to the undischarged term of his 1994 sentence will therefore be analyzed as if the sentencing court was silent with respect to the concurrent versus consecutive issue. Accordingly, this Court finds that DOCCS officials properly calculated petitioner's 2014 determinate sentence as running consecutively with respect to the undischarged term of his 1994 indeterminate sentence. *See* Penal Law §70.25(2-a) and *People ex rel Gill v. Greene,* 12 NY3d 1, *revg* 48 AD3d 1003, *cert. denied sub nom Gill v. Rock*, 558 US 837.

To the extent anything in petitioner's papers might be construed as asserting that the language of the 2014 Sentence and Commitment Order does not accurately reflect the intention of the sentencing judge to impose the 2014 determinate term as running concurrently with respect to the undischarged term of the 1994 indeterminate sentence,

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[1] In his papers petitioner cites the decisions of the Appellate Division, Third Department, in both *Ettari* and *Gill*. His reliance on the appellate-level decisions in these cases, however, is misplaced since, as indicated in the above citation, both appellate-level decisions were reversed by the New York State Court of Appeals.

this Court finds that such an assertion would constitute a challenge to the sentencing order itself, as opposed to the respondent's implementation of such order, and therefore must be pursued by motion in the sentencing court. *See McCullaugh v. DeSimone*, 111 AD3d 1011, *Caroselli v. Goord*, 269 AD2d 706, *lv denied* 95 NY2d 754, *and Tunstall v. Ward*, 253 AD2d 910.

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: July 16, 2015 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge