

Matter of Victor v Stanford

2015 NY Slip Op 31818(U)

September 30, 2015

Supreme Court, St. Lawrence County

Docket Number: 144392

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE

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In the Matter of the Application of
LOUIS VICTOR, #14-R-0438,

Petitioner,

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

**DECISION AND JUDGMENT
RJI#44-1-2014-0659.30
INDEX #144392
ORI # NY044015J**

-against-

TINA STANFORD, Chairwoman,
NYS Board of Parole,

Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition (denominated “Affidavit in Support of Order to Show Cause”) of Louis Victor, verified on August 27, 2014 and filed in the St. Lawrence County Clerk’s office on September 23, 2014. Petitioner, who is now an inmate at the Queensboro Correctional Facility, is challenging the determination establishing a final delinquency date under the provisions of Executive Law §259-i(3)(d)(iii). The Court issued an Order to Show Cause on September 26, 2014 and received and reviewed respondent’s Notice of Motion to Dismiss, supported by the Affirmation of Alicia M. Lendon, Esq., Assistant Attorney General, dated November 21, 2014 (the Lendon Affirmation). In opposition thereto, the Court received and reviewed petitioner’s Affidavit of Support to Response of Respondent Affirmation Motion to Dismiss, sworn to on December 12, 2014 and filed in the St. Lawrence County Clerk’s office on December 16, 2014. In the meantime, petitioner moved for disclosure. Petitioner’s disclosure motion, which was designated as returnable on December 12, 2014, was supported by his Affidavit in Support of an Order Directing Disclosure, sworn to on November 24, 2014.

By Decision and Order dated January 27, 2015 respondent's motion to dismiss and petitioner's motion for disclosure were both denied. The Court next received and reviewed respondent's Answer and Return, verified on February 20, 2015, as well as petitioner's Affidavit to Reply to Verified Answer and Return Motion, sworn to on April 16, 2015 and filed in the St. Lawrence County Clerk's office on April 22, 2015. By Letter Order dated June 3, 2015 the Court directed respondent to supplement her answering papers with respect to a specific issue described in the Letter Order. The Court has since received and reviewed the Letter Memorandum of Alicia M. Lendon, Esq., Assistant Attorney General, dated June 26, 2015, as well as petitioner's July 16, 2015 Letter Memorandum, filed in the St. Lawrence County Clerk's office on July 20, 2015.

On December 15, 2010 petitioner was sentenced in Supreme Court, Queens County, as a second drug felony offender, to a determinate term of 2½ years, with 2 years post-release supervision, upon his conviction of the crime of Attempted Criminal Possession of a Controlled Substance 3°. DOCCS officials calculated the initial maximum expiration date of the 2010 determinate term as April 7, 2013. On July 17, 2012 petitioner was released from DOCCS custody to post-release supervision. Upon such release the running of the 2½-year determinate term was interrupted with 8 months and 20 days still owing to the initial April 7, 2013 maximum expiration date thereof "held in abeyance." *See* Penal Law §70.45(5)(a). Also upon petitioner's July 17, 2012 release the running of the 2-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the maximum expiration date of that period initially calculated as July 17, 2014.

Petitioner committed a new criminal offense on February 13, 2013 and was apparently arrested and taken into local custody on that date or on February 14, 2013. On

February 27, 2013 he was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of release in eight separate respects. Parole Violation Charges #4 through #6 related to the February 13, 2013 incident underlying new criminal charges. Parole Violation Charge #7 alleged, in relevant part, “. . . that on or before 2/26/13 he [petitioner] used an illegal substance, to wit: marijuana as evidence [sic] by a positive toxicology submitted on 2-26-13 . . .” Petitioner waived preliminary hearing and a final parole revocation hearing was conducted on March 13, 2013. At the final hearing petitioner pled guilty to Parole Violation Charge #7 and the remaining charges were withdrawn. His post-release supervision was revoked, with a modified delinquency date of February 26, 2013, and a delinquent time assessment of time served plus three months was imposed. The delinquency interrupted the running of petitioner’s period of post-release supervision (*see* Penal Law §70.45(5)(d)(1)) with 1 year, 4 months and 21 days still owing to the initial July 17, 2014 maximum expiration date of such period.

Petitioner was returned to DOCCS custody as a post-release supervision violator on March 28, 2013 certified as entitled to 29 days of parole jail time credit (Penal Law §70.40(3)(c))¹. The parole jail time credit was applied against the interrupted 2010 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 7 months and 21 days. The 7 months and 21 days still held in abeyance against petitioner’s 2010 determinate term recommenced running upon his March 28, 2013 return to DOCCS custody (*see* Penal Law

¹ The 29 days of parole jail time credit presumably covered the time period from petitioner’s February 26, 2013 delinquency date to his return to DOCCS custody on March 28, 2013.

§70.45(5)(a)) and at that time DOCCS officials calculated the adjusted maximum expiration date of the 2010 determinate term as November 19, 2013.

On June 13, 2013, upon expiration of the time served plus three months delinquent time assessment imposed at the March 13, 2013 final parole revocation hearing, petitioner was re-released from DOCCS custody to post-release parole supervision. Upon such re-release the running of the 2010 determinate term was again interrupted with 5 months and 6 days still owing to the November 19, 2013 adjusted maximum expiration date of such term “held in abeyance.” *See* Penal Law §70.45(5)(a). Also upon petitioner’s June 13, 2013 release the running of the 1 year, 4 months and 21 days still owed by petitioner against the 2-year period of post-release supervision recommenced (*see* Penal Law §70.45(5)(a)) with the adjusted maximum expiration date of that period calculated as November 4, 2014.

On February 7, 2014 petitioner was sentenced in Supreme Court, New York County (in connection with the criminal offense of February 13, 2013), as a second drug felony offender, to a determinate term of 1½ years, with 2½ year post-release supervision. He was received back into DOCCS custody on February 20, 2014 ultimately certified as entitled to 21 days of jail time credit². Upon petitioner’s return to DOCCS custody a Notice of Final Deceleration of Delinquency, dated February 20, 2014, was issued by the New York State Board of Parole. The notice provided, in relevant part, as follows: “This is to notify you that, based upon the new [February 7, 2014] conviction and in accordance

² The 21 days of jail time credit covered the time period from petitioner’s February 13, 2013 arrest to February 20, 2013 (8 days) as well as the time period from petitioner’s February 7, 2014 sentencing to his return to DOCCS custody on February 20, 2014 (13 days). *See* the Amended Jail Time Certification of the City of New York Department of Correction, a copy of which is annexed to the Lendon Affirmation as part of Exhibit A thereof.

with Executive Law §259-i(3)(d)(iii), the Board of Parole has issued a final declaration of delinquency with a delinquency date of 2/7/14 [date of conviction].”

DOCCS officials calculated the maximum expiration date of petitioner’s multiple [2010/2014] determinate terms by aggregating the 1½-year 2014 determinate term with the 5 months and 6 days still held in abeyance against the 2010 determinate term to produce a total time owed of 1 year, 11 months and 6 days. Running that total time owed from February 20, 2014 (the date petitioner was received back into DOCCS custody following the 2014 sentencing), less 21 days of jail time credit, DOCCS officials calculated the maximum expiration date of petitioner’s aggregated multiple sentences as January 4, 2016³, with the 2½-year period of post-release supervision associated with petitioner’s 2014 determinate term controlling.

In this proceeding petitioner challenges the respondent’s designation of February 7, 2014 - the date of his 2014 conviction/sentencing - as the delinquency date with respect to the revocation of his post-release parole supervision by operation of law pursuant to Executive Law §259-i(3)(d)(iii). Citing the unreported January 14, 2013 decision of the Supreme Court, Albany County in *Lewis v. Evans* (Index No. 3065-2012), petitioner argues “. . . that regulations and case-law requires the Division of Parole to set the delinquency date as date of arrest [in this case February 13 or 14, 2013] and not the date of conviction.” Although petitioner’s argument is clear, the Court nevertheless remains uncertain as to the precise nature of the relief he seeks. In this regard it is noted that petitioner has proposed no satisfactory sentence calculation methodology employing

³ After applying possible good time and merit time, DOCCS officials also calculated the conditional release and merit release dates associated with petitioner’s multiple determinate sentences as September 24, 2015 and July 6, 2015, respectively.

a February 13/14, 2013, rather than February 7, 2014, delinquency date. There is much uncertainty on this point given the fact that between those dates petitioner's parole was revoked, with a modified delinquency date of February 26, 2013, petitioner was returned to DOCCS custody as a post-release supervision violator on March 28, 2013 and petitioner was re-released from DOCCS custody to post-release parole supervision on June 13, 2013. As alluded to previously, each of these events directly impacted the ongoing calculations associated with petitioner's 2010 sentence/period of post-release supervision and petitioner sets forth no analysis with respect to the issue of how such calculations would be affected by the subsequent (almost one year after the fact) establishment of a February 13/14, 2013 final delinquency date arising associated with his February 7, 2014 conviction/sentencing.

The methodology whereby proper parole delinquency dates are established is not statutory in origin. Nevertheless, it is well-settled that when a releasee's parole is revoked by operation of law upon his/her conviction of a new felony committed while under parole supervision (*see* Executive Law §259-i(3)(d)(iii) and 9 NYCRR §8004.3(g)), the Board of Parole is authorized to issue a final declaration of delinquency as of the date the releasee committed the new crime or the date of his/her arrest. *See Campbell v. Evans*, 105 AD3d 1277. As discussed in the preceding paragraph, however, where, as here, between the date(s) of the commission of the new crime/arrest and the date of the new conviction/sentencing the releasee's parole is revoked on other grounds, a final delinquency date is established, he/she is returned to DOCCS custody as a parole/post-release supervision violator he/she is subsequently re-released to parole/post-release supervision, it is simply not practical to establish the final delinquency date as the date

the crime was committed or the date the releasee was arrested.

Item 9212.07(I)(D) of the March 1991 New York State Division of Parole Policy and Procedures Manual establishes a single exception to the general rule that the final delinquency date should correspond to the date of the commission of the new crime/arrest as follows: “If there has been a revocation of parole, a Board order of return and a subsequent Board decision to re-release . . . between the date of the commission of the offense and the date of the imposition of a new indeterminate sentence on the new felony conviction, use the date of the new sentence for the final DD [delinquency date].” Item 9212.07 of the July 2004 New York State Division of Parole Policy and Procedures Manual, however, purports to supercede the March 1991 version. The final declaration of delinquency is defined in the 2004 version of the manual as follows: “A Final Declaration of Delinquency is established when a releasee commits a new crime while on parole supervision, is convicted of a New York felony and receives a new indeterminate or determinate sentence, all prior to the completion of a Final Revocation Hearing.” (Emphasis added). The 2004 version of Manual Item 9212.07 goes on to state that the delinquency date based upon a new conviction “. . . is either the offense date or the sentence date, depending on the circumstances.” July 2004 Manual Item 9212.07(I)(D)(1)(a). The July 2004 Manual Item does not appear to address the nature of such “circumstances.” The Court does observe, however, that the 2004 Manual Item also contains the following note: “No Final DD is to be generated on cases who have had a Final Parole Revocation Hearing which resulted in a delinquency date already being established.” 2014 Manual Item 9212.07(I)(B)(1). The New York State Division of Parole

Policy and Procedures Manual, however, does not carry the force of law and therefore, neither version of that document is binding on, or enforceable by, this Court. *See Bratton v. New York State Board of Parole*, 23 AD3d 879 and *Lord Organic Allah v. New York State Board of Parole*, 158 AD2d 328.

After carefully considering the unusual - although by no means unique - facts and circumstances of this case, the Court ultimately concludes that there is no basis to disturb the determination establishing February 7, 2014 as the final delinquency date upon the revocation of petitioner's post-release parole supervision by operation of law pursuant to Executive Law §259-i(3)(d)(iii). In this regard the Court notes that the utilization of the February 7, 2014 delinquency date affords petitioner credit (in one form or another) for the entire time period from July 17, 2012 (the date he was initially released from DOCCS custody to post-release parole supervision) to February 20, 2014 (the date he was received back into DOCCS custody as a post-release supervision violator). Prior to July 17, 2012 petitioner's 2010 sentence was running. From July 17, 2012 to February 26, 2013 (the modified delinquency date established following the March 13, 2013 final parole revocation hearing) petitioner's period of post-release supervision was running. The period from February 26, 2013 to March 28, 2013 (the date petitioner was first returned to DOCCS custody as a post-release supervision violator) was credited as parole jail time. From March 28, 2013 to June 13, 2013 (the date petitioner was next released from DOCCS custody to post-release parole supervision) petitioner's 2010 sentence was running. From June 13, 2013 to February 7, 2014 (the date of petitioner's 2014 conviction/sentencing and the delinquency date imposed upon the revocation of his post-release supervision by

operation of law) the period of post-release supervision associated with the 2010 sentence was running. The period from February 7, 2014 to February 20, 2014 (the date petitioner was again returned to DOCCS custody as a post-release violator) was credited against petitioner's multiple (2010/2014) sentences as jail time. As of February 20, 2014 those multiple sentences were running. The only "double dipping" the Court perceives in this sentence calculation involves the time period from petitioner's February 13, 2013 arrest to February 20, 2013. During those eight days the period of post-release supervision associated with petitioner's 2010 sentence was running and he also received jail time credit against his multiple (2010/2014) sentences.

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 30, 2015 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court