

Matter of McRae v Annucci

2015 NY Slip Op 31995(U)

October 27, 2015

Supreme Court, Franklin County

Docket Number: 2015-463

Judge: S. Peter Feldstein

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This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

X

In the Matter of the Application of
BARRY McRAE, #92-A-3268,

Petitioner,

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

DECISION AND JUDGMENT

RJI #16-1-2015-0244.39

INDEX # 2015-463

ORI #NY016015J

-against-

ANTHONY J. ANNUCCI, Commissioner,
NYS Department of Corrections and Community
Supervision,

Respondent.

X

This proceeding was originated by the Petition of Barry McRae, verified on March 27, 2015 and filed in Bronx County. By Order dated May 6, 2015 the Supreme Court, Bronx County (Hon. Vincent T. Quattrochi), directed a change of venue to Franklin County. The change of venue was apparently prompted by the transfer of petitioner from local custody in Bronx County into the custody of the New York State Department of Corrections and Community Supervision at the Bare Hill Correctional Facility in Franklin County. Petitioner, who remains incarcerated at Bare Hill, is challenging the time computation underlying his ongoing incarceration in DOCCS custody. More specifically, he asserts that the maximum expiration date of his underlying sentence(s) falls in July or August of 2016 rather than November 24, 2017, as calculated by DOCCS officials.

The Court issued an Order to Show Cause on June 2, 2015 and has received and reviewed respondent's Answer and Return, verified on August 3, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated

August 3, 2015. The Court has also received and reviewed petitioner's Reply thereto, dated August 21, 2015 and filed in the Franklin County Clerk's office on August 31, 2015.

On March 25, 1992 petitioner was sentenced in Supreme Court, Kings County, to an indeterminate sentence of 2 to 6 years upon his conviction of the crime of Robbery 1°. He was received into DOCCS on April 22, 1992 certified as entitled to 160 days of jail time credit (Penal Law §70.30(3)) covering the period from his November 14, 1991 arrest to April 22, 1992. He was transferred by DOCCS officials to a local holding facility on July 14, 1992 pending disposition of additional criminal charges then pending in Kings County. On February 17, 1993 petitioner was sentenced in Supreme Court, Kings County, to an indeterminate sentence of 8 $\frac{1}{3}$ ¹ to 25 years upon his conviction of the crime of Attempted Murder 2°. The criminal act underlying petitioner's 1993 conviction was committed on June 7, 1991. Following sentencing, petitioner was returned to a DOCCS facility on April 2, 1993.

After three parole delinquencies, DOCCS officials currently calculate the maximum expiration date of petitioner's multiple (1992 and 1993) sentences as November 24, 2017. Although petitioner takes issue with this calculation - asserting that his properly calculated maximum expiration date falls in July or August of 2016 - the Court is unable to discern from his papers any cogent sentence calculation methodology supporting the assertion². In any event, after reviewing the sentence calculations set forth in the July 28, 2015 letter from Richard deSimone, Esq., Deputy Counsel in Charge, DOCCS Office of

¹ The February 17, 1993 sentence and commitment order actually showed an indeterminate sentence of 8 $\frac{1}{2}$ to 25 years. On February 22, 2008, however, an amended sentence and commitment order was issued to show the correct indeterminate sentence of 8 $\frac{1}{3}$ to 25 years.

² Even if the controlling 25-year maximum term of petitioner's multiple sentences was calculated as running uninterrupted from his November 14, 1991 arrest date (and this is clearly not the case), such calculation would seemingly produced a maximum expiration date of November 14, 2016 rather than July or August of 2016.

Sentencing Review (hereinafter the deSimone Letter), annexed to respondent's Answer and Return as Exhibit N, the Court finds that the maximum expiration date of petitioner's merged multiple (1992/1993) sentences has been properly calculated by DOCCS officials as November 24, 2017.

Before describing, in detail, the sentence calculations set forth in the deSimone Letter, the Court finds it appropriate to address certain confusing/erroneous references set forth in Assistant Attorney General Fleury's Letter Memorandum of August 3, 2015. In that memorandum counsel identifies each of petitioner's three releases from DOCCS custody to parole supervision as releases to "Post-Release Supervision." Periods of post-release supervision, however, are unique to determinate sentences of imprisonment. *See* Penal Law §70.45. It is absolutely clear from the record, moreover, that petitioner's 1992 and 1993 sentences were indeterminate, rather than determinate, sentences. Determinate sentences were not introduced into the New York Penal Law until legislative enactment of the Sentencing Reform Act of 1995 (L 1995, ch 3). The Sentencing Reform Act of 1995, moreover, made no provision for additional periods of post-release supervision in conjunction with determinate sentences. It was not until the 1998 enactment of "Jenna's Law" that Penal Law §70.45, mandating that "[e]ach determinate sentence also includes, as a part thereof, an additional period of post-release supervision," was added. Penal Law §70.45(1), as added by L 1998, ch 1, §15.

Petitioner's concerns with respect to Assistant Attorney General Fleury's erroneous references notwithstanding, the Court finds nothing in the deSimone Letter, or the broader record herein, even remotely suggesting that the DOCCS sentence calculations were based upon any misunderstanding with respect to the nature of petitioner's multiple (1992/1993) sentences. Such sentences were clearly calculated as indeterminate sentences of imprisonment. There is no indication that the unique sentence calculation

methodology applicable with respect to determinate sentences/periods of post-release supervision was employed.

Since the 1993 sentencing court did not specify whether its indeterminate sentence would run concurrently or consecutively with respect to the undischarged term of the 1992 indeterminate sentence, DOCCS officials correctly calculated the 1993 sentence as running concurrently with respect to such unexpired term. *See* Penal Law §70.25(1)(a). Penal Law §70.30(1)(a), addressing the calculation of multiple, concurrent, indeterminate sentences, provides, in relevant part, that “. . . the time served under imprisonment on any of the sentences shall be credited against the minimum periods of all the concurrent indeterminate sentences . . . The maximum . . . terms of the indeterminate sentences . . . shall merge in and be satisfied by discharge of the term which has the longest unexpired time to run.” Since the 25-year maximum term of petitioner’s 1993 sentence obviously had a longer unexpired time to run than the remaining portion of the 6-year maximum term of the 1992 sentence, the maximum term of the 1993 sentence controls the calculation of the maximum expiration date of the merged multiple (1992/1993) sentences. At this juncture it should be stressed that the above-quoted provisions of Penal Law §70.30(1)(a) afford petitioner no credit against the 25-year maximum term of the 1993 sentence for the time he served under imprisonment on the 1992 sentence.³

The Court finds that DOCCS officials properly determined that the 25-year maximum term of petitioner’s merged sentences commenced running on the date the 1993 sentence was imposed (February 17, 1993) despite the fact that petitioner was then confined in a local holding facility. Although, as pointed out by petitioner, “[a]n

³ The 9 months and 25 days petitioner served under imprisonment on the 1992 sentence (from the April 22, 1992 commencement date of the 1992 sentence to the February 17, 1993 imposition of the 1993 sentence) was properly credited against the minimum period of his concurrent 1993 sentence in accordance with the provisions of Penal Law §70.30(1)(a).

indeterminate . . . sentence of imprisonment commences when the prisoner is received in an institution under the jurisdiction of the state department of corrections and community supervision” (Penal Law §70.30(1)), the petitioner was received into DOCCS custody on April 22, 1992 following the imposition of the 1992 sentence. Petitioner remained in the constructive custody of DOCCS, and his 1992 sentence continued to run, notwithstanding the fact that on or about July 14, 1992 he was moved to a local holding facility. Petitioner’s presence in the local facility as of July 14, 1992 simply represented an accommodation whereby a DOCCS inmate serving a previously imposed sentence is moved to a local institution to facilitate the disposition of additional charges pending in the local jurisdiction. Since petitioner effectively remained in DOCCS custody (serving his 1992 sentence) when the 1993 Kings County sentence was imposed on February 17, 2013, DOCCS officials properly calculated the controlling 25-year maximum term of the 1993 sentence as commencing to run on that date. *See People ex rel Weiss v. Reid*, 65 AD2d 560. Running the controlling 25-year maximum term of petitioner’s multiple (1992/1993) sentences from February 17, 1993 (less 160 days of jail time credit) DOCCS officials calculated the original maximum expiration date thereof as September 6, 2017.

On May 6, 2009 petitioner was conditionally released from DOCCS custody to parole supervision but was subsequently determined to be delinquent as of July 15, 2011. The delinquency interrupted the running of petitioner’s multiple sentences (*see* Penal Law §70.40(3)(b)) with 6 years, 1 month and 21 days still owing to the originally calculated September 7, 2017 maximum expiration date thereof. Petitioner was restored to parole supervision on August 18, 2012 credited with 387 days of parole jail time (Penal Law §70.40(3)(c)) covering the period from July 28, 2011⁴ to August 18, 2012. Running

⁴ Although not apparent from the record, the Court presumes that July 28, 2011 represents the date petitioner was taken into local custody pursuant to a parole violation warrant.

the 6 years, 1 month and 21 days still owed to the original maximum expiration date of petitioner's multiple sentences from the August 18, 2012 restoration date (less 387 days of parole jail time credit) DOCCS officials correctly calculated the adjusted maximum expiration date thereof as September 17, 2017.

After his restoration to parole supervision petitioner was next determined to be delinquent as of August 19, 2013. The delinquency interrupted the running of petitioner's multiple sentences with 4 years and 28 days still owing to the September 17, 2017 adjusted maximum expiration date thereof. He was returned to DOCCS custody as a parole violator on November 4, 2013 credited with 77 days of parole jail time covering the period from August 19, 2013 to November 4, 2013. Running the 4 years and 28 days owed to the adjusted maximum expiration date of petitioner's multiple sentences from his November 4, 2013 return to DOCCS custody (less 77 days of parole jail time credit), DOCCS officials correctly calculated the re-adjusted maximum expiration date thereof as September 15, 2017.

On February 25, 2014 petitioner was again released from DOCCS custody to parole supervision but was subsequently determined to be delinquent as of December 26, 2014. The delinquency interrupted the running of petitioner's multiple sentences with 2 years, 8 months and 19 days still owing to the September 15, 2017 re-adjusted maximum expiration date thereof. He was returned to DOCCS custody as a parole violator on April 6, 2015 credited with 31 days of parole jail time covering the period from March 6, 2015 to April 6, 2015. Running the 2 years, 8 months and 19 days owed to the re-adjusted maximum expiration date of petitioner's multiple sentences from his April 6, 2015 return to DOCCS custody (less 31 days of parole jail time credit), DOCCS officials correctly calculated the current maximum expiration date thereof as November 24, 2017.

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: October 27, 2015 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice