

Matter of Rodriguez v Yelich
2016 NY Slip Op 31198(U)
June 22, 2016
Supreme Court, Franklin County
Docket Number: 2015-940
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
JULIO RODRIGUEZ, #00-A-1690,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #16-1-2015-0561.84
INDEX # 2015-940
ORI # NY016015J**

-against-

**BRUCE S. YELICH, Superintendent,
Bare Hill Correctional Facility, and NYS
DOCCS,**

Respondents.

X

This proceeding was originated by the Petition for Writ of Habeas Corpus of Julio Rodriguez, by his attorney Kerry Elgarten, Esq., The Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, New York, NY 10038, verified on December 22, 2015 and filed in the Franklin County Clerk's Office on December 28, 2015. Julio Rodriguez, who will hereinafter be referred to as the petitioner, is an inmate at the Bare Hill Correctional Facility and is challenging his continued incarceration in DOCCS custody. The Court issued an Order to Show Case on January 8, 2016 and has received and reviewed respondents' Answer and Return, verified on February 2, 2016 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated February 2, 2016, as well as by the Affidavit of Robin Filmer, a DOCCS employee at counsel's office for the Board of Parole, sworn to on February 2, 2016¹. The Court has also received and reviewed the Reply Affirmation in Support of Petition for Writ of Habeas

¹ Ms. Filmer's Affidavit is annexed to respondents' Answer and Return as Exhibit I thereof.

Corpus of Kerry Elgarten, Esq., dated February 16, 2016 and submitted on behalf of the petitioner.

On January 24, 2000 petitioner was sentenced in Supreme Court, New York County, to a merged determinate term of 10 years upon his convictions of the crime of Rape 1^o (two counts). It is not disputed that at that time the sentencing court failed to pronounce any period of post-release supervision associated with its determinate sentence(s). Petitioner was received into state custody on March 29, 2000 and DOCCS officials calculated the maximum expiration date of his merged 10-year determinate term as May 3, 2009. In addition, notwithstanding the sentencing court's failure to pronounce a period of post-release supervision, DOCCS officials initially calculated petitioner's determinate sentence(s) as including a 5-year period of post-release supervision.

On November 27, 2007 petitioner was conditionally released from DOCCS purportedly to begin serving his 5-year administratively-imposed period of post-release supervision. By Notice Pursuant to Correction Law §601-d, dated August 25, 2008, parole officials formally notified petitioner's sentencing judge that the January 24, 2000 Sentence and Commitment Order included no reference to a statutorily-required period of post-release supervision. As part of the Notice it was requested that certified copies of any superceding or amended commitment order be mailed to DOCCS and parole officials. In the meantime, petitioner failed to appear for a scheduled August 20, 2008 parole office report and a warrant was issued on September 5, 2008. Petitioner was initially declared delinquent as of August 18, 2008. By order dated August 6, 2009 the sentencing court denied petitioner's motion opposing any re-sentencing to include a period of post-release

supervision but petitioner, who had absconded from parole supervision, did not appear in the sentencing court and was not resentenced on the record at that time.

On June 16, 2015 - approximately 6 years and 10 months after the initial delinquency date - petitioner turned himself in and the outstanding September 5, 2008 parole warrant was executed. On June 16, 2015 he was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in five separate respects. Petitioner waived a preliminary parole revocation hearing and a final hearing was conducted at Rikers Island on June 29, 2015. At the final hearing, with petitioner represented by counsel from The Legal Aid Society, an agreement was reached whereby he plead guilty to one parole violation charge (with four additional charges withdrawn), his release was revoked with a modified delinquency date of February 18, 2009 and a 15-month delinquent time assessment was imposed. There is nothing in the record to suggest that petitioner took an administrative appeal from the results and disposition of the final hearing. He was returned to DOCCS custody on July 16, 2015 certified as entitled to one month of parole jail time credit apparently covering the period from June 16, 2015 to July 16, 2015.

On August 18, 2015 petitioner appeared in Supreme Court, New York County, for resentencing on the record. The resentencing proceedings concluded with the sentencing judge directing as follows:

“All right, so at this point the defendant [petitioner] is sentenced to determinate sentence of 10 years in jail on each count, those sentences are to be served concurrent with each other, nunc pro tunc to the original date of sentence, and on each count five years post release supervision [is] imposed on those sentences to be served concurrent with each other as well . . .”

Citing, *inter alia*, *Garner v. New York State Department of Correctional Services*, 10 NY3d 358, petitioner asserts that at the time of his violative conduct (and, for that matter, at the time of the June 29, 2015 final parole revocation hearing), the merged 10-year determinate sentence imposed in 2000 did not include any period of post-release supervision. He goes on to assert that as of the initial August 18, 2008 delinquency date (which interrupted the running of the 2000 determinate sentence(s)), he had less than nine months left to the originally-computed May 3, 2009 maximum expiration date of such sentence(s)². He also asserts that as of the February 18, 2009 modified delinquency date he had less than three months left to the originally-computed maximum expiration date of the 2000 sentence(s)³. Accordingly, petitioner argues, in effect, that the Administrative Law Judge (ALJ) presiding at the final parole revocation hearing was not authorized by law to impose a delinquent time assessment (15 months) which extended beyond the maximum expiration date of his underlying sentence(s), as such sentence then existed without any judicially-imposed period of post-release supervision. *See* 9 NYCRR §8005.20(c)(1).

Since he was resentenced to include a 5-year period of post-release supervision on August 18, 2015 - prior to reaching the adjusted maximum expiration date of the original 2000 sentence(s) - petitioner effectively concedes that the 5-year period of post-release supervision was validly imposed and, therefore, he does not assert an entitlement to immediate, unconditional release from DOCCS custody. Rather, petitioner argues that “[s]ince no more than 3 months of incarceration could have properly imposed [as a delinquent time assessment], yet petitioner has now served more than three months since

² The Court computes the figure to be approximately 8 months and 15 days.

³ The Court computes the figure to be approximately 2 months and 15 days.

the impermissibly long sanction [15-month delinquent time assessment] was imposed, he is entitled to be immediately released to serve the subsequently imposed period of post-release supervision.” Petition ¶32. The Court notes that according to current DOCCS calculations, petitioner’s 15-month delinquent time assessment will expire on September 16, 2016 and petitioner is tentatively scheduled to be released from DOCCS custody to post-release supervision on that date.

Respondent first argues, as a threshold matter, that petitioner’s failure to take an administrative appeal from the results and disposition of the June 29, 2015 final parole revocation hearing precludes his challenge to the imposition of the 15-month delinquent time assessment. A habeas corpus proceeding brought by the adjudicated parole violator to challenge one or more aspects of the underlying parole revocation process is ordinarily subject to dismissal where the violator fails to first exhaust administrative remedies through the administrative appeal process set forth in 9 NYCRR Part 8006. *See People ex rel Pettijohn v. LaClair*, 78 AD3d 1395, *People ex rel Griffith v. New York State Division of Parole*, 68 AD3d 1390 and *People ex rel DeMarta v. Sears*, 31 AD3d 918, *lv denied* 7 NY3d 715. An exhaustion dismissal, however, is not mandated when the issue raised in a habeas corpus proceeding represents a fundamental due process challenge and immediate release from DOCCS custody - presumably including immediate release to community supervision - is the only appropriate remedy. *See People ex rel Sumter v. O’Connell*, 10 AD3d 823 and *People ex rel Hacker v. New York State Division of Parole*, 228 AD2d 849, *lv denied* 88 NY2d 809. In the case at bar the Court finds that the arguments advanced by petitioner with respect to the facial validity of the 15-month delinquent time assessment imposed at his final parole revocation hearing appear to fall within the above-referenced exception to the habeas corpus exhaustion requirement. Accordingly, the Court will address petitioner’s arguments on the merits.

The Court finds the facts and circumstances of this case to be troubling in a number of respects. A review of the transcript of the June 29, 2015 session of petitioner's final parole revocation hearing - wherein the plea agreement described previously was reached - reveals nothing to suggest that the hearing participants were aware of, much less addressed, any issue with respect to the enforceability of the administratively imposed 5-year of post-release supervision. Rather, all of the hearing participants appeared to proceed under the erroneous impression that petitioner was serving a lawfully-imposed 5-year period of post-release supervision. This is somewhat surprising since at the time of the final parole revocation hearing more than seven years had elapsed since the Court of Appeals effectively determined that DOCCS officials had no authority to administratively impose a period of post-release supervision where the sentencing court failed to do so. *See Garner v. New York State Department of Correctional Services*, 10 NY3d 358. This Court would have expected that the presiding ALJ, the Parole Revocation Specialist, and petitioner's assigned counsel from the Legal Aid Society would have been more attuned to the potential problem. The petitioner himself, moreover, apparently filed a motion in connection with DOCCS's 2008/2009 effort to have him resentenced to include a period of post-release supervision, thus suggesting that he too should have been aware of the issue.

Even if it ultimately concluded that the 15-month delinquent time assessment was illegally imposed following the June 29, 2015 session of petitioner's final parole revocation hearing, the Court would not be inclined to simply substitute a 2 months and 21 days time assessment since parole authorities obviously made significant concessions as part of the underlying plea agreement. In this regard it is noted that in exchange for the petitioner's agreement to plead guilty to one parole violation charge and to accept the 15-month delinquent time assessment, parole officials withdrew four additional charges

and agreed to a modification of the delinquency date from August 18, 2008 to February 18, 2009. While it is true that even if the original August 18, 2008 delinquency date had not been modified at the final hearing petitioner would have only owed approximately 8 months and 15 days to the May 3, 2009 maximum expiration date of his determinate sentence(s), parole officials had until September 14, 2015 (90 days from the date petitioner waived a preliminary hearing) to conduct the final parole revocation hearing and, therefore, could have adjourned the final hearing pending judicial resentencing of petitioner. At this juncture the Court is not prepared to rule that the maximum duration of a delinquent time assessment that may be imposed following a final parole revocation hearing is limited by the sentence status as of the date of the underlying parole violation rather than the date of the final hearing. The Court's reservation on this point is underscored by the fact that petitioner's violative conduct (absconding from parole supervision for almost seven years) frustrated DOCCS and judicial efforts to resentence him to the statutorily-mandated period of post-release supervision. A parole violator should not derive a benefit from his/her violative conduct.

As alluded to previously, when petitioner was ultimately resented in Supreme Court, New York County, on August 18, 2015, the sentencing judge vacated the original 2000 sentence(s) and went on to imposed the same merged 10-year determinate term, but this time with a 5-year period of post-release supervision. Although the resentencing court directed its now sentence(s) to run "nunc pro tunc to the original date of sentence," the precise import of this directive is unclear. In any event, Penal Law §70.30(5) provides, in relevant part, that "[w]hen a sentence of imprisonment that has been imposed on a person is vacated and a new sentence imposed on such person for the same offense . . . the new sentence shall be calculated as if it had commenced at the time the vacated sentence commenced . . ."

Under the above-quoted provisions of Penal Law §70.30(5), upon petitioner's November 27, 2007 conditional release (effectively to post-release supervision) the running of his 10-year determinate term was interrupted, with 1 year, 5 months and 6 days still owing to the initial maximum expiration date thereof "held in abeyance" pursuant to Penal Law §70.45(5)(a). Also as of petitioner's November 27, 2007 release, the running of the 5-year period of post-release supervision would have commenced (*see* Penal Law §70.45(5)(a)), with the maximum expiration date of that period to be initially calculated as November 27, 2012. Petitioner's post-release supervision, however, was subsequently revoked with a delinquency date of February 18, 2009. The delinquency interrupted the running of the period of post-release supervision (*see* Penal Law §70.45(5)(d)(i)) with 3 years, 9 months and 9 days still owed to the initial November 27, 2012 maximum expiration date of that period. Petitioner was returned to DOCCS custody on July 16, 2015 certified as entitled to one month of parole jail time credit. The parole jail time credit would be applied against the interrupted determinate term (*see* Penal Law §70.45(5)(d)(iv)), reducing the time previously held in abeyance against such term from 1 year, 5 months and 6 days to 1 year, 4 months and 6 days. The 1 year, 4 months and 6 days still held in abeyance against petitioner's determinate term would commence running as of his July 16, 2015 return to DOCCS custody (*see* Penal Law §70.45(a)) with an adjusted maximum expiration date of the determinate term calculated as November 22, 2016.

Thus, with the application of the sentence retroactivity provisions set forth in Penal Law §70.30(5), petitioner would have still owed 1 year, 5 months and 6 days (previously held in abeyance and ultimately reduced by one month of parole jail time credit) to the original maximum expiration date of his 2000/2015 sentence/resentence, together with 3 years, 9 months and 9 days remaining against the maximum expiration date of the 5-

year period of post-release supervision, as of his June 29, 2015 final parole revocation hearing. When considered from this perspective there would be no legal infirmity in the imposition of the 15-month delinquent time assessment that was part of the underlying plea agreement.

In view of all of the foregoing, including the unusual facts and circumstances of this case, the Court concludes that petitioner has failed to establish any entitlement to immediate release from DOCCS custody to post-release supervision.

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: June 22, 2016 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Justice