Matter of Cantey v Annucci
2016 NY Slip Op 32168(U)
October 26, 2016
Supreme Court, Franklin County
Docket Number: 2016-331
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
THEODORE CANTEY, #14-R-1817,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2016-0204.41
INDEX #2016-331

-against-

ANTHONY J. ANNUCCI, Acting Commissioner,
NYS Department of Corrections and Community
Supervision and **JOSEPH PONTE,** Commissioner,
New York City Department of Corrections,
Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Theodore Cantey, dated on May 26, 2016, and filed in the Franklin County Clerk's office on June 8, 2016. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the calculation of jail time credit (Penal Law § 70.30(3)) associated with an indeterminate sentence imposed against him on June 18, 2014. An Order to Show Cause was issued on June 17, 2016. The Court has since received and reviewed the Answer of the New York City respondent Commissioner Joseph Ponte (hereinafter referred to as "NYC respondent"), verified on August 12, 2016, as well as the Answer and Return of the respondent Acting Commissioner, Anthony Annucci (hereinafter referred to as "state respondent"), verified on August 4, 2016 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated August 4, 2016. Annexed to the state respondent's Answer and Return as Exhibit G thereof is a copy of a letter dated August 3, 2016 (with exhibits) from Richard de Simone, Esq., Deputy

Counsel in Charge, DOCCS Office of Sentencing Review, to the Plattsburgh Regional Office of the New York State Attorney General (hereinafter the de Simone Letter). A detailed review of petitioner's sentencing history and the relevant DOCCS sentence calculation methodology is set forth in the de Simone Letter. The Court has also received and reviewed petitioner's opposition to the state respondent's answer and return, dated August 19, 2016 and filed in the Franklin County Clerk's Office on August 29, 2016.

On October 29, 2007, the petitioner was sentenced to an indeterminate term of two and one-half (2½) to five (5) years incarceration upon the conviction of Burglary in the 3rd degree by the New York County Supreme Court. The petitioner was received by the New York State Department of Corrections[1] on November 5, 2007. At that time, the New York City Department of Correction credited the petitioner with 264 days of jail time.[2] The petitioner was conditionally released from DOCCS on August 11, 2009 but declared delinquent on September 27, 2011. On November 10, 2011, the petitioner was restored to community supervision and was credited with thirty-five (35) days of parole jail time.[3] February 19, 2012 was the maximum expiration of the petitioner's 2007 sentence.

On June 18, 2014, the petitioner was sentenced as second felony offender to an indeterminate term of three (3) to six (6) years incarceration upon the conviction of Burglary in the 3rd degree by the New York County Supreme Court for a crime that occurred

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[1] The New York State Department of Corrections merged with the New York State Division of Parole to become the New York State Department of Corrections and Community Supervision (hereinafter referred to as "DOCCS") beginning on March 31, 2011.

[2] The 264 days were originally credited for the following periods: 10/18/06 to 2/5/07, 4/26/07 to 4/28/07 and 6/8/07 to 11/04/07.

[3] The 35 days were credited for the period of 10/6/11 to 11/9/11. There is no date provided for when the petitioner was returned to custody but it is inferred that it was on or about October 5, 2011.

on February 23, 2010. On July 3, 2014, the petitioner was received into DOCCS custody and was initially credited with 339 days of jail time.[4] On or about November 6, 2015, the City of New York Department of Correction recalculated the jail time certification to be only fifty-nine (59) days.[5]

The calculation of jail time credit is controlled by Penal Law §70.30(3) which provides, in relevant part, as follows:

> "... [T]he maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence . . . The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the . . . maximum term of any previously imposed sentence . . ." (Emphasis added).

Where, as here, the criminal defendant was confined in local custody in the City of New York, jail time credit is calculated by the Commissioner of Correction of the City of New York and certified to the New York State Department of Correctional Services upon transfer of the inmate from local to state custody. *See* Correction Law §600-a. State DOCCS authorities are bound by the jail time certified by the Commissioner and can neither add nor subtract from the time so certified. *See Neal v. Goord*, 34 AD3d 1142, *Torres v. Bennett*, 271 AD2d 830 and *Jarrett v. Coughlin*, 136 Misc 2d 981. Where, as here, the Commissioner amends a previously issued jail time certificate, DOCCS officials are bound by the most recently issued certificate. *See Villanueva v. Goord*, 29 AD3d 1097.

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[4] The 339 days were credited for the following periods: 2/23/10 to 9/29/10, 10/6/11 to 11/23/11, 2/8/12 to 3/7/12 and 5/22/14 to 7/12/14.

[5] The 59 days were credited for the periods of 2/20/12 to 3/7/12 and 5/22/14 to 7/2/14.

Citing *Sparago v. New York State Board of Parole,* 132 AD2d 881, *mod* 71 NY2d 943, petitioner maintains that his entitlement to jail time credit against the 2014 sentence was unlawfully reduced by the respondent Commissioner from 339 days to 59 days. In this regard petitioner argues, in effect, that he was not properly credited with jail time for time spent in custody following his release to parole supervision as there was no delinquency pending during that time. As stated by the Appellate Division, Third Department, in *Sparago*, "[s]uch a crediting, in our view, occurs when the previously imposed sentence is duly interrupted, with jail time accruing during the period of interruption." 132 AD2d 881 at 883.[6]

The rationale of the Appellate Division, Third Department, in *Sparago* might arguably be applied to the facts and circumstances of this case. The Court notes that although the fact pattern in *Sparago* (which the Third Department deemed "unusual") bears little resemblance to the fact pattern in the case at bar, the relevant language of the

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[6] In addition to its determination with respect to the jail time credit issue, the Appellate Division in *Sparago* also determined that Mr. Sparago's most recently imposed (1984) sentence had to run consecutively with respect to the undischarged term of his previously imposed (1980) sentence. It also found that Mr. Sparago's ". . . maximum release date was properly calculated by aggregating the undischarged portion of the 1980 maximum and the 1984 maximum." 132 AD2d 881 at 882. There is nothing in the Court of Appeals decision in *Sparago* (71 NY2d 943) to suggest that such court was called upon to review the determination of the Appellate Division, Third Department, with respect to the jail time credit issue. After noting that the Appellate Division had reversed Supreme Court with regard to the jail time credit issue, the Court of Appeals further noted that "[t]he Appellate Division agreed with Supreme Court on the issue now before us, however, holding that because petitioner's sentences were to run consecutively . . . they had to be aggregated . . . It [the Appellate Division] did not address which aggregation method used by respondents was proper, but implicitly held the recalculated sentence was computed using the correct method. We agree with the Appellate Division that petitioner's sentences had to be aggregated, but disagree, under these facts, as to the aggregation method which should be used." 71 NY2d 943 at 945 (citations omitted) (emphasis added). Indeed, the Court of Appeals' only specific mention of the jail time credit issue occurred after it set forth its reasoning with respect to the sentence aggregation issue, stating as follows: "This [aggregation] method not only effectuates the stipulation which provided petitioner's parole would not be revoked, but also credits him with the 217 days of jail time to which the Appellate Division found him entitled." *Id* at 946. It is therefore the finding of this Court (Supreme Court, Franklin) that the *Sparago* holding with respect to the jail time credit issue, as well as the rationale underlying that holding, is that of the Appellate Division, Third Department, rather than the Court of Appeals.

Appellate Division, Third Department, as quoted in the final sentence of the preceding paragraph, appears broad enough on its face to be applied under the facts and circumstances of petitioner's case. It is also noted, however, that although the Appellate Division, Third Department, issued its decision in *Sparago* more than 28 years ago, the relevant holding therein has not been favorably cited in any officially-reported case. More importantly, since 1987 the Appellate Division, Third Department, has issued a number of decisions seemingly at odds with the relevant holding in *Sparago*. *See e.g. Russell v. Annucci*, 131 AD3d 772, *Parker v. Annucci*, 130 AD3d 1115, *Murphy v. Wells*, 95 AD3d 1575, *lv. denied* 19 NY3d 811 and *DuBois v. Goord*, 271 AD2d 874. The facts and circumstances of the *Russell* case, in particular, appear to be quite similar to those in the case at bar. Although the facts and circumstances of the other cases cited above (*Parker*, *Murphy* and *DuBois*) are factually distinguishable from those in the case at bar, the unifying feature in all four cases (and others) is that the Appellate Division, Third Department, applied the proscription against double crediting set forth in Penal Law §70.30(3) with respect to periods of time spent by individuals in local custody, pending the disposition of new criminal charges, notwithstanding the fact that such individuals' prior sentences ran uninterrupted during such periods of time.

> "While the statute provides generally that the amount of time that a person spends in custody prior to sentencing on a charge is to be credited against the sentence imposed for that charge, it clearly states that "[t]he credit herein provided shall be calculated from the date custody under the charge commences and shall not include any time that is *1573 credited against the term . . . of any previously imposed sentence . . . to which the person is subject" (Penal Law § 70.30[3]). Here, the time that petitioner was in NYCDOC's custody from December 4, 2008 to May 15, 2010 was credited against the term of imprisonment imposed in connection with his 2002

> convictions, resulting in petitioner reaching his maximum expiration date and receiving a final discharge of parole supervision. Under the statute, this jail time credit cannot be counted again for the purpose of calculating the conditional release and maximum expiration dates on petitioner's 2010 convictions." *People ex rel. Moultrie v. Yelich*, 95 AD3d 1571, 1572–73.

Based upon the foregoing, this Court finds that the proscription against double crediting set forth in Penal Law §70.30(3) is applicable notwithstanding the fact that petitioner's previously imposed 2007 sentence(s) continued to run, uninterrupted, while he was confined in local custody prior to reaching the maximum expiration date of February 19, 2012 on the 2007 sentence. *See Murphy v. Wells*, 95 AD3d 1575, 1576. Accordingly, this Court further finds that the NYC respondent did not err in excluding that time period in the amended jail time certificate of November 6, 2015.

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 26, 2016 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice