

People ex rel. Wickerson v O'Meara
2018 NY Slip Op 31129(U)
March 26, 2018
Supreme Court, St. Lawrence County
Docket Number: 150857
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE

People of the State of New York *ex rel.*
JAMES WICKERSON, #17-R-1269,
Petitioner,

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

DECISION, ORDER & JUDGMENT
RJI #44-1-2017-0522.11
INDEX #150857

-against-

ELIZABETH O'MEARA, Superintendent,
Gouverneur Correctional Facility,
HON. CHARLES H. SOLOMON, Part #82,
Supreme Court, State of New York,
DISTRICT ATTORNEY, County of New York,
Respondents.

This proceeding was originated by the Petition for Writ of Habeas Corpus of James Wickerson (hereinafter referred to as "Petitioner"), sworn to on September 9, 2017¹ which was filed in the office of the St. Lawrence County Clerk on September 13, 2017. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. The Court issued an Order to Show Cause on December 21, 2017 and as a part thereof Petitioner was directed to serve a true copy of the Order to Show Cause, together with the Petition and any supporting documents, by ordinary first class mail to the Respondents and the Watertown Regional Office of the New York State Attorney

¹ The Petitioner originally filed an unverified petition which was filed on August 29, 2017. By letter dated September 6, 2017, the Court advised that the Petitioner failed to provide either a verification of the Petition as required by CPLR §7002(c) or an authorization for deduction from the Petitioner's inmate account. Both requested documents were filed accordingly, however, the Court was unaware of same as copies of the documents were misfiled. Upon receipt of the Petitioner's letter on December 21, 2017, the required copies were discovered.

General on or before January 5, 2018. The Order to Show Cause further directed Petitioner to mail an original affidavit, evidencing compliance with the above service requirements, to the Court Clerk's office on or before January 12, 2018.

Assistant Attorney General Alicia M. Lendon, Esq. moved to dismiss the petition based upon the Petitioner's failure to comply with the terms of this Court's Order to Show Cause dated December 21, 2017. Attorney Lendon argues that the Petitioner failed to obtain personal jurisdiction over the named Respondents, specifically Superintendent Elizabeth O'Meara or the Honorable Justice Charles H. Solomon. It is noted that the Attorney General's Office does not represent the District Attorney of New York County and there have not been any appearances on behalf of the District Attorney. An affidavit of Superintendent O'Meara indicates that she received a copy of the Order to Show Cause, the Petition and supporting papers on January 22, 2018 via inter-facility mail, not first class mail as directed. In addition, the Petitioner provided a cover letter to Respondent Justice Solomon dated January 8, 2018 which indicated that he did not receive the Order to Show Cause until January 3, 2018 and the delay was attributable to getting copies of the papers, including the Order to Show Cause.²

The Court notes that by letter dated January 3, 2018 to the Clerk of the Court, Petitioner requested an additional copy of the Order to Show Cause insofar as he mailed his only copy to Justice Solomon. In the same letter, the Petitioner indicated that he did not receive the Order to Show Cause until January 2, 2018. However, in the "Reply to Return"

² The Supreme Court, New York County returned the papers the Petitioner mailed to Justice Solomon, who recently retired, to the Petitioner who then forwarded them to this Court. It is noted that the papers were stamped received on February 1, 2018 by the Supreme Court of New York County.

dated February 21, 2018, the Petitioner asserts that he received the Order to Show Cause on December 29, 2017. It is unclear as to which date the Petitioner actually received a copy of the signed Order to Show Cause but, by his own admissions, he failed to timely serve the Respondents by first class mail or seek an extension to do so.

In the absence of satisfactory proof that the relaxed service requirements set forth in the Order to Show Cause of December 21, 2017 were met, and in the absence in any showing that Petitioner's imprisonment presented obstacles beyond his control which prevented compliance, the Court finds that the petition must be dismissed for lack of personal jurisdiction over the respondent. *See Ventura v. New York State Department of Correctional Services*, 68 AD3d 1406 and *Hughes v. Dennison*, 40 AD3d 1297.

Notwithstanding the foregoing, even if the Petitioner had obtained personal jurisdiction over the Respondents, the Petitioner is not entitled to habeas corpus relief. The Petitioner pled guilty to Criminal Possession of a Weapon in the Third Degree as charged by Indictment No. 10207-96 on October 23, 1997 before the Supreme Court, New York County. The Petitioner failed to appear for sentencing as directed on December 19, 1997. While in the Commonwealth of Pennsylvania, the Petitioner alleges that he had been arrested on a fugitive from justice warrant on February 25, 1998 and the warrant was dismissed on May 26, 1998 as the State of New York failed to retrieve the Petitioner. Thereafter, on January 12, 2012, again in the Commonwealth of Pennsylvania, the Petitioner was sentenced as a second felony offender to an indeterminate term of incarceration for a period of three and one-half (3½) to seven (7) years for possession/use/transfer of a firearm. On May 16, 2014, the Petitioner was returned from Pennsylvania to New York County, State of New York, pursuant to the Interstate Agreement

on Detainers. On August 14, 2014, the Supreme Court, New York County (Hon. Charles H. Solomon) sentenced the Petitioner to an indeterminate term of incarceration for a period of one and one-half (1½) to three (3) years, as agreed upon in 1997, to the satisfaction of New York County Indictment No. 10207-96.³ Thereafter, the Petitioner was returned to Pennsylvania on August 28, 2014. Upon the Petitioner's parole from the sentence in Pennsylvania on February 21, 2017, the Petitioner was returned to the State of New York to commence serving the sentence of August 14, 2014. Petitioner was received by the New York State Department of Corrections and Community Supervision on May 15, 2017 and he was credited with 212 days of jail time.⁴

“Where a statute mandates the imposition of a consecutive sentence, the sentencing court is deemed to have imposed the consecutive sentence the law requires—regardless of whether it issues a specific directive to that effect.” *Pressley v. James*, 67 AD3d 1276, 1277. Inasmuch as the sentencing court was silent to whether the sentence was concurrent or consecutive, the New York sentence was considered consecutive to the Pennsylvania sentence. As such, “Penal Law § 70.30(3) expressly provides that jail-time credit ‘shall not include any time that is credited against the term or maximum term of any previously

³ The sentencing court did not specifically indicate if the sentence would be concurrent or consecutive to the time sentenced in Pennsylvania and instead, Justice Solomon merely said: “It’s up to the authorities to decide this.” Res. Ex. C.[4:15-16]. Petitioner’s defense attorney, Alex Grosstern, Esq., also noted on the record: “. . . But I don’t know if it’s the Court’s authority to consider that concurrent and how it’s going to work with the other jurisdiction. So I guess that is probably a risk that Mr. Wickerson will have to assume and we’ve had that conversation.” Res. Ex. C. [3:23-25; 4:1-2].

⁴ The jail time computation was reduced on January 23, 2018 to a period of 106 days for the periods of February 13, 1997 to March 7, 1997 (23 days) and February 21, 2017 to May 15, 2017 (83 days).

imposed sentence.’ ” *Neal v. Goord*, 34 AD3d 1142, 1143. Insofar as his maximum expiration date is March 28, 2020, the petitioner is not entitled to immediate release.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby **ORDERED**, that the Respondents’ motion to dismiss is granted, and it is further **ADJUDGED**, that the petition is dismissed for lack of personal jurisdiction over the respondent.

Dated: March 26, 2018 at
Lake Pleasant , New York.

S. Peter Feldstein
Acting Supreme Court Justice