Matter of Lewis v Dagostino
2020 NY Slip Op 33754(U)
September 2, 2020
Supreme Court, Schenectady County
Docket Number: 2020-404
Judge: Michael R. Cuevas

STATE OF NEW YORK
SUPREME COURT **COUNTY OF SCHENECTADY**

In the Matter of the Application of
JULIO LEWIS, #18-A-3966,

Petitioner,

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

ORDER
RJI #46-1-2020-0198
INDEX #2020-404

-against-

DOMINIC A. DAGOSTINO,
SHERIFF OF SCHENECTADY COUNTY.,

Respondents.

This is a proceeding originated by a document entitled "Claim" of Julio Lewis, "Plaintiff-*Pro Se*" (hereinafter referred to as "Petitioner"), sworn to on February 19, 2020, and filed in the Schenectady County Clerk's Office on February 26, 2020.[1] Petitioner, who is an inmate at the Mohawk Correctional Facility, challenges the determination of Dominic A. Dagostino, Schenectady County Sheriff (hereinafter referred to as "Respondent") in the calculation of his "jail time" when he was incarcerated at the Schenectady County Jail from July 2008 to December 2019.

After determining that Petitioner intended to institute a proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"), this Court determined that Petitioner's "Claim" should be treated as a petition. The Court then issued an Order to Show Cause that directed the manner of service of the Order to Show Cause and a schedule for the filing and service of other pleadings in this proceeding.

In response to the Order to Show Cause, Respondent served a Motion to Dismiss and a document labeled "Verified Answer and Cross Motion,"[2] both dated June

[1] Petitioner later filed a document entitled "Petition" dated March 16, 2020.
[2] CPLR §7804(d) states that where there is an adverse party, there shall be an Answer. *CPLR Section*

18, 2020, together with exhibits. The Petitioner then served a "Reply," sworn to August 19, 2020, and upon leave granted by the Court, Respondent filed a Sur-Reply Affirmation dated September 1, 2020.

FACTS

The facts in this case are not complex and are largely undisputed. Petitioner was arrested on July 23, 2008, in the City of Schenectady, and charged with the crime of Attempted Murder in the Second Degree. *Petitioner's Petition, Exhibit 2, 10/23/09 County Court Commitment and Criminal Repository for DIN Number 18A3966.* The Petitioner was then arraigned in the City of Schenectady City Court on July 24, 2008. *Petitioner's Exhibit 2, 7/24/08 Securing Order, City Court of Schenectady*. On October 23, 2009, Petitioner was convicted of Attempted Murder in the Second Degree and sentenced to a determinate term of imprisonment of ten (10) years and five (5) years post-release supervision. *Petitioner's Exhibit 2, Criminal Repository for DIN Number 18A3966.* Petitioner was received into the custody of the New York State Department of Corrections and Community Supervision ("DOCCS") on December 1, 2019. Upon transfer of Petitioner from the Schenectady County Jail to DOCCS, Respondent issued a Sentence and Commitment Statement of Conviction certifying that the Petitioner spent 496 days, from July 24, 2008 through December 1, 2019, as part of his sentence in the Schenectady County Jail. *Respondent's Exhibit A*.

7804 (e) states, in part, "The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial on any issue of fact". *CPLR Section 7804(f)* states, in part, "The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition…". *CPLR §7804(f).* Therefore, an answer and a motion to dismiss are two different means of responding to a petition. If a motion to dismiss is made and denied the Court will permit the Respondent to file an answer within five days. While Respondent's hybrid document is not specifically authorized by the statute, the Court will consider the motion to dismiss. And, as noted previously, the Article 78 proceeding being a special proceeding and not a motion, there is no motion presently before the Court to which the Respondent would serve a cross-motion. Despite the mis-labelling of the motion, the Court will address the motion.

PETITIONER'S ARGUMENT

Simply put, Petitioner's argument is that he was arrested and taken into custody on July 23, 2018 and was transferred to DOCCS on December 1, 2019, a total of 497 days. Petitioner seeks for credit to his sentence for all 497 days.

Petitioner claims that he noticed an error in the calculation of his jail time credit on December 20, 2019, while reviewing records for a similar issue in connection with a different proceeding. Petitioner then wrote to Respondent and received a response dated January 3, 2020, in which Respondent refused to issue a new jail time certificate on the basis that Petitioner was not in the Schenectady County Jail on July 23, 2008. *Petitioner's Exhibit 1, Letter from Elena Surls, Records Management, Schenectady County Correctional Facility.*

RESPONDENT'S ARGUMENT

A. PETITIONER'S CLAIM IS PRECLUDED BY RESPONDENT'S STATUTE OF LIMITATIONS DEFENSE.

Respondent's argument can also be simply summarized. Respondent moves to dismiss the petition claiming that his Sentence and Commitment Statement of Conviction became final upon issuance on December 1, 2019. Since Petitioner did not commence this proceeding until this year, more than ten (10) years later, the proceeding is untimely and should be dismissed.

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months. *CPLR §217 (1)*. An Article 78 proceeding that is not commenced within the four-month period will be dismissed. *A.J. Cerasaro, Inc. v. Ross*, 60 N.Y.2d 946 (1983); *Washington v. Rudin*, 256 A.D.2d 178 (1st Dept. 1998); *Edwards v. New York State Employees' Retirement System*, 190 A.D.2d 545 (1st Dept. 1993); *Dionisio v. Board of Educ. of*

Mahopac Cent. School Dist., 128 A.D.2d 524 (2d Dept. 1987). That is, unless the defense is waived.[3]

Here, Respondent has raised the defense of untimeliness in its combined Motion to Dismiss and Answer. However, the Sentence and Commitment Statement of Conviction is a document prepared by Respondent for submission to DOCCS. *Verified Answer and Cross-Motion, paragraph 5.* Respondent claims that this determination became final and binding as of the date of issuance (December 1, 2009), and therefore, the four-month statute of limitations began to run as of that date.

1. ***The Statute Of Limitations Runs Upon Notice, Or Knowledge Of The Adverse Determination.***

The Third-Department has ruled that "[g]enerally, the statute of limitations begins to run when the party receives oral or written notice, or when the party knows or should have known, of the adverse determination." *Matter of Singer v. New York State and Local Employees' Retirement Sys.,*69 AD3d 1037, 1038 (3d Dept. 2010). Respondent does not claim, much less prove, that Petitioner was provided with a copy of the Sentence and Commitment Statement of Conviction or that Respondent, or any of his employees, gave Petitioner oral notice of the jail time calculation. Similarly, while Respondent contends that DOCCS had the jail-time credit calculation, Respondent does not demonstrate that DOCCS shared that information with Petitioner. While the Court might speculate that the Petitioner was advised upon reception into DOCCS's custody as to the amount of local jail time credited to his sentence, we need not, and will not do so.

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[3] A public body or officer waives the defense of the statute of limitations where it fails to raise the defense either in its answer or in a motion to dismiss the petition. *De John v. Town of Frankfort*, 209 A.D.2d 938 (4th Dep't 1994); *Hans v. Burns*, 48 A.D.2d 947(3d Dep't 1975).

When considering a motion to dismiss an Article 78 petition, the court must deem the allegations in the petition to be true and afford them the benefit of every favorable inference. *Tooker v. New York State Crime Victims Bd. Executive Dept.*, 32 Misc. 3d 186, (Sup 2011). It is incumbent upon the party asserting the statute of limitations defense to establish that clear notice of the determination was afforded to the petitioner "more than four months prior to" the commencement of his or her proceeding, and any ambiguity in the communications purportedly constituting notice "must be resolved in favor of" the petitioner. *Matter of Vadell v. City of New York Health & Hosps. Corp.,* 233 A.D.2d 224, 225 (1st Dept. 1996); *see, Mundy v. Nassau County Civ. Serv. Commn.,* 44 N.Y.2d 352, 358 (1978); see also, *Stack v. City of Glens Falls*, 169 A.D.3d 1220, 1221 (3d Dept. 2019).

Petitioner cites to *Ramos v. Goord*, which holds:

> As petitioner has yet to produce a certified record of his detention in the Dominican Republic, DOCS is bound by the commitment papers that actually accompanied him (*see Matter of Murray v Goord*, 1 NY3d 29, 32 [2003]; *Matter of LaRocco v Goord*, 43 AD3d 500, 501 [2007]), which reflect only a credit for the 736 days that petitioner spent in the Westchester County jail. In the absence of the required certification, we find no basis to disturb DOCS's calculation of petitioner's jail time credit. Accordingly, Supreme Court properly dismissed his petition.

Ramos v. Goord, 58 A.D.3d 921, 922, (3rd Dep't, 2009)

Here, the documents supplied by Petitioner reflect that Petitioner was remanded to the custody of the Schenectady County Sheriff on July 24, 2008, *Schenectady City Court Securing Order, 7/24/08,* and that he was received in DOCCS's custody on December 1, 2009, *Criminal Repository for DIN Number 18A3966.* Those documents confirm Respondent's Sentence and Commitment Statement of Conviction as correct. While the record shows that Petitioner was arrested on July 23, 2008, Petitioner fails to

prove that he was in Respondent's custody at any time on July 23, 2008.[4] On the contrary, Respondent's Verified Answer is clear and unequivocal that Petitioner was not in his custody on July 23, 2008.

It may be that Petitioner was detained in the City of Schenectady Police Department Lock up on July 23, 2008, but until he produces a record of that detention, this Court can only find that the Respondent's records are correct and cannot direct Respondent to issue an amended Sentence and Commitment Statement of Conviction.

Additionally, inasmuch as Petitioner's other claims are dependent upon a finding that Respondent incorrectly calculated his jail time, they too must be denied. Therefore, it is:

ORDERED AND ADJUDGED that Respondent's motion to dismiss is granted on the merits; and it is further

ORDERED AND ADJUDGED that the Petitioner's Petition be and hereby is dismissed, in it's entirety.

Dated: September 2, 2020 at
Schenectady, New York.

Michael R. Cuevas
Supreme Court Justice

[4]The record does not reveal whether Petitioner was held at another facility, such as the City of Schenectady Police Department Lockup pending arraignment in City Court or what time the arraignment occurred, but upon his arrest without a warrant, it was incumbent upon the arresting officers to bring the Petitioner before the local court forthwith and the commitment would have occurred at that time. See, Criminal Procedure Law 510.10 regarding requirement of a securing order upon initial appearance.