September 2021

Decision in Art. 78 proceeding - Wigfall, Joseph (2013-09-30)

Matter of Wigfall v Department of Corr. & Community Supervision
2013 NY Slip Op 32631(U)
September 30, 2013
Supreme Court, Albany County
Docket Number: 57-13
Judge: Jr., George B. Ceresia

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JOSEPH WIGFALL,

Petitioner,

-against-

DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, N.Y.S.,

Respondents,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-13-ST4595 Index No. 57-13

Appearances:

Joseph Wigfall
Inmate No. 93-A-3352
Petitioner, Pro Se
Wende Correctional Facility
3040 Wende Rd.
P.O. Box 1187
Alden, NY 14004

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The Capitol
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of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Wende Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of the New York State Board of

Parole dated September 20, 2011 in which he was denied parole release. He also seeks to review the calculation of his sentence.

Turning first to the parole determination, the respondent maintains that the challenge to the parole determination is barred by the statute of limitations (see CPLR 217) by reason that the petitioner received a copy of the appeals decision of the Appeals Unit on August 22, 2012, and failed to commence the proceeding within four months thereafter. In support of the motion, the respondent has submitted a copy of the appeals decision, which contains a sentence at the bottom which recites "[t]his Final Determination, the related Statement of the Appeal's Units Findings and the separate findings of the Parole Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 8/13/12 RF." Also submitted is a redacted copy of pages from a mail room log book showing that the petitioner signed for an envelope from the New York State Division of Parole on August 22, 2012. The petition is dated December 18, 2012, and the file stamp on the petition is dated December 24, 2012.

The Court notes that "when a party [seeks] a judgment dismissing a claim on the ground that it is barred by the statute of limitations, it is that party's burden initially to establish the affirmative defense by prima facie proof that the Statute of Limitations had elapsed" (Hoosac Valley Farmers Exchange, Inc. v. AG Assets, Inc., 168 AD2d 822, 823 [3d Dept., 1990]; see also Matter of Jackson v Fischer, 67 AD3d 1207, 1208 [3rd Dept., 2009]; Matter of Estate of Rodken [Gordon], 270 AD2d 784, 785 [3d Dept., 2000). In addition, the four month statute of limitations under CPLR 217 does not commence until the petitioner receives notice of the determination (see Singer v New York State and Local Employees' Retirement System, 69 AD3d 1037, [3d Dept., 2010]). Until then, the petitioner is not

aggrieved (see Matter of Biondo v. New York State Board of Parole, 60 NY2d 832 [1983]; see also Matter of Hawking v. Russi, 193 AD2d 1032 [3d Dept., 1993]).

Notably, the respondent has not submitted an affidavit of service of an officer or employee of the respondent to demonstrate when the appeals decision was mailed to the petitioner. The statement at the bottom of the Appeals Decision (supra) has no probative value. With respect to the mail room log book entries, respondent has not submitted an affidavit of an officer or employee to establish a proper foundation for their consideration. Moreover, even if such a foundation had properly been presented, it would only establish that the petitioner received an envelope from the New York State Division of Parole. It would not demonstrate the contents of the envelope. As such the Court finds that the respondent did not establish when the statute of limitations commenced to run, and therefore the statute of limitations defense has no merit. For this reason, the Court finds that the respondent's objection in point of law based upon expiration of the statute of limitations must be dismissed.

The Court further observes that the record with respect to the parole determination appears to be incomplete. The only records submitted by the respondent are the parole denial dated September 20, 2011 and a copy of the appeals decision. Other records which the respondent must ordinarily review (including but not limited to the inmate status report and sentencing minutes) have not been included. Nor has the respondent submitted a transcript of the parole interview. For this reason, the Court is unable to proceed to the merits of this portion of the petition.

The Court notes that CPLR 7804 (e) provides in pertinent part:

> (e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. 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 t rial of any issue of fact. *The court may order the body or officer to supply any defect or omission in the answer, transcript, or an answering affidavit.* Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner. *Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted* (emphasis supplied).

The foregoing has been interpreted liberally to excuse a default on the part of an administrative body or officer (see Alexander, McKinney's Consolidated Laws, Practice Commentary C7804:6, Main Volume, p. 673, citing Castell v City of Saratoga Springs, 3 AD3d 774, [3d Dept., 2004], other citation omitted; 8 Weinstein-Korn-Miller, New York Civil Practice, Para. 7804.05).

The Court finds that the respondent should be directed, to serve and file, within 20 days, a complete copy of the record underlying the parole determination.

Turning to the calculation of petitioner's sentence, on March 4, 1987 the petitioner was sentenced in Supreme Court, New York County to a term of 5 years to 15 years for robbery 1st degree (the "1987 sentence"). He was received into custody by the respondent on March 12 ,1987. He was credited with 194 days of jail time for the period of 8/30/86 to 3/11/87. On April 1, 1987 he was sentenced in Supreme Court, New York County to a term of 5 years to 15 years for Robbery 1st degree. The Court directed that this sentence run concurrently with the sentenced imposed on March 4, 1987, and nunc pro tunc to March 4,

1987. On August 30, 1991 he was released on parole. He was declared delinquent by the Division of Parole on December 17, 1991. On April 14, 1993 he was sentenced in Supreme Court, New York County as a second violent felony offender to the following terms: 12 ½ years to 25 years for attempted murder 2nd degree; 12 ½ years to 25 years for robbery 1st degree; and 7 ½ years to 15 years for assault 1st degree (the "1993 sentences"). The Court directed that the attempted murder and robbery sentences run consecutively. The Court was silent, however, with respect to how the 1993 sentences would run with regard to the sentences imposed in 1987. The petitioner was received into custody by the respondent on May 6, 1993. He was credited by the New York City Department of Correction with 478 days of jail time (1/12/92 to 5/5/93).

The respondent points out that in a previous CPLR Article 78 proceeding (Matter of Wigfall v Goord [Sup. Ct., Albany Co., Index No. 1608-06], unpublished), the petitioner challenged computation of the sentence, arguing that the 1993 sentences should run concurrently with the 1987 sentences. Acting Supreme Court Justice Judith A. Hard held that under Penal Law § 70.25 (2-a), because the 1993 sentences were imposed upon him pursuant to Penal Law § 70.04 as a second violent felony offender, they were properly calculated to run consecutively to the 1987 sentences. Respondent's argument that this issue was "previously litigated" is, in sum and substance, the equivalent of maintaining that it is barred under principles of res judicata. That principle of law "is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again" (Gramatan Home Investors Corp. v Lopez, 46 NY2d 481, 485). In the Court's view, that principle applies here, to prevent the petitioner from re-

litigating that argument again. Apart from the foregoing, it is well settled that notwithstanding that the sentencing court failed to indicate how the 1987 sentences and 1993 sentences would run with respect to each another (concurrently or consecutively), the respondent was obligated to follow the dictates of Penal Law § 70.25 (2-a) in determining that they should run consecutively (see Matter of Campbell v Fischer, 104 AD3d 979, 970-980 [3d Dept., 2013]; Matter of Brown v Fischer, 71 AD3d 1316, 1316-1317 [3rd Dept., 2010]; People ex rel. Hardy v Napoli, 65 AD3d 1408 [3d Dept., 2009]). Thus, the respondent, in calculating petitioner's sentence did not improperly perform the function of the sentencing court. For this reason, the argument has no merit.

The petitioner also alleged that the respondent improperly reduced the 25 to 50 year aggregate term of the 1993 sentences to 20 to 40 years. As the respondent points out, the crimes resulting in the 1993 sentences were committed in 1991. At that time Penal Law § 70.30 (1) (c) was worded as follows:[1]

> "(i) Except as provided in subparagraph (ii) or (iii) of this paragraph, the aggregate maximum term of consecutive sentences imposed for two or more crimes, other than two or more crimes that include a class A felony, committed prior to the time the person was imprisoned under any of such sentences shall, if it exceeds twenty years, be deemed to be twenty years, unless one of the sentences was imposed for a class B felony, in which case the aggregate maximum term shall, if it exceeds thirty years, be deemed to be thirty years. Where the aggregate maximum term of two or more consecutive sentences is reduced by calculation made pursuant to this paragraph, the aggregate minimum period of imprisonment, if it exceeds one-half of the aggregate maximum term as so reduced, shall be deemed to be

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[1]See Laws of 1983, chapter 199. This provision, was transferred from Penal Law § 70.30 (1) (c) to Penal Law § 70.30 (1) (e) in 1995 (see Laws of 1995, chapter 3, §§ 13, 14).

one-half of the aggregate maximum term as so reduced;

"*(ii) Notwithstanding subparagraph (i) of this paragraph, the aggregate maximum term of consecutive sentences imposed for the conviction of two violent felony offenses committed prior to the time the person was imprisoned under any of such sentences and one of which is a class B violent felony offense, shall, if it exceeds forty years, be deemed to be forty years*;

"(iii) Notwithstanding subparagraphs (i) and (ii) of this paragraph, the aggregate maximum term of consecutive sentences imposed for the conviction of three or more violent felony offenses committed prior to the time the person was imprisoned under any of such sentences and one of which is a class B violent felony offense, shall, if it exceeds fifty years, be deemed to be fifty years;" (former Penal Law § 70.30 [a] [c], emphasis supplied).

In this instance, as noted, petitioner was convicted of attempted murder 2nd degree and robbery 1st degree, both class B violent felony offenses (see former Penal Law § 70.02 [1]). The consecutive indeterminate term imposed for each sentence was 12 ½ to 25 years, which would carry a maximum aggregate of 50 years. Under former Penal Law § 70.30 (1) (c) (ii) (supra), the aggregate maximum was properly fixed at 40 years.

The respondent calculated petitioner's release dates as follows:

	20-00-00	aggregate minimum period of 1993 sentences
-	01-03-23	478 days of jail time (1/12/92 to 5/5/93)
	18-08-07	to serve on minimum period
+	1993-05-06	received by DOCCS
	2012-01-12	current Parole Eligibility date
	15-00-00	maximum term of concurrent 1987 sentences
-	00-06-14	194 days of jail time (8/30/86 to 3/11/87)
	14-05-16	to serve to maximum term
+	1987-03-12	received by DOCCS
	2001-08-27	initial Maximum Expiration Sentence
-	1991-12-17	declared delinquent as of this date by Division of Parole
	09-08-10	delinquent time owed to maximum term

+	40-00-00	aggregate maximum term of 1993 sentences
	49-08-10	time owed to aggregate maximum term
-	01-03-23	478 days of jail time (1/12/92 to 5/5/93)
	48-04-17	net time owed to aggregate maximum term
+	1993-05-06	received by DOCCS
	2041-09-22	current maximum expiration date
-	16-06-23	possible good time (1/3 of 49-08-10 owed to maximum term)
	2025-03-01	earliest conditional release date
-	00-06-00	limited credit time (Correction Law § 803-b)
	2024-09-01	current limited credit time date

One further point must be made. The petitioner appears to argue with respect to his 1993 sentence, that the attempted murder 2nd degree sentence and the robbery 1st degree sentence should have been imposed to run concurrently, not consecutively, by reason that they allegedly have a common element. Any such argument should have been advanced in a direct appeal to the Appellate Division. This Court has no jurisdiction to set aside or modify the sentence imposed by the sentencing court.

The Court has reviewed and considered petitioner's remaining arguments and contentions, as they relate to the computation of his sentence, and finds them to be without merit. The Court finds that the determination with respect to the computation of the petitioner's sentence was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed with respect to the computation of the petitioner's sentence.

After the return date of the instant CPLR Article 78 proceeding the petitioner made a motion "for a hearing to determine the merits raised as to whether DOCCS has the authority to usurp the sentencing court's power and resentence convicted felons without notifying the

Courts." Among the petitioner's arguments, he maintains that the Court must give him special consideration by reason that he is a pro se litigant. Notably however, it is well settled that a pro se litigant acquires no greater rights than any other litigant (see Johnson v Title North, Inc., 31 AD3d 1071 [3rd Dept., 2006]; Matter of Hanehan v Hanehan, 8 AD3d 712, 714 [3d Dept., 2004]; Sloninski v Weston, 232 AD2d 913, 914 [3rd Dept., 1996]; Cippitelli v County of Schenectady, 284 AD2d 823, 825-826 [3rd Dept., 2001]; Ferran v Dwyer, 252 AD2d 758, 759 [3rd Dept., 1998]).

For the reasons set forth above, to the extent that the motion once again attempts to address the computation of the petitioner's sentence, the Court finds that it has no merit. Under the circumstances present here, the petitioner has no right to a hearing.

As part of the petitioner's motion, he advances arguments in connection with the parole determination dated September 20, 2011. Among them, he maintains that the Parole Board failed to perform a risk and needs assessment under Executive Law § 259-c (4); and that the respondent focused almost exclusively on the seriousness of the crimes for which he was convicted. Because however, the motion did not request any specific relief with regard to the parole determination, the Court finds that the motion has no merit. The Court concludes that the motion must be denied.

In summary, the Court renders the following determination: (1) that respondent's objection in point of law based upon expiration of the statute of limitations must be dismissed; (2) with respect to petitioner's challenge to the September 20, 2011 parole determination, that the respondent must serve and file a complete record before the Court can review the petition; (3) that the petition must be dismissed with respect to that portion which

seeks to challenge the computation of his sentence; and (4) that petitioner's motion is denied.

Accordingly it is

ORDERED and ADJUDGED, that the respondent's objection in point of law based upon expiration of the statute of limitations is dismissed; and it is

ORDERED, that the respondent is directed to serve and file, **within twenty (20) days**, a complete record with respect to petitioner's parole determination dated September 20, 2011; and it is further

ORDERED and ADJUDGED, that the petition be and hereby is dismissed with respect to that portion of the petition which seeks to review the computation of the petitioner's sentence; and it is further

ORDERED, that petitioner's motion be and hereby is denied.

This shall constitute the decision, order and judgment of the Court. The Court will retain all papers until complete disposition of the instant proceeding.

ENTER

Dated: September 30, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated February 21, 2013, Amended Order To Show Cause dated July 8, 2013 Petition, Supporting Papers and Exhibits
2. Answer dated July 16, 2013, Supporting Papers and Exhibits
3. Petitioner's Notice of Motion dated July 27, 2013