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IN THE COURT OF APPEALS OF INDIANA

JOSEPH B. WILLIAMS (AKA LONNIE WILLIAMS),
Appellant,
vs.
STATE OF INDIANA,
Appellee.

No. 32A05-0906-CV-334

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Robert W. Freese, Judge
Cause No. 32D01-0805-MI-13

June 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Joseph B. Williams (a.k.a. Lonnie Williams) appeals the trial court's denial of his petition for writ of habeas corpus, after the revocation of his parole.

We affirm.

ISSUE[1]

> Whether the Parole Board constructively discharged Williams' rape sentence when it permitted him to serve his sentence for violating his probation on a prior theft conviction while he was on parole for the rape conviction.

FACTS

On March 9, 1998, Williams was arrested for theft/receiving stolen property ("Theft I"). In the meantime, he failed to appear at a hearing on June 24, 1998, and the trial court issued a bench warrant for his arrest. On July 9, 1998, he was arrested and placed on a 72-hour hold for several sexual offenses. Apparently, he committed the sexual offenses after being released in March 1998 on bond or on his own recognizance. On July 10, 1998, Williams was sentenced pursuant to a guilty plea on Theft I to 545 days in the Marion County Jail, with 60 days being executed and 485 days suspended. He received seven days of jail time credit, and was placed on probation for 365 days.

On December 28, 1998, Williams pleaded guilty to one count of rape and two counts of criminal deviate conduct. On January 27, 1999, he was sentenced to three

[1] Williams raises eight issues on appeal which we consolidate and restate as one dispositive issue.

concurrent twenty-year sentences in the Department of Correction ("DOC") and received 203 days of jail time credit, which means that he was incarcerated on said offenses as of mid-July of 1998. On July 15, 2006, he was released to parole for ten years on the sex offense convictions.

Upon being released to parole, Williams failed to report to the Marion County probation department for intake on Theft I conviction. Subsequently, when he was arrested on September 8, 2006 for theft/receiving stolen property ("Theft II"), the probation department filed a notice of probation violation; and the Parole Board issued a parole violation warrant. However, the Theft II charge was dismissed on October 23, 2006. The probation department withdrew its probation violation, and the Parole Board voided its warrant and continued Williams on parole supervision. He also began serving his probationary period on Theft I on October 29, 2006.

On January 10, 2007, the State filed a request for probation discharge and/or modification of Williams' suspended sentence for the Theft I conviction[2] because Williams had tested positive for drug use. The trial court conducted an evidentiary hearing on February 27, 2007, and found that Williams had violated the terms of his probation. His probation was revoked and the court ordered him to serve 200 days executed. On June 5, 2007, after he finished serving his 200 days for violation of probation, the Parole Board returned him to supervised parole.

[2] The trial court's order refers to the second theft offense ("Theft II"); however, the record reveals that the Theft II charge was dismissed on October 23, 2006.

On August 23, 2007, a parole violation warrant was requested because Williams had allegedly failed to attend sex offender treatment; failed to report to his parole agent; changed his residence without notice to his parole agent; and his whereabouts were unknown. The parole violation warrant request was later amended to reflect that Williams was also in police custody after being arrested for another theft charge and for resisting law enforcement on August 19, 2007. On August 27, 2007, after the parole violation warrant was amended, it was served on Williams on September 14, 2007. At the October 12, 2007 hearing, the Parole Board found that Williams had violated his parole, revoked his parole, and assessed the balance of his sentences for the sexual offenses.

On May 22, 2008, Williams filed a petition for writ of habeas corpus. On May 6, 2009, the trial court conducted a hearing. Williams testified that DOC had declined to file a notice of violation of parole because his Theft I probation predated his parole. On May 19, 2009, the trial court issued an order denying Williams' habeas petition stating, in pertinent part, the following:

> 18. [Williams] requests immediate release based on the following arguments and allegations:
>
> a. Probation and parole must run consecutively unless ordered to run concurrently; and
> b. [He] should have been released from parole on June 5, 2007 because he was sentenced to the Department of Correction for a violation of probation. It is [his] contention that he cannot serve a prison sentence *and* be paroled at the same time.

19. However, a review of the abstracts of judgment for the theft conviction and the rape conviction show that there is no order that any portion of his sentence be served consecutively[.]

20. I.C. § 35-50-1-2(d) states:

> If, after being arrested for one (1) crime, a person commits another crime:
>
> (1) before the date the person is discharged from probation, parole, or term of imprisonment imposed for the first crime; or
>
> (2) while the person is released:
>
> (A) upon the persons' [sic] own recognizance; or
>
> (B) on bond;
>
> the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentenced are imposed.

21. Contrary to [Williams'] allegation, under I.C. § 35-50-1-2(d) there is no requirement that probation and parole for two separate sentences be served consecutively.

22. Further, under *Mills v. State,* 840 N.E.2d 354, "an offender may be on parole for one offense while serving another sentence."

23. In *Pallett v. State,* 901 N.E.2d 611, Pallett "was granted parole from his life sentence for inflicting physical injury during the commission of a felony . . . ." Pallett "was not 'turned over' to county jail to serve his sentence for operating while intoxicated, nor otherwise discharged, but, rather, he continued to be on parole while he was serving his jail sentence, until his parole was later revoked." *Id.*

24. [Williams'] allegations, then, are incorrect. Under [I.C.] § 35-50-1-2(d), probation and parole need not run consecutively. Under *Pallett v. State,* [Williams] can be on parole while serving [a] jail sentence for a probation violation.

(Order 2-3). Williams now appeals.

DECISION

Williams argues that the trial court erred in denying his habeas petition because he is entitled to immediate release from incarceration. We disagree.

> The purpose of a writ of habeas corpus is to determine the lawfulness of custody or detention of the defendant and may not be used to determine collateral matters not affecting the custody process. A defendant is entitled to a writ of habeas corpus [only] if he or she is unlawfully incarcerated and is entitled to immediate release. We review the trial court's habeas decision for an abuse of discretion. Without reweighing the evidence, this court considers only that evidence most favorable to the judgment and reasonable inferences drawn therefrom.

Hardley v. State, 893 N.E.2d 740, 742 (Ind. Ct. App. 2008) (internal citations omitted).

1. Background

We initially note that defendants often "blur[ ] the distinction between parole and probation." *Harris v. State*, 762 N.E.2d 163, 167 (Ind. Ct. App. 2002). For purposes of clarity, we address the distinction now. Probation is "[a] court-imposed criminal sanction that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison." *Id.* A probationer "specifically agrees to accept conditions upon his behavior *in lieu of imprisonment*." *Id.* (quoting *Abernathy v. State*, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006)). On the other hand, parole is "[t]he release of a prisoner from imprisonment before the full sentence has been served." *Harris*, 762 N.E.2d at 167.

2. Mandatory Consecutive Sentences; Jail Time Credit

Williams was not entitled to immediate release because he has not yet served his sentence on the sex offenses, which must be served consecutively to his Theft I sentence. Indiana Code section 35-50-1-2(d) provides that a person who after being arrested for one crime commits another crime while the person is released on his own recognizance or on bond must serve his sentences on the crimes consecutively, "regardless of the order in which the crimes are tried and sentences are imposed." (Emphasis added).

First, when Williams was sentenced on January 27, 1999 to twenty years in the DOC for the sexual offense convictions, the trial court awarded him 203 days of jail time credit. Extrapolating backwards 203 days from January 27, 1999, we surmise that he was incarcerated on the sexual offenses as of July 8 or 9, 1998. The record reveals that Williams was sentenced to 60 days executed on Theft I on July 10, 1998. Thus, from July 8 or 9, 1998 -- when he was incarcerated on the sex offenses -- until July 15, 2006 -- when he was released to parole on the same offenses -- Williams had not served the 485-day suspended sentence on the Theft I conviction. Accordingly, because he had yet to serve the complete sentence on the Theft I conviction, we cannot say that he was entitled to immediate release when he was released to parole from DOC for the sexual offenses. Moreover, the record reveals that on July 10, 1998, Williams received a sentence of 545 days, 60 days executed, 485 days suspended, and placed on probation for 365 days. On January 27, 1999, he received three concurrent sentences of twenty years each for the sex offense convictions. One can obviously see that even with the application of class I

credit and "good time" credit, Williams has not served the total time that he owes the State of Indiana.

Offense	**Date of Sentencing**	**Sentence**	**Jail Time Credit**	**Remaining Sentence to be Served**
Theft I	July 10, 1998	545 days (or 1 ½ years)	14 days (7 + 7)	531 days (545 – 14)
Rape/Criminal Deviate Conduct	January 27, 1999	7300 days (or 20 years)	406 days (203 + 203)	6,894 days (7300 – 406)

Additionally, Williams' contention that he is being illegally incarcerated is founded upon the flawed premise that he is entitled to have pre-trial jail time credit applied to each of his sentences separately. Indiana inmates imprisoned awaiting trial or sentencing earn Class I jail time credit or "one (1) day of credit time for each day [the inmate] is imprisoned for a crime or confined awaiting trial or sentencing." I.C. § 35-50-6-3(a). Jail time credit operates differently depending on whether the sentences are consecutive or concurrent. *Corn v. State*, 659 N.E.2d 554, 558 (Ind. 1995). In concurrent sentencing cases, Indiana Code § 35-50-6-3 entitles the individual to receive credit time applied against each separate term; however, in consecutive sentencing cases, pretrial credit is awarded against the total or aggregate of the sentence terms. *Stephens v. State*, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000).

Our Supreme Court has previously held that awarding a person who has mandatory consecutive sentences credit for time served against each separate sentence rather than against the aggregate of the consecutive sentences improperly results in double credit and would effectively "enable[ ] a defendant to serve part of his sentences

concurrently, a result the legislature could not have intended." *Corn*, 659 N.E.2d at 558-59; *Diedrich v. State*, 744 N.E.2d 1004, 1006 (Ind. Ct. App. 2001). Inasmuch as Williams asks here that we recalculate his sentence by applying jail time credit applied against each separate term, we must decline his invitation as contrary to Indiana law.

3. Parole

Further, Williams is not entitled to immediate release because his parole term has yet to expire, and he has failed to present any evidence that he has served the balance of his sentence on the sex offense convictions, as assessed after he violated his parole.

It has long been the law in Indiana that parole is a conditional discharge, and

> [w]hile [released] on parole[,] the prisoner remains in the legal custody of the parole agent and warden of the prison from which he is paroled until the expiration of the maximum term specified in his sentence or until discharged as provided by law.

Overlade v. Wells, 127 N.E.2d 686, 690 (Ind. 1955) (emphasis added).

Here, when Williams was sentenced on January 27, 1999 to an aggregate twenty-year sentence for the sex offenses, his maximum projected "straight" release date was approximately July 8, 2018 (with 203 days of jail time credit); however, through application of Class I credit, he could be eligible for early release to parole on July 8, 2008. The record reveals that in addition to receiving Class I credit, Williams earned educational/counseling-related "good time" and was granted an earlier release to parole for a ten-year period commencing on July 15, 2006, and ending on July 15, 2016.

Despite his early conditional release to parole, Williams "remain[ed]" in the legal custody of the parole agent and his prison warden until the expiration of his "straight" release date of January 27, 2019 or until his sentence was discharged[3] by law. *See Overlade,* 127 N.E.2d at 690. Among the conditions of parole is that "the parolee not commit a crime during the period of parole." I.C. § 11-13-3-4. Thus, when Williams was arrested on August 19, 2007, for another theft charge and for resisting law enforcement, he violated a standard term of his conditional release to parole. Consequently, because the Parole Board revoked Williams' parole on October 12, 2007, and assessed the balance of his aggregate twenty-year sentence on the sex offense convictions, he has not served the remaining balance of his sentence on the sex offenses, and, therefore, is not entitled to immediate release.

4. Constructive Discharge

Nor has Williams presented any evidence or otherwise demonstrated that he is entitled to immediate release because the Parole Board discharged his outstanding sentence. In essence, Williams appears to argue that the Parole Board relinquished its jurisdiction over him when it allowed him to serve his 200-day sentence for violating probation under Theft I while he was on parole for the sex offenses. He argues that by its failure to first file a notice of parole violation or otherwise declare that it intended to

[3] Inasmuch as his "straight" release date has yet to expire, Williams argues below that he is being improperly detained because the Parole Board constructively discharged his sentence on the sex offenses when it permitted him to serve his 200-day sentence for violating his probation on the Theft I charge while on parole.

preserve his parole, the Parole Board effectively discharged the balance of his sentence on the sex offenses. We are not persuaded.

Williams cites *Meeker v. Indiana Parole Board*, 794 N.E.2d 1105 (Ind. Ct. App. 2003), *trans. denied*, in support of his argument; however, his reliance on *Meeker* is misplaced. Unlike in *Meeker*, the instant facts do not support the finding that the Parole Board intended herein to discharge the balance of Williams' sentence on the sex offenses. In *Meeker*, the Parole Board's parole revocation form provided that Meeker should be "turned over" to a separate sentence commitment, evidencing the Board's willingness to relinquish its jurisdiction over Meeker. 794 N.E.2d at 1109. Accordingly, a panel of this Court concluded that the Parole Board had "effectively discharged [Meeker] from the remainder of his convictions." *Id*. We have since held that a Parole Board manifests its intent to discharge a defendant's sentence by its use of the "turn over" language employed in *Meeker*. *Pallett v. State*, 901 N.E.2d 611, 614 (Ind. Ct. App. 2009).

Here, Williams has not directed us to any facts in the record that indicate that the Parole Board intended to discharge his sentence on the sex offenses or "turn him over" to another sentencing commitment. He also acknowledges that the Board did not use the critical "turn over" language.[4] *See Parker v. State*, 822 N.E.2d 285, 287 (Ind. Ct. App. 2005) (holding that defendant had not been discharged where Parole Board had not used "turn over" language); *see also Mills v. State*, 840 N.E.2d 354, 358 (Ind. Ct. App. 2006)

[4] At the underlying hearing, Williams testified that the Parole Board "did not file any violation of parole, therefore, they turned me over at that time, turned me over, but they did not use that specific language." (Tr. 65) (emphasis added).

(finding *Meeker* inapplicable because defendant presented no evidence that Parole Board took action to discharge or turn over his burglary sentence).

Nor has Williams cited legal authority for the proposition that the Parole Board was required to file a parole violation or to declare that it was maintaining, preserving, or continuing his parole so as not to effect a constructive discharge of his sentence on the sex offenses. First, this unsupported contention contemplates an unlikely constraint upon the Parole Board's exercise of its statutory authority and contradicts the longstanding rule that the Parole Board has almost absolute discretion in carrying out its duties and is not subject to the courts' supervision or control." *Holland v. Rizzo*, 872 N.E.2d 659, 663 (Ind. Ct. App. 2007).

Moreover, it is well-settled law in Indiana that "[a] prisoner remains in the legal custody of the parole agent and warden of the prison from which he is paroled until the expiration of the maximum term specified in his sentence or until discharged as provided by law." *Overlade*, 127 N.E.2d at 690. Because Williams has failed to carry his burden of demonstrating either that his maximum term has expired or that his sentence has been discharged, we cannot say that the Parole Board relinquished jurisdiction over his person; that he is being illegally incarcerated; or that he is entitled to immediate release. The trial court did not err in denying his petition for habeas relief.

Affirmed.[5]

[5] We briefly address two incorrect statements of law in Williams' brief. First, he argues that he completed his term of probation under Theft I while he was incarcerated for rape/criminal deviate conduct. We disagree. Probation is a criminal sanction extended at the grace of the sentencing court in

BAKER, C.J., and CRONE, J., concur.

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lieu of imprisonment. *Prewitt v. State*, 878 N.E.2d 184, 187 (Ind. 2007). This gives the defendant "an opportunity to show he is able to rehabilitate himself and become a useful member of society without serving his time in prison" and "gives the sentencing court an opportunity to observe the defendant's conduct during this period." *Hart v. State*, 889 N.E.2d 1266, 1271 (Ind. Ct. App. 2008) (quoting *White v. State*, 560 N.E.2d 45, 46 (Ind. 1990)). Given the rehabilitative purpose of probation, a process which can only be accomplished outside the confines of prison, it is axiomatic that "[o]ne may not be simultaneously on probation and serving an executed sentence." *Thurman v. State*, 320 N.E.2d 795, 797 (Ind. Ct. App. 1974).

He also argues that an individual cannot simultaneously be on probation and parole. Again, we disagree. It is well-settled that an individual may, in fact, be serving a term of probation while on parole, provided that the parole and probation are for separate or unrelated offenses. *See Baldi v. State*, 908 N.E.2d 639, 642 (Ind. Ct. App. 2009).