

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marty A. Mohoski, :
Petitioner :
 :
v. :
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 :
Pennsylvania Board of Probation :
and Parole, : No. 1066 C.D. 2010
Respondent : Submitted: November 19, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: December 27, 2010

Marty A. Mohoski (Mohoski) petitions for review from a final determination of the Pennsylvania Board of Probation and Parole (Board) that recommitted him as a convicted parole violator to serve thirty-four months backtime or his unexpired term whichever was less¹ and a determination by the Board that established his maximum date as July 3, 2012.²

Mohoski was effectively sentenced on February 3, 2002, to a term of two years six months to five years for criminal trespass and concurrently sentenced to a term of one to two years for simple assault and concurrently sentenced to a

¹ The Board later recommitted him to serve his unexpired term of two years, six months, and three days.

² This Court's review is limited to determining whether the Board's findings are supported by substantial evidence, are in accordance with the law, and whether constitutional rights have been violated. Krantz v. Pennsylvania Board of Probation and Parole, 483 A.2d 1044 (Pa. Cmwlth. 1984). This Court will interfere with the Board's exercise of administrative discretion only where it has been abused or exercised in an arbitrary or capricious manner.

term of one to two years for intimidation of a witness/victim. He was consecutively sentenced to a term of one to two years for violation of probation and terroristic threats. As a result, Mohoski was sentenced to a combined term of three years six months to seven years.

The Board released Mohoski on parole on May 3, 2006. On June 2, 2006, the Board declared Mohoski delinquent. He reported on June 6, 2006. He was then placed in the Conewago-Wernersville Community Corrections Center. On July 16, 2006, he absconded from Conewago-Wernersville Community Corrections Center. On July 19, 2006, the Board declared Mohoski delinquent effective July 16, 2006. On July 26, 2006, the Board issued a warrant to commit and detain Mohoski. That same day he turned himself in. The Board transported him to PENN CAP.

On January 30, 2007, the Reading Police Department filed a police criminal complaint against Mohoski and charged him with aggravated assault, two counts of simple assault, recklessly endangering another person, harassment, and public drunkenness. On January 30, 2007, the Board issued a warrant to commit and detain Mohoski. On March 7, 2007, the Board issued an order to detain Mohoski pending the disposition of criminal charges. On January 30, 2009, the Board canceled the enforcement of the warrant to commit and detain effective February 3, 2009. On March 11, 2009, the Board declared Mohoski delinquent for control purposes effective January 29, 2007.

On October 21, 2009, Mohoski was convicted in the Court of Common Pleas of Berks County of aggravated assault and sentenced to a term of seven to twenty years and consecutively sentenced to a term of one and one-half to five years for unlawful restraint.

Mohoski waived a revocation hearing. In a decision recorded December 28, 2009, and mailed December 29, 2009, the Board recommitted Mohoski to serve thirty-four months backtime or his unexpired term which ever was less as a convicted parole violator. On December 29, 2009, the Board issued a warrant to commit and detain Mohoski, who was serving his new sentence.

In a decision recorded January 25, 2010, and mailed January 29, 2010, the Board referred to its December 28, 2009, action and recommitted Mohoski to serve his unexpired term of two years six months and three days. The Board also established his maximum date as July 3, 2012.

On February 25, 2010, Mohoski petitioned for administrative relief and alleged that he did not receive adequate notice of a detention hearing held on February 8, 2007, that he was not advised of his right to have counsel present, that he did not waive his right to a detention hearing, that he was denied due process and that he was not given credit for twenty-four months and three days while held under the Board's detainer while awaiting trial, and that he was not given credit for ninety days spent in confinement at PENN CAPP.

The Board denied the petition for administrative relief:

To the extent that you allege that you were denied the right to counsel, adequate notice and/or a hearing, you seek relief from the revocation decision mailed December 29, 2009. The Board regulation governing administrative appeals states that appeals must be received at the Board's central office within 30 days of the mailing date of the Board's order. . . . Because the Board did not receive your appeal on or before January 28, 2010 and there is no indication that it was submitted to prison officials within that period, your appeal cannot be accepted on this issue. Additionally, you cannot use the recalculation decision mailed January 29, 2010 to revive your lapsed appeal rights regarding the revocation decision. . . .

To the extent you object to the July 3, 2012, max date, you seek relief from the Board recalculation decision mailed January 29, 2010. This claim will be addressed on the merits. When you were paroled on May 3, 2006 your max date was February 3, 2009, which left you with 1007 days remaining on your sentence in light of your recommitment as a convicted parole violator. . . . You received 90 days of credit for the period you were in the Penn Capp program from July 26, 2006 to October 24, 2006. However, you did not receive any credit on your original sentence for time incarcerated between January 30, 2007 and October 21, 2009 because you were not incarcerated solely on the Board's warrant during this period. . . . Subtracting the credit you did receive from the time you had remaining results in a total of 917 days remaining on your sentence. Moreover, you did not become available to commence service of your original sentence until December 29, 2009, when the Board re-lodged its warrant against you. Adding 917 days to that date yields a new max date of July 3, 2012. Therefore, the appellate panel finds no grounds to grant administrative relief. (Citations omitted).

Board Decision, May 5, 2010, at 1; Certified Record at 132.

Mohoski contends that he filed a timely appeal because the Board made an interim order recorded on December 28, 2009, that was not a final adjudication until the Board action mailed January 29, 2010, modified it. Mohoski also contends that the Board did not give him all the credit he deserved when it recalculated his maximum sentence.

Initially, Mohoski contends that his appeal was timely because the December 29, 2010, order was not final because it did not specify whether Mohoski would serve thirty-four months or his unexpired term.

The Board's regulation, 37 Pa.Code §73.1(a) provides that "[a]n interested party, by counsel unless unrepresented, may appeal a revocation decision. Appeals shall be received at the Board's Central Office within 30 days of the mailing date of the Board's order."

In Woodard v. Pennsylvania Board of Probation and Parole, 582 A.2d 1144 (Pa. Cmwlth. 1990), Robert Woodard (Woodard) timely petitioned for administrative relief of the Board's December 16, 1988, order (recommitment order) which recommitted Woodard to serve twenty-four months backtime. The Board denied the petition for administrative relief. On March 23, 1989, the Board recorded an order (recalculation order) which established Woodard's tentative reparole date as August 23, 1990, and his maximum date as September 22, 1995. Woodard petitioned for administrative relief of this order and raised the same objections to the imposition of backtime and the timeliness of his revocation hearing which he had raised in his first petition for administrative relief. The

Board determined that Woodard's appeal was untimely as to the recommitment order and denied the appeal on the merits as to the recalculation order. Woodard petitioned for review with this Court. Woodard, 582 A.2d at 1145.

This Court affirmed:

We are, accordingly, squarely faced with the question of whether the recommitment order was a final appealable order, or whether the recomputation order is the only final appealable order. We hold that the recommitment order was a final appealable order because it was definitive as to the fact of recommitment and by failing to appeal it Petitioner [Woodard] waived the issues relating to *that* order including the timeliness of his revocation hearing.

....

While this view does in some instances result in two appeals (the latter one being the appeal of the recomputation order only) as a practical matter very few appeals are taken from those orders. And, certainly the inordinate delay of appeals which the contrary holding would bring about and which would affect many more cases, is sufficient reason to permit separate appeals from the two orders if need be. The two orders are palpably disparate, the subject matter of the first dealing with the award of backtime which would attach whenever the inmate is returned to state custody, while the subject matter of the second, a recomputation of the inmate reparole dates, cannot be recomputed *until* the inmate is returned to state custody. There is no such precondition in the instance of the first order. (Emphasis in original).

Woodard, 582 A.2d at 1146.

Woodard clearly sets forth that the recommitment order and the recalculation order are two separate final orders. Therefore, Mohoski had thirty days from the December 29, 2009, recommitment order to appeal the imposition of

backtime. He did not do so until February 25, 2010, after the thirty day appeal period had expired. The Board did not err when it found the petition for administrative review to be untimely.

Mohoski next contends that the Board failed to recalculate his maximum date accurately because he did not receive all credit due him. Mohoski asserts that he was returned to a state correctional institution as of December 8, 2009, and was available to begin serving backtime on that date or, alternatively, on December 22, 2009, when the Board panel acted to recommit him rather than December 29, 2009, as determined by the Board. He also argues that he should receive credit on this sentence for the forty-eight days from October 21, 2009, to December 8, 2009, while he was confined in Berks County Prison.

In his petition for administrative relief to the Board, Mohoski sought credit for the time he was confined from January 31, 2007, to February 3, 2009, and credit for time spent at PENN CAPP. He did not raise the issue of credit from December 8, 2009, or December 22, 2009, or the issue of whether he was entitled to forty-eight days credit when he was confined in Berks County Prison.

Because the issues Mohoski raises here were not raised before the Board, they are waived. Pa. R.A.P. 1551; Newsome v. Pennsylvania Board of Probation and Parole, 553 A.2d 1050 (Pa. Cmwlth. 1989).

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

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ORDER

AND NOW, this 27th day of December, 2010, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge