

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose Alberto Semidey-Ortiz,	:	
Petitioner	:	
	:	
v.	:	No. 1394 C.D. 2009
	:	
Pennsylvania Board of Probation	:	Submitted: November 13, 2009
and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: January 21, 2010

Jose Alberto Semidey-Ortiz (Petitioner) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) denying his petition for administrative relief from the recalculation of his new original state sentence maximum expiration date. Essentially, Petitioner seeks credit against his original state sentence for seven days of post-sentence confinement he spent in the Berks County Prison awaiting the Berks County Office of Adult Probation and Parole (BCOAPP) to approve his parole plan. Finding no error in the Board's calculations, we affirm.

The Court of Common Pleas of Lancaster County sentenced Petitioner to five to 10 years for robbery (original state sentence). At the time of his conviction, Petitioner's minimum expiration date was December 12, 2003, and his maximum expiration date was December 12, 2008. Certified Record (C.R.) at 1-9.

In August, 2006, the Board reparaoled Petitioner to a community corrections facility. Id. at 18-24. At the time of his reparole, Petitioner had 851 days left on his original state sentence.

On June 20, 2008, the Muhlenberg Township Police Department charged Petitioner with retail theft (new county charges). Id. That same day, Petitioner met his bail requirements, and the Court of Common Pleas of Berks County (sentencing court) released him. Id.

Petitioner failed to report to his preliminary hearing on the new county charges. C.R. at 26-28. As a result, a district magistrate judge revoked his bail and issued a warrant for his arrest. Id.

Because Petitioner also failed to report to his parole supervisors, the Board lodged a Warrant to Commit and Detain him on July 10, 2008. Id. at 25. That same day, Petitioner's parole supervisors took him into custody. Id.

While in custody on the Board's warrant,¹ Petitioner was also arrested on the new county charges on July 21, 2008. On September 16, 2008, Petitioner pled guilty to and was sentenced on the new county charges. The sentencing court ordered Petitioner:

[B]e committed for a period of not less than 58 days nor more than 23 months to:

¹ Petitioner admitted to technical parole violations on his reparole and waived his right to hearing. Id. at 28. In August, 2008, the Board issued another warrant detaining Petitioner pending disposition of the new county criminal charges. Id. at 29.

[T]he Berks County Prison, and upon completion of his/her minimum sentence shall be released without a petition upon approval of a suitable parole plan by the [BCOAPP]....

Id. at 52 (emphasis added) (new county sentence). Additionally, the sentencing court credited Petitioner with 58 days of pre-sentence confinement toward his new county sentence. C.R. at 54. The 58 days' credit included the period of July 21, 2008, the date Petitioner was arrested on the new county charges, to September 16, 2008, the date of his conviction on those charges. Id.

Seven days later, on September 23, 2008, the BCOAPP approved Petitioner's parole plan.² C.R. at 33.

On October 9, 2008, the Board held a revocation hearing to determine whether Petitioner should be recommitted as a convicted parole violator. Id. at 43-51. Relying on a certified copy of Petitioner's new county sentence, the Board recommitted Petitioner as a technical and convicted parole violator on December 22, 2008. C.R. 66-67. The Board ordered Petitioner to serve five months and two days' backtime as a technical parole violator and a concurrent six months backtime as a convicted parole violator. Id.

² That same day, the Board charged Petitioner with violating general conditions 3A (failure to report as instructed) and 5A (failure to abstain from drug use) of his parole. Id. at 31. Because Petitioner previously admitted to the technical violations of his parole, the Board recommitted Petitioner as a technical parole violator to serve six months' backtime when available. Id.

On February 3, 2009, the Board filed a recalculation order providing Petitioner's new original state sentence maximum expiration date as April 20, 2012. Id. at 68. The Board made the following relevant calculations.

On August 14, 2006, the date of Petitioner's reparole, Petitioner had 851 days remaining on his original state sentence. However, as a convicted parole violator, Petitioner forfeited credit for time at liberty on parole. Therefore, Petitioner forfeited 555 days of credit from the period of December 15, 2003 to June 22, 2005. The Board added the 555 days to the 851 days remaining on his original state sentence, for a total of 1,406 days owing on Petitioner's original state sentence. The Board made other uncontested adjustments to bring the total number of days owing on the original state sentence to 1,305.³

Also, the Board concluded the BCOAPP did not approve Petitioner's parole plan on the new county sentence until September 23, 2008. The Berks County Prison did not release Petitioner to the Board's detainer until that date. Accordingly, Petitioner did not become available to begin serving backtime on his original state sentence until September 23, 2008. Therefore, the Board added Petitioner's 1,305 days to September 23, 2008, which yielded a new original state sentence maximum expiration date of April 20, 2012.

³ The Board credited Petitioner with 90 days confinement for his time spent at the community corrections facility. Accordingly, the Board subtracted 90 days from 1,406, for a total of 1,316 days remaining on Petitioner's original state sentence.

Furthermore, the Board provided Petitioner with 11 days' credit for the period of July 10 to July 21, 2008 for time served solely pursuant to the Board's detainer. The Board, therefore, subtracted 11 days from 1,316, and it determined Petitioner owed 1,305 days on his original state sentence.

Thereafter, Petitioner filed a request for administrative relief asserting the Board erred in calculating his new original state sentence maximum expiration date. The Board, however, denied the petition. This appeal followed.⁴

Petitioner argues the Board miscalculated his new original state sentence maximum expiration date. In particular, Petitioner argues he became available to begin serving backtime on his new original state sentence on September 16, 2008. Thus, time served on his new original state sentence should accrue from that date. Essentially, Petitioner seeks an additional seven days' credit against his original state sentence and a new maximum expiration date of April 13, 2012. We disagree with Petitioner's calculation.

At the outset, we note Petitioner's grounds for relief addressed to the Board are significantly different from the issue he raises in this appeal.

In Petitioner's request for administrative relief, he contended the Board should afford credit for the 17 months that he was at liberty on reparole. In the current appeal, however, Petitioner contends the Board erred in using September 23, 2008 as the date he became available to serve the backtime on the original state sentence. Nonetheless, Petitioner did not raise this issue before the Board; rather he advances this argument for the first time on appeal. As a result, the Board did not address this issue.

⁴ Our review in a parole revocation action is limited to determining whether the findings were supported by substantial evidence, whether constitutional rights were violated, or whether the Board committed an error of law. Rosenfelt v. Pa. Bd. of Prob. & Parole, 568 A.2d 1347 (Pa. Cmwlth. 1990).

This Court generally will not consider an issue that is raised for the first time before this Court. See Pa. R.A.P. 1551(a); see also Newsome v. Pa. Bd. Prob. & Parole, 553 A.2d 1050 (Pa. Cmwlth. 1989). Where the issue could have been presented to the government unit from which the appeal is taken, but was not, this Court will not consider it and deems the issue waived. See Pa. R.A.P. 1551(a). Moreover, this Court has specifically held that a recommitted parole violator waives any claim he does not present in his administrative request for relief. Dear v. Pa. Bd. of Prob. & Parole, 686 A.2d 423 (Pa. Cmwlth. 1996).

Our review of the record reveals Petitioner failed to raise this issue before the Board. Accordingly, this issue is considered waived. See Pa. R.A.P. 1551(a); Dear.

Even if not waived, however, Petitioner's claim fails on the merits. Because Petitioner was on parole from a state sentence and received a county sentence upon conviction of the new county charges, he was required to serve the term of his new county sentence before he could begin serving time on his original state sentence. Section 21.1 of the Parole Act.⁵ Furthermore, "[t]he period of time for which the parole violator is required to serve shall be computed from and begin on the date that he is taken into custody to be returned to the institution as a parole violator." Id.

⁵ Act of August 6, 1941, P.L. 861, as amended, added by the Act of August 24, 1951, P.L. 1401, formerly 61 P.S. § 331.21a(a). Section 21.1a(a) was repealed by the Act of August 11, 2009, P.L. 147. A similar provision now appears in 61 Pa. C.S. §6138(a)(4) (relating to convicted violators). Because the Board recommitted Petitioner before August, 2009 we refer to the prior version of the Parole Act.

Sentencing courts have considerable discretion to fashion probationary and parole conditions appropriate to a particular case. See 42 Pa. C.S. §9754 (relating to conditions of probation); see also 42 Pa. C.S. §9755(d) (relating to conditions of partial confinement); Commonwealth v. Hermanson, 674 A.2d 281, 283 (Pa. Super. 1996). Here, the sentencing court ordered Petitioner “be released without a petition upon approval of a suitable parole plan by the [BCOAPP].” C.R. at 52. Indeed, the sentencing court’s condition that the Berks County Prison not release Petitioner until approval of his parole plan is a valid condition of probation.

The BCOAPP did not approve Petitioner’s parole plan until September 23, 2008. Thus, the Berks County Prison did not release Petitioner to the Board’s detainer until that day. Accordingly, Petitioner’s new original state sentence maximum expiration date must be computed as of September 23, 2008, the date upon which Petitioner became available to serve the Board-ordered backtime. Adding 1,305 days to September 23, 2008 yields a new original state sentence maximum expiration date of April 20, 2012.

In summary, the Board’s calculation of Petitioner’s new original state sentence maximum expiration date is not clearly erroneous and is supported by

substantial evidence. Accordingly, we affirm.⁶

ROBERT SIMPSON, Judge

⁶ Petitioner's reliance on Gaito v. Pennsylvania Board of Probation and Parole, 488 Pa. 397, 412 A.2d 568 (1980), is misplaced. In Gaito, the Court held if a parolee has otherwise met the requirements of bail but remains in custody solely pursuant to a Board detainer, the time he spent in custody shall be credited against his original sentence.

In accordance with Gaito, the Board credited Petitioner's original state sentence with 11 days served from July 10 to July 21, 2008, solely as a result of the Board's detainer. Those 11 days, however, are not at issue; rather Petitioner argues he should receive credit for the 7 days that he was held in post-sentence confinement on the new county sentence awaiting release to the Board's detainer. Thus, Gaito is factually distinguishable and has no application here.

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Pennsylvania Board of Probation	:	
and Parole,	:	
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ORDER

AND NOW, this 21st day of January, 2010, the order of the Pennsylvania Board of Probation and Parole is **AFFIRMED**.

ROBERT SIMPSON, Judge