

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jermaine Bostic, :
Petitioner :
 :
v. :
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Pennsylvania Board of :
Probation and Parole, : No. 1423 C.D. 2009
Respondent : Argued: June 21, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: July 29, 2010

Jermaine Bostic (Bostic) petitions for review from a final determination of the Pennsylvania Board of Probation and Parole (Board) that recommitted him to serve twelve months backtime as a technical parole violator and established his maximum date as March 8, 2013.¹

Bostic was effectively sentenced on March 8, 2003, to a term of five to ten years for robbery. He was concurrently sentenced to a term of one to five years for possession of a firearm not to be carried without a license and concurrently sentenced to a term of five to ten years for conspiracy to commit

¹ 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. Green v. Pennsylvania Board of Probation and Parole, 664 A.2d 677 (Pa. Cmwlth. 1995).

robbery. Bostic was paroled to a community corrections center on March 10, 2008. On March 28, 2008, Bostic was released to his approved plan to reside with his mother in Scottsdale, Arizona.

On April 15, 2008, Arizona parole reports indicated that Bostic was unemployed. On May 15, 2008, Bostic tested positive for marijuana. On May 20, 2008, Bostic was again reported as unemployed. On June 20, 2008, Bostic was arrested and charged with assaulting Malaika Kalena Cartwright (Cartwright), his fiancée. The charge was not prosecuted. On August 18, 2008, the Board issued a warrant for the arrest and return of Bostic to Pennsylvania.

Bostic was charged with the following technical violations:

PA Condition #5a. . . . You shall abstain from the unlawful possession or sale of narcotics and dangerous drugs and abstain from the use of controlled substances within the meaning of the Controlled Substance, Drug, Device, and Cosmetic Act.^[2]

. . . .
PA Condition #5c. . . . You shall refrain from any assaultive behavior.

. . . .
PA Condition #7. You shall maintain employment as approved by parole supervision staff – Mandatory.
(Emphasis in original).

Notice of Charges and Hearing Amended, August 22, 2008, Certified Record (C.R.) at 14.³

² Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. §§780-101 – 780-144.

³ In response to Bostic’s request for administrative relief, the Board determined there was no evidence to support a violation of Condition #7. Bostic does not contest that he violated Condition #5a. The only violation before this Court involves Condition #5c.

On January 7, 2009, the Board held a revocation hearing. Parole Agent Julie Stowitzky (Agent Stowitzky) testified that Cartwright stated that Cartwright and Bostic were at Bostic's approved residence:

[W]hen the offender [Bostic] assaulted her by forcibly grabbing her left upper arm and leaving bruises and scratches. She further stated that the offender [Bostic] choked her by the neck using both hands, then grabbed her hair and banged her head against the wall and threw her on the bed. The offender [Bostic] then left the residence and when he did, Ms. Cartwright came to the parole office and reported the incident. The offender [Bostic] was taken into custody to the Maricopa County Jail on June 26, 2008.

Notes of Testimony, January 7, 2010, (N.T.) at 10; C.R. at 43.

Agent Stowitzky submitted into evidence the Arizona Department of Corrections Proof of Warrant Service Form (Warrant Service Form), in which Bostic waived his preliminary hearing. On the document a box was checked for waiver for Interstate Compact parolees under Arizona supervision and Bostic signed the document below the following paragraph: "I admit I am in violation of the charges as listed and understand that I waive my rights and privileges to a preliminary hearing. This admission is made knowingly, voluntarily and intelligently without coercion and with my understanding of the possible consequences. . . ." N.T. at 21; C.R. at 54.

Bostic's counsel objected to the contents of the documents, especially the hearsay statements of Cartwright. N.T. at 22; C.R. at 55. The objection was overruled.

Bostic stated he did not have the opportunity to read the document but admitted signing it. He explained: “But when he said as far as the waiver, when they gave me parole, they already told me that I signed a waiver. So I thought it was the same things.” N.T. at 24-25; C.R. at 57-58.

Agent Stowitzky submitted the offender violation report from the State of Arizona which noted that Bostic was arrested on June 20, 2008, by the Phoenix Police Department, the signed statement from Cartwright, as well as three copies of photographs of what Cartwright characterized as bruises. Bostic’s attorney objected:

We’ll object to the offender violation report in that it contains information which is not accused [sic] in the notice of charges. Specifically a reference to Arizona condition number 7, I believe it is, about matters that relate to an April 15, 2008 report that Mr. Bostic is in violation of use of marijuana by a lab report of April 14, 2008. They were not part of the notice of charges in this hearing. I will object to the hearsay statement of Malaka Cartwright as to the accuracy of the statement and there’s no indication that the statement was actually written by Ms. Cartwright. And I believe . . . there’s a second statement given to the parole office by Ms. Cartwright, which was not part of this report. This was in possession of Mr. Bostic’s parole supervisor.^[4] To the extent that is not a complete statement by Ms. Cartwright, we would object.

N.T. at 26-27; C.R. at 59-60. The hearing examiner overruled the objections.

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A second statement by Cartwright is not included in the certified record.

There was also a determination that there was insufficient probable cause to charge Bostic with assault because there were no independent witnesses, both parties gave conflicting stories, and the Phoenix Police Department was “unable to show primary aggressor.” Phoenix Police Department Report, June 23, 2008, at 1; C.R. at 114.

Also introduced into evidence was a “booking detail” from Arizona which indicated that assault charges and disorderly conduct charges against Bostic were dismissed due to Cartwright’s failure to appear. N.T. at 35-36; C.R. at 68-69. Bostic’s attorney again objected because “it’s not a signed document, one, and two, it doesn’t identify what they’re talking about in this document.” N.T. at 36; C.R. at 69. Again, the hearing examiner overruled the objections.

Bostic testified concerning the confrontation with Cartwright:

I walked in the kitchen. She came in the kitchen, slammed my phone on the floor. And I said, whoa, . . . and she’s yelling . . . she uses foul language.

. . . .

[W]e’re supposed to be getting married and . . . you got women calling on the phone and trying to talk to you And we was [sic] getting ready to leave I said . . . I’m not going to argue . . . so I’m going to go outside. So I walked out [of] the kitchen, go out the door. She stands in front of the door, and I grabbed her by her arm and pushed her to the side, went and got back in the truck because I had to pick my mom back up.

N.T. at 47-48; C.R. at 80-81.

Bostic denied choking Cartwright, banging her head against the wall, and throwing her on the bed. N.T. at 48-49; C.R. at 81-82. Bostic testified that

Cartwright signed the statement, but the statement itself was not in her handwriting. N.T. at 49; C.R. at 82.

In a decision recorded February 24, 2009, and mailed March 3, 2009, the Board: recommitted Bostic to serve twelve months backtime as a technical parole violator for three violations; established a parole violation maximum date of March 8, 2013⁵; and established a date for review for reparole on or after August 2009. In a decision recorded June 18, 2009, and mailed June 22, 2009, the Board modified the February 24, 2009, decision and removed the violation for failure to maintain employment. In a decision recorded June 25, 2009, and mailed June 26, 2009, the Board changed the review date to “list for reparole review on the next available docket.” Notice of Board Decision, June 25, 2009, at 1; C.R. at 127.

Bostic sought administrative review and contended: one, that he should have received backtime credit from the time he was detained in custody in Arizona on June 20, 2008, and not just from August 2008; two, there was not substantial evidence to conclude that he engaged in assaultive behavior; three, the investigating authorities found insufficient probable cause to charge; four, the panel considered objected to evidence of assaultive behavior erroneously admitted at the hearing; and, lastly, Bostic alleged substantial evidence did not support the other two violations.⁶

⁵ The maximum date of March 8, 2013, remained the same.

⁶ The Board did not address the issue of credit. It did not specifically address all of the allegations regarding Condition #5c but found sufficient evidence to support the charges.

The Board denied the administrative appeal in part and granted it in part:

After reviewing the record, the appellate panel has reversed the Board decision mailed March 3, 2009 (recorded 2/24/09) to the extent it recommitted Mr. Bostic for violating condition #7 of his parole. As such, a Board decision was mailed, on June 22, 2009, that removed the condition #7 (failure to maintain employment) violation. However, the appellate panel finds that sufficient evidence was presented to support Mr. Bostic's recommitment for violating conditions #5A (use of drugs) and #5C (failure to refrain from assaultive behavior) of his parole based on the evidence indicated. See *Sanders v. Pennsylvania Board of Probation and Parole*, 958 A.2d 582 (Pa. Commw. Ct. 2008).

Board Decision, June 29, 2009, at 1; C.R. at 136.

Before this Court, Bostic contends that substantial evidence does not support a violation of Condition #5c where the Board's evidence consisted of the hearsay statements of Cartwright, alleged conduct which Bostic contested and for which the Phoenix Police Department did not prosecute.

Bostic's arguments ignore a crucial fact. On the Warrant Service Form, Bostic initialed the space next to the checked box for "4. [] WAIVER FOR INTERSTATE COMPACT PAROLEES/PROBATIONERS UNDER ARIZONA SUPERVISION." Arizona Department of Corrections, Proof of Warrant Service June 26, 2008, at 1; C.R. at 110. The form also contained the following:

I admit I am in violation of the charge(s) as listed, and understand that I waive my rights and privileges to a preliminary/probable cause hearing. This admission is made knowingly, voluntarily, and intelligently without coercion and with an understanding of the possible

consequences. It is also understood that if the sending state orders my return, I will receive a Revocation hearing within a reasonable time period upon my return.

Proof of Warrant Service at 1; C.R. at 110. The Warrant Service Form was signed by Bostic.

In Sanders v. Pennsylvania Board of Probation and Parole, 958 A.2d 582 (Pa. Cmwlth. 2008), this Court addressed a similar factual situation. Alphonso Sanders (Sanders), a Pennsylvania parolee, had been on parole in Georgia under the supervision of the Georgia Parole Department pursuant to the Interstate Compact for the Supervision of Adult Defenders.⁷ The Board received an “offender violation report” from Georgia dated July 26, 2007, which stated that Sanders violated the conditions of his parole when he failed to have a home phone installed for electronic monitoring, failed to attend a substance abuse group, and changed his residence without first obtaining permission from his parole officer on or about July 23, 2007. On August 6, 2007, the Board issued an arrest warrant for Sanders based on the reported parole violations. On August 13, 2007, the Macon County Sheriff’s Office arrested him. Sanders signed a document entitled, “Out-of-State Waiver of Preliminary Hearing on Parole for Conditional Release Revocation and Agreement to Return” (Waiver), in which Sanders waived and renounced the right to a preliminary hearing, waived extradition, and agreed to return to Pennsylvania. In addition, as part of the Waiver, Sanders admitted he

⁷ At the time Sanders was decided, the Interstate Compact for the Supervision of Adult Offenders Act was contained within what was commonly known as the Parole Act. Act of June 25, 1937, P.L. 2086, *as amended*, 61 P.S §321. The Parole Act was repealed by the Act of August 11, 2009, P.L. 147. The Interstate Compact for the Supervision of Adult Offenders Act is now located at 61 Pa.C.S. §§7111-7123.

violated the conditions of his parole. On September 21, 2007, Sanders signed a waiver of a panel hearing and a parole violation hearing was held. Sanders, 958 A.2d at 582-583.

As in the current controversy, at the hearing the parole agent for Sanders introduced the Waiver without objection. Sanders testified that his parole agent told him to ignore the part of the waiver in which he admitted to the violations of the parole conditions because it did not matter and he had to sign the Waiver to come back to Pennsylvania. The Board recommitted Sanders to serve nine months backtime as a technical parole violator for changing his residence without permission. Sanders's request for administrative relief was denied. Sanders, 958 A.2d at 584.

Before this Court, Sanders contended that the Board erred when it found that the Waiver constituted an admission when all that he admitted was that probable cause for a parole violation existed which authorized his return to Pennsylvania. Because he only admitted to probable cause, Sanders argued that there was no substantial evidence to support the Board's decision. Sanders, 958 A.2d at 584.

This Court affirmed:

When the Board, at Sanders' request allowed his parole to be supervised by the Georgia parole officials, it did so under the Compact. As part of the Compact, the state became a member of the Interstate Commission for Adult Offender Supervision (Commission) which oversees the day-to-day activities of the compact between the states and promulgates rules to achieve the goals of the

compact. When a parolee violates parole in the receiving state, Rule 5.108 of the Interstate Commission on Adult Offender Supervision Commission Rules . . . addresses how a parolee is sent back to the sending state. It provides:

....

(b) No waiver of a probable cause hearing shall be accepted unless accompanied by an admission by the offender to one or more significant violations of the terms or conditions of supervision.

....

This Commission Rule allows a prisoner to confront the receiving states parole agent who is charging that a parolee violated the conditions of his parole with full access to the information to defend against the charge before sending him back to the sending state. Most relevant here, a parolee cannot waive that hearing unless he or she admits to “one or more significant violations of the terms or conditions of supervision.” Commission Rule 5.108(b). Presumably, holding a hearing or requiring a waiver in the receiving state is to make the Compact workable by avoiding the expense of parole agents coming to the sending state to testify. Once a preliminary hearing is held finding probable cause or a parolee has signed a waiver admitting the violations, then under the Compact, A Case Closure Notice and Violation Report are sent to the sending state. The sending state may then use that evidence to support the violation and the parolee is free to offer any explanation, which the Board may consider in deciding whether to revoke his parole or impose backtime.

....

In this case, Sanders signed the Waiver, which was entered into evidence without objection, listed the violations of the conditions of his parole, . . . and expressly stated, ‘I admit to violation of my release as stated above.’ . . . This admission alone constitutes substantial evidence for the Board to make a finding that Sanders violated his parole. (Citation and footnote omitted). (Emphasis in original).

Sanders, 958 A.2d at 584-586.

Here, as in Sanders, Bostic admitted to the violations when he signed the Warrant Service Form. At the hearing Bostic asserted that he did not know what he was signing. Curiously, Bostic does not address his admission in his brief. This Court finds that, as in Sanders, Bostic's admissions provided substantial evidence for the Board to determine that he violated his parole. A parolee's admission to a parole violation is substantial evidence regardless of whether it is corroborated by any independent evidence that the parolee committed a parole violation. Pitch v. Pennsylvania Board of Probation and Parole, 514 A.2d 638 (Pa. Cmwlth. 1986). The Board did not err. The hearsay statement of Cartwright was superfluous in light of Bostic's admission. Sanders.

Bostic also asserts that this case should be remanded for a determination of backtime because he only committed one violation of his parole rather than three. However, this Court finds that the Board's determination that Bostic engaged in assaultive behavior was supported by substantial evidence because of his admission that he committed the assault. He violated Condition #5a "refrain from any assaultive behavior" and Condition #5c "abstain from the use of controlled substances."⁸ Further, Bostic does not challenge the Board's assessment of twelve months backtime for the two violations, rather than three, as too lengthy a recommitment, so this Court may not address it. Pa.R.A.P. 2116(a) provides that

⁸ Bostic also asserts that the matter should be remanded because the Administrative Appeal Vote Sheet indicated that the case should be remanded. The Administrative Appeal Vote Sheet is difficult to interpret, but it appears that one of the three Board members voted to remand as to Condition #7. A second Board member voted to reverse as to Condition #7. The third Board member initially voted to remand as to Condition #7 but subsequently changed his vote to reverse as to Condition #7. The Board voted to reverse on that count, so no remand was necessary.

“ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby.” This Court will refrain from addressing this issue because it was not set forth in the statement of questions involved pursuant to Pa.R.A.P. 2116(a).

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Jermaine Bostic, | : |
| | : |
| Petitioner | : |
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| v. | : |
| | : |
| Pennsylvania Board of | : |
| Probation and Parole, | : |
| | : No. 1423 C.D. 2009 |
| Respondent | : |

ORDER

AND NOW, this 29th day of July, 2010, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge