

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Monroe Yates,	:		
	:		
Petitioner	:		
	:		
v.	:	No. 1460 C.D. 2009	
	:	SUBMITTED: December 24, 2009	
Pennsylvania Board of Probation	:		
and Parole,	:		
	:		
Respondent	:		

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE BERNARD L. MCGINLEY, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: April 15, 2010**

Monroe Yates petitions for review of the denial of his administrative appeal following his recommitment for violation of parole condition 5a, which, in pertinent part, prohibits a parolee from unlawful possession of narcotics and dangerous drugs. Petitioner challenges the sufficiency of the evidence presented to establish possession.

Yates was serving a 10- to 30-year sentence at inmate number AM-7882, with a parole violation maximum date of August 23, 2016, when he was paroled to a 3- to 7-year state detainer sentence at his current inmate number FQ-0467. The Pennsylvania Board of Probation and Parole (Board) released Yates on parole from the state detainer sentence on February 25, 2008. Certified Record

(C.R.) at 32. As a condition of his parole, Yates was to abstain from the unlawful possession of narcotics and dangerous drugs. Condition 5a, C.R. at 36. On October 2, 2008, Philadelphia police officers arrested Yates for possession of a controlled substance; the charges were later withdrawn. The Board subsequently charged Yates with violation of condition 5a for possessing drugs.

At the violation hearing, Philadelphia Police Officer Dayton Bennett,<sup>1</sup> one of two officers who apprehended Yates on October 2, 2008, testified as follows. The officer and his partner were patrolling in a “high drug activity” area when they observed Yates talking to a woman. Upon seeing the officers, Yates walked away from the woman and sat on a step. The officers decided to conduct a pedestrian stop, and as the partner exited the vehicle, Yates took off running. Officer Bennett observed Yates holding a blue object in his hand as he ran with a closed fist. The partner pursued Yates on foot, and Officer Bennett went the other way to cut him off. The blue object, which Yates had discarded during the pursuit, was recovered and identified as a blue plastic bag containing 17 packets of a substance that tested positive as cocaine. The officers also recovered \$300 in U.S. currency. On cross-examination, Officer Bennett conceded that although he was present when Yates was arrested, he did not see him discard the blue object and was not present when it was recovered.

Parole Agent Kevin Dodson introduced into evidence a lab report from the Philadelphia Police Department Chemistry Lab, indicating property receipt number 2818620. Officer Bennett testified that after the arrest, either he or

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<sup>1</sup> Although the briefs and the hearing examiner refer to the Board’s witness as Officer Dayton or Officer Bennett Dayton, the officer identified himself on the record as Officer Dayton Bennett. C.R. at 84.

his partner turned the drugs over to a detective, who would have tested the contents, sealed the evidence, and processed the property receipt, which was signed by both Officer Bennett and his partner. Parole Agent Dodson testified that he obtained the lab report from the lab technician, who signed it in the Agent's presence.

Following the violation hearing, the Board recommitted Yates on both of his inmate numbers as a technical parole violator based on the testimony of Parole Agent Dodson, the testimony of Officer Bennett, and the Philadelphia Police Department lab report. The Board denied Yates's administrative appeal, in which he alleged that the recommitment was based on hearsay evidence. Yates filed the present appeal.<sup>2</sup>

Through counsel, Yates filed a petition for review challenging the sufficiency of the Board's evidence in establishing that he was in possession of cocaine on October 2, 2008. Specifically, Yates argues that the parole agent's testimony was not relevant to the issue, Officer Bennett's testimony was insufficient to establish that Yates was in possession of drugs, and the hearing examiner erred in admitting an unauthenticated lab report over Yates's hearsay objection.

The Board must prove a technical parole violation by a preponderance of the evidence. *Brown v. Pa. Bd. of Prob. & Parole*, 806 A.2d 984 (Pa. Cmwlth. 2002); 37 Pa. Code § 71.2(19). The hearing examiner at a violation hearing is not bound by the technical rules of evidence and may receive all evidence that is both

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<sup>2</sup> Our review here is limited to determining whether the Board's decision was supported by substantial evidence and whether the Board erred as a matter of law. 2 Pa. C.S. § 704; *Prebella v. Pa. Bd. of Prob. & Parole*, 942 A.2d 257 (Pa. Cmwlth. 2008).

relevant and probative. 2 Pa. C.S. § 505; *Lee v. Pa. Bd. of Prob. & Parole*, 885 A.2d 634 (Pa. Cmwlth. 2005). Hearsay evidence is admissible in a revocation proceeding where no objection is made and where good cause is shown. *Lee*; 37 Pa. Code § 71.5(b).

Yates argues that Officer Bennett's testimony is insufficient to establish that he possessed cocaine on October 2, 2008, because Officer Bennett did not see Yates discard the blue object, was not present when the blue object was recovered, did not observe the processing of the evidence by the detective, and had no first-hand knowledge of what the detective did with the evidence once it was bagged and the property slips were signed. Yates also challenges the admissibility and sufficiency of the lab report. The Board counters that the chain of custody claim is waived because Yates failed to raise it in his administrative appeal, the hearsay claim is waived because it was not raised before the hearing examiner, and even if these claims are not waived, the Board's decision is supported by substantial evidence.

### **Testimony of Officer Bennett**

Objections to the testimony appear to be twofold: 1) Officer Bennett was not the arresting officer and did not see Yates discard the blue object or its recovery; and 2) the officer's testimony is insufficient to prove chain of custody of the recovered evidence and thus the lab report showing the recovered substance to be cocaine is not entitled to any evidentiary weight.

Upon review of the hearing transcript, the court is satisfied that Officer Bennett had personal knowledge of the facts to which he testified. In describing the events surrounding the arrest of Yates on October 2, 2008, Officer

Bennett testified that as his partner exited the police vehicle, Yates fled with a blue object in his hand. Officer Bennett was present when Yates was apprehended and when Yates was arrested. C.R. at 86-87. Although Officer Bennett did not see Yates discard the blue object or his partner's recovery of a blue object, the officer did testify that the recovered evidence, a blue plastic bag containing packets of cocaine, appeared to be the blue object he saw in Yates's hand as he took off running. C.R. at 90. The hearing examiner then elicited the following exchange.

Hearing Examiner:

Just so I can be clear, you didn't see him discard it, but what you saw recovered is what you saw in his hand originally?

A. Yes. My partner actually seen him discard it.

Hearing Examiner:

But the same item that was recovered is what you saw in his hand?

A. Yeah, the same item.

Hearing Examiner:

Okay. Anything else, Agent Dodson?

Agent Dodson:

Yeah. At this point I'd like to introduce the lab report from the Philadelphia Police Department Chemistry Lab for the property receipt number 2818620.

C.R. at 91.

### **Chain of Custody**

Chain of custody is an inquiry undertaken to determine whether a lab report is admissible. *See UGI Utils., Inc. v. Unemployment Comp. Bd. of Review*, 851 A.2d 240 (Pa. Cmwlth. 2004). Lab reports showing the outcome of tests on samples are irrelevant unless that factfinder has some assurance that a report relates to the right sample; gaps in the chain of custody go to the weight of

testimony offered on chain of custody and not the admissibility of the testimony. *Id.* It is in this context that Yates argues that Officer Bennett's testimony is inadequate to establish the chain of custody linking the evidence seized and the lab report. Counsel for Yates raised a chain of custody objection to the admission of the lab report. The hearing examiner then elicited the following exchange:

Hearing Examiner:

Officer, is that property receipt number the property receipt number that corresponds with the cards you have in front of you?

A. That's correct. Just to make it clarified, what happens is that we bring the items in. We give them to a detective. He tests them in our presence and they are sealed and sent down to the lab.

Hearing Examiner:

You observed that whole process?

A. I didn't observe the whole process, but I had to sign a property receipt and my partner signed a property receipt. So we observed that these items was sealed inside and they was tested because we got two new things we're doing at that time, I'm processing them and one --- he's doing the narcotics or vice versa. There's two things going on at this time, but there's no gap in the chain of custody.

Hearing Examiner:

I'm going to overrule the objection.

C.R. at 92-93.

Although Yates, through counsel, raised the chain of custody objection at the hearing, the Board argues that the issue is now waived because it was not raised in the administrative appeal. The Board cites *McCaskill v. Pennsylvania Board of Probation and Parole*, 631 A.2d 1092 (Pa. Cmwlth. 1993), for the proposition that any issue not raised in the administrative appeal to the

Board is waived. The law is clear that, except in instances that are not relevant here, issues not raised before the administrative agency may not be raised for the first time on judicial review. 2 Pa. C.S. § 703; *Jacobs v. Pa. Bd. of Prob. & Parole*, 958 A.2d 1110 (Pa. Cmwlth. 2008). What is less clear is whether, to avoid waiver, the parolee must raise an issue both at the revocation hearing and in the administrative appeal.

In *Goods v. Pennsylvania Board of Probation and Parole*, 590 Pa. 132, 912 A.2d 226 (2006), the Supreme Court affirmed this Court's determination that the parolee had preserved a challenge to the timeliness of his revocation hearing by raising it in his administrative appeal even though he did not raise it at the revocation hearing. The Court held that the Board, in the exercise of its discretion, could adopt a rule requiring issue preservation at the revocation hearing, but that its decision in *Dilliplaine v. Lehigh Valley Trust Company*, 457 Pa. 255, 322 A.2d 114 (1974), requiring that parties raise claims of error before the trial court in order to preserve them for appellate review, was a function of its rulemaking authority for the judicial system, and did not independently require that a parolee raise any and all issues at the revocation hearing. *Goods*, 590 Pa. at 148, 912 A.2d at 235-36. The Court declined to address the parolee's contention that a parolee adequately preserves a claim if he raises it *either* at the hearing or in the administrative appeal. 590 Pa. at 149, 912 A.2d at 236. Thus, our Supreme Court has not addressed the issue raised in the present case, *i.e.*, whether an issue is waived for purpose of judicial review if it was raised at the hearing but not raised in the administrative appeal and 2 Pa. C.S. § 703(a) states only that an issue must be raised at some point to the Board before it may be addressed on appeal. *Jacobs*, 958 A.2d at 1117. Nonetheless, this Court has required that an issue be raised in

the administrative appeal in order to be preserved for judicial review, and we are bound by these decisions. *White v. Pa. Bd. of Prob. & Parole*, 833 A.2d 819 (Pa. Cmwlth. 2003); *McCaskill*. Accordingly, we agree with the Board, that the chain of custody claim is waived.

Even if the issue were not waived, we would conclude that Officer Bennett's testimony is sufficient to connect the drug evidence recovered at the time of Yates's arrest and the lab report. Officer Bennett testified that he and his partner took the drug evidence to a detective who processed it for submission to the lab, that they observed that the evidence was sealed, and that they signed the property receipt bearing the property receipt number 2818620, the same number referenced in the lab report.

### **Lab Report--Hearsay**

Yates raised his hearsay objection in his administrative appeal; the issue is not waived. *Goods*. In *Powell v. Pennsylvania Board of Probation and Parole*, 513 A.2d 1139 (Pa. Cmwlth. 1986), this court ruled that a lab report may not be admitted into evidence at a violation hearing over the parolee's objection unless the report contains indicia of regularity and reliability. "The letterhead of the approved laboratory, the signature of a known and responsible member of its staff, or some other mark of reliability, is necessary . . . ." *Id.* at 1144.

Consistent with these evidentiary principles, the lab report in this case from the Philadelphia Police Department Chemistry Lab for property receipt number 2818620 bore the signature of the lab technician, and Parole Agent Dodson testified that he obtained the report directly from the lab technician, who signed the report in his presence. Despite the lack of letterhead, the report, a computer



printout, bearing the signature of Parole Agent Dodson and that of the lab technician from whom he obtained it, had sufficient indicia of regularity and reliability, and the hearing examiner did not abuse his discretion in admitting the report under the good cause exception to the inadmissibility of hearsay. *Burgess v. Pa. Bd. of Prob. & Parole*, 568 A.2d 268 (Pa. Cmwlth. 1989); *Montione v. Pa. Bd. of Prob. & Parole*, 557 A.2d 34 (Pa. Cmwlth. 1988) (finding of good cause supported by evidence of its source when report on letterhead and signed by toxicology supervisor). *Cf. Neal v. Pa. Bd. of Prob. & Parole*, 531 A.2d 119 (Pa. Cmwlth. 1987) (computer printout lacking signature of responsible person and not on letterhead lacked sufficient indicia of regularity and reliability).

Accordingly, the order of the Board is affirmed.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 15th day of April, 2010, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby AFFIRMED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge