IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Timothy VanHook,	:	
Petitioner	:	
	:	
v.	:	No. 1675 C.D. 2010
	:	Submitted: December 23, 2010
Pennsylvania Board of Probation	:	
and Parole,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED:April 15, 2011

Timothy VanHook petitions for review of an adjudication of the Pennsylvania Board of Probation and Parole (Board) denying his request for credit toward his recalculated sentence. The Board concluded that VanHook failed to rebut the presumption that he was at liberty on parole during the period of time he spent at the Kintock-Erie Community Corrections Facility (Facility). VanHook argues that he is entitled to credit because the time he spent in the Facility was sufficiently custodial to warrant credit to his sentence. Finding no merit to this argument, we affirm the Board.

In 1988, VanHook was convicted of robbery and criminal conspiracy and sentenced to a term of six to thirty years in prison, with a maximum sentence date of October 1, 2016. VanHook has been released on parole on multiple occasions beginning in 1992. The parole at issue in the present case is for the

period of time from January 22, 2007, through August 6, 2007. During that entire period of time, VanHook remained on parole at the Facility.

On October 6, 2007, a detainer was lodged against VanHook after he was charged with possession of drugs with intent to deliver.[1] On February 10, 2009, following his conviction on this new criminal charge, VanHook was recommitted to serve eighteen months backtime. Because he was recommitted as a convicted parole violator, the Board gave him no credit for the time he spent on parole. This resulted in a recalculation of his maximum sentence date to July 12, 2017.

On March 16, 2009, the Board received a petition for administrative review in which VanHook claimed he was entitled to credit on his maximum sentence date for the period of time he spent at the Facility, which was 196 days. The Board held a hearing on VanHook's claim.[2]

At the hearing, VanHook testified that one of the terms of his parole required him to complete the program at the Facility, after which he was to find employment.[3] Upon submission of a home plan he was to be discharged from the Facility. VanHook placed the Facility's handbook into evidence.

VanHook stated that during his first week at the Facility, he was permitted to travel unescorted to the public assistance office to apply for benefits. His public assistance checks were deposited into his own account, to which the

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[1] It is unclear when Van Hook was actually arrested on the new criminal charge.

[2] Pursuant to *Cox v. Pennsylvania Board of Probation and Parole*, 507 Pa. 614, 620, 493 A.2d 680, 683 (1985), the Board must hold a hearing when a recommitted convicted parole violator claims the in-patient program he lived in as a condition of his parole was a prison equivalent.

[3] VanHook's testimony was brief. It encompassed ten pages in total, only five of which addressed his parole requirements at the Facility. He presented no other witnesses on his behalf.

Facility did not have access. He also traveled to several other agencies and to the police department unescorted. He was permitted to leave the Facility unescorted for short trips to purchase certain personal effects.

Frank Guyon, who is employed by the Facility, testified. He explained that the center has dorm style rooms with bunk beds. The doors were only locked from the outside to prevent intruders from entering the Facility. Persons within the Facility were not locked inside, allowing them to leave any time. Parolees were permitted to walk unescorted around the grounds of the Facility. Guyon also explained that the Facility was not enclosed by a fence and that there were no bars on the windows.[4] If a parolee attempted to leave without authorization, no attempt was made to detain him, but it would be reported to his parole agent as misconduct. No parolee is charged with escape if he leaves without permission.

Guyon stated that the Facility housed both pre-release inmates and parolees and explained the differences in their treatment. Pre-release inmates may be furloughed and charged with escape if they leave the Facility. Parolees are not. Absent special permission, parolees cannot travel outside the City of Philadelphia, but pre-release inmates can travel within a five-county area.

The Board concluded that VanHook was not entitled to credit on his prison sentence based on the time he spent at the Facility. The Board found, as fact, that the doors of the Facility were equipped to permit residents to exit at will; that VanHook was permitted to walk unescorted on the grounds; that VanHook was permitted to leave the Facility unescorted for appointments and errands; that

[4] While the Facility was not enclosed by a fence, a recreational area behind the Facility was bordered with a fence.

VanHook would not be charged with escape if he left the Facility without permission; and that VanHook had his own account which could not be accessed by the Facility. Based on these findings, the Board concluded that VanHook did not meet his burden of showing that the Facility placed restrictions on his liberty sufficient to warrant credit on his sentence.

VanHook filed an administrative appeal, in which he asserted that the conditions at the Facility were the equivalent of incarceration. He asserted that this was established by Guyon's testimony, which showed that the constraints on his movements were greater than the constraints placed on the pre-release inmates. Certified Record at 141-142 (C.R. __). In response, the Secretary affirmed the Board's decision.

VanHook now appeals to this Court.[5] He raises one issue for review: that the Board erred in failing to credit his original sentence with all of the time to which he was entitled.[6] He argues that the Facility was a prison-like environment, as established in the residential handbook.

In his brief, VanHook claims his environment was prison-like because of the rules regulating his whereabouts, random searches of his person and property, limited residence visiting hours, random official head counts and required drug testings. None of these issues were raised at the hearing or in his

[5] Our scope of review of the Board's recommitment order is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether any constitutional rights of the parolee have been violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; *Cromartie v. Pennsylvania Board of Probation and Parole*, 680 A.2d 1191, 1193 n.5 (Pa. Cmwlth. 1996).

[6] VanHook does not challenge any of the Board's factual findings.

appeal to the Board.[7] C.R. 140-142. Because VanHook is not permitted to raise issues for the first time in an appeal to this Court, these claims are waived. *See* Pa. R.A.P. 1551(a)(1), (2) and (3).[8]

The issue that was raised in the administrative appeal was whether VanHook established that the conditions at the Facility were the equivalent of incarceration because the constraints on his movements were greater than the constraints placed on the pre-release inmates. We will address that issue.

We begin with a review of the applicable law. At the time of VanHook's arrest on the new criminal charge and at the time his parole was revoked by the Board, the law in place was former Section 21.1(a) of the act commonly referred to as the Parole Act.[9] The Parole Act provided that the Board has the authority to recommit a parolee who

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[7] We reiterate that in his appeal to the Board, VanHook only claimed that the conditions of his parole were the equivalent of incarceration because he had greater restraints placed on his liberty than the pre-release inmates that resided at the facility. C.R. 142.

[8] It provides:

> (a) **Appellate jurisdiction petitions for review**. Review of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which was not raised before the government unit except:
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> (1) Questions involving the validity of a statute.
>
> (2) Questions involving the jurisdiction of the government unit over the subject matter of the adjudication.
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> (3) Questions which the court is satisfied that the petitioner could not by the exercise of due diligence have raised before the government unit.

Pa. R.A.P. 1551(a)(1), (2) and (3).

[9] Former Act of August 6, 1941, P.L. 861, *as amended*, 61 P.S. § 331.21a(a), formerly added by Section 5 of the Act of August 24, 1951, P.L. 1401, *as amended*. The Parole Act was repealed by the Act of August 11, 2009, P.L. 147, No. 33. Similar language is now codified at 61 Pa. C.S. § 6138(a)(1) and (2) which provides:

(Footnote continued on the next page . . .)

> during the period of parole … commits any crime punishable by imprisonment, from which he is convicted or found guilty by a judge or jury or to which he pleads guilty or nolo contendere at any time thereafter….

61 P.S. § 331.21a(a). Where a parolee is recommitted, he "shall be given no credit for the time at liberty on parole." *Id*.

The phrase "at liberty on parole" has never been defined in the Parole Act and has traditionally been known as "street time." However, the Pennsylvania Supreme Court has clarified that "street time" is not to be construed literally and that "at liberty on parole" does not mean freedom from any type of confinement. *Cox*, 507 Pa. at 618, 493 A.2d at 682. Because parole imposes some restraint on freedom, the Supreme Court established that time spent in a residential facility is time presumed to be at "liberty on parole." The parolee may rebut the presumption with evidence that shows the conditions at the facility are prison-like. When the Board determines that the restrictions on a parolee's liberty are not sufficiently restrictive to warrant credit, this Court is not to interfere with the determination absent a finding that the Board acted arbitrarily or abused its discretion.

The uncontroverted evidence presented at the hearing established that VanHook was permitted to leave the Facility unescorted for appointments and to purchase personal effects. Further, the Facility was not locked from the inside and

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(continued . . .)

> (1) A parolee under the jurisdiction of the [B]oard released from a correctional facility who, during the period of parole … commits a crime punishable by imprisonment, for which the parolee is convicted … may at the discretion of the board be recommitted as a parole violator.
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> (2) If the parolee's recommitment is so ordered, the parolee shall be reentered to serve the remainder of the term which the parolee would have been compelled to serve had the parole not been granted and shall be given no credit for the time at liberty on parole.

VanHook would not have been restrained by staff if he chose to leave. He also would not have been charged with the crime of escape if he chose to leave without authorization.

In *Detar v. Pennsylvania Board of Probation and Parole*, 890 A.2d 27, 31 (Pa. Cmwlth. 2006), we held that when considering whether confinement was the equivalent of incarceration, the most important factors were "whether the patient, or resident, is locked in and whether the patient may leave without being physically restrained." In *Figueroa v. Pennsylvania Board of Probation and Parole*, 900 A.2d 949, 952 (Pa. Cmwlth. 2006), we reiterated this holding. In *Figueroa*, as in the present case, the parolee was permitted to leave the facility unescorted; would not be physically restrained if he attempted to leave without authorization; and would not be charged with escape for so doing. *Id.* at 952-953. We concluded that this type of confinement could not be considered the equivalent of incarceration.

Despite the holdings in *Detar* and *Figueroa*, VanHook argues that because he was subjected to restrictions greater than the pre-release inmates at the Facility, his confinement was the equivalent of incarceration. Specifically, VanHook notes that pre-release inmates were eligible for furloughs and were permitted to travel within the five-county area surrounding the City of Philadelphia. By contrast, he was not eligible for a furlough and could only travel within the City of Philadelphia.

The Board counters that it is irrelevant whether VanHook had restrictions placed on him which were greater than or equal to those of pre-release inmates. The only issue is whether his restrictions were the equivalent of imprisonment. Furloughs to inmates are governed by a regulation of the

Department of Corrections. *See* 37 Pa. Code §94.2(c)(3).[10] A parolee is under the authority of the Board, not the Department of Corrections. The Board also argues that pre-release inmates are subject to greater restraints than parolees, noting that they can be returned to prison even if they do not violate the terms of their pre-release. Further, if a pre-release inmate leaves the Facility without authorization, he is charged with the crime of escape.

We agree with the Board that the standard imposed by *Cox*, 507 Pa. at 619, 493 A.2d at 683, is whether the restrictions placed on a parolee's liberty "were the equivalent of incarceration." Thus, even if VanHook could establish that the restrictions placed on him were greater than the restrictions placed on pre-release inmates, he still has not met his burden of establishing whether the restrictions were the equivalent of incarceration.

In *Meehan v. Pennsylvania Board of Probation and Parole*, 808 A.2d 313, 315-316 (Pa. Cmwlth. 2002), a parolee claimed that the program he was in was as restrictive as the program the pre-release inmates were in and it was a violation of equal protection to permit the pre-release inmates to receive credit for time spent in the facility while denying it to him. We disagreed, noting that pre-release inmates were in custody, not at liberty, and were subject to the charge of escape should they leave without authorization. Parolees, on the other hand, could not be charged with escape. Thus, parolees "are not similarly situated with pre-release inmates, who are deemed to be in *official detention*, for purposes of credit for time spent at [the facility]." *Id.* at 317-318 (emphasis in original).

[10] It provides that under the Department of Corrections pre-release program, an inmate may receive a furlough "for a period not to exceed 7-consecutive days." 37 Pa. Code §94.2(c)(3).

Moreover, in *Harden v. Pennsylvania Board of Probation and Parole*, 980 A.2d 691 (Pa. Cmwlth. 2009), we discussed our holding in *Meehan* and reiterated that there is a distinction between being under supervision on parole and being subject to official detention. We provided that this difference in status "justified treating pre-release inmates and parolees [in a facility] differently for purposes of sentence credit." *Harden*, 980 A.2d at 698.

Cox established that there is a presumption that the time VanHook spent at the Facility was time spent at liberty on parole. It was VanHook's burden to rebut that presumption by establishing with competent evidence the characteristics of the Facility that made time spent there the equivalent of incarceration. Instead, the evidence established that the terms of his parole permitted unescorted travel for personal errands and the ability to leave, unrestrained by staff, at any time. As we have already explained in *Detar* and *Figueroa*, this type of confinement is not the equivalent of incarceration.

Likewise, as explained in *Meehan* and *Harden*, there are reasons for treating pre-release inmates and parolees differently. However, even if VanHook was placed under greater restrictions than pre-release inmates in certain limited circumstances, it is irrelevant to his burden of proving that the restrictions on his liberty rose to the level of incarceration.

Accordingly, the order of the Board is affirmed.

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MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Timothy VanHook, Petitioner	:	
v.	:	No. 1675 C.D. 2010
Pennsylvania Board of Probation and Parole, Respondent	:	

O R D E R

AND NOW, this 15th day of April, 2011, the order of the Pennsylvania Board of Probation and Parole dated July 23, 2010, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge