

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephen Holmberg,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1772 C.D. 2009
	:	Submitted: April 1, 2010
Pennsylvania Board of Probation and	:	
Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: May 28, 2010

Stephen Holmberg (Holmberg) petitions for review of the August 11, 2009, order of the Pennsylvania Board of Probation and Parole (Board), which concluded that Holmberg waived the question of whether the Board provided him with a timely parole revocation hearing because, at the hearing, Holmberg did not object to its timeliness. We vacate and remand.

On May 14, 2007, Holmberg was released on parole from a sentence with a maximum date of June 26, 2008. (C.R. at 16.) However, on December 23, 2007, Holmberg was arrested on new criminal charges and was confined in Blair County jail. (C.R. at 20.) The next day, the Board issued a detainer warrant. (C.R. at 19.) On January 18, 2008, Holmberg was charged with additional offenses that he allegedly committed on December 11, 2007. (C.R. at 30.) On February 5, 2008, the Board issued a decision to recommit Holmberg as a technical parole violator (TPV)

to serve six months backtime, when available, pending resolution of his new criminal charges. (C.R. at 29.) On March 17, 2008, Holmberg was charged with another offense, this one allegedly committed on December 19, 2007. (C.R. at 44, 48.)

On June 26, 2008, the maximum term of Holmberg's original sentence expired. The Board cancelled its December 24, 2007, detainer but, on September 25, 2008, declared that Holmberg was delinquent for control purposes, referring to the Board's February 5, 2008, decision to recommit Holmberg as a TPV when available. (C.R. at 57-58.)

On November 17, 2008, Holmberg was convicted of the new charges against him. (C.R. at 50.) On December 2, 2008, he was moved to the State Correctional Institution (SCI) at Camp Hill. (C.R. at 108.) The Board received official verification of the convictions on January 5, 2009. (C.R. at 50.) On April 8, 2009, the Board issued a detainer. (C.R. at 71.) On April 15, 2009, the Board set a parole revocation hearing for May 1, 2009. (C.R. at 84.)

After the hearing, on May 12, 2009, the Board recommitted Holmberg as a convicted parole violator (CPV) to serve his unexpired term of one year, one month and twelve days. (C.R. at 111.) Holmberg filed a petition for administrative relief, arguing that the Board failed to provide him with a timely hearing. (C.R. at 113.) The Board denied Holmberg's petition on August 11, 2009, stating that Holmberg waived the timeliness issue when he failed to raise it at the May 1<sup>st</sup> hearing. (C.R. at 119.) Holmberg petitions this court for review.

Preliminarily, we note the Board's concession in its brief that, under *Goods v. Pennsylvania Board of Probation and Parole*, 590 Pa. 132, 912 A.2d 226 (2006), and *Jacobs v. Pennsylvania Board of Probation and Parole*, 958 A.2d 1110 (Pa. Cmwlth. 2008), a parolee need not raise timeliness as an issue at the hearing. Thus, the Board acknowledges its error. The Board then advises that, unless we affirm the Board on other grounds, this court should remand the case for a hearing at which the Board could present evidence to establish the timeliness of the hearing. (Board's brief at 11-12.) We now consider the issue raised by Holmberg.

Holmberg argues that the Board failed to hold his revocation hearing within 120 days of the date he was transferred from the Blair County jail to SCI-Camp Hill. In making this argument, Holmberg relies on 37 Pa. Code §71.4(1)(i), which provides that, where a parolee is confined in a county correctional institution and has not waived his right to a panel revocation hearing, the hearing shall be held within 120 days of the official verification of the return of the parolee to a state correctional institution.

The Board asks this court to affirm the denial of Holmberg's petition on the ground that 37 Pa. Code §71.4(1)(i) does not apply here. The Board contends that the regulation applies only to "parolees," and, because Holmberg's original sentence had expired, he was not a "parolee" when he was convicted of the new charges. We decline to affirm on this ground. Holmberg was a parolee when he committed the underlying offenses; pursuant to the Board's February 5, 2008, decision, Holmberg was a "parolee" awaiting recommitment as a TPV, when available; and pursuant to the Board's September 25, 2008, decision, Holmberg was a delinquent "parolee."

Thus, we conclude that Holmberg was a “parolee” for purposes of the regulation at 37 Pa. Code §71.4(1)(i).

Because the Board had the burden of proving the timeliness of a parole revocation hearing and because the Board presented no evidence at Holmberg’s revocation hearing to establish when the Board received official verification of Holmberg’s transfer to SCI-Camp Hill, we vacate and remand to the Board for an evidentiary hearing and a decision on the merits of Holmberg’s challenge to the timeliness of his parole revocation hearing.

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ROCHELLE S. FRIEDMAN, Senior Judge

Judge Simpson concurs in the result only.

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	:	
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ORDER

AND NOW, this 28th day of May, 2010, it is hereby ordered that the August 11, 2009, order of the Pennsylvania Board of Probation and Parole (Board) is vacated, and this case is remanded to the Board for an evidentiary hearing and a decision as to the timeliness of Stephen Holmberg's parole revocation hearing.

Jurisdiction relinquished.

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ROCHELLE S. FRIEDMAN, Senior Judge