IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jason A. Sanders, Petitioner	:	
v.	:	No. 1777 C.D. 2009
	:	Submitted: January 29, 2010
Pennsylvania Board of Probation and Parole, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON FILED: February 25, 2010

Jason A. Sanders (Sanders) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) that denied his administrative appeal. The Board's January 2, 2009 decision recommitted Sanders to serve the remainder of his unexpired term of incarceration based upon several technical violations of the conditions of his parole. We affirm the Board's decision recommitting Sanders to serve the remainder of his unexpired sentence.

On March 5, 1997, the Court of Common Pleas of Mercer County (trial court) sentenced Sanders to a maximum term of seven years incarceration for his conviction for the crimes of simple assault and criminal attempted escape.[1]

[1] At the time of his conviction for these crimes, Sanders had already been convicted and sentenced for additional crimes as early as 1989. (Certified Record (C.R.) 25.) Those earlier
(Footnote continued on next page…)

(C.R. 48.) Following at least two previous periods of parole and re-parole, the Board again re-paroled Sanders and released him on March 31, 2008 (C.R. 55, 57), subject to several conditions, including (1) the general condition of parole that he report to a district office in Beaver Falls within forty-eight hours of his release,[2] and (2) the special condition of parole that he report immediately upon his release to his approved residence, Penn Pavilion.[3] Sanders never reported to either of these locations or in any way contacted the Board regarding his location. Consequently, on April 1, 2008, the Board declared him delinquent as of the date of his release, March 31, 2008. On August 11, 2008, the Board received information indicating that Sanders had been arrested in Ohio and, thus, issued a warrant to commit and detain Sanders on that date.

The Board's notice of charges and hearing indicated that it was charging Sanders with the following technical violations: (1) two counts of violation of Condition No. 1, for (a) failing to report to the Board's district office within forty-eight hours of his release, and (b) leaving the district without permission of the parole supervision staff; (2) one count of violation of Condition No. 2 for failing to live at the approved residence, Penn Pavilion; and (3) one count

(continued…)

convictions explain why his earliest release date for parole purposes after the 1997 convictions did not occur until July 2005. The nature of those convictions, however, is not necessary to our review here.

[2] 37 Pa. Code § 63.4(1) (providing parolees must report to district office within forty-eight hours of release).

[3] *See* 37 Pa. Code § 63.5(a) (providing parolees must comply with special conditions Board imposes or which parole officer may impose after release).

of violation of special Condition No. 7 for failing to report to Penn Pavilion immediately upon his release on parole. (C.R. 65.)

According to the Board's hearing report, dated November 25, 2008, Sanders stated that the reason he did not report to either the district office or his approved residence was that his mother was ill in Ohio. The hearing officer regarded Sanders' statements as an admission that he had failed to comply with the conditions of his parole. The hearing panel members noted that this was the second time Sanders had absconded on the date he was released on parole or re-parole,[4] and, consequently, based upon the presumptive range available for Sanders' violations of Conditions Nos. 1 and 2 (six-to-eighteen months for each) aggregated with the range available for his violation of special Condition No. 7 (three-to-eighteen months), Sanders could be subject to a total recommitment time of nine-to-thirty-six months.[5] The panel's ultimate recommendation was to recommit Sanders for the period of his unexpired term of two years, six months and twenty-three days, which fell with the recommitment range. (C.R. 67-72.)

On January 2, 2009, the Board mailed its decision recommitting Sanders for a period of thirty months and twenty-three days (the remaining period of his unexpired sentence), which is less than the maximum aggregate period that the Board could impose for the four separate violations. Sanders filed an

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[4] *See* (C.R. 41 (declaring delinquency as of July 19, 2005, four days after his July 15, 2005 release)); (C.R. 51 (declaring delinquency as of March 14, 2007)).

[5] *See* 37 Pa. Code § 75.3(f) (providing that "[b]acktime for a violation of a special condition shall be aggregated with other backtime, unless the revocation decision states otherwise").

administrative appeal, which the Board denied on August 25, 2009. Sanders then filed his petition for review with this Court.[6]

In the issue section of his brief, Sanders presents the following questions: (1) whether the Board's recommitment time exceeds the presumptive ranges permitted for the violations; (2) whether Conditions No. 1 and 2 are duplicative such that the Board exceeded the permitted presumptive range of recommitment time; and (3) whether the Board erred in relying upon this Court's decision in *Petty v. Pennsylvania Board of Probation and Parole*, 896 A.2d 698 (Pa. Cmwlth.), *allocator denied*, 590 Pa. 680, 912 A.2d 1294 (2006), as a basis for denying Sanders' request for administrative relief. In the argument section of his brief, however, he asserts essentially that Conditions Nos. 1 and 7 are duplicative, because he could not have violated Condition No. 1 (failure to report to the district office within forty-eight hours of his release) without also violating Condition No. 7 (failure to report to his assigned residence, Penn Pavilion), and, thus, he contends, the Board's aggregation of the backtime for the general and special condition violations was erroneous.

Sanders relies upon this Court's decision in *Anderson v. Pennsylvania Board of Probation and Parole*, 868 A.2d 649 (Pa. Cmwlth. 2005), in arguing that the two conditions are so similar as to make the Board's decision to charge and recommit him under both constitutionally offensive. In *Anderson* (a consolidation of two appeals by individual parolees), the parolees sought to challenge the Board's denial of administrative relief based upon its conclusion that the parolees'

[6] This Court's standard of review of an order of the Board is limited to considering whether the Board erred as a matter of law or violated any constitutional rights and whether necessary factual findings are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

brief failed to comply with a brevity requirement. Specifically, the Board rejected the administrative appeal because the parolees had attached to their brief a ten-page unreported opinion of this Court. This Court, however, reversed and remanded the matter to the Board for consideration on the merits, based upon the parolees' citation to another case involving alleged duplicative conditions, *Gartner v. Pennsylvania Board of Probation and Parole*, 469 A.2d 697 (Pa. Cmwlth. 1983). Therefore, although the Court in *Anderson* suggested that the two conditions that were the subject of the recommitment order were duplicative, that discussion was not necessary to the outcome in the case. Consequently, the discussion of the merits was dicta, and, therefore, that analysis does not bind this Court's evaluation of the issue in this case.

In *Gartner*, upon which Sanders also relies, we concluded that the Board had improperly imposed a special condition that mirrored a general condition, both of which prohibited the possession and/or control of weapons. Under the Board's regulations, as in this case, the finding of a violation of a special condition of parole empowered the Board to aggregate the presumptive ranges of backtime. This Court concluded that the Board, by imposing such a duplicative condition of parole, had violated its own regulations requiring that it provide written justification for deviations from the presumptive ranges. The Court stated:

> The effect of imposing a special condition duplicative of a general condition here has been an increase of the possible recommitment time for the general condition violation, in the absence of any express justification of that deviation.

Id., 469 A.2d at 700.

In response to the reasoning Sanders relies upon in those two decisions, the Board points to our decision in *Petty*. In that case, Petty argued that

a general parole condition forbidding him from changing his residence without permission was duplicative of a special condition that required him to avoid expulsion from his group home. Petty contended that a violation of the general condition necessarily would constitute a violation of the special condition. The court reasoned that:

> Parole … staff could have given Petty permission to change his residence before … completion of the Center program, or Petty could have been discharged from the Center without actually changing his approved residence. The fact that he was removed from the program because he decided to leave and thus change his address does not mean that the two conditions are duplicative.

Id., 896 A.2d at 699.

Petty also relied upon *Anderson*, but, as noted above, the discussion of the merits in that case was dicta, and the Court rejected the analysis. The Court stated:

> To the extent that the facts in *Anderson* are similar to those in the present case, we disagree that violation of the general condition would automatically result in violation of the special condition as explained above. The fact that violation of one condition *may* result in violation of another condition does not render the conditions duplicative. In *Gartner* …, the general and special conditions were nearly identical, such that a violation of the general condition would necessarily be a violation of the special condition. The two parole violations in the present case are not so inter-related as to be duplicative of one another.

Id., 896 A.2d at 699-700.

In this case, we agree with the Board that Condition No. 1 and Condition No. 7 are not duplicative. There is no question that Sanders could have

elected to comply with Condition No. 1 by reporting to the district office within forty-eight hours of his release and also elected not to comply with the requirement of Condition No. 7, that he report immediately to his assigned residence. Similarly, he could have elected to report immediately to his assigned residence, and thus complied with Condition No. 7, but nevertheless could have decided not to report to the district office within forty-eight hours as required by Condition No. 1. These conditions are not duplicative. Further, the facts in *Gartner* are distinguishable from the facts in this case, such as to make the holding in *Gartner* inapplicable here. *Gartner*, as noted above, involved two conditions that identically made the act of possessing or controlling a weapon both a violation of a general condition and special condition of parole.

Accordingly, we conclude that the Board did not err in imposing backtime in an aggregate manner based upon Sanders' four technical violations, and we affirm the order of the Board.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 25th day of February, 2010, the order of the Pennsylvania Board of Probation and Parole is affirmed.

P. KEVIN BROBSON, Judge