

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis Carter, :
 :
 Petitioner :
 :
 v. : No. 2066 C.D. 2009
 : Submitted: April 23, 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: June 30, 2010

Dennis Carter petitions for review of the October 6, 2009, order of the Pennsylvania Board of Probation and Parole (Board) affirming its decision to recommit Carter to a state correctional institution as a convicted parole violator. Carter asserts that his parole violation charge should be dismissed due to the Board's failure to hold a timely parole revocation hearing under 37 Pa. Code §71.4(1).¹ We affirm.

¹ This regulation provides in pertinent part:

A revocation hearing shall be held within 120 days from the date the Board received official verification of the plea of guilty or nolo contendere or of the guilty verdict at the highest trial court level.....

37 Pa. Code §71.4(1). "Official verification" is defined as:

(Footnote continued on next page...)

On May 14, 2007, Carter was released on parole from a prior prison sentence. On February 10, 2008, while still on parole, Carter was arrested on drug-related charges. On March 18, 2008, Carter was recommitted to a state correctional institution as a technical parole violator and detained pending disposition of the new charges. On October 10, 2008, Carter pled guilty to the new charges and was sentenced to an aggregate term of two-and-one-half to five years in prison. Carter's supervising parole agent, J. Wesley,² received official verification of Carter's convictions on February 26, 2009.

Carter's parole revocation hearing was held on May 29, 2009, at State Correctional Institution-Graterford. At the hearing, Carter moved to dismiss the revocation charge on the ground that the hearing, held seven months after his October 2008 convictions, was untimely. In response to Carter's motion, Agent Wesley testified as follows:

MR. WESLEY: The proof of his charges of his conviction...we ended up obtaining it [on] 02/26/2009, verification of his conviction.

HEARING EXAMINER: What was the reason for the delay?

(continued...)

[a]ctual receipt by a parolee's supervising parole agent of a direct written communication from a court in which a parolee was convicted of a new criminal charge attesting that the parolee was so convicted.

37 Pa. Code. §61.1.

² Agent Wesley's full name is not identified in the certified record.

MR. WESLEY: Well, to be honest with you, part of it was a little oversight out of my office, with me. We had his case mixed up with James Carter.^{3]} So therefore I probably could have put a little bit more pressure on the unit to get that. So I ended up getting it myself. I had one of our guys go down and get it.

HEARING EXAMINER: When you say the unit, what unit?

MR. WESLEY: They're not the – they do the transports and stuff, but they get the proof of convictions for us as well, investigative unit. But I guess they're getting overwhelmed and stuff like that, so if you're not keeping up with them, then you know, you can get kind of lost in the shuffle a little bit. We have been – I have been going back and forth with his prison up there the last two plus months. We were trying to get the hearing done up there, but there was some mix-ups and stuff like that, so that's why we're here – he's down here, now we're doing a hearing.

(N.T., 5/29/09, at 9-10.) The hearing examiner denied Carter's motion, finding that the revocation hearing was timely because it was held within 120 days of the Board's receipt of the official verification of the convictions. (*Id.* at 10.)

By order dated June 30, 2009, the Board recommitted Carter as a convicted parole violator to serve his unexpired term. Carter filed a petition for administrative relief from the recommitment order, and his petition was denied on October 6, 2009. Carter now appeals from that decision.⁴

³ Carter previously had been arrested under various aliases, including James Carter, Dennis Waters, and Michael Waters.

⁴ Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law has been committed, or whether the findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

When a parolee⁵ alleges that the Board failed to hold a revocation hearing in a timely manner, the Board bears the burden of proving that the hearing was timely. *Taylor v. Pennsylvania Board of Probation & Parole*, 931 A.2d 114, 116 (Pa. Cmwlth. 2007), *appeal denied*, 596 Pa. 750, 946 A.2d 690 (2008). If the Board fails to satisfy its burden, the appropriate remedy is dismissal of the parole violation charge with prejudice. *Id.*

Carter asserts that the Board erred in concluding that his revocation hearing was timely. Carter does not dispute that the hearing was held within 120 days of the Board's receipt of the official verification of his convictions. Rather, he claims that, as part of its burden of proof, the Board was required to demonstrate that it exercised due diligence in obtaining the official verification after it first became aware of Carter's guilty pleas. We disagree.

In fact, this precise argument was rejected in *Lawson v. Pennsylvania Board of Probation & Parole*, 977 A.2d 85 (Pa. Cmwlth. 2009), *appeal denied*, ___ Pa. ___, 992 A.2d 890 (2010). In *Lawson*, there was a nine-month delay between the parolee's conviction and his revocation hearing. On appeal, the parolee argued that when there is a significant delay between a conviction and the Board's receipt of the official verification of that conviction, the Board must prove that it exercised due diligence in obtaining the verification. *Id.* at 87. However, our court observed that "[n]either statute nor regulation places a burden on the Board to demonstrate that it exercised due diligence in obtaining official verification of a parolee's new

⁵ In its brief, the Board argues that the 120-day requirement of 37 Pa. Code §71.4(1) does not apply in this case because Carter was not a "parolee" at the time of his revocation hearing. We need not address this claim, however, in light of our disposition of Carter's claim on appeal.

conviction.” *Id.* at 88. Thus, we reaffirmed the bright-line rule set forth in *Lee v. Pennsylvania Board of Probation & Parole*, 596 A.2d 264 (Pa. Cmwlth. 1991), *appeal denied*, 530 Pa. 647, 607 A.2d 256 (1992), that the Board need only demonstrate that the revocation hearing was held within 120 days of the date it received official verification of the conviction.⁶ *Lawson*, 977 A.2d at 88-89.⁷

Accordingly, because Carter’s revocation hearing was held within 120 days of the date the Board received official verification of his convictions, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

⁶ In *Lee*, this court explained the rationale for the strict application of the 120-day rule as follows:

[I]t is reasonable for the 120-day period mandated by 37 Pa. Code §71.4(1) to begin to run on the date that the Board receives official verification of a parolee’s conviction, because, to hold otherwise, would impose on the Board the Herculean task of searching the dockets of every court of record in the United States on a daily basis to discover when a parolee was convicted. Moreover, considering the logistical problems the Board would face in discovering when a parolee was convicted, it is also reasonable for a parole agent to wait for official verification even if the agent is aware that charges are, or may be, pending.

596 A.2d at 265 (citation omitted).

⁷ Carter acknowledges the holding in *Lawson* but argues that its reasoning is flawed and should not be followed. Even if we agreed with Carter, we would still affirm because, in this case, the Board had a reasonable and justifiable excuse for its delay in obtaining official verification of the convictions. There was no evidence as to when Agent Wesley first became aware of Carter’s guilty pleas, and Agent Wesley explained that the delay was due in part to the Board’s getting Carter’s case “mixed up” with another inmate whose name was one of Carter’s aliases. (*See* N.T., 5/29/09, at 9.)

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

ORDER

AND NOW, this 30th day of June, 2010, we hereby affirm the October 6, 2009, order of the Pennsylvania Board of Probation and Parole.

ROCHELLE S. FRIEDMAN, Senior Judge