

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mike Maley,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2136 C.D. 2010
	:	SUBMITTED: March 4, 2011
Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: May 25, 2011

Mike Maley petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) denying his administrative appeal from an order recommitting him for multiple technical parole violations. We affirm.

On April 6, 2010, the Board held a panel hearing on Maley's violation of two parole conditions: Condition 3A, imposing an 8:00 p.m. to 6:00 a.m. curfew, and Condition 5C, directing him to refrain from engaging in assaultive behavior. At the hearing, Maley admitted to violating Condition 3A, conceding that he was in West Aliquippa at 4:30 a.m. on October 19, 2010, near the home that Heather Ross shared with her boyfriend Michael Dobbins. At issue, therefore,

was what happened that morning and whether Maley's actions constituted assaultive behavior. In support of the violations, parole agent William Kimmel presented himself as a witness, the October 21st statement of Ross and the live testimony of Ross and Dobbins. The Board found their testimony to be credible.

Ross testified that because the couple had only one car and she needed it on the day in question to drive her son to school, she needed to drive Dobbins to work by 5:00 a.m. Therefore, she went outside early that morning to warm-up the car parked in front of the couple's home. As she was unlocking the car, she heard a car door shut, saw Maley exit his nearby car and heard him say something to the effect of "it's time to get even now." April 6, 2010 Hearing, Notes of Testimony (N.T.) at 21; Certified Record (C.R.) at 77. He then chased her onto her porch and tried to prevent her from closing the front door. She stated that, although it was pitch black, she knew that the male was Maley because she recognized both his voice and his car. She further testified that she and Dobbins, who was close to the door, managed to keep the door shut until Maley returned to his car and drove away. Dobbins corroborated Ross' version of the events. The couple immediately phoned the police and a police officer pulled Maley's car over and questioned him regarding the incident.

Maley admitted at the hearing that he was at the couple's home on October 19th in violation of his curfew and even acknowledged that he was two cars away from Ross. *Id.* at 29; C.R. at 85. He testified, however, to an alternate version of the events, which the fact-finder rejected. Maley's counsel also attempted to submit the statement of a person who was not present, but the hearing examiner sustained the hearsay objection.

In a decision mailed May 10, 2010, the Board ordered that Maley be recommitted as a technical parole violator to serve an eighteen-month backtime, with a maximum parole expiration date of November 12, 2014. On September 8, 2010, the Board denied Maley's *pro se* petition for administrative review. It accepted Maley's admission to violating Condition 3A. In support of a Condition 5C violation, it accepted the parole agent's documentary evidence and the testimony of his witnesses. Further, it stated that the fact that Maley disagreed with the credibility determinations was not grounds for a reversal and that he had ample opportunity to present a defense at the April 6th hearing, despite the fact that he was not permitted to submit hearsay evidence.

On October 7, 2010, Maley filed a *pro se* petition for review with this Court, asserting that the Board erred in determining that the evidence adduced at the hearing was sufficient to establish that his actions constituted assaultive behavior.¹ Specifically, he contends that Ross' statement and testimony were insufficient to establish that he failed to refrain from assaultive behavior in that the words "it's time to get even" would convey no threat of physical harm to a reasonable person and that Ross simply overreacted. In addition, he maintains that there is insufficient evidence that he tried to force his way into Ross' home. He notes the testimony of Ross and Dobbins that neither knew exactly why they felt resistance while attempting to shut the front door.

With regard to "assaultive behavior," this Court has recently observed:

Although the Board's regulations require that parolees refrain from assaultive behavior, the regulations do not provide a definition of "assault." 37 Pa. Code §

¹ Before this Court, Maley is once again represented by counsel.

63.4(5)(iii) (relating to general conditions of parole). However, this Court recognizes “[a]ssaultive behavior encompasses a broader category of actions than would the crime of assault, and thus actions that would not constitute a crime may nonetheless be sufficient grounds for revocation of parole.” *Jackson v. Pa. Bd. of Prob. & Parole*, 885 A.2d 598, 601 (Pa. Cmwlth. 2005).

Moreover, in the context of parole violations, assaultive behavior is defined under the ordinary dictionary definition of assault. *Moore v. Pa. Bd. of Prob. & Parole*, 95 Pa. Cmwlth. 531, 505 A.2d 1366 (1986). Webster’s Collegiate Dictionary, 73 (11th ed. 2003) defines assault as: “**1 a:** [A] violent physical or verbal attack to inflict offensive physical contact or bodily harm on a person (as by lifting a fist in a threatening manner) that puts the person in immediate danger of or in apprehension of such harm or contact.”

Flowers v. Pa. Bd. of Prob. & Parole, 987 A.2d 1269, 1271-72 (Pa. Cmwlth. 2010).

Noting how the term “assaultive behavior” has been interpreted, the Board maintains that Maley’s conduct was assaultive in that he “lay in wait in his car for Heather Ross outside her residence at 4:00 AM, approached her in the darkness after she reached her car while saying ‘it’s time to get even now,’ chased her as she ran back to her residence for sanctuary and tried to stop her from closing the door of her residence behind her to keep him from following her into her residence. . . .” Board’s Brief at 7. Noting that its interpretation of its own regulations proscribing “assaultive behavior” is entitled to great weight unless clearly erroneous, *Moore*, the Board asserts that the record supports a determination that Maley violated Condition 5C.

Having carefully reviewed the hearing transcript and the parties’ arguments in support of their respective positions, we conclude that Maley is essentially asking this Court to reassess the credibility of the witnesses and to

reweigh the evidence in his favor. This Court may not do so. *See Flowers*, 987 A.2d at 1271 n.2 (noting that “[t]he Board, as the ultimate fact-finder, evaluates witness credibility, resolves conflicts in the evidence, and assigns evidentiary weight.”) The Board accepted the testimony of Ross and Dobbins as credible and rejected Maley’s version of the morning’s events. As for the couple’s inability to pinpoint exactly why the front door would not close, their testimony reflects that the dispute centered on what part of Maley’s body was blocking the door, not whether he actually was blocking it.

Moreover, as Maley’s counsel acknowledged in his brief, there is no requirement of physical contact in order for a state parolee to engage in prohibited assaultive behavior. *Flowers*. Merely “knowingly placing an individual in the apprehension of or immediate danger of bodily harm constitutes assaultive behavior.” 987 A.2d at 1273. As the Board maintains, words such as those at issue spoken on a dark street, immediately followed by the speaker’s pursuit of the recipient to the door of her residence, could have put a reasonable person in objective apprehension of or immediate danger of harm. We conclude, therefore, that the Board did not err in determining that Maley failed to refrain from engaging in assaultive behavior.

Finally, we note that the presumptive range for multiple violations of general parole conditions is six to eighteen months. 37 Pa. Code § 75.4. We “will not interfere with the Board’s discretion where the parole violations are supported by substantial evidence and the amount of backtime imposed . . . is within the applicable presumptive range.” *Davis v. Pa. Bd. of Prob. & Parole*, 841 A.2d 148, 151-52 (Pa. Cmwlth. 2004) (footnote omitted).

Accordingly, we affirm the Board's order denying administrative relief.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 25th day of May, 2011, the order of the Pennsylvania Board of Probation and Parole is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge