IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Juan Washington,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 23 C.D. 2010
	:	
Pennsylvania Board of Probation and Parole,	:	Submitted: April 30, 2010
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: June 29, 2010**

Juan Washington (Washington), pro se, petitions for review of the order of the Pennsylvania Board of Probation and Parole (Board) denying his administrative appeal of the Board's decision revoking his parole and recommitting Washington as a technical parole violator to serve nine months backtime in a state correctional institution. Washington's technical violation arises from the Board's finding that Washington consumed alcohol in violation of condition 7 of his special parole conditions. Washington appeals on the grounds that: (1) Officer Wan Terry's (Officer Terry) testimony did not constitute substantial evidence to support the Board's finding that Washington had consumed

alcohol; and (2) the Board's regulation at 37 Pa. Code § 71.2(19)[1] violates the fundamental fairness principle of due process by requiring the Commonwealth to prove a technical violation of parole only by a preponderance of the evidence instead of by clear and convincing evidence.

On June 7, 2006, the Board released Washington on parole from a ten to twenty year sentence for third degree murder, which had a maximum date of May 24, 2011. (Order to Release on Parole/Reparole, April 17, 2006, R. at 40.) On November 30, 2006, he was arrested for Driving Under the Influence (DUI) following a traffic stop. (Criminal Arrest and Disposition Report, December 1, 2006, R. at 44.) In response to this charge, on November 30, 2006, the Board issued a warrant to commit and detain Washington. (Warrant to Commit and Detain at 1, November 30, 2006, R. at 43.) On December 4, 2006, Washington was charged with a technical violation of condition 7 of his parole. (Technical Violation Arrest Report at 1, December 4, 2006, R. at 57.) Condition 7 of his special parole conditions provided, in part, that Washington was not to "consume or possess alcohol under any condition or for any reason." (Conditions Governing Parole/Reparole at 2, June 6, 2006, R. at 42.) On July 25, 2007, Washington was found not guilty of DUI charges resulting from the November 30, 2006 incident. (Criminal Docket CP-02-CR-0018371-2006 at 3, January 18, 2008, R. at 147.)

On January 18, 2008, the Board held Washington's parole violation hearing. (Hr'g Tr. at 1, R. at 86.) At this hearing, the Greene County Public Defender Office (PD Office) represented Washington. On February 4, 2008, the Board

[1] 37 Pa. Code § 71.2(19) provides that "[t]he panel may not find that a violation was proved except by a preponderance of the evidence."

recommitted Washington to a state correctional institution as a technical parole violator to serve nine months backtime. (Notice of Board Decision, February 4, 2008, R. at 155.) On February 19, 2008, the PD Office wrote a letter to Washington informing him that it did not intend to take action on an appeal. (Letter from Attorney Armstrong to Washington (February 19, 2008), R. at 165.) Washington responded by letter, dated February 22, 2008, with a request that the PD Office file an appeal on his behalf or, alternatively, if they did not intend to take action, to inform him of issues that he might be able to challenge on appeal. (Letter from Washington to Attorney Armstrong (February 22, 2008), R. at 166.)

No appeal was filed on Washington's behalf, and, on August 1, 2008, he filed a pro se "Application for Leave to File Administrative Appeal Nun[c] Pro Tunc." ("Application for Leave to File Administrative Appeal Nun[c] Pro Tunc," August 1, 2008, R. at 161.) On December 8, 2008, the Board denied this request. (Letter from Board to Washington (December 8, 2008), R. at 171.) Washington filed a petition for review with our Court, and, by memorandum opinion filed on October 21, 2009, this Court reversed and remanded the Board's decision. Washington v. Pennsylvania Board of Probation and Parole, No. 22 C.D. 2009 (Pa. Cmwlth. October 21, 2009). On November 2, 2009, Washington resubmitted his August 1, 2008 administrative appeal to the Board for review. On December 28, 2009, the Board affirmed its prior revocation decision ruling that the evidence presented through the testimony of Officer Terry was sufficient to support its finding. (Letter from Board to Washington (December 28, 2009), R. at 174.)

Washington, once again, petitions this Court for review of the Board's determination.[2]

Washington first contends that the Board erred in determining that there was substantial evidence to support a finding by a preponderance of the evidence that he consumed alcohol. Washington believes that, even though Officer Terry smelled alcohol on his breath, witnessed him stumble and sway, and administered a field sobriety test that Washington failed, there was not substantial evidence to support a finding that he had consumed alcohol. In support of his belief, Washington argues that Officer Terry never observed him possessing, consuming, or transporting alcohol and that the Board did not present any scientific evidence that he had consumed alcohol. (Washington's Br. at 7.)

Contrary to Washington's argument, the Board does not need to offer scientific evidence or eye witness testimony that Washington consumed alcohol in order to prove a technical parole violation. Rather, the Board must merely prove a technical parole violation by a preponderance of the evidence. Smalls v. Pennsylvania Board of Probation and Parole, 823 A.2d 274, 275 (Pa. Cmwlth. 2003). The preponderance of evidence standard requires "such proof as leads the fact-finder . . . to find that the existence of a contested fact is more probable than its nonexistence." Id., 823 A.2d at 275. The parole condition at issue here,

[2] This Court may not overturn the Board's ruling that a violation occurred, so long as that ruling was supported by substantial evidence, no error of law was committed, and the parolee's constitutional rights are not violated. Sigafoos v. Pennsylvania Board of Probation and Parole, 503 A.2d 1076, 1079 (Pa. Cmwlth. 1986). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Chapman v. Pennsylvania Board of Probation and Parole, 484 A.2d 413, 416 (Pa. Cmwlth. 1984).

condition 7, provided that Washington was not to "consume or possess alcohol under any condition or for any reason." (Conditions Governing Parole/Reparole at 2, June 6, 2006, R. at 42.)

Based on Officer Terry's testimony at the violation hearing, the Board found by a preponderance of the evidence that Washington had consumed alcohol in violation of condition 7 of his special parole conditions. (Letter from Board to Washington (December 28, 2009), R. at 174.) At the hearing, Officer Terry testified that he pulled Washington over for speeding. (Hr'g Tr. at 32, R. at 117.) Officer Terry stated that, when he told Washington to shut off his vehicle, Washington exited the vehicle. (Hr'g Tr. at 32, R. at 117.) Officer Terry testified that, when he asked Washington why he had exited his vehicle, Washington explained that he was following Officer Terry's instructions. (Hr'g Tr. at 32-33, R. at 117-18.) According to Officer Terry, when he explained his prior instructions, Washington "stumbled into the car." (Hr'g Tr. at 33, R. at 118.) Officer Terry testified that he could smell alcohol on Washington's breath and that Washington told him he had consumed "two drinks." (Hr'g Tr. at 33, R. at 118.) Officer Terry stated that, at that point, he had Washington perform a "heel to toe walking test" and that Washington was "stumbling and swaying to the side" and "was off balance." (Hr'g Tr. at 33, R. at 118.) Officer Terry then testified that he placed Washington under arrest for DUI and that, when asked to take a breathalyzer at the police station, Washington refused. (Hr'g Tr. at 33, R. at 118.)

In support of his argument that Officer Terry's testimony does not constitute substantial evidence to find a violation of his parole, Washington cites Commonwealth v. Williamson, 532 Pa. 568, 571-72, 616 A.2d 980, 981 (1992), in

which our Supreme Court held that smelling the odor of alcohol on a minor's breath, without more, is not sufficient to prove guilt of underage drinking beyond a reasonable doubt. This case is distinguishable from the present situation because, unlike in Williamson, which involved a criminal charge of underage drinking that had to be proven beyond a reasonable doubt, the standard of evidence set forth for a technical parole violation is the lower standard of preponderance of the evidence. Smalls, 823 A.2d at 275.

After reviewing the record, we conclude that Officer Terry's credible testimony of the circumstances surrounding Washington's arrest for DUI constitutes substantial evidence to support a finding by a preponderance of the evidence that Washington had consumed alcohol on November 30, 2006.[3] Officer Terry witnessed many factors that would lead a reasonable mind to believe that Washington had consumed alcohol. He observed the smell of alcohol on Washington's breath. (Hr'g Tr. at 33, R. at 118.) Washington admitted to Officer Terry that he had consumed "two drinks," but now Washington claims that he did not mean alcoholic drinks. (Hr'g Tr. at 33, R. at 118.) However, Officer Terry testified that Washington was stumbling and swaying, that his breath smelled of alcohol, and that he failed to adequately perform a field sobriety test. (Hr'g Tr. at 33, R. at 118.) Considering the totality of the circumstances, we conclude that there is substantial evidence in the record to support the finding that it is more

[3] The Board, not the reviewing court, has exclusive authority to determine the credibility of witnesses, resolve conflicts in evidence, and assign evidentiary weight. McCauley v. Pennsylvania Board of Probation and Parole, 510 A.2d 877, 879-80 (Pa. Cmwlth. 1986).

probable than not that Washington consumed alcohol in violation of his special parole condition 7 at some point before the events witnessed by Officer Terry.[4]

Washington also argues that the issue of whether he consumed alcohol was previously litigated during the course of his criminal trial for DUI and that he was found not guilty on those charges. However, the elements of proving a DUI charge and a parole violation are different and involve two different standards of proof. In order to convict an accused of DUI, the Commonwealth must prove, beyond a reasonable doubt, that a driver has consumed an amount of alcohol that would render an individual incapable of safely driving or operating a vehicle or that the alcohol concentration in the driver's blood or breath has reached the level of at least 0.08%. 75 Pa. C.S. § 3802(a)(1)-(2); see also Commonwealth v. Griscavage, 512 Pa. 540, 544, 517 A.2d 1256, 1258 (1986). Washington's special parole condition 7 says that Washington "shall not possess or consume alcohol under any condition or for any reason." (Conditions Governing Parole/Reparole at 2, June 6, 2006, R. at 42.) The preponderance of evidence standard is applicable to a parole violation and requires only "such proof as leads the fact-finder . . . to find that the existence of a contested fact is more probable than its nonexistence." Smalls, 823

[4] Both sides present arguments regarding the effect of Washington's refusal to submit to a breathalyzer test. In Washington's brief, he states that he believed that he had the right to counsel before taking a chemical test and that Officer Terry did not inform him otherwise. (Washington's Br. at 11.) He cites Department of Transportation, Bureau of Traffic Safety v. O'Connell, 521 Pa. 242, 555 A.2d 873 (1989), in which our Supreme Court held that an arresting officer has a duty to clarify to an accused that the right to counsel is inapplicable to chemical test requests. The Board cites a Superior Court case, Commonwealth v. Dougherty, 393 A.2d 730 (Pa. Super. 1978), in which the court says that the refusal to take a breathalyzer test may be introduced as evidence of intoxication. (Board's Br. at 8.) We decline to address this issue because, even without the refusal to take a breathalyzer test, the record contains substantial evidence that it is more probable than not that Washington consumed alcohol.

A.2d at 275. Thus, while the facts of Washington's situation may not have led to proof beyond a reasonable doubt that Washington's blood alcohol content was at least 0.08%, they are sufficient to find that it was more probable than not that he had consumed some amount of alcohol.

Washington next asserts that the Board's regulation at 37 Pa. Code § 71.2(19) violates the fundamental fairness principles of due process because it requires technical parole violations to be proven by a preponderance of the evidence rather than by clear and convincing evidence. The Board claims that this argument was waived because Washington did not include it in his administrative appeal. Alternatively, the Board argues that this issue has been directly addressed by both the Supreme Court of the United States and the Supreme Court of Pennsylvania and that the weight of this authority is clearly contrary to Washington's argument.

In order for a parolee to preserve a claim for appellate review, the issue must be presented to the Board in his administrative appeal. McCaskill v. Pennsylvania Board of Probation and Parole, 631 A.2d 1092, 1094-95 (Pa. Cmwlth. 1993). However, Pa. R.A.P. 1551(a)(1) provides an exception to this rule for "[q]uestions involving the validity of a statute." Pa. R.A.P. 1551(a)(1); see also Gwynedd Development Group, Inc. v. Department of Labor and Industry, 666 A.2d 365, 370 n.5 (Pa. Cmwlth. 1995) (applying the Pa. R.A.P. 1551(a)(1) exception where the petitioner first challenged the constitutional validity of Section 9.1(d) of the Wage Payment and Collection Law[5] on appeal). Washington's claim that the standard of evidentiary proof required by 37 Pa. Code § 71.2(19) for parole violations is

[5] Act of July 14, 1961, P.L. 637, as amended, 43 P.S. § 260.9a(d).

contrary to the fundamental fairness principles of constitutional due process is a claim that falls under the exception set forth in Pa. R.A.P. 1551(a)(1) and may be raised on appeal to this Court. Therefore, Washington did not waive this issue by failing to include it in his administrative appeal.

In his argument, Washington cites what he mistakenly believes to be the holding of the Supreme Court of the United States in Morrissey v. Brewer, 408 U.S. 471 (1972), claiming that the Supreme Court held that more than probable cause of a violation of parole must be shown for parole revocation. However, the Court held that probable cause must be shown in a preliminary hearing to hold a parolee until a final determination is made by the parole board at a revocation hearing. Id., 408 U.S. at 487. The Court did not give any specific guidance on the proper standard of evidence at a revocation hearing. See id., 408 U.S. at 487-90.

Furthermore, the Board has presented cases directly on point in this matter. In Johnson v. United States, 529 U.S. 694, 700 (2000), the Supreme Court stated that a violation of a condition of supervised release need only be proven by a preponderance of the evidence. In Commonwealth v. Wright, 508 Pa. 25, 48, 494 A.2d 354, 366 (1985) (Larsen, J., concurring, joined by the majority opinion), the Supreme Court of Pennsylvania explicitly states that the preponderance of the evidence standard applies to proving a parole violation during parole revocation proceedings. Moreover, in Smalls, this Court used a preponderance of the evidence standard to prove a technical parole violation. Id., 823 A.2d at 275. Johnson, Wright, and Smalls leave no doubt that the standard to be applied in parole revocation proceedings is that of a preponderance of the evidence. Since the use of the preponderance of the evidence standard to prove a technical parole

violation during parole revocation proceedings has been directly addressed and approved by the Supreme Court of the United States, the Supreme Court of Pennsylvania, and this Court, Washington's arguments on the issue must fail.

Washington also includes a statement from the Supreme Court in Morrissey, which states that society has an interest in rehabilitating a parolee and, thus, has an interest in not having parole erroneously revoked. Id., 408 U.S. at 484. He believes that society would be better served by requiring the Board to prove parole violations by clear and convincing evidence because fair treatment of parolees in revocation hearings will enhance the chance of rehabilitation by avoiding ill reactions by parolees to arbitrariness.[6] However, since there is no violation of Washington's due process, such policy arguments are best addressed by the General Assembly.

For the foregoing reasons, we affirm the Board's order.

RENÉE COHN JUBELIRER, Judge

[6] In addition to this policy argument, Washington cites Commonwealth v. Maldonado, 576 Pa. 101, 110, 838 A.2d 710, 715 (2003), a case involving the Megan's Law classification of sex offenders, to show that our Supreme Court has required the clear and convincing evidence standard when "individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money." However, since this case involves Megan's Law classification of sex offenders, it is distinguishable from a case involving parole revocation.

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	:	
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O R D E R

NOW, June 29, 2010, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge