

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Murray, :  
Petitioner :  
 :  
v. : No. 2456 C.D. 2009  
 : Submitted: October 22, 2010  
Pennsylvania Board of :  
Probation and Parole, :  
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: January 20, 2011

David Murray petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief and recommitting him to serve his unexpired sentence of two years, eight months and seven days, for two technical parole violations. Murray contends that he was not at liberty on parole at the time the second violation occurred and, thus, the Board erred in holding that he violated two parole conditions. Concluding that Murray has waived this issue, we affirm the order of the Board.

In 1994, while on parole from a 12-year, six-month to 25-year sentence for third-degree murder and possession of a concealed weapon, Murray was arrested on a new criminal charge for possession of a controlled substance

with intent to deliver.<sup>1</sup> In 1995, Murray was convicted of the new criminal charge and received a sentence of four to ten years. Murray was unable to begin serving this sentence immediately, resulting in a minimum sentence date of November 1, 2005, and a maximum sentence date of November 1, 2011.<sup>2</sup>

On July 14, 2008, Murray was paroled to the Renewal Back-on-Track Program (Renewal). On February 25, 2009, Murray was unsuccessfully discharged from Renewal and charged with violating two conditions of his parole. Specifically, he was charged with violating Condition #5C, which required that he refrain from assaultive behavior, and Condition #7, which required that he successfully complete the Renewal program. Murray denied violating these conditions of his parole, and a parole violation hearing was held.

Cynthia Lacey, Murray's parole agent, testified regarding the purported violations. She stated that on February 25, 2009, a meeting was held at Renewal for the purpose of reviewing Murray's complaints about his parole requirements. She was present at the meeting, along with several Renewal staff members. During the meeting, Murray became angry and was instructed to leave the room. Because of his behavior at this meeting, Murray was discharged from Renewal.

Lacey summoned John Addison, another parole agent, to take Murray into custody. She then informed Murray that he was being discharged from Renewal and directed him to place his hands on the wall. Murray refused and pushed her aside, causing her to stumble. He then ran down the hallway yelling

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<sup>1</sup> Murray was initially convicted in 1981 and reached that maximum sentence date on February 4, 2008.

<sup>2</sup> Murray had also been paroled in 2006, but was recommitted for entering an establishment that sells alcohol, consuming alcohol, and failing to abide by written parole instructions.

that he was not going to jail. Four Renewal staff members and Addison attempted to restrain Murray, who resisted arrest. After a brief struggle, Murray was taken into custody. One of the staff members was injured in the struggle and taken to the hospital.

Addison also testified at the violation hearing. He stated when he arrived, Murray was yelling in the hallway. When he asked Murray to put his hands on the wall, Murray refused. Murray then pushed several people and knocked two Renewal staff members to the floor as he attempted to escape. One of the staff members was injured as a result of Murray slamming into him. Addison described it as “a body blow.” Certified Record at 85 (C.R. \_\_\_).

Anthony DeMario, the security shift supervisor of Renewal, next testified. He stated that Murray was asked to place his hands on the wall and informed that he was “getting returned.” C.R. 88. Murray responded by pleading with Lacey and Addison. When Lacey tried to handcuff him, he pushed Lacey’s hands away. DeMario stated that Murray ran right into him, and pushed him and another staff member out of the way. After Murray was brought down to the floor by staff members, he continued to struggle and would not let Addison handcuff him. One of the Renewal staff members was injured during the struggle.

Murray then testified. He stated that he put his hands on the wall when instructed but turned around to ask Lacey how she could let this happen to him. At that point, he was body slammed by an unnamed person, and Addison threw him to the ground. While he was lying on the ground, several people jumped on top of him. Murray stated that he never touched or pushed anyone.

The Board concluded that Murray violated conditions #7 and #5C of his parole. As a multiple technical parole violator, he was recommitted to serve his

unexpired term of two years, eight months and seven days. The Board's decision stated, specifically, that a request for administrative relief had to be filed within thirty days and that "YOU HAVE THE RIGHT TO AN ATTORNEY IN THIS APPEAL AND IN ANY SUBSEQUENT APPEAL TO THE COMMONWEALTH COURT." C.R. 112.<sup>3</sup>

Although Murray was represented by counsel at the violation hearing, he filed his administrative appeal *pro se*. In his appeal, he asserted that his parole agent erred in arresting him and in not placing him in a different halfway house program. He also asserted that the revocation hearing should have been stopped because his counsel quit in the middle of the hearing, denying him the ability to present evidence in his own defense.<sup>4</sup> Further, he asserted that the Board erred in not requiring his parole agent to present a videotape of the incident and in allowing his parole agent to testify about information not stated on the original violation report. Finally, he raised the issue of whether the hearing was timely.<sup>5</sup>

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<sup>3</sup> Murray received a copy of the recommitment decision. He contends, however, that a copy of the recommitment decision was not mailed to his counsel. The Board does not contest Murray's assertion that notice was not provided to counsel.

<sup>4</sup> Murray's counsel refused to pursue one of Murray's claims, *i.e.*, that the violation hearing was untimely. When the hearing examiner asked Murray if he was representing himself, Murray replied that he was. Murray's counsel stated that if his client was discharging him, he was obligated to withdraw. Counsel explained that he was precluded from raising a spurious issue such as the timeliness of the violation hearing. Murray replied that he did not want counsel to leave and did not want to represent himself. The hearing continued with counsel representing Murray, examining the witnesses and making argument on Murray's behalf.

<sup>5</sup> When a parolee is detained for technical violations, a preliminary hearing must be held within 14 days; a revocation hearing must be held within 120 days of the preliminary hearing. 37 Pa. Code § 71.2(3) and (10). Murray was detained on February 25, 2009. His preliminary hearing was held on March 6, 2009, and the revocation hearing took place on June 30, 2009. Both hearings were timely.

On appeal, the Board explained that there was sufficient evidence to support the finding that Murray had violated both conditions of his parole and that he had not been denied the right to counsel or the opportunity to present a defense. The Board also held that the term of Murray's recommitment fell within the presumptive range and, thus, was not excessive. Accordingly, the Board denied Murray's appeal.

Murray then filed a petition for mandamus; an application for appointment of counsel; and an application to proceed *in forma pauperis*. On December 31, 2009, this Court issued a *per curiam* order directing that Murray's pleading would be treated as a petition for review addressed to the Court's appellate jurisdiction. Further, Murray's motion to proceed *in forma pauperis* was granted and counsel was appointed.

Murray raises three issues for our review.<sup>6</sup> First, he claims that the Board erred in finding that he violated Condition #5C of his parole (refrain from assaultive behavior).<sup>7</sup> He argues that at the point in time he resisted arrest, he had been expelled from Renewal and, thus, was no longer at liberty on parole. Accordingly, it was legally impossible for him to violate technical conditions of his

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<sup>6</sup> Our scope of review is limited to determining whether the Board committed an error of law, a constitutional violation or whether the factual findings are supported by substantial evidence. *Miller v. Pennsylvania Board of Probation and Parole*, 837 A.2d 618, 620 n.1. (Pa. Cmwlth. 2003).

<sup>7</sup> Murray concedes that he violated condition #7 of his parole by failing to successfully complete the Renewal program. The presumptive range for a violation of condition #7, which is a special condition, is three to eighteen months. 37 Pa. Code §75.4. The presumptive range for violating both Condition #7 and #5C is nine to thirty-six months. *Id.* and 37 Pa. Code §75.3(f). Thus, the thirty-two month recommitment period set by the Board is only within the presumptive range if Murray is deemed to have violated both conditions of parole.

parole.<sup>8</sup> Second, he argues that this issue is not barred by waiver because his prior counsel failed to raise it at the hearing, which constitutes ineffective assistance of counsel. Third, Murray argues that the issue has not been waived even though not raised in his administrative appeal.

We begin by addressing issue three, *i.e.*, Murray's claim that he has not waived the issue of whether he was at liberty on parole at the time he was alleged to have violated condition #5C of his parole, despite his failure to raise the issue in his administrative appeal. Murray argues that the Board erred in not sending a copy of its recommitment decision to his counsel, which was compounded by the Board's failure to tell Murray of his "right to appointed counsel." Had the Board done its job, Murray would have been represented by counsel in the administrative appeal and his attorney would have raised the issue.

The Board counters that Murray was properly advised of his right to counsel. In any case, his failure to raise the issue of whether he was at liberty on parole at the time he violated Condition #5C is fatal to his ability to raise the issue to this Court. The Board also argues that Murray's claim that he was not on parole when he assaulted staff and others at Renewal lacks merit.

In *Wallace v. Pennsylvania Board of Probation and Parole*, 548 A.2d 1291 (Pa. Cmwlth. 1988), an inmate, Wallace, was represented by counsel at the revocation hearing and then filed his administrative appeal *pro se*. Following the denial of his administrative appeal, he appealed to this Court, arguing that his counsel had been ineffective in not challenging the sufficiency of his violation

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<sup>8</sup> This claim is based on *Miller*, 837 A.2d at 622, wherein we held that parolees could not be charged with technical parole violations once they had been "re-incarcerated," as such violations were not committed "during the period of parole."

notice. We explained that “[w]here a parolee fails to raise an issue before the Board, it is considered waived and cannot be raised for the first time on judicial review.” *Id.* at 1293. However, there is an “extraordinary consideration” exception to this general rule. *Id.* For example, where a parolee has the same counsel for his revocation hearing and his administrative appeal, a parolee can only raise ineffective assistance of counsel for the first time to this Court. It cannot be expected that counsel will raise the issue of his own ineffectiveness at the administrative appeal. No exception was found for Wallace, who did not raise ineffective assistance of counsel at the administrative appeal at which he appeared *pro se*.<sup>9</sup>

In sum, absent an “extraordinary consideration,” Murray cannot raise a legal issue before this Court that was not raised before the Board. Murray suggests that the Board’s failure to advise him of his right to *appointed* counsel constitutes an “extraordinary consideration,” allowing him to raise the issue of whether he was on parole when his assaultive behavior occurred. The case law does not support this syllogism.

In *Snipes v. Pennsylvania Board of Probation and Parole*, 527 A.2d 1080 (Pa. Cmwlth. 1987), we explained that the Board is not required to inform a parolee of the right to counsel in an administrative appeal. Further, the Board is not obligated to provide counsel for this appeal unless the parolee requests counsel. In *Snipes*, the Board notified the parolee of his right to an attorney for the

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<sup>9</sup> In *Jacobs v. Pennsylvania Board of Probation and Parole*, 958 A.2d 1110 (Pa. Cmwlth. 2008), we explained that the Board’s regulations do not require that an issue be raised at the revocation hearing in order for it to be preserved on administrative appeal. However, the issue must be raised at the time of the administrative appeal in order for this Court to address it on review. *Id.* at 1117.

administrative appeal. We approved the Board's conduct in this regard, observing, however, that such "notice is not strictly required by the Board's regulations." *Id.* at 1082 n.4. Stated otherwise, *Snipes* established that the Board is not required to provide written notice to a parolee of the right to counsel in an administrative appeal.<sup>10</sup> *A fortiori*, the Board does not have to notify a parolee of his right to appointed counsel if he is indigent.

Accordingly, we reject Murray's contention that the Board's notice with respect to his right to counsel was defective. Simply, Murray has not offered any basis to find an "extraordinary consideration" exception to the rule that issues not raised in a parolee's administrative appeal are waived.

Likewise, we reject Murray's argument that the Board's failure to mail the revocation decision to his hearing counsel constitutes an "extraordinary consideration." The regulation obligates the Board to transmit the decision in a technical violation case "to the parolee *or* to counsel of record." 37 Pa. Code § 71.2(18) (emphasis added). Revocations based on a conviction require that the revocation decision "be transmitted to the parolee *and* to counsel of record." 37 Pa. Code §71.4(8) (emphasis added).<sup>11</sup> Murray argues that the revocation decision should be transmitted to counsel, regardless of the type of revocation.

Murray offers no authority for his argument that the Board's regulation on transmittal of revocation decisions is illegal. He claims that it places a hardship on an inmate, who will have to contact counsel within the allotted

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<sup>10</sup> However, a parolee must be advised of his "right to retain counsel, and the name and address of the public defender of the county of confinement" following detention. 37 Pa. Code § 71.2(1)(iv). He must also be informed that he "may retain counsel" at the time of the preliminary hearing. 37 Pa. Code §71.2(5).

<sup>11</sup> The Board does not address this issue.



appeal period. This argument fails to consider that inmates manage to contact attorneys on a routine basis while incarcerated. We cannot agree that the Board's regulation constituted a hardship or an "extraordinary" event warranting an exception to the waiver requirement.<sup>12</sup>

Because Murray's issues have been waived, we do not reach their merit. Accordingly, the order of the Board is affirmed.

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MARY HANNAH LEAVITT, Judge

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<sup>12</sup> Murray, while incarcerated, managed to contact his hearing counsel prior to the hearing. Further, in filing his petition to this Court he apparently no longer suffered from the confusion he alleges occurred when filing his administrative appeal, as here, along with his petition, he filed an application for appointment of counsel.

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**ORDER**

AND NOW, this 20<sup>th</sup> day of January, 2011, the order of the Pennsylvania Board of Probation and Parole, dated November 25, 2009, is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge