IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nelson Rosa-Perez, Petitioner	:	
v.	:	No. 2548 C.D. 2010
	:	Submitted: April 8, 2011
Pennsylvania Board of Probation and Parole, Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge**
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** August 2, 2011

Petitioner Nelson Rosa-Perez (Rosa-Perez) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board). The Board denied Rosa-Perez's petition for administrative review of a Board determination denying Rosa-Perez's assertion that he was entitled to credit on his prison sentence for 160 days during which he resided in group homes. We affirm the Board.

Rosa-Perez was serving a ten-year sentence when the Board constructively granted him parole to begin serving a new two-year sentence. On January 5, 2009, the Board granted Rosa-Perez parole from his two-year sentence, releasing him to the Kintock Back-on-Track Outside Community Correction Residency Program (Kintock) in Philadelphia. Rosa-Perez spent ninety (90) days at Kintock from January 5, 2009, through April 5, 2009. Thereafter, for a

seventy-day period, Rosa-Perez resided at the ADDAPT program (ADDAPT) in Reading from April 5, 2009, through June 14, 2009.[1]

While Rosa-Perez was residing at ADDAPT, he engaged in assaultive and harassing conduct that culminated in new criminal convictions. By decision mailed March 4, 2010, the Board recommitted Rosa-Perez as a convicted parole violator. The Board calculated Rosa-Perez's new maximum expiration date for his initial ten-year sentence to be May 14, 2012. The Board's recalculation of Rosa-Perez's maximum sentence date did not provide any credit to Rosa-Perez for the 160-day period he resided at the facilities.

Rosa-Perez filed a petition for administrative review on March 4, 2010, in which he claimed he was entitled to credit for the period he spent at the facilities. A Board hearing examiner held a hearing on Rosa-Perez's petition for administrative review in accordance with *Cox v. Pennsylvania Board of Probation and Parole*, 507 Pa. 614, 493 A.2d 680 (1985), in order to determine whether the conditions at the group homes are the essential equivalent of prison such that Rosa-Perez is entitled to credit for the periods he resided at the facilities.

During the hearing, Rosa-Perez testified regarding the conditions he experienced while residing at the facilities. Rosa-Perez testified that he shared a dormitory-like room with four or five other residents while he was at ADDAPT. Although there were no locks on his dormitory room door, the building had a lock. Rosa-Perez testified that he could not leave the building except when he sometimes attended rehabilitation programs elsewhere in Reading. On those occasions, staff

[1] Rosa-Perez referred to Kintock as a "halfway" house. (Certified Record (C.R. at 65.) Rich Levin, ADDAPT's Director for Security, described ADDAPT as a community corrections facility (CCF). (C.R. at 55.) Mr. Levin explained that the Commonwealth runs community corrections centers, while private entities operate CCFs. (*Id.*) Hereafter, where appropriate, we will refer to the two facilities collectively as "the facilities."

did not escort Rosa-Perez to his programs, and he could walk to the programs on his own.

The Board offered the testimony of Rich Levin, the Director of Security for ADDAPT. Mr. Levin testified that although ADDAPT's entrance doors had locks, ADDAPT kept the doors locked only to prevent non-residents from entering the building. There are no bars on windows, nor is there a fence surrounding the building. Residents who have jobs can leave for work. ADDAPT staff does not physically prevent residents from leaving the building, although staff will advise residents who leave without authorization that they will get into trouble. If a "parole holdover" case such as Rosa-Perez is away from ADDAPT without an excuse, the resident is not charged with escape, but staff will notify the Board, which could decide to identify the resident as an absconder. Mr. Levin testified that ADDAPT is not a secure facility.

With regard to Kintock, Rosa-Perez testified as follows. Kintock's doors were locked. No one was permitted to leave the building. Sometimes Rosa-Perez could leave the building unescorted and take a bus to "outside groups." The Board offered the testimony of Cory Davis, Kintock's Deputy Program Director. Mr. Davis testified that there is no perimeter fence around the facility, and there are no bars on the windows. Also, Mr. Davis testified that the purpose of keeping the entrance doors at Kintock locked was to prevent outsiders from entering the facility. Additionally, Mr. Davis testified that residents may "leave the facility unescorted to go on social passes, treatment passes, work passes, [and] school passes."

Based upon the testimony offered at the hearing, the Board made pertinent factual findings, which we summarize below. There are no bars on the

windows at Kintock, and there is no fence around the perimeter of Kintock. Rosa-Perez was allowed to leave Kintock unescorted to attend treatment and to take a public bus to attend treatment. Parolees residing at Kintock were not allowed to leave Philadelphia County because of parole conditions, whereas pre-release inmates at Kintock were permitted to travel within a five-county region. With regard to ADDAPT, the Board determined that ADDAPT is not a secure facility. Both Rosa-Perez and pre-release inmates were free to leave ADDAPT without an escort. Parolees were free to leave the facility, and residents at ADDAPT were free to leave the facility for work and leisure activities.

Based upon the factual findings, the Board concluded that Rosa-Perez had not satisfied his burden to demonstrate that the conditions at the facilities included restrictions on his liberty, warranting credit for the time he resided at the facilities.

Rosa-Perez filed an administrative appeal of that decision with the Board, and the Board affirmed its decision by order mailed November 16, 2010. On appeal,[2] Rosa-Perez's primary argument is that the Board erred in concluding that Rosa-Perez failed to satisfy his burden to prove that the conditions at the facilities restrained his liberty in a manner similar to incarceration such that he is entitled to credit on his prison sentence for the periods of time he spent at those facilities.

In *Cox*, the Supreme Court "declined to issue a *per se* rule that all time spent in a residential facility as a condition of parole is time 'at liberty on parole.'" *Harden v. Pennsylvania Bd. of Prob. and Parole*, 980 A.2d 691, 697 (Pa.

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[2] This Court's standard of review of an order of the Board denying credit to a parolee for time spent in a residential facility is limited to considering whether the Board acted arbitrarily or abused its discretion. *Cox*, 507 Pa. at 620, 493 A.2d at 683.

Cmwlth. 2009).[3] The Supreme Court in *Cox* addressed the meaning of the phrase "at liberty on parole" and wrote:

> . . . All forms of parole involve some restraint on the parolee's liberty, and non-compliance with them can result in arrest and recommittal as a technical parole violator. It is appellant's burden, on remand, to show the specific characteristics of the . . . program that constituted restrictions on his liberty sufficient to warrant credit on his recomputed backtime, and persuade the Board of that fact. Moreover, *we will not interfere with the Board's determination of that issue unless it acts arbitrarily or plainly abuses its discretion*.

Cox, 507 Pa. at 620, 493 A.2d at 683 (citations and footnote omitted) (emphasis added).

Following the Supreme Court's decision in *Cox*, this Court has had the opportunity on several occasions, including its most recent *en banc* decision in *Harden*, to consider whether a parolee's time in a non-prison facility constituted time "at liberty" for purpose of credit for time-served. *See Meleski v. Pennsylvania Bd. of Prob. and Parole*, 931 A.2d 68, 72 (Pa. Cmwlth. 2007), *appeal denied*, 596 Pa. 736, 945 A.2d 173 (2008) (holding that parolee was not at liberty given he was not permitted to leave particular floor of facility except for meals and use of escorts for appointments outside facility was for "mandatory coercive" effect as

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[3] The Supreme Court in *Cox* reversed this Court's order affirming the Board's denial of credit for a parolee who had resided in an inpatient drug treatment program at Eagleville Hospital. The Supreme Court remanded the matter for additional hearings, opining:

> The Board imposed special conditions on appellant's parole, conditions beyond those generally imposed on parolees. While the Board had the statutory authority to impose these conditions, the specific programs at [the facility] may have been so restrictive that they require the granting of credit. Other programs may not require such credit. We cannot make an informed determination of this issue on the record before us.

Id., 507 Pa. at 619-20, 493 A.2d at 683-84 (citations and footnotes omitted).

opposed to "transportation assistance"); *Torres v. Pennsylvania Bd. of Prob. and Parole,* 861 A.2d 394, 400-01 (Pa. Cmwlth. 2004) (holding that parolee who is forbidden generally to leave particular facility and who is under 24-hour supervision and is not permitted to make trip without escort "cannot reasonably be described as being 'at liberty on parole.'"); *Jackson v. Pennsylvania Bd. of Prob. and Parole*, 568 A.2d 1004 (Pa. Cmwlth. 1990) (holding Board did not abuse its discretion in determining program lacked sufficient custodial aspects to characterize time spent there as confinement rather than liberty where doors were not locked, facility had no fences and staff did nothing to prevent parolee from leaving but would notify Board if parolee left facility).

In *Harden*, this Court summarized the standards applicable in considering an inmate's claim of entitlement to credit for time spent in alternative facilities such as group homes:

> 1. Because a parolee does not enter a residential facility pursuant to a court order but, rather voluntarily agrees to do so "as part of his parole program, his attendance there is presumed to be at 'liberty on parole.'"
>
> 2. The presumption that attendance at a residential facility is "at liberty on parole" may be rebutted. However, it is the burden of the parolee to develop a factual record and to persuade the Board that the residential program he attended was a "prison equivalent precluding the conclusion that [the parolee] was at 'liberty on parole.'"
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> 3. If the Board is not persuaded that the parolee did time in a "prison equivalent," courts should "not interfere with the Board's determination of that issue unless it acts arbitrarily or plainly abuses its discretion."

Harden, 980 A.2d at 697-98 (citations omitted).[4]

In *Harden*, this Court first considered the physical construction of the facility to determine whether it was "prison-like." *Harden*, 980 A.2d at 699. The Court reasoned that the facility was physically constructed in a way that the Court had held on numerous occasions was unlike prisons. The Court specifically stated that "[f]acilities are not prison-like if they lack fences or have fences with gates that open from the inside; have doors and windows locked from the outside, not the inside, to prevent entry not exit; lack guards stationed to prevent residents from leaving; and do not attempt to use physical force by staff members to stop an inpatient from leaving." *Id.*

After concluding that the structural conditions at the facility were not prison-like, the Court in *Harden* then considered "whether the rules at each facility were so restrictive as to make the facility the equivalent of a prison." *Id.* The Court concluded that neither use of a "schedule" for a parolee's day nor use of "close monitoring" of a parolee's activities overcomes the presumption that the parolee was "at liberty on parole." *Id.* Among other things, the Court considered whether use of "escorts" by the facility to accompany a parolee to a medical appointment evidenced that the parolee was not at liberty. We explained:

> The use of "escorts" at a facility does not, in itself, show that the facility is a prison equivalent. The "escort" may be an armed law officer, a lifeguard at a pool, a person providing transportation assistance, or just another patient or parolee. Because the term "escort" can be given a wide variety of meanings, the parolee does not sustain his evidentiary burden simply by slipping the

[4] In *Harden*, we noted that the *Cox* principles make it difficult for a parolee to rebut the presumption that a parolee is not entitled to sentence credit for time spent in a residential facility. *Id.*, 980 A.2d at 698.

> word "escort" into the record. *Instead, it is the parolee's burden to prove factually that the "escort" exercises a coercive function and does not function as a counselor, whose goal is to advance treatment or to provide transportation assistance."*

Id. at 700 (emphasis added). In *Harden*, a witness for the Board testified that staff accompanied inpatients to medical appointments to provide transportation services; the parolee presented no contrary evidence. The Court, therefore, concluded that the Board did not plainly abuse its discretion because the parolee's evidence with respect to the use of an escort was inadequate to rebut the presumption that the facility was not the equivalent of a prison.

Furthermore, in *Jackson*, this Court held that the fact that a parolee was free to leave without restraints but that the Board would consider a parolee to be an absconder if he left the facility without authorization was insufficient to establish that the parolee was not at liberty.[5]

As the Board points out, the Board specifically determined that (1) Rosa-Perez could leave both facilities unescorted to attend treatment programs, (2) ADDAPT was not a secure building, and (3) there was no perimeter fence around Kintock or bars on the windows at Kintock. Thus, the facilities did not physically resemble a prison, and the restrictions that were placed upon Rosa-Perez did not include a coercive escort when he left either facility. Therefore, under the holdings discussed above, the Board did not abuse its discretion concluding that a

[5] In *Harden*, this Court noted that pre-release residents could be charged with the crime of escape, whereas a parolee, at the most, would face possible technical parole violation charges for leaving a community correction center without authorization. *Harden*, 980 A.2d at 698 (relying on *Meehan v. Pennsylvania Bd. of Prob. and Parole*, 808 A.2d 313, 317 (Pa. Cmwlth. 2002), *appeal denied*, 573 Pa. 669, 820 A.2d 706 (2003)).

parolee was not entitled to credit for time residing in a community corrections center.

Rosa-Perez essentially acknowledges that this Court's decision support the Board's order. Rosa-Perez argues, however, that we should re-evaluate our holdings because of inequity reflected in the disparity of treatment between pre-release residents of community corrections centers and parolee residents of the same centers. In the former case, Rosa-Perez observes that pre-release residents continue to receive credit for the time they spend in the centers; however, parolees lose credit for such periods of time even if the living conditions are essentially the same as the conditions for pre-release inmates.

Rosa-Perez argues that the Court should reconsider its holdings in light of Judge Friedman's concurring opinion in *Torres*. In *Torres*, the Board paroled Torres to a community correction center with an inpatient drug treatment program. During the first forty-five day period Torres spent at the facility, he could not leave the facility unless he was escorted by staff. At some point following that initial forty-five day period, Torres left the facility without permission. Thereafter, he was charged with a new crime and ultimately entered a nolo contendre plea to the crime of possession of drug paraphernalia. When the Board refused to grant him credit for the time he spent at the facility, Torres appealed that denial. On appeal to this Court, we concluded that during the initial forty-five day period of his residency he was required to have staff escort him when he left the facility for a treatment program. This Court wrote that this condition constituted "a coercive security measure and not merely transportation assistance." *Torres*, 861 A.2d at 400-01. The Court concluded that when the restrictions of a program are so onerous "they destroy any sense of being 'at liberty

on parole,'" a parolee is entitled to credit. *Id*. The majority concluded that Torres was entitled to credit for his initial forty-five day period at the facility.

The Court, however, rejected the Board's invitation to distinguish or overrule an earlier decision of this Court, *McMillian v. Pennsylvania Board of Probation and Parole*, 824 A.2d 350 (Pa. Cmwlth. 2003) (*McMillian*), *appeal granted*, 578 Pa. 718, 854 A.2d 969 (2004).[6] The Court instead indicated that under *Cox*, the restrictions were sufficiently onerous that Torres had overcome the presumption that he was at liberty while he was residing in the facility during the first forty-five days of his parole at that facility. As noted above, the Court opined that although some similar inpatient treatment programs may not be so onerous,[7] the evidence indicated that the mandatory escort was coercive, rather than merely for the purpose of assisting residents' transportation to mandatory programs, and, consequently, that condition rendered the period of residency more like imprisonment.

In her concurring opinion, Judge Friedman first observed that inmates who serve "sentences of incarceration always receive credit for time spent in [community correction center] residency programs like the one [at issue]." *Id*., 861 A.2d at 402. Judge Friedman noted that, "to an inmate who is not on parole, a [community corrections center] is the equivalent of incarceration. On this basis, I suggest that to meet their burden of proof under *Cox*, parolees may present

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[6] In *McMillian*, the Court concluded that the inmate was entitled to credit because the facility at issue was located in an "institutionalized setting," parolees had assigned counselors, were required to participate in mandatory programs, and were granted leisure time depending upon their status and behavior. *McMillian*, 824 A.2d at 353.

[7] *See Jackson*; *Meehan v. Pennsylvania Bd. of Prob. and Parole*, 808 A.2d 313 (Pa. Cmwlth. 2002); and *Wagner v. Pennsylvania Bd. of Prob. and Parole*, 846 A.2d 187, 191 (Pa. Cmwlth. 2004).

evidence to establish that the restrictions on liberty are identical for parolees and inmates at a [community corrections center]. Given such evidence, I would conclude that the parolee is entitled to credit towards his sentence for time spent at the CCC." *Id*. at 402. She reasoned as follows:

> It may seem logical to think that, for a person to be "incarcerated" in a particular facility, that person would be charged with escape for leaving the facility without authorization. However, the result of such thinking is that parolees can never receive credit for time spent in a [community corrections center] because parolees in a [community corrections center] can never be charged with escape. In *Cox*, our supreme court clearly anticipated that parolees in a [community corrections center] might be entitled to credit. To reiterate, the question under *Cox* is whether the specific characteristics of the program restrict liberty to such an extent that residency in the program is the equivalent of incarceration. The charge made against an individual who leaves a [community corrections center] without authorization is a legal matter; the applicable charge is not a characteristic of the program.

Id. at 403 (footnote and emphasis omitted). As Rosa-Perez acknowledges, however, neither this Court nor our Supreme Court has altered the analysis with regard to parolees. The majority's approach in *Torres*, which requires a court to consider the specific restrictions a particular type of community corrections center imposes, still applies.

In this case, Rosa-Perez testified that while he was at Kintock he was able to take a bus or walk, without any escort at all, to programs in which he was required to participate. Similarly, while he was at ADDAPT he could walk by himself to treatment programs. The testimony indicates that both Kintock and ADDAPT were locked only to prevent outsiders from entering, that there were no

locks on doors or windows, and that a parolee could leave the facility without any members of the staff preventing him. Additionally, the Board determined as a matter of fact that ADDAPT is not a secure facility and Kintock does not have a perimeter fence or bars on windows. In fact, at ADDAPT, residents were permitted to leave the facility for work and leisure activities.[8]

Rosa-Perez, while stressing that a pre-release *inmate* at Kintock could travel in a five-county area but *parolees* could only travel in Philadelphia, ignores the fact that the Board is able to impose such travel conditions on a parolee who is not situated in a group home or community corrections center. Furthermore, Rosa-Perez himself testified equivocally, at least as to ADDAPT, regarding whether the terms of conditions were the same for inmates and parolees. (C.R. at 54.) With regard to the differences in conditions at Kintock, Rosa-Perez only stated that inmates and parolees were not treated differently. (C.R. at 68.)

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[8] Although the Board did not refer to Rosa-Perez's Supervision History (C. R. at 28), that document states that Rosa-Perez "failed to obtain drug and alcohol treatment and domestic violence prevention while at ADDAPT. The offender was sanctioned on 05/18/2009 for TPV# 7, Failing to follow the rules of ADDAPT. [Rosa-Perez] was cashing his payroll checks rather than submitting them to ADDAPT." This comment, not reflected in the factual findings, and, therefore, not a factor we may consider, indicates that Rosa-Perez had the opportunity to participate in gainful employment while at ADDAPT. Although not relevant under our standard of review, it highlights the fact that a parolee seeking credit under *Cox* bears the burden of proof to demonstrate that the conditions of his residency are akin to imprisonment. We observe, however, that it is understandable that Rosa-Perez would not be inclined to testify regarding any employment he may have had while at one or both of the facilities, as such information would certainly not assist him in satisfying his burden to overcome the presumption that he was at liberty while on parole.

Because we conclude that the Board did not abuse its discretion in concluding that Rosa-Perez failed to overcome the presumption that he was at liberty while he resided at Kintock and ADDAPT, we affirm the Board's order denying Rosa-Perez's administrative appeal.

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P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nelson Rosa-Perez, Petitioner	:	
v.	:	No. 2548 C.D. 2010
Pennsylvania Board of Probation and Parole, Respondent	:	

O R D E R

AND NOW, this 2nd day of August, 2011, the order of the Pennsylvania Board of Probation and Parole is AFFIRMED.

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P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nelson Rosa-Perez,	:	
Petitioner	:	
	:	
v.	:	No. 2548 C.D. 2010
	:	Submitted: April 8, 2011
Pennsylvania Board of Probation and Parole,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE FRIEDMAN FILED: August 2, 2011

I respectfully dissent. Nelson Rosa-Perez has asked this court to address whether the Commonwealth violates the equal protection rights of parolees by failing to give them credit for time served in a Community Corrections Center (CCC) under the same conditions as pre-release inmates, who always receive credit for time served in a CCC, as set forth in my concurring opinion in *Torres v. Pennsylvania Board of Probation and Parole*, 861 A.2d 394 (Pa. Cmwlth. 2004) (Friedman, J., concurring).

Although the majority quotes from the concurring opinion, the majority chooses not to squarely address the issue because our Supreme Court still requires this court to consider the specific restrictions imposed on Rosa-Perez by the CCC. (Majority Op. at 11); *see Cox v. Pennsylvania Board of Probation and Parole*, 507 Pa. 614, 493 A.2d 680 (1985). However, the equal protection question asks whether, under *Cox*, the specific restrictions must be compared to the restrictions on pre-

release inmates at the same CCC. The majority obviously answers the question in the negative, continuing to allow disparate treatment of parolees and pre-release inmates, but the majority does not give any reason to justify the disparate treatment. Because Rosa-Perez has properly raised the equal protection issue, I submit that this court should attempt to set forth a valid reason for the disparate treatment.

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ROCHELLE S. FRIEDMAN, Senior Judge