IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jerry Stevens,	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Board of Probation	:	
and Parole,	:	No. 2691 C.D. 2010
Respondent	:	Submitted: April 29, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: June 15, 2011

Jerry Stevens (Stevens) petitions for review from a December 6, 2010 determination of the Board of Probation and Parole (Board) partially denying and partially granting administrative relief. The only issue before this Court is whether the Board failed to credit Stevens' original sentence with all of the time to which he was entitled – i.e., credit for April 18, 2006, and the period between his release on a writ to federal court on December 2, 2008 and his federal sentencing on December 16, 2009. For the reasons that follow, we affirm the determination of the Board.

Stevens was serving a 5 to 10-year sentence when he was released on parole on May 23, 2005, with a parole violation maximum date of July 4, 2009. On April 18, 2006, he was arrested in Philadelphia County on drug-related charges, and detained by a Board warrant dated April 19, 2006, pending disposition of the new charges. Later, Stevens was federally indicted for the actions that led to his April 18, 2006 arrest, and his Philadelphia County criminal charges were *nolle prossed* on October 30, 2008 in order to permit federal prosecution. On December 2, 2008,

federal agents arrested Stevens and transferred him from the State Correctional Institution at Graterford (SCI – Graterford) to the Federal Detention Center in Philadelphia. He was convicted in federal court on August 5, 2009, and sentenced on December 16, 2009 to serve 96 months of incarceration and 6 years of supervised release. On February 23, 2010, the United States (U.S.) Marshals Service lodged a detainer against Stevens with the Pennsylvania Department of Corrections. Stevens was returned to state custody on March 2, 2010.

Stevens received a revocation hearing before the Board and, the Board issued an order mailed August 5, 2010, recommitting Stevens as a convicted parole violator with a new parole violation maximum date of July 31, 2011. Stevens timely filed a petition for administrative relief with the Board on August 24, 2010. On December 6, 2010, the Board partially denied administrative relief, and on December 7, 2010, partially granted administrative relief by recalculating his parole violation maximum date to June 14, 2011.[1] Stevens appealed to this Court.[2]

Stevens argues that his confinement credit should have started on April 18, 2006 when he was arrested, not on April 19, 2006 when the Board lodged its warrant pursuant to Section 6138(b) of the Prisons and Parole Code (Parole Code).[3] We disagree.

Section 6138(b)(1) of the Parole Code provides: "The formal filing of a charge after parole against a parolee within this Commonwealth for any violation of the laws of this Commonwealth shall constitute an automatic detainer and permit the

[1] The Board credited Stevens for time he had been detained solely on the Board's warrant prior to his arrest on federal charges on December 2, 2008.

[2] Our scope of review of the Board's decision denying administrative relief is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether constitutional rights have been violated. *McNally v. Pennsylvania Bd. of Prob. and Parole*, 940 A.2d 1289 (Pa. Cmwlth. 2008).

[3] 61 Pa.C.S. § 6138(b).

parolee to be taken into and held in custody." 61 Pa.C.S. § 6138(b)(1). Neither the phrase "formal filing of a charge" nor the phrase "automatic detainer" is defined by statute or in case law; however, it is clear that in order for the automatic detainer to be triggered, there must first be a filing of charges, not simply an arrest. Furthermore, the Board's regulations provide:

> A parolee may be detained on a Board warrant pending disposition of a criminal charge following the occurrence of one of the following:
>
> (i) A district justice has conducted a criminal preliminary hearing and concluded that there is a prima facie case against the parolee.
>
> (ii) The parolee waives a criminal preliminary hearing and is held for court.
>
> (iii) The parolee is convicted of a crime at a trial before a judge of the Philadelphia Municipal Court or a district justice.
>
> (iv) An examiner conducts a detention hearing.

37 Pa. Code § 71.3(1). In other words, one of these events must occur in order for a parolee to be detained pursuant to a Board warrant when a new criminal offense occurs. According to the certified record in the present case, none of these events occurred on April 18, 2006.[4]

In addition, as far as the term "automatic" is concerned, it is necessary here to distinguish the process of detaining a parolee who has technically violated his

[4] It would be premature for the Board to detain a parolee as a parole violator if no charges have been filed against him because a person can be arrested and later released without being charged with any crime. If an arrest warrant had been issued for Stevens prior to his arrest, charging him with some form of new crime, it could be argued that he could receive credit for his time spent in custody starting at the time of his arrest on April 18, 2006 since the charges would have been brought against him in order to issue the warrant. However, in the present case, Stevens was arrested during a plainclothes narcotics surveillance operation. No charges were brought against him until after he was arrested.

parole and the process of detaining a parolee who has been arrested on new criminal charges. The Board's regulations provide that:

> If an agent has reason to believe that a parolee has violated the conditions of his parole, that action of the Board is necessary, and that an arrest or the lodging of a detainer is appropriate, the agent may apply to his district supervisor for permission to arrest and for the issuance of a "Warrant to Commit and Retain" (PBPP-141).

37 Pa. Code § 71.1(a). In other words, there is a process that a parole agent must follow in order to obtain a warrant to detain a parolee who is a technical parole violator; whereas, if the parolee is formally charged with a new crime while on parole, the detainer is automatic. Hence, we conclude that the automatic detainer pursuant to Section 6138(b) of the Parole Code is non-existent until a parolee is charged with a new crime. Therefore, Stevens' automatic detainer did not take effect until April 19, 2006, i.e., when he was formally charged with the new crimes, and he should not receive credit towards his original sentence for his time in custody on April 18, 2006 solely pursuant to his arrest on new charges.

Next, Stevens argues that since Pennsylvania had primary jurisdiction over him, it does not relinquish its jurisdiction to the federal authorities until he is released from his state sentence, and the time spent in confinement between his release on a writ to federal court on December 2, 2008 and his sentencing on December 16, 2009 should be credited towards his original sentence. Stevens contends that even though this exact issue was unsuccessfully raised in *Bowman v. Pennsylvania Board of Probation and Parole*, 930 A.2d 599 (Pa. Cmwlth. 2007), we should reconsider our position established in that case concerning presentence confinement. More specifically, he contends that he does not want to be caught in the "*Bowman* trap" whereby a parolee will not know exactly how a second sovereign will treat time served until it is too late to appeal the denial of credit of the first sentence,

and where the parolee could not establish that he had unsuccessfully exhausted remedies to apply the credit to his first sentence. We disagree with his characterization of *Bowman*.

In *Bowman*, the parolee argued, *inter alia*, that his original sentence should have been credited for 158 days from the time he was moved on a writ to a federal detention center and the date of his sentencing on the new federal criminal charges. This Court held that

> this case is similar to [*Armbruster v. Pennsylvania Board of Probation and Parole*,[5] *Melhorn v. Pennsylvania Board of Probation and Parole*[6] and *McCray v. Department of Corrections*[7]] in that Petitioner was not given credit on his new sentence for the time spent in custody but now seeks to have it applied to his original sentence. As in *Armbruster*, the remedy is not through the Board but was, instead, through the entity with the power to make credit determinations, in this case the [Federal Bureau of Prisons (FBOP)]. Simply put, Petitioner's oversight in failing to seek credit on his new federal sentence for his time in custody cannot and should not be rewarded.

Bowman, 930 A.2d at 605.

The law is clear concerning how Pennsylvania treats time served for new charges when a parolee is also being held on a Board detainer. In *Gaito v. Pennsylvania Board of Probation and Parole*, 488 Pa. 397, 412 A.2d 568 (1980), the Pennsylvania Supreme Court held:

> if a defendant is being held in custody solely because of a detainer lodged by the Board and has otherwise met the requirements for bail on the new criminal charges, the time which he spent in custody shall be credited against his original sentence. If a defendant, however, remains incarcerated prior to trial because he has failed to satisfy

[5] 919 A.2d 348 (Pa. Cmwlth. 2007).

[6] 883 A.2d 1123 (Pa. Cmwlth. 2005), *rev'd*, 589 Pa. 250, 908 A.2d 266 (2006).

[7] 582 Pa. 440, 872 A.2d 1127 (2005).

> bail requirements on the new criminal charges, then the time spent in custody shall be credited to his new sentence.[FN6] . . . .
>
> FN6. It is clear, of course, that if a parolee is not convicted, or if no new sentence is imposed for that conviction on the new charge, the pre-trial custody time must be applied to the parolee's original sentence.

488 Pa. at 403-04, 412 A.2d at 571. Given current Pennsylvania law, Stevens should have known at the time of his sentencing in federal court that he would not receive credit against his original sentence for time he spent in federal custody on new criminal charges, and should have taken the steps necessary to credit his federal sentence.

Stevens also believes that the U.S. Supreme Court decision in *Reno v. Koray*, 515 U.S. 50 (1995), holding that in order to be eligible to receive credit for presentence confinement, a parolee must be subject to the control of the FBOP in order to be under "official detention," pursuant to 18 U.S.C. § 3585(b), supports his contention that he should receive credit from the Commonwealth for time served in the Federal Detention Center between December 2, 2008 and December 16, 2009. Specifically he contends that because Pennsylvania arrested him first and he had yet to serve his backtime as a convicted parole violator, Pennsylvania retained primary jurisdiction over him, such that he did not have administrative remedies available to him under federal law. We disagree.

In *Reno*, the issue involved a determination of credit concerning the difference between a parolee who had been released on bail and one who was still under official detention because he was unable to post bail. The U.S. Supreme Court determined that under 18 U.S.C. § 3585(b), the time a parolee spent in a treatment center while released on bail following his arrest on new criminal charges was not within the meaning of "official detention." *Reno*. The U.S. Supreme Court

explained: when a parolee is released on bail he is not under the FBOP's control; but, when a parolee is detained by the FBOP he is completely subject to the FBOP's control, and is, therefore, under "official detention." Here, Stevens remained in the custody of the FBOP during the period in question, under the control of the FBOP, and, therefore, under "official detention" by the FBOP. On December 2, 2008, he was released by the Commonwealth on a writ to federal authorities and transferred to the Federal Detention Center. According to the certified record, he was not returned to the Commonwealth's custody until March 2, 2010. Clearly, *Reno* is not implicated the present case.

Like the parolee in *Bowman*, Stevens should have availed himself of the proper steps to receive credit against his federal sentence pursuant to 18 U.S.C. § 3585(b). The Board did not err, therefore, by not crediting his original sentence with the time he spent in federal custody between his release on a writ to federal court on December 2, 2008 and his federal sentencing on December 16, 2009.

For the reasons stated above, we affirm the Board's determination.

_____

JOHNNY J. BUTLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jerry Stevens,	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Board of Probation	:	
and Parole,	:	No. 2691 C.D. 2010
Respondent	:	

O R D E R

AND NOW, this 15th day of June, 2011, the December 6, 2010 determination of the Board of Probation and Parole is affirmed.

_____

JOHNNY J. BUTLER, Judge