

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Randy Carl Hinkley, :
Petitioner :
 :
v. :
 :
Department of Corrections, : No. 326 M.D. 2010
Respondent : Submitted: October 8, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: January 6, 2011

Before this Court are Pennsylvania Department of Corrections' (DOC) Preliminary Objections¹ to Randy Carl Hinkley's (Petitioner) petition for review in the nature of a complaint in mandamus.

Petitioner, an inmate incarcerated at Pennsylvania State Correctional Institution, Coal Township, initiated this action in this Court's original jurisdiction, *pro se*, on March 17, 2010.

Petitioner seeks to compel DOC to award him credit towards two of his three concurrent sentences for time he was "erroneously at liberty." He alleges

¹ Preliminary Objections in the nature of a demurrer admit all well-pleaded material facts and any inferences reasonably deduced therefrom, but not legal conclusions. Danysh v. Department of Corrections, 845 A.2d 260 (Pa. Cmwlth. 2004). When ruling on a demurrer, a court must take all facts as pled and determine whether the moving party has stated a cause of action as a matter of law. Skokut v. MCI, 613 A.2d 55 (Pa. Cmwlth. 1992).

that DOC correctly credited *one* of his sentences.² But, he asserts that because the other two sentences were concurrent, DOC must likewise credit them. Petitioner also seeks credit towards a concurrent sentence for periods which he was “detained for probation violations” from November 18, 2003, to February 6, 2004, and March 25, 2004, to May 3, 2005.

At one time, Petitioner was incarcerated at the Lehigh County Prison serving three different sentences.³ Petitioner asserts that on January 15, 1993, he was erroneously released by the Lehigh County Probation Department. Instead of

² There is nothing in the record which indicates DOC credited Petitioner for time he spent “erroneously at liberty.”

³ (1) On July 23, 1990, Petitioner was arrested and charged with burglary, criminal mischief, criminal trespass, and defiant trespass. Petitioner pled guilty to criminal mischief and defiant trespass. **Case No. 2967-1990**, Court of Common Pleas of Lehigh County. Judge Lawrence Brenner (Judge Brenner) sentenced Petitioner to one year of county probation plus 50 hours of community service. On May 3, 2005, Judge Brenner revoked Petitioner’s probation and sentenced him to “a period of incarceration of not less than one year nor more than two years at ... a state correctional institution....and that credit shall be given ... for all time spent in custody, as a result of these criminal charges for which sentence is being imposed. This sentence shall run consecutive to the [escape] sentence imposed at **Case No. 2004-1209.**” Petitioner appealed his sentence to the Superior Court which affirmed.

(2) On April 16, 1992, Petitioner was arrested and charged with burglary, criminal trespass and criminal mischief. **Case No. 1228-1992**, Court of Common Pleas of Northampton County. On December 23, 1992, Judge Richard D. Grifo (Judge Grifo) sentenced Petitioner to 23 months to 5 years imprisonment. Judge Grifo stated that Petitioner’s sentence would be deemed satisfied if he completed the Commonwealth’s boot camp program and Petitioner was returned to Lehigh County Prison.

(3) On July 13, 1992, Petitioner was charged with aggravated assault, reckless endangerment, terroristic threats, and simple assault stemming from an incident on June 12, 1992. **Case No. 1689-1992**, Court of Common Pleas of Lehigh County. Petitioner, by plea bargain, pled guilty to the charge of reckless endangerment and simple assault. On January 14, 1993, Judge Edward D. Reibman (Judge Reibman) sentenced Petitioner to a term of imprisonment at the Lehigh County Prison for “a period of not less than time served (7 months) nor more than 1 day less than 2 years.” Pursuant to plea bargain, Judge Reibman stated that **(Footnote continued on next page...)**

being taken to boot camp, Petitioner was released on “probation” at **Case No. 2967-1990**, and released on “parole” at **Case No. 1689-1992** even though Petitioner was, at that time, serving 23 months to 5 years imprisonment imposed by Judge Grifo at **Case No. 1228-1992**.

After he was erroneously released, Petitioner failed to report to his probation/parole officer. He was eventually taken back into custody and recommitted to Lehigh County Prison on April 19, 1995. Bail was posted and on May 10, 1995, bail was revoked, and a bench warrant was issued for Petitioner’s arrest. On June 6, 1995, Petitioner was taken into custody and committed to Lehigh County Prison. He was released on bail six days later.

According to Petitioner, he remained at liberty for another 8 years until he was arrested and charged with DUI on October 26, 2003.

On December 1, 2003, Judge Reibman revoked Petitioner’s parole and ordered Petitioner to Lehigh County Prison to serve the balance of the sentence imposed on January 13, 1993, at **Case No. 1689-1992**. In the same order, Judge Reibman granted Petitioner immediate work release.

On February 6, 2004, Petitioner “walked away” from work release and was charged with “escape while incarcerated.” **Case No. 1209-2004**. On

(continued...)

Petitioner’s sentence was to run “concurrently” with the sentence from Judge Brenner imposed at **Case No. 2967-1990**.

March 4, 2005, the Lehigh County Court of Common Pleas sentenced Petitioner to serve two-and-one-half years to six years for escape.

Petitioner asserts that the January 15, 1993, release was a “nullity.” Therefore, all of his sentences continued to run concurrently as if he was incarcerated. He asserts that each of his sentences was to be credited for the time he was “erroneously at liberty.”

Petitioner contends that DOC “refuses” to credit two of his sentences with the time he was “erroneously at liberty.” Petitioner seeks in mandamus to compel DOC to award him that credit. He claims DOC has “a mandatory duty to disregard all [sentencing] court nullities.” Amended Petition for Review Supplement, May 5, 2010, at ¶49 at 10. Petitioner specifically alleges:

5. Upon reconfinement after an extended period “erroneously at liberty” at the above captioned (3), the Department (DOC) has determined to credit time served at #1228/92, but refuses to award same time credit at the concomitant #2967/90, #1689/92.

6. Instead, the Department (DOC) has determined to structure the above captioned (3) concurrent sentences consecutively, staggered, on either side of #1209/04 Leh. Cty. (a walkaway escape incurred while serving #1689/92).

Amended Petition for Review Supplement, May 5, 2010, at ¶¶5 and 6 at 1-2.

A proceeding in mandamus is an extraordinary action at common law and is available only to compel the performance of a ministerial act or mandatory duty where there exists no other adequate and appropriate remedy, there is a clear

legal right in the plaintiff, and a corresponding duty in the defendant. Jackson v. Vaughn, 565 Pa. 601, 777 A.2d 436, 438 (2001).

It is beyond cavil that DOC has a duty to credit an inmate for all statutorily mandated periods of incarceration. Martin v. Pennsylvania Board of Probation and Parole, 576 Pa. 588, 840 A.2d 299 (2003). However, this does not end the matter. DOC is an executive branch agency that is charged with faithfully implementing sentences imposed by the courts. McCray v. Department of Corrections, 582 Pa. 440, 872 A.2d 1127 (2005). As part of the executive branch, DOC lacks the power to adjudicate the legality of a sentence or to add or delete sentencing conditions. Id.

Here, it is not clear from the record that DOC did, in fact, credit Petitioner for the time he spent “erroneously at liberty” as he contends. Moreover, it is not at all clear from any of the sentences imposed that Petitioner was to receive such credit. There was no mention of credit for time “erroneously at liberty” in any of the sentencing courts’ orders. As noted, Petitioner appealed his sentence at **Case No. 2967-1990** to the Superior Court which affirmed.

Accordingly, DOC did not have a duty to credit Petitioner for the time spent “erroneously at liberty” because the sentencing courts did not so provide in their sentencing orders and DOC is without authority to alter sentencing conditions. McCray.

To the extent that Petitioner claims *he should have* received credit on two of the three sentences for time “erroneously at liberty,” the time to raise the issue was before the sentencing court. Whenever there is a question as to the

correct application of credit for time served, the correct avenue is to seek relief from the sentencing court. McCray. An adequate remedy was available to Petitioner in the sentencing courts and through the direct appeal process.⁴ DOC has no authority or responsibility to determine whether the time Petitioner spent erroneously at liberty should have been credited to his sentences.

Petitioner also asks this Court to compel DOC to credit time served towards the sentence at **Case No. 1689-1992** for periods which he was “detained for probation violations” from November 18, 2003, to February 6, 2004, and March 25, 2004, to May 3, 2005. Again, there is nothing in any of the sentencing courts’ orders that indicated Petitioner was to be credited for time he was detained for probation violations. If Petitioner believed he was entitled to such credit his remedy was with the sentencing court. Again, DOC may neither change the conditions of a Judge’s sentence nor credit a sentence where the sentencing court did not expressly order it.

The record is far from clear that Petitioner is entitled to the relief he seeks from DOC and DOC does not have the duty to perform the acts Petitioner requests. Petitioner has failed to meet any of the criteria required for a writ of mandamus.

⁴ The docket in Case No. 2967-1990, indicates that Petitioner *pro se* filed a “Motion for Time Credit” with the sentencing court on November 12, 2009. The motion was denied on November 11, 2009. However, there is no discussion of it in the briefs and there is no copy of the motion in the record. Therefore, this Court is unable to determine if this issue was addressed by the sentencing court.

Accordingly, the Preliminary Objections of DOC to Petitioner's Complaint in Mandamus are sustained. Petitioner's Complaint is dismissed with prejudice.

BERNARD L. McGINLEY, Judge

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ORDER

AND NOW, this 6th day of January, 2011, the Preliminary Objections of Department of Corrections in the above-captioned case are hereby SUSTAINED. Petitioner’s Complaint in Mandamus is dismissed with prejudice.

BERNARD L. McGINLEY, Judge