

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alexander Gary,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 383 C.D. 2010
	:	SUBMITTED: September 10, 2010
Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: December 10, 2010

Alexander Gary petitions for review of the order of the Pennsylvania Board of Probation and Parole (Board) that denied his administrative appeal from an order recommitting him as a convicted parole violator. Gary asserts that his revocation hearing was untimely and therefore in violation of due process. We affirm.

In 2002, Gary was convicted of Possession of a Controlled Substance and Possession with Intent to Deliver in violation of Section 13(a)(16) and (30) of the Controlled Substance, Drug, Device and Cosmetic Act,¹ 35 P.S. § 780-113(a)(16), (30), and sentenced to serve a three to six year sentence. In 2007, he

¹ Act of April 14, 1972, P.L. 499, *as amended*.

was paroled. Several months later, Gary was arrested on similar drug charges, and he was found guilty of Possession of a Controlled Substance and Possession with Intent to Deliver on July 8, 2008. However, he was not sentenced on those charges until December 29, 2008, when he received a term of imprisonment of two to four years. The Board received official verification of Gary's conviction on February 26, 2009, and held a revocation hearing on June 18, 2009. At the hearing, Gary's counsel objected to its timeliness, but the Board overruled the objection, and ultimately recommitted Gary as a convicted parole violator. On appeal, the Board affirmed, and an appeal to this court followed.²

On appeal, Gary asserts that the Board's revocation hearing was untimely under 37 Pa. Code § 71.4(1) and, therefore, a violation of due process. Section 71.4(1) requires the Board to hold a hearing within 120 days of receiving official verification of a conviction.³ In this case, it is undisputed that the Board received official verification of Gary's 2008 conviction on February 26, 2009, and that it held the revocation hearing on June 18, 2009, 112 days later. Despite the

² In a footnote in its brief, the Board contends that this case became moot on September 1, 2010, when Gary completed serving his backtime. The Board asserts, without pointing to any support in the record, that from the revocation of Gary's parole until September 1, 2010, Gary was concurrently serving both his backtime and his 2008 sentence. The Board argues that reversing its revocation decision now, after Gary has served his backtime, would therefore have no effect on Gary's release date. However, we can find nothing in the record that clearly establishes whether Gary's backtime was in fact running concurrently with his 2008 sentence and, therefore, we proceed to address the merits. We note that because we ultimately rule for the Board, our decision has the same practical effect as if we had dismissed this case as moot.

³ Section 71.4(1) states: "A revocation hearing shall be held within 120 days from the date the Board received official verification of the plea of guilty or nolo contendere or of the guilty verdict at the highest trial court level" "Official verification" is defined as the "[a]ctual receipt by a parolee's supervising parole agent of a direct written communication from a court in which a parolee was convicted of a new criminal charge attesting that the parolee was so convicted." 37 Pa. Code § 61.1.

fact that the hearing was held within the time period required by the Board's regulations, Gary asserts that this court should consider delays in other phases of the proceedings when determining the timeliness of his hearing. Specifically, he points to the 174 days that elapsed between the guilty verdict and his sentencing, and the 59 days between his sentencing and the time the Board received verification of his conviction.

There is some case law to support Gary's contention that this court should consider more than the time between the Board's receipt of official verification of conviction and the date of the revocation hearing, but this precedent has been considerably narrowed by subsequent cases, and does not apply to these facts. *See Ramos v. Bd. of Prob. & Parole*, 954 A.2d 107 (Pa. Cmwlth. 2008); *Fitzhugh v. Bd. of Prob. & Parole*, 623 A.2d 376 (Pa. Cmwlth. 1993). In *Fitzhugh*, a delay between the conviction and its verification resulted in a hearing that took place 234 days after the conviction, although the time elapsed between official verification and the hearing was under the 120-day limit set by Section 71.4(1). The petitioner in that case alleged that the Board had actual notice of the conviction well before it received official verification, and that it had intentionally delayed verifying his conviction to avoiding starting the 120-day time limit. This court remanded to the Board for:

proceedings adequate to establish the facts relating to the 143-day period between the conviction and the receipt of the conviction records. Should such a proceeding bear out the allegations made by Petitioner-that the Board was aware of the conviction and the availability of the conviction records but did not retrieve them-there is a possibility there was an unreasonable and unjustifiable delay . . . The Board must justify not holding a timely hearing.

Fitzhugh, 623 A.2d at 379.

In *Ramos*, there was a delay of five months between conviction and official verification, though, like in *Fitzhugh*, the Board hearing was held within 120 days of verification. In *Ramos*, however, it was established that a Board agent had actual notice of the conviction well before official verification was obtained. This court, citing *Fitzhugh*, stated that, “if there is a delay between the time the Board has notice of the conviction and the time when the Board receives official verification of the conviction, the Board has the burden of proving that the delay was not unreasonable and unjustifiable.” *Ramos*, 954 A.2d at 109. Finding that the Board had not met that burden, this court reversed the Board’s revocation of the petitioner’s parole.

This court clarified the scope of *Ramos* and *Fitzhugh* in *Lawson v. Board of Probation and Parole*, 977 A.2d 85 (Pa. Cmwlth. 2009). Faced with a petitioner who did not allege that the Board was aware of the delay between his conviction and official verification, but who asserted that the Board had a common law duty to exercise due diligence to obtain verification in a timely manner, this court held that there was no such duty. In addition, this court stated that *Fitzhugh* was “limited to its facts” and “*sui generis*” and that the above-quoted language in *Ramos* was *dicta*. *Lawson*, 977 A.2d at 88, 89. This court went on to state that, “the regulation at 37 Pa. Code § 71.4(1) sets a clear timeline for a revocation hearing, and in doing so it strikes a balance between a parolee’s right to due process and the Board’s ability to obtain information.” *Id.* at 89 [citing *Lee v. Bd. of Prob. & Parole*, 596 A.2d 264 (Pa. Cmwlth. 1991)].

When *Ramos* and *Fitzhugh* are considered in light of *Lawson*, it is clear they do not apply to this case. In both *Ramos* and *Fitzhugh*, the petitioner

alleged that the Board had actual notice of the conviction and failed to act despite this knowledge. In *Lawson*, the petitioner made no such allegation and merely asserted that the Board had a duty to use due diligence to obtain timely verification, a proposition this court rejected. In this case, there is no allegation that the Board had notice of Gary's conviction prior to receiving official verification. Therefore, it is clear that *Lawson* controls, and we reject Gary's argument. As the Board provided Gary with a timely revocation hearing pursuant to Section 71.4(1), we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 10th day of December, 2010, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge