

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kenneth Settles, :  
Petitioner :  
 :  
v. : No. 468 M.D. 2010  
 : Submitted: October 8, 2010  
Pennsylvania Department :  
of Corrections, :  
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: April 6, 2011

The Department of Corrections (Department) has demurred to a petition for review in the nature of mandamus filed in our original jurisdiction by inmate Kenneth Settles, who seeks credit for eight months of time previously served against his revocation of probation sentence.<sup>1</sup> Because Settles does not have a clear right to relief and the Department does not have a duty to give him the credit he seeks, we will sustain the Department's demurrer and dismiss the petition for review.

Settles is currently incarcerated at the State Correctional Institution at Greensburg. According to Settles' petition, which he filed *pro se*, he was

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<sup>1</sup> Although Settles has styled his petition as a petition for writ of *habeas corpus*, he is actually seeking mandamus relief. *Alston v. Pennsylvania Board of Probation and Parole*, 799 A.2d 875, 876 n.3 (Pa. Cmwlth. 2002).

sentenced on June 9, 2006, to a term of four years probation by the Philadelphia County Court of Common Pleas for carrying a firearm without a license. On February 16, 2008, while still on probation, Settles was arrested on new charges and posted bail the next day. A detainer was filed against him on February 20, 2008, for violation of his probation, and Settles was detained on February 22, 2008. He has remained incarcerated since that time. On July 21, 2008, the Philadelphia County Court of Common Pleas convicted and sentenced Settles on the new charges to a term of one to two years imprisonment, with a maximum sentence date of July 21, 2010. The calculation of this new sentence term is not in dispute.

On October 21, 2008, Settles' original sentence of probation was revoked because of his new conviction, and he was sentenced to a term of imprisonment of two to four years. The minimum sentence date for Settles' violation of probation (VOP) sentence was October 21, 2010, and his maximum sentence date is October 21, 2012.

On May 18, 2010, Settles filed the instant petition for review. Settles requests this Court to order the Department to give him credit for the time that he served from February 22, 2008, when he was incarcerated on the probation violation detainer, to October 21, 2008, when his VOP sentence began. Settles also asks this Court, in the interest of justice, to grant him immediate parole because he would have been paroled eight months earlier but for the sentencing court's erroneous sentence.

The Department has responded by filing a preliminary objection in the nature of a demurrer.<sup>2</sup> The Department points out that although Settles seeks credit from February 22, 2008, to October 21, 2008, Settles began to be credited with time toward his new sentence on July 21, 2008. Thus, the only time possibly at issue is February 22, 2008, through July 21, 2008. The Department argues that Settles has no clear right to relief because the sentencing court did not order the credit he is seeking and because Settles failed to pursue other more appropriate remedies.

Mandamus is used to compel the performance of a ministerial duty or act and is thus an extraordinary remedy. *Pennsylvania Dental Association v. Insurance Department*, 512 Pa. 217, 227, 516 A.2d 647, 652 (1986). This Court has the authority to issue such writs of mandamus to other government units. *Bethlehem Mines Corporation v. Commonwealth*, 462 Pa. 207, 210, 340 A.2d 435, 437 (1975). A writ of mandamus will be granted only if the petitioning party demonstrates a clear right to relief, a corresponding clear duty on the part of the party against which mandamus is sought, and the want of any other adequate remedy. *Jackson v. Vaughn*, 565 Pa. 601, 604, 777 A.2d 436, 438 (2001).

Our Supreme Court considered this issue in *McCray v. Pennsylvania Department of Corrections*, 582 Pa. 440, 872 A.2d 1127 (2005). In *McCray*, the defendant received a sentence of 23 months time served and ten years of probation. He was immediately paroled. On parole he violated his probation sentence and

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<sup>2</sup> When ruling on preliminary objections, this Court considers as true all well-pleaded facts which are material and relevant. *Silo v. Ridge*, 728 A.2d 394, 397 (Pa. Cmwlth. 1999). A preliminary objection in the nature of a demurrer is deemed to admit all well-pleaded facts and all inferences reasonably deduced therefrom. *Id.* at 397-398. In determining whether to sustain a demurrer the court need not accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion. *Id.* at 398.

received a VOP sentence. Thereafter, McCray filed a mandamus action seeking credit towards his new VOP sentence for time served on his original sentence. The Court held that there was no clear right to relief where the original sentence and the VOP sentence in combination do not exceed the legal maximum sentence for the crimes committed.

In *Aviles v. Pennsylvania Department of Corrections*, 875 A.2d 1209 (Pa. Cmwlth. 2005), this Court considered an action brought by an inmate, Aviles, who had been given a split sentence, *i.e.*, one that is divided between a period of incarceration and a period of probation. Aviles violated probation and was resentenced to a three to six year term of imprisonment. This Court denied Aviles' request for credit towards his latest sentence, explaining that we presume the sentencing court takes into consideration any time previously served when fixing the VOP sentence. If the sentencing court intends to credit the defendant for time served against the VOP sentence, it must state so clearly. *See also Black v. Pennsylvania Department of Corrections*, 889 A.2d 672 (Pa. Cmwlth. 2005) (holding that when resentencing after a violation of probation, trial court should state whether the VOP sentence is inclusive of the original sentence).

Settles' VOP sentence does not exceed the legal maximum sentence for his original conviction for carrying a firearm without a license. This crime can be classified either as a misdemeanor of the first degree or as a felony of the third degree, and it is not known whether Settles' conviction was a misdemeanor or a felony. 18 Pa.C.S. §§ 6106, 6108. His sentence was probation. His subsequent VOP sentence for the firearm offense was two to four years. Therefore, Settles' maximum sentence of imprisonment is four years, which is less than the five year statutory maximum for a misdemeanor of the first degree. 18 Pa.C.S. § 1104(1).

Further, even without credit for time in prison from February 22, 2008, to July 21, 2008, Settles would, at most, spend four years and five months incarcerated on the VOP sentence, which is less than the statutory maximum. 18 Pa.C.S. §§ 1103-1104. Because Settles' total term of imprisonment for his VOP sentence and for time previously served is less than the maximum sentence on his original firearm conviction, his VOP sentence is not illegal.

Using the principles established in *Aviles*, we must assume the trial court considered any time Settles had previously served when it ordered its VOP sentence. The trial court did not state that Settles should be credited with time previously served. Further, his VOP sentence is not illegal. In short, Settles has not stated a clear right to relief in his petition for review.

Settles admits that the sentencing judge did not order credit for time served. He fails to appreciate, however, that the Department has no authority to alter a sentence. It is empowered only to implement the sentence imposed by the sentencing court. *McCray*, 582 Pa. 440, 450, 872 A.2d 1127, 1133.<sup>3</sup> Thus, it cannot give Settles the credit for time served when the trial court did not.

Accordingly, we sustain the Department's preliminary objection in the nature of a demurrer, and we dismiss Settles' petition.<sup>4</sup>

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MARY HANNAH LEAVITT, Judge

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<sup>3</sup> Since Settles has not proven a clear right to relief or a corresponding duty on behalf of the Department, we need not discuss whether Settles has any other adequate remedies.

<sup>4</sup> Settles' outstanding Petition for Prompt Disposition is dismissed as moot.

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**ORDER**

AND NOW, this 6<sup>th</sup> day of April, 2011, the preliminary objection in the nature of a demurrer filed by the Pennsylvania Department of Corrections is SUSTAINED, and the petition for review filed by Kenneth Settles is DISMISSED. Settles' Petition for Prompt Disposition is DISMISSED as moot.

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MARY HANNAH LEAVITT, Judge