

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gilberto Rivera-Mateo,	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Board of Probation	:	
and Parole,	:	No. 660 C.D. 2009
Respondent	:	Submitted: April 1, 2010

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: May 19, 2010

Gilberto Rivera-Mateo (Rivera-Mateo), an inmate currently imprisoned at State Correctional Institution Frackville, petitions for review of the order of the Pennsylvania Board of Probation and Parole (Board) issued March 16, 2009 denying his request for administrative relief, and affirming its decision to recommit him as a technical parole violator to serve nine months backtime. The sole issue before this Court is whether the Board erred in concluding that Rivera-Mateo constructively possessed alcohol and/or weapons in violation of conditions of his parole. For reasons that follow, we reverse the Board's order.

Rivera-Mateo was serving six to fifteen years on a state sentence when he was paroled on December 20, 2006, subject to certain conditions. At that time, his maximum sentence was to expire on January 31, 2014. On July 18, 2008, the Board issued a warrant to commit and detain Rivera-Mateo because of his arrest in New

York City for felony possession of four pounds of marijuana. He was subsequently arrested by parole agents in Pennsylvania. As a result of an ensuing search of Rivera-Mateo's residence, wherein a weapon and alcoholic beverages were found, he was charged with violations of parole condition number 5b (possession of a weapon) and parole condition number 7 (possession of alcohol).

Following a hearing on September 18, 2008, in a decision dated October 27, 2008, the Board found that Rivera-Mateo violated the conditions of his parole regarding possession of weapons and alcohol. The Board recommitted Rivera-Mateo to a state correctional institution to serve nine months backtime as a technical parole violator, with a maximum release date of January 31, 2014.

Rivera-Mateo filed, pro se, an administrative appeal on November 17, 2008, alleging that: (1) there was an illegal search of his residence by parole agents; (2) the Board failed to prove by a preponderance of evidence that he committed technical violations of parole conditions 5b and 7; and, (3) he was not in possession, actual or constructive, of the weapon and alcohol that were found in the residence. By decision, mailed March 16, 2009, the Board affirmed its October 7, 2008 decision to recommit Rivera-Mateo.

Rivera-Mateo, continuing pro se, filed a Petition for Review¹ with this Court on April 8, 2009 alleging that the Board failed to meet its burden of proving that on July 18, 2008, he possessed a weapon and alcohol in technical violation of parole condition numbers 5b (possession of a weapon) and 7 (possession of alcohol).²

¹ Rivera-Mateo's Petition for Review did not raise the issue of whether the search of his residence by parole agents constituted an illegal search. That issue, therefore, is not before this Court.

² "Our review in a parole revocation action is limited to determining whether the findings were supported by substantial evidence, whether constitutional rights were violated, or whether the Board committed an error of law." *Flowers v. Pennsylvania Bd. of Prob. and Parole*, 987 A.2d 1269, 1271 n.3 (Pa. Cmwlth. 2010).

By order dated April 14, 2009, this Court appointed an attorney to represent Rivera-Mateo. On April 20, 2009, the attorney entered his appearance as counsel for Rivera-Mateo.

On July 2, 2009, the attorney filed a petition to withdraw as counsel. By order of this Court dated December 15, 2009, the petition to withdraw was denied on the basis that the no-merit letter³ failed to satisfy the requirements of *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988), in that it failed to address Rivera-Mateo's argument that he was not in possession of the weapon or alcohol at issue, and failed to explain why or how this issue lacks merit. Consequently, the attorney was ordered to file a brief on Rivera-Mateo's behalf addressing the issue of whether the Board erred in concluding that Rivera-Mateo constructively possessed alcohol and/or weapons in violation of the conditions of his parole. The attorney subsequently filed his brief. We will now address the merits of Rivera-Mateo's arguments on appeal.

Rivera-Mateo was recommitted by the Board based upon violations of parole condition number 5b (possession of a weapon) and parole condition number 7 (possession of alcohol). Certified Record (C.R.) at 24-26, 44, 46, 134-135. In parole violation proceedings, the Board must present substantial evidence and establish by a

³ When court-appointed counsel wants to withdraw his representation of a client, he must review the case zealously,

then submit a 'no-merit' letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Zerby v. Shanon, 964 A.2d 956, 960 (Pa. Cmwlth. 2009). "A no-merit letter must include 'substantial reasons for concluding that' a petitioner's arguments are meritless." *Id.* at 962 (quoting *Jefferson v. Pennsylvania Bd. of Prob. and Parole*, 705 A.2d 513, 514 (Pa. Cmwlth. 1998)).

preponderance of evidence that the charged conduct occurred. *Price v. Pennsylvania Bd. of Prob. and Parole*, 863 A.2d 173 (Pa. Cmwlth. 2004). “‘Substantial evidence’ is defined as ‘such relevant evidence as a reasonable mind might accept to support a conclusion of law.’” *Id.*, 863 A.2d at 175. “The Board may consider all the admissible evidence presented to it, but ‘its determination must rest on a foundation of substantial evidence.’” *Id.* “A preponderance of the evidence is such proof as leads the fact-finder, here the Board, to find that the existence of a contested fact is more probable than its nonexistence.” *Sigafoos v. Pennsylvania Bd. of Prob. and Parole*, 503 A.2d 1076, 1079 (Pa. Cmwlth. 1986).

It is undisputed that, on July 18, 2008, when parole agents searched Rivera-Mateo’s deceased mother’s residence, where he resided with his 18-year-old twin brothers, they found a pellet gun, three opened bottles of Old English beer, an open bottle of Bacardi Rum and an unopened bottle of Blue Moon beer. It is also undisputed that the possession of such items would violate Rivera-Mateo’s parole. C.R. at 4-10, 58-59, 61-63, 73-74, 91-97. However, while Rivera-Mateo had access to the areas in which the gun, the Bacardi Rum and the Blue Moon beer were found, he was not in actual possession of the weapon or alcohol when parole agents searched his residence. C.R. at 75-76, 81, 86, 97, 111. Rivera-Mateo argues on appeal that there was insufficient evidence to support the Board’s conclusion that he violated his parole by being in constructive possession of a weapon and alcohol. We agree.

We recognize that to be in violation of conditions of parole prohibiting the possession of weapons and/or alcohol, a parolee need not be in actual possession of them; rather, constructive possession is sufficient. *Smalls v. Pennsylvania Bd. of Prob. and Parole*, 823 A.2d 274 (Pa. Cmwlth. 2003); *Nickens v. Pennsylvania Bd. of Prob. and Parole*, 502 A.2d 277 (Pa. Cmwlth. 1985). “Constructive possession

occurs when a person does not have actual possession but instead knowingly has the power and **intention** at a given time to exercise dominion and control over the object, either directly or through others.” *Smalls*, 823 A.2d at 276 (quotation marks omitted).

Here, Parole Agent Pennypacker testified that he found the pellet gun and the opened bottle of Bacardi Rum in an area he deemed a “common area” of the residence. C.R. at 61-63, 97. Yet, according to the testimony, those items were located in a storage room used by Rivera-Mateo’s brother, Josel Rodriguez (Rodriguez), as a closet. C.R. at 61, 63, 75-76, 84-85. Rodriguez testified that the pellet gun belonged to him. C.R. at 72, 84. He further testified that he found the rum, drank some of it and left the remainder in a box in that same room. C.R. at 106-107. Rivera-Mateo testified that he was not aware that either the pellet gun or the rum was in that room. C.R. at 77, 85, 108, 110. None of the searching agents asked Rivera-Mateo if the pellet gun or the alcohol on the premises were his. C.R. at 66, 69-70, 77-78, 103, 105. Neither the pellet gun nor the alcohol bottles were fingerprinted to see whether Rivera-Mateo had handled them. C.R. at 70, 98. Finally, the alcohol bottles were not swabbed, nor was Rivera-Mateo tested relative to alcohol consumption at the time of the search. C.R. at 98-100, 103. Parole Agent Lee stated that she merely assumed that the alcohol on the premise was Rivera-Mateo’s since he was the only resident over the age of 21. C.R. at 100.

In *Smalls*, this Court held that *the mere presence of alcohol in an apartment does not establish a parolee’s possession* thereof, and that there must be some showing that the parolee had the intention to exercise control over it beyond the fact that he had access to the object. Such intention may be difficult to prove when there is an opportunity for someone else to have consumed and/or placed the

contraband in a residence. While the requisite intent may be inferred from a totality of circumstances,⁴ the burden of proof in these cases remains with the Board. Here, as in *Smalls*, there were other residents who had equal access to the items at issue, and the record is devoid of any showing that Rivera-Mateo intended to control the pellet gun or the alcohol.⁵

The Board argues that the hearing examiner in this case “obviously found” the Board’s witnesses credible, and Rivera-Mateo’s contradictory evidence “incredible,” since it ruled in the Board’s favor. Board Br. at 10. We do not reach the same conclusion. We acknowledge “[t]he Board, as the ultimate fact-finder, evaluates witness credibility, resolves conflicts in the evidence, and assigns evidentiary weight. . . . and we will not interfere with the Board’s finding of a technical parole violation if it is supported by substantial evidence.” *Flowers v. Pennsylvania Bd. of Prob. and Parole*, 987 A.2d 1269, 1271 n.2 (Pa. Cmwlth. 2010) (citation omitted). However, this case does not present a credibility issue. Nowhere in the record was a credibility determination made. In fact, the hearing examiner stated on the record at the hearing, “we’re not here to determine credibility[; w]e’re here for preponderance on a violation.” C.R. at 87. Moreover, the evidence at issue here is not contradictory as the testimony provided by Rivera-Mateo and Rodriguez served to supplement rather than contradict the testimony of Parole Agents Lee and Pennypacker.

⁴ *Commonwealth v. Ocasio*, 619 A.2d 352 (Pa. Super. 1993).

⁵ We find the Superior Court opinion in *Commonwealth v. Ocasio* to be instructive on this point. There, the Superior Court held that where multiple persons had equal access to a location where drugs were stored, the Commonwealth must introduce evidence of participation in the drug related activity or evidence connecting the accused to the specific room or areas where the drugs were stored in order to make a case for constructive possession in criminal matters; presence alone in conjunction with such access is insufficient to prove the conscious dominion required. *Id.*

In order to uphold the Board's decision, we must find that there was sufficient evidence for the Board to have determined that Rivera-Mateo was more likely in constructive possession of the pellet gun and the alcohol than not. Based upon this record and this Court's decision in *Smalls*, we hold that the Board failed to meet its burden. Rivera-Mateo was not in constructive possession of the weapon or the alcohol found by parole agents in their search of his residence. Consequently, Rivera-Mateo was not in violation of the conditions of his parole. Therefore, the Board's order denying his request for administrative relief and recommitting him as a technical parole violator to serve nine months backtime must be reversed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 19th day of May, 2010, the order of the Pennsylvania Board of Probation and Parole issued March 16, 2009 is reversed.

JOHNNY J. BUTLER, Judge