IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Michael McClary, | : | |
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| Petitioner | : | |
| | : | |
| v. | : | No. 72 C.D. 2010 |
| | : | Submitted: July 30, 2010 |
| Pennsylvania Board of Probation and Parole, | : | |
| | : | |
| Respondent | : | |
| | : | |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY SENIOR JUDGE FLAHERTY

FILED: December 14, 2010

Michael McClary (McClary) petitions for review from an order of the Pennsylvania Board of Probation and Parole (Board) which denied his request for administrative relief. We affirm.

McClary was last paroled from a sentence of five to twenty years as a result of his conviction for violating 18 Pa. C.S. § 3701, relating to robbery. McClary was not released from confinement at that time, but was paroled to commence serving a detainer sentence. McClary was denied parole on the detainer sentence and completed serving the maximum term of that sentence on September 24, 2008. On September 26, 2008, McClary was

arrested in Philadelphia on new criminal charges, but was continued on parole pending disposition of the charges.

After incidents involving alleged cocaine use by McClary, on September 26, 2008, McClary's parole agent imposed a special condition of parole, number seven, which required McClary to successfully complete the Penn CAPP program (program) for drugs and alcohol at the Kintock Group in Philadelphia. The new criminal charges were later withdrawn.

On April 20, 2009, parole agents arrested McClary after he was discharged from the program. McClary was discharged from the program because he broke a rule regarding truthfulness. Namely, McClary staged a slip and fall accident at the facility and faked an injury.

A preliminary hearing was held at which it was determined that probable cause existed to believe that McClary violated special parole condition number seven, which required him to successfully complete the program. Thereafter, a panel revocation hearing was held on July 29, 2009.

At the violation hearing, Victoria Jackson (Jackson), a supervisor for the program, testified that on April 18, 2009, she saw McClary sitting on the floor and that McClary told her that he had slipped and fallen. Jackson did not observe McClary slip and fall. Jackson then called paramedics who determined that McClary did not need treatment.

Corey Davis (Davis), a senior case manager for the program, testified that he became aware of the incident when he received a grievance filed by McClary. Davis stated that he interviewed McClary regarding the incident and informed him that he was going to review the videotape which recorded the incident. Davis then began to testify as to what he saw on the

videotape. Counsel for McClary objected and the hearing examiner ruled that Davis would be permitted to testify as to what he did in response to what he had observed on the videotape.

Davis stated that after he viewed the videotape, he discharged McClary from the program for making a false claim. Davis asserted that McClary was unsuccessfully discharged from the program for making a claim that he slipped at the facility and had been injured, requiring the facility to contact paramedics and, that based upon what was observed on the videotape, it was determined that McClary staged the slip and fall and that the injury was faked.

McClary testified that on April 18, 2009, he walked out of the cafeteria with a cup of ice in his hand, slipped on a wet spot on the floor and ended up lying on the floor on his back. After being examined by the paramedics, several residents helped him back to his room. McClary had difficulty walking and Jackson provided him with crutches and an ace bandage. After being denied medication for the pain, McClary filed a grievance and met with Davis. According to McClary, after viewing a video of the incident, Davis informed McClary that it looked as if McClary was pouring water onto the floor when he fell.

The videotape of McClary's April 18, 2009 slip and fall was played at the hearing. However, the videotape was never offered or admitted into evidence.

On August 14, 2009, the Board issued a decision recommitting McClary for twelve months as a technical parole violator for violating special condition number seven, being unsuccessfully discharged from the

program. McClary thereafter filed an administrative appeal, which was denied by the Board.

On appeal, McClary argues that the Board's determination that he violated a special condition of his parole by being unsuccessfully discharged from the program for being untruthful, is not supported by substantial evidence.[1]

Here, McClary does not dispute that he was unsuccessfully discharged from the program. However, in accordance with Hudak v. Pennsylvania Board of Probation and Parole, 757 A.2d 439 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 565 Pa. 657, 771 A.2d 1291 (2001), McClary argues that the Board was required to prove that he was "somewhat at fault" for his unsuccessful discharge and that the Board failed to do so. In Hudak, this court stated that the Board has the burden of showing that a parolee was somewhat at fault for a violation of a special condition of parole when the ability to comply with the special condition is completely outside of the parolee's control. Id. at 442. In that case, we determined that the Board failed to prove that the parolee was somewhat at fault for being discharged from a community corrections center for purely medical reasons.

"In contrast, no such burden is placed on the Board when a parolee acts under his free will and violates his parole." McPherson v. Pennsylvania Board of Probation and Parole, 785 A.2d 1079, 1081 (Pa.

[1] This court's review is limited to determining whether necessary findings are supported by substantial evidence, an error of law was committed, or constitutional rights were violated. Pometti v. Pennsylvania Board of Probation and Parole, 705 A.2d 953 (Pa. Cmwlth. 1998).

Cmwlth. 2001). Such acts include leaving an approved district, possession of a weapon and interacting with unauthorized persons. Id. Here, the reason that McClary was discharged from the program was not for a medical problem, as was the case in Hudak; McClary was discharged for being untruthful. Such action was within McClary's control.

In this case, the decision to discharge McClary, according to Davis, was based on McClary making a false claim. Davis testified that he made his determination after reviewing the video of the incident. At the Board hearing, counsel for McClary objected to Davis' testimony regarding what he observed on the tape and how he interpreted McClary's actions on the tape. The hearing examiner ruled that Davis would be permitted to testify only as to what he did in response to viewing the video. Davis testified that after viewing the video, he discharged McClary for untruthfulness. The Board credited Davis' testimony and witness credibility is within the discretion of the Board. Chapman v. Pennsylvania Board of Probation and Parole, 484 A.2d 413 (Pa. Cmwlth. 1984).

However, because the videotape was not introduced into evidence at the parole hearing and because McClary objected to Davis describing events on the videotape, McClary argues that no substantial evidence exists to support the Board's determination that he was discharged for staging a slip and fall. We disagree.

According to McClary, in accordance with Pa. R.E. 1002, in order to prove the content of a writing, recording, or photograph, the original is required unless otherwise provided by a court rule or statute. Pa. R.E. 1002 provides:

Rule 1002. Requirement of original

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, by other rules prescribed by the Supreme Court, or by statute.

The Superior Court addressed the applicability of Pa.R.E. 1002 to videotapes in Commonwealth v. Lewis, 623 A.2d 355 (Pa. Super. 1993). In that case, Lewis was sentenced for retail theft. At his trial, over defense counsel's objection, a police officer testified that he watched a videotape which showed Lewis handing an electronic item from a store to his co-worker, who then placed it in his jacket while Lewis glanced around the store. Neither of the men attempted to pay for the item before leaving the store. The Superior Court determined that it was error to permit the officer to testify as to what he observed on the videotape when the tape itself had not been introduced into evidence. "We find that the facts in the instant case present the same type of circumstances which the best evidence rule was designed to guard against: a witness is attempting to testify regarding the contents of a videotape when the tape itself has not been introduced into evidence. … [T]he best evidence rule should apply, in order to prevent any mistransmission of the facts surrounding Appellant's acts in the Sear's store which might mislead the jury." Id. at 358.

Here, although counsel for McClary objected to the videotape as hearsay, he did not raise a best evidence objection, as was the case in Lewis. As stated in Lewis, conduct recorded on a videotape does not fall within the category of assertive conduct, which is conduct intended to

convey a message. Accordingly, neither the hearsay rule nor the hearsay exception is applicable.

Finally, we address McClary's contention that his parole agent lacked the statutory authority to impose a special condition of parole on him, inasmuch as only the Board has statutory authority to impose special conditions. McClary acknowledges that this issue was not raised at his violation hearing or in his administrative appeal to the Board. Issues not raised in an administrative appeal to the Board are waived. McCaskill v. Pennsylvania Board of Probation and Parole, 631 A.2d 1092 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 537 Pa. 655, 644 A.2d 739 (1994).

Nonetheless, McClary contends that this court "may nevertheless consider this issue in that it goes to the jurisdiction of the Parole Board to revoke his parole for an agent-imposed special condition of parole, which is one of the exceptions set forth in Pa. R.A.P. 1551 (relating to scope of review), and is a question that this Court can consider without the issue being first raised before the Parole Board." (McClary's brief at 33.)

We observe that Pa. R.A.P. 1551(a)(2), relied on by McClary, provides that a court shall not consider any issue which was not raised before the government unit except, "[q]uestions involving the jurisdiction of the government unit over the subject matter of the adjudication." McClary claims that his challenge to the agent's authority to impose special conditions fits within this exception. We agree with the Board, however, that he is not questioning the jurisdiction of the government unit. Rather, he is questioning an agent's authority to impose a condition. Thus, the

exception under Pa. R.A.P. 1551(a)(2) does not apply and the issue of whether a parole agent has authority to impose conditions on a parolee is an issue not properly before this court.

In accordance with the above, the order of the Board is affirmed.

JIM FLAHERTY, Senior Judge

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**O R D E R**

Now, December 14, 2010, the order of the Pennsylvania Board of Probation and Parole is affirmed.

JIM FLAHERTY, Senior Judge