

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jeremy S. Balsinger, :
Petitioner :
 :
v. :
 :
 :
Pennsylvania Board of :
Probation and Parole, : No. 7 C.D. 2011
Respondent : Submitted: May 13, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: June 14, 2011

Jeremy Balsinger (Balsinger) challenges the final determination of the Pennsylvania Board of Probation and Parole (Board) that recommitted him to serve twelve months backtime as a convicted parole violator to be served concurrently with a previously imposed nine months backtime as a technical parole violator.¹

Balsinger was effectively sentenced on February 27, 2006, to a term of one to three years for credit card offenses and to a term of four months to two years for a bad check conviction to be served consecutively. The Board paroled Balsinger on July 28, 2008, to a community corrections program. On or about February 5, 2009, Balsinger was charged with indecent assault and harassment.

¹ This Court's review is limited to determining whether the Board's findings are supported by substantial evidence, are in accordance with the law, and whether constitutional rights have been violated. Krantz v. Pennsylvania Board of Probation and Parole, 483 A.2d 1044 (Pa. Cmwlth. 1984). This Court will interfere with the Board's exercise of administrative discretion only where it has been abused or exercised in an arbitrary or capricious manner.

On February 13, 2009, the Board declared Balsinger delinquent effective February 9, 2009. On August 10, 2009, the Board issued a warrant to commit and detain Balsinger. On August 10, 2009, Balsinger was arrested by the City of Erie Police Department for unauthorized use of a motor vehicle. He was released on his own recognizance for both charges on August 13, 2009.

The Board charged Balsinger with the following technical violations: changing his approved residence without written permission, failing to maintain regular contact with parole supervision staff, and failing to comply with curfew. In a decision recorded on October 5, 2009, and mailed October 8, 2009, the Board recommitted Balsinger to serve nine months backtime as a technical parole violator pending resolution of the outstanding criminal charges.

On January 5, 2010, Balsinger pled guilty to driving while his operating privilege was suspended/revoked and was sentenced to pay a fine of \$200 plus costs. He also pled guilty to indecent assault and was sentenced to a term of one to two years plus costs. He also pled guilty to harassment and was fined \$300.

On June 30, 2010, the Board held a revocation hearing based on the criminal convictions. Balsinger's attorney moved for dismissal on the basis, that the hearing was untimely because Balsinger was convicted on January 5, 2010, the Board's verification of conviction was dated January 28, 2010, and the hearing was not held within one hundred twenty days of either date. Parole Agent William Stidfole responded that Balsinger did not return to custody of the Department of

Corrections until March 2, 2010, so the June 30, 2010, hearing date was timely. Notes of Testimony, June 30, 2010, at 7-8; Certified Record (C.R.) at 72-73. The record of the convictions was introduced into evidence. Balsinger did not testify.

In a decision recorded August 25, 2010, and mailed October 27, 2010, the Board recommitted Balsinger to serve twelve months backtime as a convicted parole violator to be served concurrently with the previously assessed nine months of backtime as a technical parole violator.

Balsinger requested administrative relief and alleged that the Board erred when it overruled his objection to the timeliness of the hearing and the Board erred when it did not grant him one hundred forty-five days credit for the time he was out on bail pending the disposition of the criminal charges.

The Board denied the request for administrative relief:

Because the Board revoked your parole by a revocation decision mailed October 8, 2009, you were no longer on parole when you pleaded guilty on January 5, 2010, so the 120-day rule of 37 Pa.Code §71.4 did not apply to your guilty pleas. Even if the 120-day rule of 37 Pa.Code §71.4 had applied to your guilty pleas, the 120-day period would have begun on March 2, 2010, when you were returned to the State Correctional Institution at Pittsburgh, so that the Revocation Hearing held 120 days later on June 30, 2010, would have been held within the 120-day period. The recalculation order did credit your 5-year sentence within 145 days you were confined from August 13, 2009, to January 5, 2010.

Board Decision, December 17, 2010, at 1; C.R. at 107.

Balsinger contends that the Board did not hold a timely revocation hearing. He concedes that he was returned to the State Correctional Institution at Pittsburgh (SCI-Pittsburgh) on March 2, 2010. He argues that the revocation hearing held on June 30, 2010, was one hundred twenty-one (121) days after his return to SCI-Pittsburgh and, thus, untimely because it was outside one hundred and twenty days.

"When a parolee alleges that the [B]oard held a revocation hearing beyond the 120-day period..., the [B]oard bears the burden of proving, by a preponderance of the evidence, that a timely revocation hearing was held." Saunders v. Pennsylvania Board of Probation and Parole, 568 A.2d 1370, 1371 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 522 Pa. 620, 590 A.2d 760 (1990).

37 Pa. Code §71.4(1) provides in pertinent part that

before a parolee is recommitted as a convicted violator . . . 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 except as follows . . . if a parolee is confined outside the jurisdiction of the Department of Corrections, such as confinement out-of-State, confinement in a Federal correctional institution or confinement in a county correctional institution where the parolee has not waived the right to a revocation hearing by a panel in accordance with Commonwealth ex rel. Rambeau v. Rundle, 455 Pa. 8, 314 A.2d 842 (1973), the revocation hearing shall be held within 120 days of the official verification of the return of the parolee to a State correctional facility. (Emphasis added).

Here, the parties agree that Balsinger was returned to SCI-Pittsburgh on March 2, 2010. Balsinger argues that his hearing on June 30, 2010, was untimely because it was held 121 days after March 2, 2010. The Board argues that the hearing was timely because it was held 120 days after March 2, 2010.

The Board's regulation, 37 Pa.Code §71.5(d), provides: "The number of days set forth in this chapter shall be calculated as prescribed by 1 Pa.C.S. §1908 (relating to computation of time)."

Section 1908 of the Statutory Construction Act, 1 Pa.C.S. §1908, provided in pertinent part:

When any period of time is referred to in any statute, such period in all cases, except as otherwise provided in section 1909 of this title (relating to publication for successive weeks) and section 1910 of this title (relating to computation of months) shall be so computed as to exclude the first and include the last day of such period.

In Africa v. Pennsylvania Board of Probation and Parole, 556 A.2d 506 (Pa. Cmwlth.), *petition for allowance of appeal*, 522 Pa. 625, 564 A.2d 917 (1989), Dennis Sims Africa (Africa), a parolee, pled guilty to robbery. The Board received official verification of Africa's guilty plea on November 17, 1986. On December 9, 1986, the Board held a panel revocation hearing that was continued until such time as Africa could secure counsel. On January 22, 1987, Africa asked a counselor to inform the Board that he was ready for the revocation hearing. After not receiving a response, Africa informed the Board in writing that he was ready to proceed. The Board received the letter on April 16, 1987. The Board held

a revocation hearing on August 11, 1987. Africa challenged the timeliness of the hearing, but the Board concluded that any delay due to the continuance was attributable to Africa. Africa petitioned for review with this Court and contended that the hearing was not held in a timely manner. Africa, 556 A.2d at 507-508.

This Court determined that the Board's revocation hearing was timely. What is instructive to the present controversy was how this Court applied Section 1908 of the Statutory Construction Act, 1 Pa.C.S. §1908, and commenced the countdown on November 18, 1986, the date after the Board received official verification of Africa's conviction. Africa, 556 A.2d at 509.

Here, Balsinger was returned to Board custody on March 2, 2010. His revocation hearing was held on June 30, 2010. Applying the Board's regulation, the Statutory Construction Act, and Africa, the count commenced on March 3, 2010. There were twenty-nine (29) remaining days in March, thirty (30) in April, thirty-one (31) in May, and thirty (30) in June for a total of 120 days. The Board did not err when it held that the hearing was timely.

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

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ORDER

AND NOW, this 14th day of June, 2011, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge