

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maurice Evans,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
	:	
Pennsylvania Board of	:	
Probation and Parole,	:	
	:	No. 82 C.D. 2011
Respondent	:	Submitted: July 8, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: August 12, 2011

Maurice Evans (Evans) petitions for review of the January 5, 2011 order of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief. The issue before this Court is whether the Board contravened Evans' due process right to timely resolution of a parole violation charge. For the following reasons, we affirm the order of the Board.

On January 25, 2006, Evans was paroled from an aggregated 30-year state prison sentence for burglary, criminal conspiracy (burglary) and violation of parole, subject to certain conditions. On December 1, 2008, Evans was arrested and charged with simple assault on his girlfriend and reckless endangerment of another person. On December 2, 2008, the Board issued a warrant to commit and detain Evans based upon the new criminal charges. On December 22, 2008, the Board held a detention hearing to determine whether there was probable cause to detain Evans on the new criminal charges. On August 23, 2010, the new criminal charges were

dismissed for lack of prosecution. On September 10, 2010, the Board withdrew its order detaining Evans on the new criminal charges, and issued a new warrant to commit and detain Evans for violation of parole Condition 5(c) (refrain from assaultive behavior), stemming from his December 1, 2008 assault on his girlfriend.

On September 17, 2010, Evans waived his right to counsel, to a preliminary hearing, and to a violation hearing; and admitted the parole violation as charged. He also asked the Board to consider the time he had been detained on the new criminal charges when calculating his time. Evans did not withdraw or revoke his admission within ten days. By order issued November 2, 2010, the Board recommitted Evans as a technical parole violator to serve 12 months backtime. On November 16, 2010, Evans filed an administrative appeal of the Board's revocation decision, claiming that Evans' parole agent induced him to admit his parole violation, waive his right to counsel and a violation hearing; and that the Board erred by failing to apply the 21 months he had been detained on the Board's warrant for new criminal charges to the sanction he received as a result of his parole violation. The Board issued a decision on January 5, 2011 changing his reparole review date to account for the time he served on the Board's first warrant, but otherwise affirming the Board's revocation decision. Evans filed an appeal with this Court.¹

Evans' sole argument on appeal is that the Board violated his due process right to timely resolution of his parole violations by waiting until after his criminal assault charges had been dismissed to prosecute him for the behavior underlying the dismissed charges. We disagree. "The Board has broad discretion to administer the parole laws, and the Court will defer to the Board's interpretation of its

¹ "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).

regulations if it is consistent with statutory authority and is not clearly erroneous.” *Jackson v. Pennsylvania Bd. of Prob. and Parole*, 885 A.2d 598, 601 (Pa. Cmwlth. 2005). This Court has recognized that:

there is no constitutional limitation for the *initiation* of parole revocation proceedings. . . . [D]ue process . . . rights do not attach simply because the parolee commits a parole violation, nor even because the Board discovers the violation. No deprivation of a liberty interest of the parolee is effected until he is taken into custody because of the violation.

Garfield v. Pennsylvania Bd. of Prob. and Parole, 454 A.2d 1187, 1189 (Pa. Cmwlth. 1983). Accordingly, it has long been the law, and it is undisputed by Evans, that the Board is authorized to detain a parolee during pendency of criminal charges and defer prosecution of a parole condition violation until disposition of the criminal charges has been reached. *Garfield*; *Cromartie v. Pennsylvania Bd. of Prob. and Parole*, 680 A.2d 1191 (Pa. Cmwlth. 1996). In *Cromartie*, this Court specifically recognized that “the Board’s course of action, charging technical parole violations after criminal charges for which [a parolee] was charged . . . were dropped may smack of unfairness,” the Board is nonetheless authorized to take such action. *Id.*, 680 A.2d at 1196 n.10. Because the Board was authorized to await the final disposition of Evans’ new criminal charges before detaining him for his parole violation, the Board did not violate Evans’ due process right to timely resolution of his parole violation. Having found that the Board’s action in this case was within its discretion and was not erroneous, we will not disturb its decision.

We note that in his brief, Evans objects to the Board’s violation of Section 71.2(10) of the Board’s Regulations, 37 Pa.Code § 71.2(10).² The Board

² Section 71.2(10) of the Board’s Regulations provides: “If a [parole] violation hearing is scheduled, it shall be held not later than 120 days after the preliminary hearing.”

argues that Evans waived his right to raise this issue on appeal. We agree. Pa.R.A.P. 1551(a) states in pertinent part: “Review of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which was not raised before the government unit” This Court has specifically held that where an issue is “not raised before the Board in either the revocation hearing or in [a parolee’s] administrative appeal, the issue has been waived and cannot be considered for the first time in his judicial appeal.” *Dear v. Pennsylvania Bd. of Prob. and Parole*, 686 A.2d 423, 426 (Pa. Cmwlth. 1996).

Evans admits in his brief that he “did not raise the issue of the timeliness of his Violation Hearing . . . or in the form wherein he admitted the violation.” Evans Br. at 14. It is also clear from the record that, with the exception of a vague reference that “the Board’s action violates its own Regulations” and a specific reference to only Section 76.4 of the Board’s Regulations, 37 Pa.Code § 76.4, he did not raise this issue in his administrative appeal of the Board’s revocation decision. Certified Record (C.R.) at 47. In addition, Evans’ petition for review stated generally that “the Board’s action violates applicable Board Regulations,” and specifically asked that this Court resolve only the issue of whether the Board “contravened Petitioner’s due process protection to a timely resolution of his parole violations by waiting until after his criminal assault charges had been dismissed to prosecute him for the behavior underlying the dismissed charges.” Pet. for Review ¶¶ 5, 6. Finally, although Evans mentions the issue of violation of Section 71.2(10) of the Board’s Regulations in his brief, he fails to address it in his statement of questions involved. Pa.R.A.P. 2116(a) states, in relevant part: “No question will be considered unless it is stated in the statement of questions involved, or is fairly suggested thereby.” Because Evans had the opportunity, but failed to raise the issue in his administrative appeal to the Board

or in his petition for review, and failed to properly raise it in his brief to this Court, he has waived that argument. Thus, it need not now be considered by this Court.³

³ Even if this Court were to address this issue, we would find that the Board did not violate Section 71.2(10) of the Board's Regulations. The term "preliminary hearing," as it is used in Section 71.2, refers to "[a] hearing held to determine whether there is probable cause to believe that a parolee has committed a technical violation of parole." 37 Pa. Code § 61.1. In addition, due process requires only that there be a "timely disposition of parole violation charges *once they are filed.*" *Garfield* at 1189. Moreover, this Court has held that the initial paragraph of Section 71.2 of the Board's Regulations renders the provisions thereof inapplicable where, as here, a parolee is already detained on new criminal charges. *Lanzetta v. Pennsylvania Bd. of Prob. and Parole*, 568 A.2d 283, 285 (Pa. Cmwlth. 1989) (a preliminary hearing on parole violations was not required where the petitioner was already detained on new criminal charges). Because Section 71.2 does not set forth a time limitation for a violation hearing under circumstances where no preliminary hearing is required, the Board must hold the violation hearing "within a reasonable time after the parolee is taken into custody" on his parole violation charges. *See Morrissey v. Brewer*, 408 U.S. 471 (1972); *see also Harris v. Pennsylvania Bd. of Prob. and Parole* (Pa. Cmwlth. 1479 C.D. 2008, filed June 18, 2009). Thus, rather than requiring that Evans' violation hearing be held within 120 days of his December 22, 2008 preliminary/detention hearing relative to his new charges, as Evans suggests, the law requires that Evans' violation hearing be held within a reasonable time following his September 10, 2010 detainer. That would have happened, but for Evans' waivers.

Section 71.2(5) of the Board's Regulation, 37 Pa. Code § 71.2(5), specifically provides that a parolee may waive his right to a preliminary hearing, right to counsel and right to a violation hearing. Section 71.2(7)(iii) of the Board's Regulations, 37 Pa. Code § 71.2(7)(iii), anticipates admissions by parolees to parole violations. This Court has held that, because the clear statements in the waiver/admission forms alone are sufficient evidence to justify recommitment, no violation hearing is required after a parolee admits that he violated the terms and conditions of his parole and waives his right to a hearing. *McKenzie v. Pennsylvania Bd. of Prob. and Parole*, 963 A.2d 616 (Pa. Cmwlth. 2009); *Prebella v. Pennsylvania Bd. of Prob. and Parole*, 942 A.2d 257 (Pa. Cmwlth. 2008). In order to prove that a parolee made a knowing and voluntary waiver, "all that is required is for the Board to show that it followed its own regulations and provided the necessary information to the offender prior to the offender signing the written waiver form." *McKenzie*, 963 A.2d at 620.

Here, on September 17, 2010, Evans signed the violation hearing waiver after being advised of his constitutional rights to preliminary and violation hearings, and that he did so of his "own free will, without promise, threat or coercion." C.R. at 38. Evans also signed the waiver of representation by counsel after being advised of his right to be represented, and that he did so of his "own free will, without promise, threat or coercion." C.R. at 39. Evans further admitted the parole violation "knowingly, intelligently, and voluntarily," and with knowledge his admission could be withdrawn within ten days. C.R. at 38. His signature in each instance was witnessed. C.R. at 38-40. His waiver and admission was also reviewed and signed by parole supervisor, Bobby Kemper, on September 21, 2010. C.R. at 38. Evans did not retract his admission within the ten-day grace period. Clearly, there is sufficient evidence in this case that Evans made knowing and voluntary waivers, particularly of his violation hearing. The Board did not, therefore, violate Section 71.2(10) of its Regulations.

The Board's order is, therefore, affirmed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 12th day of August, 2011, the January 5, 2011 order of the Pennsylvania Board of Probation and Parole is affirmed.

JOHNNY J. BUTLER, Judge