IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tyrone Armstrong,	:	
Petitioner	:	
v.	:	No. 851 C.D. 2010
	:	Submitted: September 24, 2010
Pennsylvania Board of Probation	:	
and Parole,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** February 1, 2011

Petitioner Tyrone Armstrong (Armstrong) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board), which denied his administrative appeal of a Board decision. The underlying Board decision rejected Armstrong's claim that he was entitled to credit on his sentence for time he spent on parole in the Kintock-Erie Community Correction Center group home (Kintock) and in an Eagleville Hospital North Philadelphia program (Eagleville), another group home. We affirm.

Armstrong was serving a five-year prison sentence when, on August 15, 2005, the Board released Armstrong on parole. As per the Board's release

order, Armstrong lived in Kintock from August 15, 2005, until November 21, 2005. Armstrong lived in Eagleville from March 27, 2006, until June 23, 2006.

While on parole, Armstrong was arrested and ultimately convicted of new criminal charges. The Board issued an order on February 26, 2009, recommitting Armstrong as a convicted parole violator and recalculating his maximum sentence release date. Armstrong challenged the Board's refusal to credit his original sentence with time Armstrong spent in Kintock and Eagleville. A Board hearing examiner conducted a hearing solely on the question of whether the nature of Armstrong's placement in those programs sufficiently constrained his liberty such as to entitle him to credit.[1]

Although Armstrong purported to testify, he did not present any direct evidence regarding any specific restrictions the programs placed on his liberty. Rather, he simply asserted that in judicial decisions involving other post-release programs, courts had held that the conditions of such programs were such that time spent in the programs was the equivalent of incarceration, thereby entitling the parolee to credit on his sentence.

[1] This hearing is known as a *Cox* hearing based upon our Supreme Court's decision in *Cox v. Pennsylvania Board of Probation and Parole*, 507 Pa. 614, 493 A.2d 680 (1985), which requires the Board to conduct a hearing when a recommitted convicted (or direct) violator asserts that a program to which he was assigned following parole encompasses conditions that are the essential equivalent of a prison.

Armstrong's parole agent, Carlos Riera, engaged in direct examination of Corey Davis, who worked at Kintock as a senior case manager. Mr. Davis testified to the following characteristics of Kintock: (1) Kintock was a secure facility with which the Department of Corrections contracted to provide services to residents who had been released from prison; (2) the doors had locks, but "they're pretty much locked to keep anyone from the outside getting in;" (3) there is a fence around the courtyard of the facility and a gate at the entrance of the facility; (4) if a parolee asks to leave the facility, staff will open the doors; (5) if a parolee does not have authorization to leave the facility, staff will report the parolee to the Board as an absconder; (6) a parolee may walk unescorted around the facility; (7) a parolee can leave Kintock for work, school, social purposes, religious purposes, and other reasons if he has authority to do so; and (8) a parolee must have permission from his agent in order to travel to Philadelphia. (Certified Record (C.R.) at 12-14.)

On cross-examination, Davis testified that a parolee who leaves the building without authorization is regarded as an absconder and a parolee who is on pre-release would be considered an escapee if he leaves without authorization. (C.R. at 14-15.)

Mr. Riera also presented the testimony of a former employee of Eagleville, Joseph Kelly. Mr. Kelly testified to the following conditions at

Eagleville: (1) the facility was not a secure facility, but the doors were locked to prevent outsiders from coming in; (2) the facility did not have a fence around it and was not a secure facility; (3) nothing prevented a parolee from leaving, but if a parolee is "absent," staff would call the Board to report the parolee as an absconder; (4) the parolees were mostly "halfway back," and thus did not work or have furloughs; (5) if a parolee had a medical appointment, the parolee was usually escorted to the appointment by a staff member; and (6) a parolee could not walk about the grounds unescorted. (C.R. at 76-77.) In his closing remarks, Mr. Riera stated: "If a parolee wants to leave, they basically open the door and let them go. They do not restrain them. They report to Harrisburg. We put them on the absconder list." (C.R. at 80-81.)

The Board rejected Armstrong's claim that he was entitled to credit for the time spent at Kintock and Eagleville, reiterating the analysis set forth by the Supreme Court in *Cox* and concluding that Armstrong had not satisfied his burden. This Court neatly summarized those standards in *Harden v. Pennsylvania Board of Probation and Parole*, 980 A.2d 691 (Pa. Cmwlth. 2009):

> 1. Because a parolee does not enter a residential facility pursuant to a court order but, rather voluntarily agrees to do so "as part of his parole program, his attendance there is presumed to be at 'liberty on parole.'"
>
> 2. The presumption that attendance at a residential facility is "at liberty on parole" may be rebutted. However, it is the burden of the parolee to develop a

> factual record and to persuade the Board that the residential program he attended was a "prison equivalent precluding the conclusion that [the parolee] was at 'liberty on parole.'"
>
> 3. If the Board is not persuaded that the parolee did time in a "prison equivalent," courts should "not interfere with the Board's determination of that issue unless it acts arbitrarily or plainly abuses its discretion."

Harden, 980 A.2d at 697-98 (citations omitted).[2]

On appeal,[3] Armstrong's primary argument is that the evidence in the record is sufficient to demonstrate that the characteristics of his residency at both Kintock and Eagleville were the equivalent of a prison, such that he was not "at liberty on parole." The Board's primary argument is that Armstrong failed to present any evidence that he was subject to a rule prohibiting him from leaving either facility without a mandatory coercive security escort.

In *Cox*, the Supreme Court "declined to issue a *per se* rule that all time spent in a residential facility as a condition of parole is time 'at liberty on parole.'" *Harden*, 980 A.2d 697. The Supreme Court in *Cox* addressed the meaning of the phrase "at liberty on parole" and wrote:

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[2] In *Harden*, we noted that the *Cox* principles make it difficult for a parolee to rebut the presumption that a parolee is not entitled to sentence credit for time spent in a residential facility. *Harden*, 980 A.2d at 698.

[3] This Court's standard of review of an order of the Board denying credit to a parolee for time spent in a residential facility is limited to considering whether the Board acted arbitrarily or abused its discretion. *Cox*, 507 Pa. at 620, 493 A.2d at 683.

> . . . All forms of parole involve some restraint on the parolee's liberty, and non-compliance with them can result in arrest and recommittal as a technical parole violator. It is appellant's burden, on remand, to show the specific characteristics of the . . . program that constituted restrictions on his liberty sufficient to warrant credit on his recomputed backtime, and persuade the Board of that fact. Moreover, we will not interfere with the Board's determination of that issue unless it acts arbitrarily or plainly abuses its discretion.

Cox, 507 Pa. at 620, 493 A.2d at 683 (citations and footnote omitted) (emphasis added).

In *Cox*, the Supreme Court reversed this Court's order affirming the Board's denial of credit for a parolee who had resided in an inpatient drug treatment program at Eagleville Hospital. The Supreme Court remanded the matter for additional hearings, opining:

> The Board imposed special conditions on appellant's parole, conditions beyond those generally imposed on parolees. While the Board had the statutory authority to impose these conditions, the specific programs at [the facility] may have been so restrictive that they require the granting of credit. Other programs may not require such credit. We cannot make an informed determination of this issue on the record before us.

Id., 507 Pa. at 619-20, 493 A.2d at 683-84 (citations and footnotes omitted).

Following the Supreme Court's decision in *Cox*, this Court has had the opportunity on several occasions, including its most recent *en banc* decision in *Harden*, to consider whether a parolee's time in a non-prison facility constituted

time "at liberty" for purpose of credit for time-served. *See Meleski v. Pennsylvania Bd. of Probation and Parole*, 931 A.2d 68, 72 (Pa. Cmwlth. 2007) (holding that parolee was not at liberty given he was not permitted to leave particular floor of facility except for meals and use of escorts for appointments outside facility was for "mandatory coercive" effect as opposed to "transportation assistance"); *Torres v. Pennsylvania Bd. of Probation and Parole*, 861 A.2d 394, 400-01 (Pa. Cmwlth. 2004) (holding that parolee who has been forbidden generally to leave particular facility and who is under 24-hour supervision and is not permitted to make trip without escort "cannot reasonably be described as being 'at liberty on parole.'"); *Jackson v. Pennsylvania Bd. of Probation and Parole*, 568 A.2d 1004 (Pa. Cmwlth. 1990) (holding Board did not abuse its discretion in determining program lacked sufficient custodial aspects to characterize time spent there as confinement rather than liberty where doors were not locked, facility had no fences and staff did nothing to prevent parolee from leaving but would notify Board if parolee left facility).

In *Harden*, this Court first considered the physical construction of the facility to determine whether it was "prison-like." *Harden*, 980 A.2d at 699. The Court determined that the facility was physically constructed in a way that the Court had held on numerous occasions was unlike prisons. The Court specifically stated that "[f]acilities are not prison-like if they lack fences or have fences with

gates that open from the inside; have doors and windows locked from the outside, not the inside, to prevent entry not exit; lack guards stationed to prevent residents from leaving; and do not attempt to use physical force by staff members to stop an inpatient from leaving." *Id.*

After concluding that the structural conditions at the facility were not prison-like, the Court in *Harden* then considered "whether the rules at each facility were so restrictive as to make the facility the equivalent of a prison." *Id.* The Court concluded that neither use of a "schedule" for a parolee's day nor use of "close monitoring" of a parolee's activities overcomes the presumption that the parolee was "at liberty on parole." *Id.* As to rules regarding freedom of movement, the Court noted that "being able to leave a facility for personal errands is most assuredly not a feature of doing time in prison." *Id.* The Court then considered whether use of "escorts" by the facility to accompany a parolee to a medical appointment evidenced that the parolee was not at liberty. We explained:

> The use of "escorts" at a facility does not, in itself, show that the facility is a prison equivalent. The "escort" may be an armed law officer, a lifeguard at a pool, a person providing transportation assistance, or just another patient or parolee. Because the term "escort" can be given a wide variety of meanings, the parolee does not sustain his evidentiary burden simply by slipping the word "escort" into the record. *Instead, it is the parolee's burden to prove factually that the "escort" exercises a coercive function and does not function as a counselor, whose goal is to advance treatment or to provide transportation assistance."*

Id. at 700 (emphasis added). In *Harden*, a witness for the Board testified that staff accompanied inpatients to medical appointments to provide transportation services; the parolee presented no contrary evidence. The Court, therefore, concluded that the Board did not plainly abuse its discretion because the parolee's evidence with respect to the use of an escort was inadequate to rebut the presumption that the facility was not the equivalent of a prison.

Furthermore, in *Jackson v. Pennsylvania Board of Probation and Parole*, 568 A.2d 1004 (Pa. Cmwlth. 1990), this Court held that the fact that a parolee was free to leave without restraints but that the Board would consider a parolee to be an absconder if he left the facility without authorization was insufficient to establish that the parolee was not at liberty. [4]

In the case now before the Court, we will first consider whether Armstrong is entitled to credit for the period during which he resided at Kintock. The key testimony in the record indicates that Kintock was a "secure" facility. The primary purpose of locks on the doors was to keep outsiders from entering the facility. Parolees could walk around the facility without an escort. Although a fence surrounded the facility, staff would open the doors and permit a parolee to

[4] In *Harden*, this Court noted that pre-release residents could be charged with the crime of escape, whereas a parolee, at the most, would face possible technical parole violation charges for leaving a community correction center without authorization. *Harden*, 980 A.2d at 698 (relying on *Meehan v. Pennsylvania Bd. of Probation and Parole*, 808 A.2d 313, 317 (Pa. Cmwlth. 2002), *appeal denied*, 573 Pa. 669, 820 A.2d 706 (2003)).

leave if a parolee made such a request. Parolees with authorization could leave for work, school, religious, or other purposes. Also, a parolee could travel to Philadelphia with the approval of his agent. If, however, a parolee left the facility without authorization, the staff at Kintock would regard the parolee as an absconder. Under the analysis set forth in *Cox*, *Jackson*, and later *Harden*, the testimony of the Board's witness reveals that the structural conditions and rules of the Kintock facility are not the equivalent of a prison, as a parolee could walk around the facility unescorted and could even leave the facility without an escort. With regard to the fact that staff at Kintock would consider a parolee to be an absconder if he left the facility, this factor is insufficient to establish that the parolee was not at liberty. Furthermore, Armstrong, who did not testify, never provided any contrary evidence as to the conditions imposed upon him during the period he resided at Kintock. Under these circumstances, we cannot conclude that the Board acted arbitrarily or abused its discretion when it denied Armstrong credit for the time he resided at Kintock.[5]

Next, we will consider whether Armstrong is entitled to credit for the period he resided at Eagleville. The testimony of record indicates that although the

[5] Although Armstrong states in his brief that upon his arrival at Kintock, he had gone through a processing period, which he referred to as a "blackout" period, where he could not leave (Petitioner's brief at 11), there is no evidence of record to support that assertion. As such, we cannot conclude that Armstrong is entitled to credit for any "blackout" period. *See Meleski*, 931 A.2d at 72.

facility had a fence, it was not a secure facility. The doors were locked to keep non-residents out of the facility. As with Kintock, a parolee could leave the Eagleville facility, but staff would report a parolee to the Board as an absconder if he left the facility without authorization. Additionally, the testimony indicates that staff had to escort parolees to medical appointments and on walks around the grounds of the facility. As with the Kintock facility, the Board's Eagleville witness testified that while no staff member would stop a parolee from leaving without authorization, the staff would report the parolee as an absconder.

As with the Kintock facility, under the analysis set forth in *Cox*, *Jackson*, and later *Harden*, the testimony of the Board's witness reveals that the structural conditions and rules of the Eagleville facility are not the equivalent of a prison. The structure of the facility is not prison-like, and the fact that staff at Eagleville would consider a parolee to be an absconder if he left the facility is insufficient to establish that the parolee was not "at liberty on parole." Although the requirement that a parolee be escorted to travel to appointments and to walk around the facility distinguishes Armstrong's stay at Eagleville from his stay at Kintock, that factor, in and of itself, is not determinative. While the record indicates that a parolee was required to have an escort when he left the facility, the record is silent as to the purpose of the escort. There is no evidence, therefore, that use of an escort served as a mandatory coercive measure. *Harden*, 980 A.2d at

699. Moreover, Armstrong did not provide any contrary evidence as to the conditions imposed upon him during the period he resided at Eagleville. Under these circumstances, Armstrong failed to prove that the Eagleville facility was so like a prison that he was not "at liberty on parole." We cannot conclude, therefore, that the Board acted arbitrarily or abused its discretion when it denied Armstrong credit for the time he resided at Eagleville.

Accordingly, we affirm the order of the Board.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 1st day of February, 2011, the order of the Pennsylvania Board of Probation and Parole is AFFIRMED.

P. KEVIN BROBSON, Judge