

five to 10-year State prison sentence. Almost one year later, on January 1, 2005, Barber was arrested on new criminal charges, and on January 2, 2005, a complaint was filed charging him with indecent assault, terroristic threats, corruption of a minor and unlawful contact with a minor on November 29, 2004, in violation of 18 Pa. C.S. §6318. Barber was detained at the State Correctional Institution at Graterford (SCI-Graterford) after a hearing pending disposition of that charge. On June 20, 2005, the charge was dismissed, but on June 28, 2005, Barber was rearrested and recharged with having unlawful contact with a minor on November 29, 2004.¹ The Board held a detention hearing on September 30, 2005, and notified Barber that he would be detained at SCI-Graterford pending disposition of the criminal charges. On January 5, 2006, Barber pled guilty and was convicted of indecent assault, terroristic threats, unlawful contact with a minor and corruption of a minor. On February 28, 2006, Barber requested in writing a continuance of any of his hearings in order to secure counsel. On August 4, 2006, the Court sentenced him to 20 to 40 months imprisonment.

On August 7, 2006, Barber requested in writing that his revocation hearing be scheduled before a hearing examiner by signing a form that stated: “With full knowledge and understanding of my right to a final hearing before a panel, I hereby waive that right and request that my hearing be held before an examiner.” The Board scheduled a revocation hearing before a hearing examiner for September 13, 2006, but on that date Barber requested in writing a continuance so that he could

¹ Barber posted bail on that charge. No issue has been raised regarding the credit of time towards his initial sentence for time served after he posted bail while on detainer.

have a revocation hearing before a panel instead. A hearing before a panel was scheduled and held on December 19, 2006.

At that hearing, Barber initially argued that the detention hearing was not timely held because it should have been held 30 days after he was arrested and it was held three months later. As a result, he was denied bail because the Board took its time to remove the detainer. Barber then offered into evidence an affidavit of his wife, Hope Barber, declaring that on May 8, 2006, she mailed to the Board a request by Barber for a revocation hearing to be scheduled. The request was mailed to “1101 S. Broad Street, Harrisburg, PA” and to “IBEAR JONES” at “990 Springgarden [sic] Street, Philadelphia, PA 19102.” Barber did not call his wife as a witness. The Board determined that 1) no such addresses existed in either Harrisburg or Philadelphia; 2) Barber’s parole agent was “Alfred Ibare-Jones,” not “IBEAR JONES”; 3) Parole Agent Alfred Ibare-Jones testified that he never received any communications from Barber requesting that his revocation hearing be scheduled; and 4) Barber never attempted to explain why he simply did not deliver a written request to a parole officer at SCI-Graterford to have his revocation hearing scheduled prior to August 7, 2006. Consequently, the Board found the affidavit lacking in credibility and decided to recommit Barber as a convicted parole violator for an additional 12 months on his 15-year State prison sentences for robbery and burglary based on his guilty plea to the charges stemming from November 29, 2004.

The Board sent Barber a notice dated February 15, 2007, indicating that he had been recommitted as a convicted parole violator to serve 12 months backtime as a result of the November 29, 2004 crimes. The notice further indicated his parole

violation maximum release date was December 8, 2014, and stated that if he wanted to appeal the decision, he had to file a request for administrative relief with the Board within 30 days of the order. Barber filed a timely *pro se* administrative appeal to the Board arguing that the Board had failed to provide him with timely detention and revocation hearings. He requested that the Board vacate its order, reinstate him to parole and recalculate his maximum release date. In response, the Board sent Barber a letter stating the following:

The record reflects that you have already been recommitted as a convicted parole violator following a revocation hearing. Thus, your claim that you were not provided with a timely detention hearing is now moot. *Whittington v. Pennsylvania Board of Probation and Parole*, 404 A.2d 782 (Pa. Commw. 1979); *Anderson v. Pennsylvania Board of Probation and Parole*, 471 A.2d 593 (Pa. Commw. 1984).

Additionally, the record reflects that you were provided with a timely revocation hearing in accordance with 37 Pa. Code §§71.4 and 71.5 based on request for a continuance and your subsequent request for a panel hearing after previously waiving said right. Furthermore, the fact that the Board chose not to believe your testimony that you raised a timeliness objection prior to reasserting your right to a panel hearing is not subject to review.

(Original Record at 133.) This appeal by Barber followed.²

² Our scope of review of the Board's order is limited to determining whether necessary findings are supported by substantial evidence, an error of law was committed, or whether constitutional rights of the parolee were violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Barber first contends that he was denied the right to a timely detention hearing because that hearing was held on September 30, 2005, and it should have been held on or before July 28, 2005, 30 days from the day of his arrest on June 28, 2005, on the new charges. He relies on 37 Pa. Code §71.3(9), which provides:

The following procedures shall be followed if a parolee, not already detained after appropriate hearings for other criminal charges or technical violations, has been charged with a new criminal offense:

(9) The Board will follow the procedures generally governing preliminary hearings contained in §71.2(1)-(8) (relating to procedure for violation of parole conditions) in conducting detention hearings, except that a detention hearing shall be held *within 30 days of the parolee's detention*. After the detention hearing, a panel shall determine whether to continue to detain the parolee pending disposition of the new criminal charge. (Emphasis added.)

Because he was denied a timely administrative process, Barber argues that he is entitled to dismissal of his parole violation and reinstatement to parole.

The Board admits that Barber's detention hearing was not held in a timely fashion, but argues that defect in his detention hearing did not vitiate its otherwise valid recommitment decision. It explains that, "[t]he principal function of a criminal preliminary hearing, comparable to the principal function of a Detention Hearing, is to protect an individual's right against an unlawful arrest and detention, and it is well settled that once a defendant has gone to trial and been found guilty of a crime, the failure to hold a criminal preliminary hearing is rendered immaterial.

Commonwealth v. Jacobs, 640 A.2d 1326, 1330 (Pa. Super.), *appeal denied*, 542 Pa. 661, 668 A.2d 1125 (1994).” (Board’s brief at 7.)

The purpose of a detainer is to place a hold on the parolee/offender’s release from confinement until the Commonwealth has an opportunity to determine whether it will pursue the charges against him or her or pursue parole.³ Here, after the Commonwealth determined that it would pursue the charges against Barber, the Board did not hold a timely detention hearing because Barber was ultimately convicted of the new charges on June 28, 2005, and the detention hearing was not held until September 30, 2005, more than 90 days later. Although Barber raised this issue before the Board at the revocation hearing, because Barber had been granted bail after his arrest on June 28, 2005, and his detention hearing was not held until September 30, 2005, his only recourse was to compel the Board to hold such a hearing by filing a mandamus action in the Court’s original jurisdiction. *See Bronson v. Pennsylvania Board of Probation and Parole*, 491 Pa. 549, 421 A.2d 1021 (1980), *cert. denied*, 450 U.S. 1050 (1981) (proceeding in mandamus available to compel Board to conduct hearing); *St. Clair v. Pennsylvania Board of Probation and Parole*, 493 A.2d 146 (Pa. Cmwlth. 1985). By failing to do so and only addressing the matter before the Board at the revocation hearing, which was not held until December 19, 2006, over one-and-one-half years after the detention hearing should have been held, there was nothing the Board could do at that time to rectify the situation.

³ Unlike here, in *Commonwealth ex rel. Rambeau v. Rundle*, 455 Pa. 8, 314 A.2d 842 (1973), our Supreme Court held that a parolee who is detained as a convicted parole violator is not constitutionally entitled to a detention hearing because the purpose of the hearing is to determine whether there is probable cause to support the charge of a parole violation. Because the purpose is served by the proceedings at which the prisoner is convicted, there is no need for the hearing.

Barber also contends that his revocation hearing had to be held within 120 days of the Board’s notification of his guilty pleas to the new charge pursuant to 37 Pa. Code §71.4(1). However, it was not held until 348 days after his guilty pleas and 137 days after the imposition of his sentence. While 37 Pa. Code §71.4(1) provides that, “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,”⁴ 37 Pa. Code §71.5(c)(2) provides an exception and states:

In determining the period for conducting hearings under this chapter, there shall be excluded from the period, a delay in any stage of the proceedings which is directly or indirectly attributable to one of the following:

* * *

(2) Continuances granted at the request of a parolee or counsel, in which case the Board is not required to

⁴ That code section further provides, “except as follows:

(i) 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.

(ii) A parolee who is confined in a county correctional institution and who has waived the right to a revocation hearing by a panel in accordance with the *Rambeau* decision shall be deemed to be within the jurisdiction of the Department of Corrections as of the date of the waiver.”

reschedule the hearing until it receives a written request to reschedule the hearing from the parolee or counsel.

* * *

(4) A change of decision by a parolee either to waive the right to be heard by a panel after asserting it or to assert that right after waiving it. In this case, the hearing shall be held within 120 days of the last change of decision.

The Board, however, argues that the revocation was timely because Barber pled guilty and was convicted on January 5, 2006, and they received notification on that date.⁵ He then requested a continuance of his revocation hearing until further notice to be scheduled upon his written request. That request was granted on February 28, 2006. Barber then requested a continuance of his revocation hearing in writing by signing a form dated August 7, 2006. However, once September 13, 2006, rolled around, Barber again requested in writing a continuance so that he could have a revocation hearing before a panel instead. The hearing was finally held on December 19, 2006. Pursuant to 37 Pa. Code §71.5(c)(2), the 120 days excludes all of the dates in which Barber waived his right to be heard by the panel, i.e., February 28, 2006, to obtain counsel; August 7, 2006, waiving the right to a panel; September 13, 2006, when he requested a panel; until the actual hearing on December 19, 2006. Regardless, the Board argues, and we agree, that pursuant to 37 Pa. Code §71.5(c)(4), the December 19, 2006 hearing was held within 120 days of the last request by Barber on September 13, 2006, to have the revocation hearing held

⁵ The Board does not provide and the record does not indicate an actual date of notification to the Board of Barber's conviction date, but uses January 5, 2005, as a starting date for calculation purposes.

before a panel. Consequently, the revocation hearing was timely held, and Barber's argument is without merit.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

