

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jamal Wise,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1054 C.D. 2008
	:	Submitted: October 3, 2008
Pennsylvania Board of	:	
Probation and Parole,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE McCLOSKEY

FILED: November 7, 2008

Jamal Wise (Petitioner) petitions for review of a determination of the Pennsylvania Board of Probation and Parole (Board), denying his request for credit toward his recalculated sentence for the period of time he resided at Kintock-Erie Community Corrections Center (Center). We affirm.

On April 4, 2000, Petitioner pleaded guilty to the criminal charge of robbery. He was sentenced to serve five to ten years in prison. At the time of his sentencing, his minimum sentence date was December 2, 2004, and his maximum sentence date was December 2, 2009.

Petitioner was paroled to the Center on February 22, 2005. He remained there until May 29, 2006. After leaving the Center, Petitioner remained on parole until March 7, 2007, when he was arrested for possession of an illegal substance with intent to deliver.

Following his conviction on the new criminal charge, Petitioner was recommitted as a convicted parole violator to serve eighteen months backtime. As a convicted parole violator, Petitioner's time spent at liberty was also revoked. Therefore, his maximum sentence date was recalculated by the Board to April 24, 2012.

Petitioner filed a request for administrative review alleging that he was entitled to a credit for the period of time he resided at the Center. The Secretary of the Board found that Petitioner was entitled to an evidentiary hearing in order to determine whether or not he was entitled to a credit.

At the hearing, Petitioner testified that the Center had windows made of unbreakable glass and was surrounded by gates with barbed wire. He stated that he had to pass through two doors to reach the street and that security had to "buzz you through" the first door. (O.R., Evidentiary Hearing at 28). Also, when arriving at the Center, he had to pass through a metal detector and have the door opened by security. Petitioner further indicated that he was not permitted to leave the facility alone.

On cross-examination Petitioner agreed that he received "passes" while at the Center. (O.R., Evidentiary Hearing at 32). When he received a pass, he was permitted to leave the Center unescorted. He stated that he left the Center without an escort to go to the police station, the social security office, the welfare office and traffic court. He was also permitted to leave the Center unescorted to have social visits with his family. Petitioner further agreed that "the walking entrance gate" to the Center was never closed.

Corey Davis, the senior case manager at the Center, also testified at this hearing. Mr. Davis indicated that the exterior doors of the Center were locked to prevent anyone from entering without permission. He stated that there is a gate surrounding the parking lot which was closed on occasion, but that the walkthrough gate

was always open. He explained that anyone leaving the Center could always exit directly through that gate.

Mr. Davis further explained that the fence surrounding the Center does not have barbed wire on it. Only the fence enclosing the basketball courtyard is covered in barbed wire. He stated that prior to the barbed wire enclosure, residents were able to exit the property by climbing over the fence and the Center was unaware of their absence. Additionally, unauthorized persons were actually entering the Center property via the fence.

Mr. Davis stated that if any of the residents at the Center wanted to leave, all that they needed to do was ask someone at the control booth to “buzz” open the door. He explained that residents were not physically restrained from leaving by the staff and that the staff opened the door upon request. However, if someone were to leave without an approved pass, the absence would be reported to his parole agent. Mr. Davis claimed that if a resident left the Center without permission, he was not charged with the crime of escape, but was only charged with a violation of his parole. Also, Mr. Davis testified that when a resident had an approved pass, the resident was permitted to leave unescorted.

Following the hearing, the Board found that Petitioner had not rebutted the presumption that he was at liberty on parole while residing at the Center. The Board concluded that he did not meet his burden of establishing that the Center implemented restrictions on his liberty sufficient to warrant credit on his sentence. Petitioner then filed a request for administrative relief with the Board, but the same was denied.

Petitioner now appeals to this Court.<sup>1</sup> Petitioner alleges that the Board erred in failing to credit his parole violation maximum date with the amount of time he spent at the Center. We disagree.

Section 21.1(a) of the Act commonly known as the Parole Act (Act)<sup>2</sup> provides that the Board has the authority to recommit a parolee who “during the period of parole . . . commits any crime punishable by imprisonment, from which he is convicted or found guilty by a judge or jury or to which he pleads guilty or nolo contendere at any time thereafter. . . .” If a parolee is recommitted under this section of the Act, he must serve the remainder of his term of imprisonment he would have had to serve had he not been paroled and does not receive credit for time spent “at liberty on parole.” *Id.*

The phrase “at liberty on parole” is not defined in the Act. The term had traditionally been interpreted as “street time.” However, our Supreme Court has since clarified that “street time” was not to be construed literally and that “at liberty” does not mean freedom from each and every type of confinement. Cox v. Pennsylvania Board of Probation and Parole, 507 Pa. 614, 619, 493 A.2d 680, 683 (1985). The Court in Cox further explained that in such cases, the burden is on the parolee to establish the specific characteristics of a program that constitute restrictions on his liberty sufficient to

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<sup>1</sup> Our scope of review of a Board’s recommitment order is limited to determining whether necessary findings of fact are supported by substantial evidence and are in accordance with law and whether any constitutional rights of the parolee have been violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Cromartie v. Pennsylvania Board of Probation and Parole, 680 A.2d 1191 (Pa. Cmwlth. 1996).

<sup>2</sup> Act of August 6, 1941, P.L. 861, as amended, 61 P.S. §331.21a(a). This Section was added by Section 5 of the Act of August 24, 1951, P.L. 1401.

warrant credit.<sup>3</sup>

We have recently discussed this issue on several occasions. See Meleski v. Pennsylvania Board of Probation and Parole, 931 A.2d 68 (Pa. Cmwlth. 2007), petition for allowance of appeal denied, \_\_ Pa. \_\_, 945 A.2d 173 (2008); Figueroa v. Pennsylvania Board of Probation and Parole, 900 A.2d 949 (Pa. Cmwlth. 2006); Detar v. Pennsylvania Board of Probation and Parole, 890 A.2d 27 (Pa. Cmwlth. 2006); Torres v. Pennsylvania Board of Probation and Parole, 861 A.2d 394 (Pa. Cmwlth. 2004). Upon review of these cases, two factors appear to be consistent throughout in determining whether the community corrections center/group home is the equivalent of incarceration: whether the facility is secured/locked and whether the parolee is able to leave the facility without restraint and without an escort.

In Meleski, we discussed whether or not a parolee in an inpatient program had sufficient restrictions on his liberty to warrant credit. There we noted as follows:

A parolee who has been forbidden generally to leave a particular inpatient drug and alcohol rehabilitation facility for a specified period for which credit is sought, who is under 24-hour supervision during the specified period and who is not permitted to make required trips outside of the facility without an escort cannot reasonably be described as being ‘at liberty on parole.’

Meleski, 931 A.2d at 72.

In Figueroa, the parolee sought credit for the first ninety days at a treatment center which he claimed was a blackout period during which he could only leave the

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<sup>3</sup> Nevertheless, the Supreme Court in Cox declined to conclude that time served by the parolee at an in-patient rehabilitation program was the equivalent of incarceration, thereby entitling the parolee to credit for his time at the program. Instead, the Court remanded the case to the Board for further findings regarding the specific nature of the rehabilitation program at issue.

facility with an escort. The parolee asserted that the doors of the facility were locked and that he would be stopped if he attempted to leave without an escort. The parolee's testimony was contradicted by a manager of the facility who testified that parolees were permitted to leave the facility unescorted and that, although the doors were locked, staff members did not physically restrain the residents.

In concluding that the parolee was not entitled to credit, this Court stated:

In this case, we agree with the Board's determination that Figueroa was not constructively incarcerated during the initial 90-day blackout period. Although the doors to the Center are locked, this is only to prevent unauthorized visitors from entering, not to prevent the residents from leaving. Staff members do not physically restrain the residents, nor are the residents charged with escape if they leave the facility. According to the Center's unit manager, the residents are, in fact, permitted to leave unescorted during the blackout period to attend to personal business. Although Figueroa may have perceived the restrictions as confining, his subjective impressions are irrelevant, and the fact that he may have chosen not to exercise his right to leave the facility without an escort in no way strengthens his claim that he was in custody.

Figueroa, 900 A.2d at 952-953 (footnote omitted).

In the present case, as in Figueroa, Mr. Davis testified that residents were not physically restrained from leaving the Center, nor charged with escape upon leaving without permission. Petitioner testified that he was permitted to leave the Center without an escort to attend to personal business and to visit with his family. As such, we conclude that the Board did not err in finding that Petitioner failed to establish that he was not at liberty during the period of time he was at the Center.

Accordingly, the order of the Board is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge

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**ORDER**

AND NOW, this 7<sup>th</sup> day of November, 2008, the order of the Pennsylvania Board of Probation and Parole is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge