

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Angel M. Ortega, :  
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 Petitioner :  
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 v. : No. 1068 C.D. 2009  
 : Submitted: December 18, 2009  
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 Pennsylvania Board of :  
 Probation and Parole, :  
 :  
 Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: January 29, 2010

Angel M. Ortega petitions for review of a May 12, 2009 decision of the Pennsylvania Board of Probation and Parole (Board) denying his July 25, 2008 request for administrative relief. Therein, Ortega sought relief from the Board's decision mailed June 30, 2008 recommitting Ortega as a technical and convicted parole violator. Specifically, Ortega challenged the correctness of his new parole violation maximum sentence date of March 26, 2009.

Ortega was originally released on parole from SCI-Rockview on January 26, 2004, with a maximum sentence expiration date of January 22, 2007. On May 21, 2004, the Board declared Ortega delinquent. Ortega remained at large until October 19, 2004, when he was arrested. The Board issued a warrant to

commit and detain Ortega on October 19, 2004. Ortega was subsequently recommitted as a technical parole violator to serve 6 months backtime, with a parole violation maximum sentence date of June 20, 2007.

On May 8, 2006, Ortega was again released on parole and he once again became delinquent and remained at large until June 28, 2006, at which time the Board issued an order to commit and detain. Ortega was again recommitted as a technical parole violator, with a parole violation maximum sentence date of July 17, 2007.

On October 30, 2006, Ortega was released on parole for a third time and he was declared delinquent by the Board effective December 12, 2006. Ortega remained at large until March 13, 2007, when he was arrested on new criminal charges. On March 13, 2007, the Board issued a warrant to commit and detain Ortega. Ortega did not post bail. By decision mailed May 22, 2007, the Board recommitted Ortega as a technical parole violator to serve his unexpired term when available.

On February 20, 2008, Ortega was convicted of the new criminal charges and given a new state sentence. A parole revocation hearing was held on May 23, 2008, after which the Board recommitted Ortega as a technical and convicted parole violator to serve a total of his unexpired term of 1 year, 1 month and 6 days. The Board also adjusted Ortega's parole violation maximum sentence date to March 26, 2009.

Ortega filed a timely request for administrative relief. Therein, Ortega contended that the Board's calculation of his parole violation maximum sentence date as March 26, 2009 failed to credit his original sentence with all the time to which he is entitled under Gaito v. Pennsylvania Board of Probation and Parole, 488 Pa. 397, 412 A.2d 568 (1980). Ortega contended that he was paroled from the

sentence underlying the instant revocation on December 30, 2006, with a parole violation maximum sentence date of July 17, 2007. Ortega argued that this left 260 days remaining on his original sentence which would be forfeited were he to be recommitted as a convicted parole violator. Ortega argued further that he became available to serve his backtime on February 20, 2008, when he was sentenced to a new period of state incarceration, as there was a technical parole violation recommitment order extant at the time of the imposition of this new sentence. Ortega contended that adding the 260 days to February 20, 2008 yields a new parole violation maximum sentence date of November 6, 2008, not March 26, 2009.

Ortega contended further that to the extent that the Board arrived at the March 26, 2009 parole violation maximum date by including additional period of street time predating his October 23, 2006 parole, the Board erred. Ortega argued that the Board did not present evidence at the revocation hearing that additional time was owed on the original sentence and the Board cannot do so after the hearing. Ortega argued further that the Board's interpretation of 21.1 of what is commonly known as the Parole Act (Act),<sup>1</sup> to require the forfeiture of all good

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<sup>1</sup> Act of August 6, 1941, P.L. 861, as amended, 61 P.S. §331.21a, added by the Act of August 24, 1951, P.L. 1401, as amended. The Parole Act was repealed by the Act of August 11, 2009, P.L. \_\_, No. 33, effective in sixty days (October 13, 2009). The provisions of Section 21.1 of the Parole Act are now found at Section 6138 of the Prisons and Parole Code, 61 Pa.C.S. §6138.

Section 21.1(a) of the Act provides that “[a]ny parolee under the jurisdiction of the [Board] released from any penal institution . . . who, during the period of parole or while delinquent on parole, commits any crime punishable by imprisonment, for 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 in a court of record, may, at the discretion of the board, be recommitted as a parole violator.”

street time accrued from previous technical parole violation recommitments is unreasonable notwithstanding this interpretation by this Court.

By decision mailed May 12, 2009, the Board denied Ortega's request for administrative relief and affirmed its June 30, 2008 decision. The Board stated that it was enclosing with its decision, a copy of the Board's PBPP-39 Order to Recommit dated January 23, 2009, for counsel's review that the Board stated provided relevant facts used to determine Ortega's parole violation maximum sentence date as March 26, 2009. The Board determined that Ortega owed 400 days which consists of 260 days left remaining on his original sentence plus 140 days which consists of two periods of time Ortega spent on parole prior to October 30, 2006. The Board cited to Section 21.1 of the Act as support for its calculation of the amount of backtime owed by Ortega. The Board stated that, as a convicted parole violator, Ortega automatically forfeited credit for all of the time he spent on parole including the 140 days.

The Board further determined that Ortega was not entitled to a time served credit as he was not held solely on the Board's warrant because Ortega failed to post bail on the new charges. Lastly, the Board determined Ortega became available to begin serving his original sentence on February 20, 2008, when he was convicted on the new criminal charges. Thus, adding 400 days to February 20, 2008 yielded a new parole violation maximum sentence date of March 26, 2009. This appeal followed.<sup>2</sup>

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<sup>2</sup> This Court's scope of review of a decision by the Board is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether the constitutional rights of the parolee was violated. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704.

Herein, Ortega raises the issue of whether the Board incorrectly calculated his parole violation maximum sentence date by failing to credit his original sentence with all the time to which he was entitled. In support of this issue, Ortega does not dispute that he owes the 260 days on his original sentence. Ortega believes, however, that the Board erred in adding the 140 days, which represents the two periods of time that he was on parole prior to October 30, 2006, for two reasons. First, Ortega points out that there is conflicting authority in this Court as to whether the Act's provision for forfeiture of street time following revocation requires forfeiture of all street time ever served on the sentence or merely the street time served since the last paroling action. Second, Ortega, citing Grubbs v. Pennsylvania Board of Probation and Parole, 481 A.2d 1390 (Pa. Cmwlth. 1984), contends that the Board should not have added an additional 140 days on the basis of facts garnered after he filed his request for administrative relief.

We disagree that there is currently a conflict in this Court regarding the forfeiture of street time following revocation. Section 21.1 of the Act provides, in pertinent part, as follows:

(a) CONVICTED VIOLATORS. Any parolee under the jurisdiction of the Pennsylvania Board of Parole released from any penal institution of the Commonwealth who, during the period of parole or while delinquent on parole, commits any crime punishable by imprisonment, for which he is convicted or found guilty by a judge or jury or to which he pleads guilty or nolo contendere at anytime thereafter in a court of record, may, at the discretion of the board, be recommitted as a parole violator. If his recommitment is so ordered, he shall be reentered to serve the remainder of the term which said parolee would have been compelled to serve had he not been paroled, and he shall be given no credit for the time at liberty on parole. The board may, in its discretion,

reparole whenever, in its opinion, the best interests of the prisoner justify or require his release on parole and it does not appear that the interests of the Commonwealth will be injured thereby. The period of time for which the parole violator is required to serve shall be computed from and begin on the date that he is taken into custody to be returned to the institution as a parole violator.

.....

(b) TECHNICAL VIOLATORS. Any parolee under the jurisdiction of the Pennsylvania Board of Parole released from any penal institution in the Commonwealth who, during the period of parole, violates the terms and conditions of his parole, other than by the commission of a new crime of which he is convicted or found guilty by a judge or jury or to which he pleads guilty or nolo contendere in a court of record, may be recommitted after hearing before the board. If he is so recommitted, he shall be given credit for the time served on parole in good standing but with no credit for delinquent time, and may be reentered to serve the remainder of his original sentence or sentences. Said remainder shall be computed by the board from the time his delinquent conduct occurred for the unexpired period of the maximum sentence imposed by the court without credit for the period the parolee was delinquent on parole, and he shall be required to serve such remainder so computed from the date he is taken into custody on the warrant of the board. Such prisoner shall be subject to reparole by the board whenever in its opinion the best interests of the prisoner justify or require his being reparoled and it does not appear that the interests of the Commonwealth will be injured thereby.

61 P.S. §331.21a.

Ortega is correct that this Court in Gregory v. Pennsylvania Board of Probation and Parole, 533 A.2d 509, 511-12 (Pa. Cmwlth. 1987), held that where a parolee, who was previously recommitted for technical parole violations only, is

later recommitted as a convicted parole violator in a separate proceeding by the Board, such recommitment does not expunge the parolee's entitlement to credit for street time served in good standing as it affects technical parole violation recommitment time nor does it extend the time of the expiration of the parolee's original sentence as it affects technical parole violation recommitment time. However, in later decisions, we have specifically and consistently rejected our holding in Gregory and have adhered to the plain language of Section 21.1(a) of the Act that a convicted parole violator "shall be reentered to serve the remainder of the term which said parolee would have been compelled to serve had he not been paroled, and he shall be given no credit for the time at liberty on parole." 61 P.S. §331.21a(a). In other words, time spent in good standing on parole prior to recommitment for technical violations is not shielded from forfeiture where the parolee subsequently commits a new crime and is recommitted as a convicted parole violator. See Gair v. Pennsylvania Board of Probation and Parole, 948 A.2d 884 (Pa. Cmwlth.), petition for allowance of appeal denied, 599 Pa. 712, 962 A.2d 1198 (2008); Melendez v. Pennsylvania Board of Probation and Parole, 944 A.2d 824 (Pa. Cmwlth.), petition for allowance of appeal denied, 598 Pa. 771, 956 A.2d 437 (2008); Palmer v. Pennsylvania Board of Probation and Parole, 704 A.2d 195 (Pa. Cmwlth. 1997); and Houser v. Pennsylvania Board of Probation and Parole, 682 A.2d 1365 (Pa. Cmwlth. 1996), petition for allowance of appeal denied, 547 Pa. 759, 692 A.2d 568 (1997).

We also disagree that the Board extended Ortega's parole violation maximum date as a result of facts contained in documents generated after the revocation hearing. Ortega contends that the Board erred in relying upon the Form PBPP-39 Order to Recommit dated January 23, 2009, which provides relevant facts, to determine his parole violation maximum sentence.

As stated above, Ortega argues that this matter is controlled by Grubbs. In response, the Board argues that the Form PBPP-39 merely shows where credit was applied in arriving at Ortega's parole violation maximum date and was not part of the decision making process. The Board argues further that once it decided to revoke Ortega's parole because of his new conviction, all the time he was at liberty on parole was statutorily forfeited. As such, the Board contends that our decision in Palmer controls.

In Grubbs, this Court granted petitioner's motion to strike certain documents from the record that were not offered into evidence in the course of the administrative hearing. The documents included, *inter alia*, a Form PBPP-39, which was the Board's recommitment order dated May 31, 1983. We pointed out that neither the Board in its decision making process, nor this Court in a review of that process, may consider any matters not made a part of the record when counsel and the litigants are present. We stated further that is irrelevant if the documents would be prejudicial; they simply cannot be considered. As there was no evidentiary reference to the Form PBPP-39 in the record, we sustained petitioner's motion to strike and ordered the extraction of the Form PBPP-39 from the record.

In Palmer, the parolee argued that the Board erred and violated his constitutional rights by failing to provide him with written notification, prior to his recommitment hearing, that a loss of credit for time at liberty on parole, or street time, was a possible outcome of the hearing. In rejecting this argument, we held that "[s]ince the loss of street time is statutorily mandated, due process does not require the board to provide notice to the parolee because there is nothing the parolee can say on his behalf or in mitigation at the hearing to prevent the loss of time at liberty at parole." Palmer, 704 A.2d at 197. Put simply, once the Board



decides to recommit a parolee as a convicted parole violator, the loss of credit for street time is automatic.

While we agree that the Board cannot consider anything outside the record, we believe that Palmer controls this case. The loss of credit for Ortega's street time was statutorily mandated by Section 21.1 of the Act; therefore it was automatic. Moreover, while the Board states in its decision denying Ortega's request for administrative relief that it has attached a Form PBPP-39 dated January 23, 2009, the certified record shows that the actual Form PBPP-39 that is attached to the Board's decision is the Form PBPP-39 that was created and last modified on June 24, 2008.

Accordingly, Ortega's argument that the Board erroneously relied upon documents outside the record in calculating his parole violation maximum sentence date as March 26, 2009 is without merit. Based on the Act, the Board correctly added the 140 days of Ortega's prior street time to the 260 days not in dispute to arrive at a total of 400 statutorily forfeited days, which Ortega was available to begin serving on February 20, 2008.

The Board's order is affirmed.

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JAMES R. KELLEY, Senior Judge

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Pennsylvania Board of	:	
Probation and Parole,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 29th day of January, 2010, the order of the Pennsylvania Board of Probation and Parole entered in the above-captioned matter is affirmed.

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JAMES R. KELLEY, Senior Judge