

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Faheem Scott, :  
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 Petitioner :  
 :  
 v. : No. 1222 C.D. 2007  
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 Pennsylvania Board of : Submitted: December 14, 2007  
 Probation and Parole, :  
 :  
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: April 15, 2008

Faheem Scott petitions for review of the decision of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative review from a Board order recommitting Scott to serve nine months backtime as a multiple technical parole violator pursuant to the provisions of the statute commonly referred to as the Parole Act.<sup>1</sup> We affirm.

Scott was initially sentenced to five to fifteen-year term of imprisonment based on an adjudication of guilt on two counts of Robbery and a consecutive one to two-year term for an adjudication of guilt for one count of Impersonating a Public Servant. With an effective date of November 29, 1987, his

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<sup>1</sup> Act of August 6, 1941, P.L. 861, as amended, 61 P.S. §§ 331.1 – 331.34a.

aggregated sentence had a minimum expiration date of November 29, 1993, and a maximum expiration date of November 29, 2004. By decision dated December 9, 1993, following the expiration of his minimum sentence, Scott was constructively paroled to a New Jersey detainer sentence.

On August 18, 1996, Scott was arrested by the Abington Police Department. By decision dated May 19, 1997, the Board detained Scott pending the disposition of the new criminal charges. By decision dated January 7, 1998, the Board recommitted Scott as a convicted parole violator based on his new conviction for Retail Theft. The decision also recalculated Scott's parole violation maximum date to be July 24, 2007. By decision dated August 10, 1998, Scott was reparaoled to a community corrections center for a minimum of three months, and subject to a number of technical conditions.

On September 13, 1999, Scott was arrested by the Philadelphia Police Department. By decision dated November 1, 1999, the Board detained Scott pending the disposition of the new criminal charges, and recommitted Scott to serve twelve months backtime as a technical parole violator. By decision dated April 2, 2001, the Board recommitted Scott as a convicted parole violator to serve a total of twelve months backtime based on his conviction for Retail Theft. The decision also recalculated Scott's parole violation maximum date to be September 9, 2008. By decision dated October 2, 2001, Scott was reparaoled to a state detainer sentence. By decision dated December 6, 2002, Scott was reparaoled to an approved plan in New Jersey.

On February 27, 2004, the Board declared Scott delinquent effective February 26, 2004. By decision dated April 24, 2004, the Board recommitted Scott to serve nine months backtime as a technical parole violator. The decision also recalculated Scott's parole violation maximum date to be September 23, 2008. By

decision dated January 24, 2005, Scott was reparaoled to an approved plan, and subject to a number of technical conditions.

On June 1, 2005, the Board declared Scott delinquent effective May 26, 2005. By decision dated August 4, 2005, the Board recommitted Scott to serve three months backtime as a technical parole violator. By decision dated February 21, 2006, Scott was reparaoled to a community corrections residency and subject to a number of technical conditions.

On May 18, 2006, the Board declared Scott delinquent effective May 17, 2006. By decision dated February 26, 2007, and mailed March 26, 2007, the Board recommitted Scott to serve nine months backtime as a technical parole violator. The decision also recalculated Scott's parole violation maximum date to be May 11, 2009.

On May 3, 2007, Scott's counsel mailed a request for administrative review to the Board in which he alleged, inter alia, that the Board erred in failing to give him credit for the time he spent in custody in New Jersey from January 12, 1994 to March 25, 1996 and, as a result, erred in calculating his parole violation maximum date. Certified Record (CR) at 51–52. On June 8, 2007, the Board's Secretary mailed Scott a letter denying his request for administrative review which states, in pertinent part:

Board regulations provide that petitions for administrative review must be received at the Board's Central Office within 30 days of the mailing date of the Board's determination. 37 Pa. Code § 73.1(b).<sup>[2]</sup>

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<sup>2</sup> Section 73.1(b) of the Board's regulations provides, in pertinent part:

(1) A parolee, by counsel unless unrepresented, may petition for administrative review under this subsection of determinations relating to revocation decisions.... Petitions for administrative review shall be received at the Board's Central Office within 30

*(Continued....)*

Because the Board did not receive your petition within the applicable period, your petition cannot be accepted. *Maldonado v. Pennsylvania Board of Probation and Parole*, 492 A.2d 1202 (Pa. [Cmwlth]. 1985).

Accordingly, your petition for administrative review is DISMISSED AS UNTIMELY.

CR at 62. Scott then filed the instant petition for review.<sup>3</sup>

In this appeal, Scott claims that the Board erred in dismissing his petition for administrative review as untimely.<sup>4,5</sup> More specifically, Scott claims: (1) because Section 73.1(b)(1) of the Board’s regulations states that a parolee “may” petition for administrative review of a revocation decision, this permissive and non-mandatory language permits review for requests filed outside of the thirty-day period provided for in that section; and (2) the Board can entertain his petition

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days of the mailing date of the Board’s determination....

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(3) Second or subsequent petitions for administrative review and petitions for administrative review which are out of time under this part will not be received.

37 Pa. Code § 73.1(b)(1) and (3).

<sup>3</sup> This Court’s review is limited to determining whether the Board’s findings are supported by substantial evidence, whether the decision is in accordance with the law, and whether constitutional rights have been violated. Vanderpool v. Pennsylvania. Board of Probation and Parole, 874 A.2d 1280 (Pa. Cmwlth. 2005).

<sup>4</sup> On July 26, 2007, the Board filed a motion to limit the issue to be considered by this Court in this appeal to whether the Board properly dismissed Scott’s request for administrative review as untimely. This Court granted the Board’s motion by order dated August 13, 2007.

<sup>5</sup> It should be noted that, “[i]n this case, however, we are not dealing with a prisoner who sought to file an appeal without the aid of counsel. Instead, we have a situation where the parolee’s counsel filed a request for administrative relief on behalf of the parolee. Thus, the ‘prisoner mailbox rule’, and its underlying rationale, simply does not apply.” Christjohn v. Pennsylvania Board of Probation and Parole, 755 A.2d 92, 93 (Pa. Cmwlth. 2000).

at any time because his claims regarding the Board's calculation of the credit due on his sentence and his parole violation maximum date implicates the legality of his sentence.

With respect to Scott's first allegation of error, he ignores the plain language of Section 73.1(b) of the Board's regulations which explicitly states that "[p]etitions for administrative review *shall* be received at the Board's Central Office within 30 days of the mailing date of the Board's determination...", and that "[p]etitions for administrative review which are out of time under this part *will not be received.*" 37 Pa. Code § 73.1(b)(1) and (3) (emphasis added). Thus, contrary to Scott's assertion, the clear mandatory language of this section requires the receipt of the request for administrative review by the Board's Central Office within thirty days of the decision's mailing date or it will not be received. This Court has clearly and consistently held that, based on the foregoing explicit language, the Board is without jurisdiction to consider a petition for administrative review that is not filed within the prescribed thirty-day period.<sup>6</sup> As a result, Scott's allegation of error in this regard is patently without merit.

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<sup>6</sup> See, e.g., Merriwether v. Pennsylvania Board of Probation and Parole, 693 A.2d 1000, 1001 (Pa. Cmwlth. 1997) ("[I]t is evident that the recommitment of fifteen months was ordered in the Board's June 11, 1996 decision and Merriwether thus had thirty days from that date to challenge that decision. However, Merriwether did not petition the Board until July 18, 1996. Therefore, although he ostensibly appealed the Board's June 28, 1996 decision, any challenge to the Board's June 11, 1996 action, including its imposition of fifteen months backtime, would be untimely, thereby divesting the Board of jurisdiction to consider Merriwether's petition and, in turn, prompting this Court to reject the contest on procedural grounds. For these reasons, without deciding the merits of the argument on the recommitment time ordered in the June 11, 1996 decision we must affirm the Board's determination denying administrative relief as to the amount of backtime imposed.") (citations omitted); McCaskill v. Pennsylvania Board of Probation and Parole, 631 A.2d 1092, 1095 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 537 Pa. 655, 644 A.2d 739 (1994) ("[P]risoners desiring to appeal a determination of the Board must file an administrative appeal within 30 days of the mailing date of the determination.

(Continued....)

Finally, Scott alleges that the Board can entertain his petition for administrative review at any time because his claim regarding the Board's calculation of the credit due on his sentence implicates the legality of his sentence. As noted above, in the request for administrative review, Scott alleged that the Board erred in failing to give him credit for the New Jersey sentence that he served from January 12, 1994 to March 25, 1996 and, as a result, erred in calculating his parole violation maximum date. See CR at 51–52. In this appeal, Scott again seeks credit for the time he spent in custody in New Jersey because “[i]t does not fit the technical definition of ‘street time’ and therefore should not have been taken away from him.” See Brief in Support of Petition for Review at 11.

However, the New Jersey sentence to which Scott was constructively paroled<sup>7</sup> does constitute “time at liberty on parole”, or “street time”, under Section 21.1 of the Parole Act.<sup>8</sup> As the Pennsylvania Supreme Court recognized long ago:

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Where a prisoner fails to meet this deadline, this Court has held that the Board has no jurisdiction to entertain the appeal and should dismiss it as untimely.... This Court has also held that where a tribunal issues an order in a case after the jurisdictional time limit for issuing such order has expired, any such order is a nullity.” (citations omitted); Ayers v. Pennsylvania Board of Probation and Parole, 565 A.2d 1257, 1258 (Pa. Cmwlth. 1989), petition for allowance of appeal denied, 527 Pa. 588, 588 A.2d 511 (1990) (“[U]nder the provisions of 37 Pa. Code § 73.1, a petition for administrative review of a board determination relating to revocation decisions is to be received within 30 days of the mailing date of the determination.... Because Petitioner did not file his request for reconsideration of the Board’s October 26, 1987 order until April of 1989 it was untimely, and since the timeliness of an appeal is jurisdictional, the Board was without authority to consider it.”) (citation omitted);

<sup>7</sup> As this Court has previously noted, “[a] prisoner on constructive parole is not released from prison but is paroled from his or her original sentence to immediately begin serving another sentence.” Calloway v. Pennsylvania Board of Probation and Parole, 857 A.2d 218, 220 n. 4 (Pa. Cmwlth.), appeal quashed, 581 Pa. 269, 864 A.2d 1199 (2004) (citation omitted).

<sup>8</sup> Section 21.1 of the Parole Act provides, in pertinent part:

- (a) Convicted Violators. Any parolee under the jurisdiction of the [Board] released from any penal institution of this

*(Continued....)*

What the legislature must have intended by “at liberty on parole” is not at liberty from all confinement but at *liberty from confinement on the particular sentence for which the convict is being reentered as a parole violator*. Any other interpretation would be in conflict with other provisions of the statute, and with the long established policy of the Commonwealth. During the time that a convict may be on parole from a particular offense he might be confined in a Pennsylvania prison on another offense, or in a prison of another state, or in a federal prison, or in a mental institution, or in an enemy prison camp during a war. It was not the intent of the legislature to have the words “at liberty” to mean freedom from confinement under all these and other conceivable circumstances. (Emphasis supplied).

Hines v. Pennsylvania Board of Probation and Parole, 491 Pa. 142, 148–149, 420 A.2d 381, 384 (1980) (citation omitted). See also Timothy P. Wile, *Pennsylvania Law of Probation and Parole*, § 16:15 at 456 (2003 ed.) (“[I]f the offender was paroled from one sentence to commence serving another sentence, the offender was on ‘constructive parole’ and time spent on such ‘constructive parole’ is considered time ‘at liberty’ on parole or ‘street time’ for which a technical parole violator is entitled to credit against the original maximum sentence upon recommitment.”) (citations omitted). Thus, Scott’s assertion that the period in

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Commonwealth 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 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....

61 P.S. § 331.21a(a).

which he served his New Jersey sentence does not constitute “street time” is patently without merit.

In addition, the explicit mandatory provisions of Section 21.1 of the Parole Act specifically prohibit the Board from giving Scott credit for this “street time”. See Section 21.1(a) of the Parole Act, 61 P.S. § 331.21a(a) (“[I]f 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....*”) (emphasis added); Armbruster v. Pennsylvania Board of Probation and Parole, 919 A.2d 348, 351 (Pa. Cmwlth. 2007) (“[U]pon recommitment as a convicted parole violator, the parolee must serve the remainder of the term which he would have been compelled to serve had he not been paroled with no credit given for street time. [61 P.S. § 331.21a(a)]; *Stepoli v. Pennsylvania Board of Probation and Parole*, [525 A.2d 888 (Pa. Cmwlth. 1986)]....”). Thus, even if it assumed that Scott could have raised this claim before the Board in an untimely manner, it is patently without merit and does not serve as a basis for disturbing the Board’s decision in this case.<sup>9,10</sup>

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<sup>9</sup> Moreover, the Pennsylvania Supreme Court recognized long ago that the denial of credit for “street time” is not an unconstitutional enhancement of a parolee’s original sentence. See Young v. Pennsylvania Board of Probation and Parole, 487 Pa. 428, 435–436, 409 A.2d 843, 847 (1979) (“[T]he effectiveness of parole as a penological device to assist in the reintegration of the offender into society as a useful member is dependent upon the state’s power to impose reasonable conditions upon the offender who serves in that status. This Court and the courts in the federal system have recognized that statutes denying credit on sentence for time spent on parole, where the offender has committed and has been convicted of an offense while serving in the parole status, represents a reasonable exercise of the penological responsibility and does not offend the constitutional guarantees to the citizens of the state and this nation. Certainly, a state is not precluded by the Federal Constitution from giving paroled convicts an added inducement to ‘go straight’ by retaining the ability to recommit them for crimes they commit while on parole.

(Continued....)



Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

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No constitutional question is involved in the Parole Board's failure to give relator credit for time on parole and its adjustment of the expiration date of his new maximum." (footnotes and citations omitted).

<sup>10</sup> As a corollary to this allegation of error, Scott also alleges that the Board erred in its calculation of his parole violation maximum in its decision of April 2, 2001 following the revocation of his reparole based on his 1999 Retail Theft conviction. See Brief in Support of Petition for Review at 9–10. Scott asserts that the Board erred in calculating the “street time” that he had lost upon the revocation of his reparole at that time and, as a result, his present parole violation maximum date thereby incorrectly lengthens his sentence constituting cruel and unusual punishment. See Id. at 10–11. However, our review of the certified record demonstrates that Scott did not raise this issue in a request for administrative review to the Board either in 2001 or in the instant proceedings in 2007. As a result, it has been waived for purposes of appeal. Pa.R.A.P. 1551(a) (“[N]o question shall be heard or considered by the court which was not raised before the government unit....”); McCaskill, 631 A.2d at 1094–1095 (“[A]s to the first issue raised, McCaskill argues that the Board erred by extending his sentence beyond that imposed by the trial court or that authorized by law.... The Board contends that McCaskill has waived these issues by failing to raise them in his administrative appeal. We agree. It has been the holding of this Court that issues not raised by a CPV before the Board in an administrative appeal are waived for purposes appellate review by this Court.... McCaskill, in his August 1992 request for administrative relief failed to specifically raise any allegations of error with respect to the Board's determinations that extended his maximum term expiration date pursuant to the 1986 convictions, or any convictions which occurred while he was not at liberty on parole. As McCaskill's request for administrative relief merely stated his opinion as to what the maximum term expiration date should be, such issues are waived for purposes of appeal to this Court.”) (citations omitted). See also Evans v. Department of Corrections, 713 A.2d 741, 743 (Pa. Cmwlth. 1998) (“[A]n inmate's failure to petition for administrative relief with the Board from the alleged miscalculation of a maximum sentence acts as a bar to judicial intervention in the administrative process. In this case, although Evans alleges that his maximum sentence date was miscalculated, he never filed a petition for administrative relief with the Board. Because Evans did not petition for administrative relief with the Board from that calculation, he did not exhaust his administrative remedies. Consequently, because he did not avail himself of the available administrative remedy by filing an appeal from the 1994 order, his [1998] petition for review [in the nature of a writ of mandamus] is dismissed.”) (citation and footnote omitted).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Faheem Scott,		:	
	Petitioner	:	
		:	
v.		:	No. 1222 C.D. 2007
		:	
Pennsylvania Board of		:	
Probation and Parole,		:	
	Respondent	:	

**ORDER**

AND NOW, this 15th day of April, 2008, the decision of the Pennsylvania Board of Probation and Parole, mailed June 8, 2007 at Parole No. 2060-V, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge