

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Antoine Smith, :
 :
 Petitioner :
 :
 v. : No. 1238 C.D. 2007
 : Submitted: March 28, 2008
 Pennsylvania Board of Probation and :
 Parole, :
 Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Judge
 HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY JUDGE FRIEDMAN

FILED: May 12, 2008

Antoine Smith (Smith) petitions for review of the March 7, 2007, order of the Pennsylvania Board of Probation and Parole (Board), which set his parole violation maximum date at July 13, 2013. In his petition, Smith argues that the Board failed to give him credit for all time he spent in custody solely under a Board warrant. Appointed counsel has filed an application for leave to withdraw as counsel, to which Smith has filed a response. We *sua sponte* quash Smith's petition for review for lack of appellate jurisdiction based on Smith's failure to exhaust administrative remedies, and we dismiss appointed counsel's application to withdraw as moot.

Initially, we note that the Board had filed a motion to quash Smith's petition for review. In its motion, the Board pointed out that Smith had not filed a petition for administrative relief from the Board's March 7, 2007, order. Because

Smith did not exhaust administrative remedies, the Board argued that his petition should be quashed for lack of appellate jurisdiction.¹

In response to the Board's motion, appointed counsel suggested that Smith **intended** to petition for review of the Board's June 6, 2007, order, which denied as untimely a letter, treated as a request for administrative relief, (Letter) received by the Board from Smith on October 12, 2006. Appointed counsel argued that, because the Board's June 6, 2007, decision mentions the Board's March 7, 2007, order² and because Smith had raised the same credit issue in his October 12, 2006, Letter to the Board, this court should review the credit issue raised by Smith in his current petition for review.

By order dated August 21, 2007, this court denied the Board's motion to quash without explanation. Apparently, this court accepted appointed counsel's argument. Otherwise, this court would lack jurisdiction over Smith's petition for review.

¹ The Board's regulation at 37 Pa. Code §73.1(b)(1) states that a Board determination will **not be deemed final** for purposes of appeal to a court until the Board has mailed its response to a petition for administrative review filed by the parolee. Section 763(a)(1) of the Judicial Code gives this court appellate jurisdiction over **final** orders of Commonwealth agencies. 42 Pa. C.S. §763(a)(1).

² The Board stated, "purely for [Smith's] information," that the Board issued an order on March 7, 2007, changing Smith's maximum date from November 28, 2013, to July 13, 2013. (C.R. at 68.)

After this court denied the Board's motion to quash, the Board filed the certified record with this court. Upon review of the record, we note that Smith did **not** raise a Board-related credit issue in his October 12, 2006, Letter. Smith stated in his Letter that the Board "did what was right [in giving him credit on his original sentence,] but the record office" at the prison has not given him sufficient credit on his **new** sentence. (C.R. at 63.) Although the Board had advised Smith to approach the sentencing court about the matter, Smith said, "I just need for you to just let the record office here know that all the rest of the time goes to the front [on the new sentence and that] the [B]oard only took 9 months." (C.R. at 63.) Because Smith's October 12, 2006, Letter raised a credit issue that involved the prison's record office, but not the Board, one of the factual bases for this court's denial of the Board's motion to quash was incorrect.

We recognize that, under the law of the case doctrine, a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of the same court in the earlier phases of the matter. *National Railroad Passenger Corporation v. Fowler*, 788 A.2d 1053 (Pa. Cmwlth. 2001). However, a departure from the law of the case doctrine is allowed where there has been a substantial change in the facts or evidence giving rise to the dispute or where the prior holding was clearly erroneous. *Id.* Moreover, the failure to exhaust administrative remedies is jurisdictional in nature, and, thus, we may consider *sua sponte* whether Smith's petition for review should be quashed for lack of appellate jurisdiction. *Brog v. Department of Public Welfare*, 401 A.2d 613 (Pa. Cmwlth. 1979).

Having examined the record, it is clear that Smith did **not** intend to petition for review of the Board's June 6, 2007, order.³ Indeed, there is no connection between the credit issue raised in the petition for review and the request for assistance with the prison's record office in the October 12, 2006, Letter. Inasmuch as Smith did not seek administrative review of the Board's March 7, 2007, order, and there is no indication in the record that Smith intended to petition for review of the Board's June 6, 2007, order, this court lacks appellate jurisdiction over Smith's petition for review.⁴

Accordingly, the petition for review is quashed. The application for leave to withdraw as counsel is dismissed as moot.

ROCHELLE S. FRIEDMAN, Judge

³ We note that when Smith filed his petition for review with this court, Smith failed to attach a copy of the order to be reviewed. This court returned the petition to Smith and directed him to attach the appropriate order. Smith then re-filed the petition, attaching the March 7, 2007, order of the Board, **not** the June 6, 2007, order, to his petition for review.

⁴ Even if we were to treat Smith's filing as a petition to review the Board's June 6, 2007, order, we reiterate that the Board, in that order, dismissed Smith's October 12, 2006, Letter as untimely. Smith does not address the timeliness issue in his petition for review, and appointed counsel does not address the timeliness issue in his application to withdraw. Ultimately, we would be compelled to dismiss the petition for review for failing to preserve the timeliness issue and deny the application to withdraw for failing to address the timeliness issue.

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

ORDER

AND NOW, this 12th day of May, 2008, the petition for review filed by Antoine Smith is quashed. The application for leave to withdraw as counsel is dismissed as moot.

ROCHELLE S. FRIEDMAN, Judge