

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald Burns,	:
Petitioner	:
	:
v.	: No. 1362 C.D. 2007
	: Submitted: May 16, 2008
Pennsylvania Department of	:
Probation and Parole and Jeffrey A.	:
Beard, Ph.D., Secretary of	:
Corrections of DOC,	:
Respondents	:

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
          HONORABLE MARY HANNAH LEAVITT, Judge  
          HONORABLE JAMES GARDNER COLINS,\* Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: July 2, 2008

Before us are two matters – one in our original jurisdiction and the other in our appellate jurisdiction involving the same issue – whether Ronald Burns (Burns) properly received credit for time resulting from one of his paroles. Before us under our appellate jurisdiction is an appeal from the Pennsylvania Board of Probation and Parole’s (Board) denial of Burns’ petition for administrative review that affirmed the Board’s decision setting his maximum

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\* The decision in this case was reached before the conclusion of Senior Judge Colins’ service.

release date as September 27, 2008, and that did not include time served while “eligible” for parole. The matter before us under our original jurisdiction involves preliminary objections filed by the Department of Corrections and its Secretary, Jeffrey A. Beard, Ph.D. (Beard) (collectively, the Department) to Burns’ petition for review in the nature of mandamus<sup>1</sup> requesting that a writ be issued directing the Department to recalculate his sentence to award credit against his maximum release date for time served while he was eligible for parole. Because time spent while “eligible” for parole does not count against time served, we affirm the Board and sustain the Department’s preliminary objections.

Burns was sentenced in Lehigh County on July 6, 1995, to a five to 15 year term for various drug offenses. At that time, he was awarded pre-sentence credit for three years, eight months and 28 days. He was also serving a separate sentence at the time of the new five to 15 year Lehigh sentence, and was, therefore, remanded to serve an additional period of backtime for the separate sentence. Burns was later notified that he was to be re-paroled from the separate sentence “on or after July 6, 1996.” The Board rescinded that eligibility on September 20, 1996, and he was ultimately re-paroled from the earlier sentence on April 22, 1997.<sup>2</sup>

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<sup>1</sup> A writ of mandamus is an extraordinary writ and is properly granted to compel performance of a ministerial duty only when the plaintiff establishes a clear legal right to relief and a corresponding duty to act on the part of the defendant. *Taglienti v. Department of Corrections*, 806 A.2d 988 (Pa. Cmwlth. 2002).

<sup>2</sup> On April 22, 1997, Burns signed the Board forms acknowledging the conditions of his parole.

Burns was subsequently paroled to the street on the five to 15 year Lehigh sentence and re-incarcerated based upon a possible parole violation due to the filing of new charges in Lehigh County. However, these convictions were vacated by the Superior Court and later *nolle prossed*. The Department then re-structured Burns' five to 15 year sentence and recalculated his maximum release date to September 27, 2008, which the Board noted in a decision setting forth the date he was eligible for parole.

Burns filed a petition for administrative review in April 2007 contending that the maximum date did not reflect credit for time spent incarcerated when he was notified of his eligibility for parole in July 1996 on his other sentence for which he was serving backtime. He argued that the tentative re-parole date of July 6, 1996, on the other sentence should be used as the commencement date for his five to 15 year sentence, and that if so used, his maximum release date would be December 12, 2007. The Board denied that petition on July 3, 2007, contending that "the Board had no control over the calculation, and that it was not the appropriate party to seek relief from" because it had never calculated the maximum release date – that calculation had been made by the Department.

Claiming that the Board and the Department had to count the time he was eligible for parole as the commencement of his later sentence, Burns filed a petition for review in the nature of mandamus against the Department and the Board seeking credit for the period from July 6, 1996, to April 22, 1997, on July 18, 2007. Because he challenged the Board's decision regarding his maximum release date, we construed that petition as an appeal from the Board's denial of his

request for administrative relief as well as an action for mandamus. In October 2007, a motion was filed to dismiss Beard from the proceedings on the basis that he was not a proper party of a sentence challenge concerning a final adjudication of the Board. By order entered October 31, 2007, we denied that motion and directed both Beard and the Board to file responsive pleadings to the amended petition and to address the issue of mandamus relief.

The Board filed preliminary objections to the amended petition contending that it was not a proper party to the action to the extent that Burns sought mandamus against the Board because he had an adequate remedy at law. We sustained those objections and dismissed the Board from the original jurisdiction part of the action. Before us is the Department's preliminary objections<sup>3</sup> in the nature of a demurrer, as well as Burns' appeal from the Board's denial of his petition for administrative review.<sup>4</sup>

As to Burns' appeal from the Board's 2007 decision denying his request for administrative review, Burns contends that the Board should have given him credit on his five to 15 year sentence for the time he was eligible for parole

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<sup>3</sup> In ruling on preliminary objections in the nature of a demurrer, we must determine whether the petitioner has stated a cause of action in his petition for review, assuming the truth of all factual averments and bearing in mind that if there is any doubt, preliminary objections should be overruled. *Sinwell v. Pennsylvania Board of Probation and Parole*, 406 A.2d 597 (Pa. Cmwlth. 1979).

<sup>4</sup> When reviewing whether the Board properly applied a time credit to Burns' sentence, our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. §704.

from his earlier sentence. However, as the Board noted in its denial of the request for administrative review, the Department has exclusive authority to calculate the original maximum release date. *See Gillespie v. Department of Corrections*, 527 A.2d 1061 (Pa. Cmwlth. 1987). As the Board further noted, the 2006 recalculation was done by the Department, and the Board had “no control over the decision.” Because Burns challenged the recalculation of a decision that the Board did not make, his appeal was properly denied.

As to the Department’s preliminary objections to Burns’ petition for review, whether its demurrer should be sustained is determined by whether Burns is entitled to credit for time he was “eligible for parole.”<sup>5</sup> When the Board issues an order stating that one is eligible for parole “on or after” a certain date, it does not, as Burns suggests, establish a definite parole date; such an order only establishes that a prisoner will not be paroled *before* that date. Moreover, a prisoner does not attain the status of “parolee” until the grant of parole is “executed.” *Shaw v. Pennsylvania Board of Probation and Parole*, 617 A.2d 290 (Pa. Cmwlth. 1996); *Cf. Jago v. Van Curen*, 454 U.S. 14 (1981). It is only when a prisoner is actually released from incarceration that the time becomes “street time” that may count against his maximum release date absent a revocation of parole as a convicted parole violator. Such a conviction results in a loss of all street time. *See Meritt v. Pennsylvania Board of Probation and Parole*, 524 Pa. 577, 574 A.2d 597 (1990); *Bowman v. Pennsylvania Board of Probation and Parole*, 709 A.2d 945

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<sup>5</sup> Burns contends that he is entitled to time from “on or about” July 6, 1996, until he was released on April 22, 1997, or alternatively, that he should be given credit from July 6, 1996, to September 20, 1996, the date on which his eligibility for parole was rescinded.

(Pa. Cmwlth. 1998). Because time served by an inmate on an earlier sentence while eligible for parole does not count as time served on a later sentence to which the inmate would be paroled, Burns is not entitled to credit for the time served on his earlier sentence while merely eligible for parole and not actually paroled, and his five to 15 year sentence cannot be considered as commenced until he was actually paroled from his prior sentence. Therefore, we sustain the Department's preliminary objections.

Accordingly, the order of the Board is affirmed, and Burns' petition for review is dismissed.

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DAN PELLEGRINI, JUDGE

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**ORDER**

AND NOW, this 2<sup>nd</sup> day of July, 2008, the July 3, 2007 Order of the Pennsylvania Board of Probation and Parole denying Petitioner’s petition for administrative review is affirmed and the Respondents’ preliminary objections are sustained and Petitioner’s petition for review is dismissed.

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DAN PELLEGRINI, JUDGE