IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles Johnson, Petitioner	:	
v.	:	No. 1515 C.D. 2009
Pennsylvania Board of Probation and Parole, Respondent	:	Submitted: August 20, 2010

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: November 10, 2010

Charles Johnson petitions for review of a decision of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief from the Board's decision recommitting him to serve 12 months back time as a convicted parole violator, and setting his parole violation maximum date as July 1, 2015. Also before the Court is a Petition for Leave to Withdraw as Counsel (petition) filed by Jonathan D. Ursiak, Esquire, an Assistant Public Defender for Luzerne County, Pennsylvania, on the basis that Johnson's appeal is without merit. We deny Attorney Ursiak's petition.

On August 8, 1990, Johnson was sentenced to serve an aggregate term of imprisonment of 6 years, six months to 13 years based upon his guilty pleas to the delivery of heroin and conspiracy to deliver heroin. Certified Record (CR) at

1. With an effective date of May 3, 1990, the minimum date of Johnson's sentence was November 3, 1996 and the maximum date of his sentence was May 3, 2003. Id. Johnson was released on parole on November 11, 1996. Id. at 4.

On September 15, 1999, Johnson was arrested by agents of the Pennsylvania Attorney General's Office for drug-related activities, and he was detained in the Lycoming County Jail. CR at 8-10. Bail was set on these charges at $27,500.00 and Johnson did not post bail. Id. at 8. That same day, the Board issued a warrant to commit and detain Johnson for violation of his parole based on the new state drug charges. Id. at 7, 8.

On October 27, 1999, a federal grand jury indicted Johnson on charges of possession with the intent to distribute cocaine and crack cocaine and conspiracy to distribute these controlled substances. CR at 22-23, 32-36. Johnson was arrested on the federal charges on December 2, 1999, and he did not post bail. Id. at 22, 37. Johnson continued to be detained in the Lycoming County Jail on the new state drug charges. Id. at 22. On April 10, 2000, Johnson pleaded guilty to one count of the federal charges. Id. at 24, 37.

On June 12, 2000, a parole revocation hearing was conducted before a Board hearing officer based upon Johnson's guilty plea to the federal charge. CR at 45-64. On July 24, 2000, the Board recommitted Johnson to serve 12 months back time as a convicted parole violator when available. Id. at 85.

On August 16, 2000, Johnson was sentenced to serve a 130-month term of imprisonment in federal court. CR at 25, 86, 95. On September 7, 2000, the new state drug charges were nolle prossed. Id. at 19. On February 20, 2009, Johnson was released from federal custody to serve his original sentence and the back time imposed by the Board. Id. at 86, 95.

In a decision mailed April 21, 2009, the Board referred to its decision of July 24, 2000, to recommit Johnson as a convicted parole violator to serve 12 months back time based upon his federal conviction. CR at 89. The decision indicated that Johnson's new parole violation max date was July 1, 2015. Id.

On May 21, 2009, Johnson submitted a request for administrative relief with the Board. CR at 90-94. In particular, Johnson was seeking credit on his original sentence for the time period of September 15, 1999, the date on which he was arrested on the new state drug charges, to October 25, 2000, the date on which he alleged that he was taken into custody by the federal authorities to serve his federal sentence. Id. at 92-93.

On July 14, 2009, the Board issued a letter denying Johnson's request for administrative relief. Johnson then filed the instant appeal from the Board's decision.[1]

On January 8, 2010, Attorney Ursiak filed his first petition for leave to withdraw as counsel.[2] On June 30, 2010, this Court issued a memorandum opinion

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[1] This Court's scope of review of a Board decision is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether the parolee's constitutional rights were violated. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Gaito v. Pennsylvania Board of Probation and Parole, 563 A.2d 545 (Pa. Cmwlth. 1989), petition for allowance of appeal denied, 525 Pa. 589, 575 A.2d 118 (1990). Substantial evidence is such evidence that a reasonable mind might accept as adequate to support a conclusion. Chapman v. Pennsylvania Board of Probation and Parole, 484 A.2d 413 (Pa. Cmwlth. 1984).

[2] This Court has reexamined what steps counsel appointed to represent parolees seeking review of determinations of the Board must take to withdraw from representation. In Hughes v. Pennsylvania Board of Probation and Parole, 977 A.2d 19 (Pa. Cmwlth. 2009), this Court held that in a case where there is a constitutional right to counsel, counsel seeking to withdraw from representation of a parolee in an appeal of a determination of the Board should file a brief in accordance with Anders v. California, 386 U.S. 738 (1967). Relying upon the United States Supreme Court's decision in Gagnon v. Scarpelli, 411 U.S. 778 (1973), we held that a

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and order denying the petition, and directed Attorney Ursiak to either refile a proper petition for leave to withdraw or to file a brief in support of Johnson's petition for review within 30 days.

As a result, on July 30, 2010, Attorney Ursiak filed the instant Anders brief in support of his petition for leave to withdraw in which he again concludes that Johnson's appeal is without merit. In the brief, Attorney Ursiak outlines the relevant facts and law supporting his conclusion that Johnson's appeal is without merit. See Anders Brief in Support of Petition for Leave to Withdraw as Counsel at 5-6. However, our review of the certified record in this case compels a contrary conclusion.

In this case, the Board's decision denying Johnson's request for administrative relief stated the following, in pertinent part:

> When you were released on parole from your original sentence on November 11, 1996, your maximum sentence date was May 3, 2003, which left 2,364 days

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constitutional right to counsel arises where the petitioner raises a:

> colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Hughes, 977 A.2d at 24 (quoting Gagnon, 411 U.S. at 790). We stated further that such claims would only arise in appeals from determinations revoking parole. Id. Accordingly, we held that "[i]n an appeal from a revocation decision, this Court will apply the test from Gagnon, quoted above, and, unless that test is met, we will only *require* a no-merit letter." Id. at 26 (emphasis in original, footnote omitted). We noted further that "[a]s in the past, we will not deny an application to withdraw simply because an attorney has filed an Anders brief where a no-merit letter would suffice. In cases where there is no constitutional right to counsel, however, we shall still apply the standard of whether the petitioner's claims are without merit, rather than whether they are frivolous." Id. at 26, n.4.

remaining to serve on your original sentence. As a convicted parole violator, you automatically forfeited credit for all of the time that you spent on parole. *See* [Section 21.1(a) of the former statute commonly referred to as the Parole Act (Act)[3,4]]. While on parole, you were arrested on September 15, 1999, and placed in the Lycoming County Prison on [your new state drug charges]. The Board lodged its warrant to commit and detain you that same day. You did not post bail in this

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[3] Act of August 6, 1941, P.L. 861, added by the Act of August 24, 1951, P.L. 1401, as amended, 61 P.S. § 331.21a(a). Section 21.1a of the Act provided, in pertinent part:

> (a) Convicted Violators. Any parolee under the jurisdiction of the [Board] released from any penal institution of the Commonwealth who, during the period of parole … commits any crime punishable by imprisonment, … to which he pleads guilty … 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….
>
> If a new sentence is imposed upon such parolee, the service of the balance of said term originally imposed shall precede the commencement of the new term imposed in the following cases:
>
> (1) If a person is paroled from any State penal or correctional institution under the control and supervision of the Department of Justice and the new sentence imposed upon him is to be serviced in any such State penal or correctional institution.
>
> (2) If a person is paroled from a county penal or correctional institution and the new sentence imposed upon him is to be served in the came county penal or correctional institution.
>
> In all other cases, the service of the new term for the latter crime shall precede commencement of the balance of the term originally imposed.

61 P.S. § 331.21a(a)(1) & (2).

[4] Effective October 13, 2009, Section 21.1 of the Act was repealed and replaced by Section 6138 of the Prisons and Parole Code, 61 Pa.C.S. § 6138.

> case. You were also arrested for [your new federal drug charges] on October 27, 1999, for an incident that occurred on February 19, 1999. You did not post bail on the aforementioned charges. You pled guilty to charges against you in the federal case on April 10, 2000, and you were sentenced that same day to a term of 130 months in federal prison. On September 7, 2000, the [new state drug charges] were dismissed. You were released from your federal sentence on February 20, 2009, and on February 24, 2009 you were returned to SCI-Pittsburgh and placed in "parole violator pending" status.
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> With the above facts in mind, the Board provided you with 42 days of back time served credit (i.e. time that you were held solely on the Board's warrant prior to your recommitment order) for the period of September 15, 1999 (date the Board warrant was lodged) to October 27, 1999 (date you were arrested on the federal charges). Subtracting 42 days from 2,364 days results in you owing 2,322 days of back time toward your original sentence. You became available to begin serving your back time on February 20, 2009, when you were released from your federal sentence. Adding 2,322 (or 6 years, 4 months, 10 days) to February 20, 2009, yields a new parole violation maximum date of July 1, 2015. Therefore, your parole violation maximum sentence date is correct.

CR at 97-98 (citation omitted).

However, as noted above, although Johnson was indicted on the federal charges on October 27, 2000, see CR at 22-23, 32-36, he was not arrested on the federal charges until December 2, 2000, at which time he did not post bail. See id. at 22, 37. In addition, although Johnson pleaded guilty to the federal charge on April 10, 2000, see id. at 24, 37, he was not sentenced to a 130-month term of imprisonment in federal court until August 16, 2000. See id. at 25, 86, 95. Thus, it appears that the Board's decision denying Johnson's request for administrative relief is not supported by substantial evidence. To the contrary, it appears that the dates upon which the Board relied in its decision denying

Johnson's request for administrative relief are patently incorrect and are belied by the certified record of this case.

Generally, when a parolee was convicted of a new offense while on parole and was recommitted by the Board, Sections 21 and 21.1 of the Act[5] required that the parolee serve the remainder of his original term, with no credit for time already served on parole. 61 P.S. §§ 331.21(a), 331.21a(a); Gaito v. Pennsylvania Board of Probation and Parole, 488 Pa. 397, 400-401, 412 A.2d 568, 569-570 (1980). However, Gaito provided a nuance to the general rule:

> [T]hus, if a defendant is being held in custody *solely* because of a detainer lodged by the Board and has otherwise met the requirements for bail on the new criminal charges, the time which he spent in custody shall be credited against his original sentence. If a defendant, however, remains incarcerated prior to trial because he has failed to satisfy bail requirements on the new criminal charges, then the time spent in custody shall be credited to his new sentence.

Gaito, 488 Pa. at 403-404, 412 A.2d at 571 (emphasis in original and footnote and citations omitted).

Section 21.1(a) of the Act outlined the method in which a new sentence imposed on a convicted parolee by the Board should have commenced in

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[5] Specifically, Section 21(a) of the Act limited the Board's discretion in this matter:

> The power to parole herein granted to the Board of Parole may not be exercised in the board's discretion at any time before, but only after, the expiration of the minimum term of imprisonment fixed by the court in its sentence or by the Pardon Board in a sentence which has been reduced by commutation.

61 P.S. § 331.21(a). Furthermore, Section 21.1(a) of the Act mandated that if the parolee's "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).

relation to back time stemming from the original offense. A parolee should have served back time prior to the new sentence in one of two scenarios: (1) the parolee was paroled from an SCI and the new sentence was also to be served in an SCI; and (2) the parolee was paroled from a county institution and the new sentence was to be served in a county institution as well. 61 P.S. § 331.21a(a); Frankhouser v. Pennsylvania Board of Probation and Parole, 608 A.2d 595, 596 (Pa. Cmwlth. 1992). In other instances, the sentence for the new offense should have been served prior to serving the back time. 61 P.S. § 331.21a(a); Frankhouser, 608 A.2d at 596.

In Frankhouser, this Court interpreted Section 21.1(a) of the Act and recognized that any sentence to be served in a non-state institution, such as a federal sentence, takes precedence over back time. Frankhouser, 608 A.2d at 597. The facts in Frankhouser involved a parolee who was convicted of a federal offense, which occurred while out on parole from the Board, and sentenced by a federal court. Id. at 596. There, the federal Bureau of Prisons (BOP) designated any SCI in Pennsylvania which would confine the parolee as the institution where the parolee could serve his federal sentence. Id. In reviewing the record, this Court discovered the judgment form, which would normally indicate when and at which SCI the parolee would be subjected to serving his federal sentence, was left blank. Id. at 597. The portion of the judgment certifying that a U.S. Marshal delivered the defendant to a specified institution and the date of delivery was also blank. Id. This Court explicitly noted that "[n]othing in the record establishes when [the parolee] was transferred to federal custody, nor does the record establish that [the BOP] began crediting [the parolee's] federal sentence from the date of sentencing." Id. In light of these concerns, this Court could not determine the

amount of back time served by the parolee and vacated and remanded to the Board for a determination of when the parolee started his federal sentence. Id.

Here, as in Frankhouser, the record does not establish when Johnson was received into federal custody, or from what date he received credit on his federal sentence. The judgment form issued by the federal court on August 16, 2000, lists Johnson's residence address and mailing address as the Lycoming County Prison. CR at 24. In addition, the judgment form does not indicate where Johnson was to serve his federal sentence, merely stating that "the Court recommends that the Bureau of Prisons place [Johnson] in a suitable institution as close as possible to Williamsport, Pennsylvania." CR at 25. Moreover, although the judgment form indicates that Johnson was remanded to the custody of the United States Marshal, it does not indicate when he came into the custody of the U.S. Marshal, and the portion of the judgment certifying that a U.S. Marshal delivered him to a specified institution and the date of delivery is blank. Id.[6]

In addition, as also noted above, on September 15, 1999, Johnson was arrested on his new state drug charges and detained at the Lycoming County Jail. CR at 8-10. Bail was set on these charges at $27,500.00 and Johnson did not post bail. Id. at 8. However, on September 7, 2000, the new state drug charges were nolle prossed. Id. at 19.

As indicated above, in Gaito, the Supreme Court determined that a parolee is entitled to credit against his original sentence when he is detained solely on the Board's warrant. However, in Martin v. Pennsylvania Board of Probation and Parole, 576 Pa. 588, 840 A.2d 299 (2003), the Supreme Court addressed the

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[6] See, e.g., Scott v. Pennsylvania Board of Probation and Parole, 498 A.2d 31, 33 (Pa. Cmwlth. 1985) ("[T]hat federal authorities held Scott in a county prison in Pennsylvania does

(Continued....)

credit calculation for a parolee that is incarcerated on both new criminal charges and a Board detainer prior to a trial and, thereafter, is sentenced to fewer days than he has already spent in custody. The Supreme Court held that in such a situation, the excess time spent in custody that is over and above the sentence imposed for the new crime will be credited toward the parolee's original sentence. More specifically, the court stated:

> [O]ur decision in the instant matter does not create a "penal checking account." It merely provides for the allocation of all periods of confinement: (1) where confinement is the result of both a Board warrant and pending criminal charges; (2) where there is no period of incarceration imposed; (3) where the charges are nolle prossed; (4) or the parolee is acquitted. Accordingly, we hold that, where an offender is incarcerated on both a Board detainer and new criminal charges, all time spent in confinement must be credited to either the new sentence or the original sentence. We further hold that the indigency of a detainee in failing to satisfy the requirements for bail is not determinative as to whether the offender receives credit for time served.

Martin, 576 Pa. at 605, 840 A.2d at 309 (footnote omitted). See also Gaito, 488 Pa. at 404 n. 6, 412 A.2d at 571 n. 6 ("It is clear, of course, that if a parolee is not convicted, or if no new sentence is imposed for that conviction on the new charge, the pre-trial custody time must be applied to the parolee's original sentence.").

Based upon all of the foregoing, in the case sub judice, it appears that the Board's decision denying Johnson's request for administrative relief is not supported by substantial evidence. Moreover, it appears that there are issues with respect to the credit to be allocated among Johnson's state and federal sentences

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not diminish the effect of their custody over him at the times in question.").

for the time period of September 15, 1999, to October 25, 2000, that are not patently without merit.

Accordingly, Attorney Ursiak's petition is denied, with prejudice, and counsel is directed to file a brief in support of Johnson's petition for review within thirty (30) days.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles Johnson, Petitioner	:	
v.	:	No. 1515 C.D. 2009
Pennsylvania Board of Probation and Parole, Respondent	:	

<u>O R D E R</u>

AND NOW, this 10th day of November, 2010, the Petition for Leave to Withdraw as Counsel filed by Jonathan D. Ursiak, Esquire, is DENIED with prejudice, and counsel is directed to file a brief in support of Charles Johnson's petition for review within thirty (30) days of this order.

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JAMES R. KELLEY, Senior Judge