IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Edward Hill,	:	
Petitioner	:	
	:	No. 1759 C.D. 2009
v.	:	
	:	Submitted: June 4, 2010
Pennsylvania Board of Probation and Parole,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: October 29, 2010

John Edward Hill appeals from the August 5, 2009, order of the Pennsylvania Board of Probation and Parole (Board), which denied his administrative appeal.

In 1992, Hill was arrested and charged with simple assault, burglary, indecent assault, and criminal attempt of indecent assault. (Certified Record (C.R.) at 55.) Hill ultimately pleaded guilty to burglary and a probation violation, and in 1997 he was sentenced to a period of incarceration of one year and six months to four years, eleven months, and thirty days. The record reflects that the indecent assault and attempted indecent assault charges were withdrawn pursuant to a plea agreement. (C.R. at 68.) Subsequently, on October 3, 2005, Hill pleaded guilty to aggravated assault and was sentenced to a term of eight years and six months to twenty years in prison.

The Board paroled Hill on February 4, 2008. One of the special conditions of Hill's parole was a requirement that he submit to an evaluation to determine his need for sexual offender treatment. (C.R. at 7.) The document setting forth the conditions governing Hill's parole informed him that, if he believed that his rights were violated as a result of his parole supervision, he could file a complaint with the Board's district office and, if he was not satisfied, submit a complaint to the Board. (C.R. at 10.) Hill did not file such a complaint. Hill signed the document setting forth the special conditions of his parole, (C.R. at 11), and was subsequently evaluated for treatment. The evaluation resulted in a determination that he should receive sex offender treatment.

By notices dated September 30, 2008, and December 1, 2008, Hill's parole agent ordered him to attend and successfully complete outpatient sex offender treatment as a special condition of his parole. The Board's notices informed Hill that an administrative procedure was available to challenge this condition:

> If you believe that the above Special Conditions are inappropriate, you may file a timely complaint in writing, first to the supervisor of the district office under which you are being supervised. If your complaint is not resolved to your satisfaction, you may then submit your complaint in writing to the District of Supervision. If your complaint is still not resolved to your satisfaction, you may then submit your complaint in writing to the Board Secretary for final disposition by the Board.

(C.R. at 17, 18.) Hill did not file a complaint objecting to the imposition of this special condition of his parole.

Hill participated in sexual offender treatment; however, he denied during the course of treatment that he was a sexual offender. The treatment program

required Hill to submit to a therapeutic denial polygraph examination, and his answers to questions posed during the examination were interpreted by the program to be deceptive. (C.R. at 24-26, 58.) The program subsequently discharged Hill, concluding that he was not amenable to community based treatment. (C.R. at 26, 58.)

Hill was arrested on December 31, 2009, and confined at the State Correctional Institution at Camp Hill, where the Board conducted a violation hearing on March 13, 2009. The evidence produced at the hearing revealed that the Board's decision to require sex offender treatment as a condition of Hill's parole was based on allegations contained in the 1992 criminal complaint, which charged Hill with the crimes of indecent assault and criminal attempt of indecent assault. (C.R. at 54-55.) The evidence showed that Hill was never convicted of these offenses and did not have a history of sexually related convictions. (C.R. at 62.) Furthermore, evidence was presented showing that Hill was discharged from treatment because he denied that he was a sexual offender. (C.R. at 60.)

On March 26, 2009, the Board issued a decision recommitting Hill to serve nine months backtime for failure to successfully complete sex offender treatment. Hill filed with the Board a petition for administrative relief, alleging that he was not convicted of or imprisoned for any sexually related crimes, was released from the treatment program for denying that he had sexual problems, and should not have been ordered to attend therapy. On August 5, 2009, the Board denied Hill administrative relief, concluding that the evidence proved the parole violation. The Board also observed in its decision that Hill never filed a complaint challenging the imposition of the special parole condition requiring sex offender treatment.

On appeal to this Court, Hill contends that the Board erred by ordering him to undergo sex offender therapy and violated his rights under the Fifth

Amendment of the Constitution of the United States and Article I, Section 9, of the Pennsylvania Constitution against self incrimination by compelling him to make incriminating statements about offenses for which he was never convicted. Hill also asserts that he was erroneously discharged from the sexual offender program.

The Board argues that Hill's first and second issues are not properly raised on appeal because Hill did not pursue available administrative remedies to challenge the parole condition prior to violating it and because Hill never raised his constitutional claims in his administrative appeal. We agree with the Board.

A parolee is required to exhaust all available administrative remedies before a right to judicial review arises. St. Clair v. Pennsylvania Board of Probation and Parole, 493 A.2d 146 (Pa. Cmwlth. 1985). A parolee's failure to exhaust his or her available administrative remedies acts as a bar to judicial intervention in the administrative process. Id. This doctrine is designed to preserve the integrity of the administrative process by requiring the administrative agency charged with broad regulatory and remedial powers to address issues within its expertise before judicial review attaches. LeGrande v. Department of Corrections, 894 A.2d 219 (Pa. Cmwlth. 2006).

Here, the record reveals that the Board informed Hill of his right to file a complaint regarding the sexual offender treatment condition and that Hill did not take advantage of that opportunity. Instead, Hill entered into the sexual offender treatment program and, only after unsuccessful discharge from the program, argued that the condition should not have been imposed in the first instance. Hill does not assert that the Board's administrative procedure was inadequate or that any exception to the exhaustion of remedies doctrine applies in this case. We conclude that Hill failed to

exhaust administrative remedies and therefore cannot challenge the Board's decision to impose sex offender treatment as a condition of parole.[1]

Regarding Hill's constitutional claim, we have reviewed the request for administrative relief and find that Hill did not raise any issue therein regarding the constitutional right to self-incrimination. (C.R. at 91-92.) Therefore, we conclude that this issue is waived.[2] McKenzie v. Pennsylvania Board of Probation and Parole, 963 A.2d 616 (Pa. Cmwlth. 2009).

Finally, Hill argues that the Board erred by revoking his parole for violation of the condition mandating sex offender treatment, when he was never convicted of a sexual offense and was merely being truthful when he denied any sexual offense. We agree.

Where a parolee fails to satisfy a condition of parole over which he or she does not have control, such as being discharged from a program or employment, the Board must show that the parolee was somewhat at fault in order to prove a violation. McPherson v. Pennsylvania Board of Probation and Parole, 785 A.2d 1079 (Pa. Cmwlth. 2001); Hudak v. Pennsylvania Board of Probation and Parole, 757 A.2d 439 (Pa. Cmwlth. 2000). Where the parolee is not at fault, recommitting a parolee is

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[1] We are troubled by the Board's decision to impose a parole condition based on unadjudicated indecent assault charges contained in a criminal complaint that was approximately sixteen years old at the time of Hill's parole. The averments in the criminal complaint are merely allegations, not facts determined by trial or admitted by a guilty plea, and the record does not indicate any history of prior sexual offenses. Moreover, we note that the criminal complaint is not part of the record in this matter.

[2] This Court previously held in Wilson v. Pennsylvania Board of Probation and Parole, 942 A.2d 270 (Pa. Cmwlth. 2008), that a prisoner's right against self-incrimination was not violated by requiring him to participate in a sexual offender program that mandated acknowledgment of past sexual misconduct and crimes, and we recognize that the United States Supreme Court held that the right against self-incrimination does not arise until a person is compelled to be a witness against himself or herself in a criminal proceeding. Chavez v. Martinez, 538 U.S. 760 (2003).

an abuse of the Board's authority. Hudak. Furthermore, because the Board has the duty to acquire the specialized knowledge and expertise necessary to make parole decisions, Johnson v. Pennsylvania Board of Probation and Parole, 532 A.2d 50 (Pa. Cmwlth. 1987), it follows that the Board possesses the capacity to independently evaluate the reasons why a treatment provider discontinued treatment and determine whether those reasons involve the fault of the parolee.

The record reveals that Hill was discharged from sex offender treatment because he denied that he was a sexual offender and because the results of a therapeutic denial polygraph examination indicated that Hill was deceptive with regard to the offense charged in the 1992 criminal complaint. The events leading to Hill's discharge from treatment were described by Clay Rundell, the sexual offender program's assistant clinical director:

> Due to the statements from the criminal complaint of the arrest, at that point, it was warranted that further review be conducted. Mr. Hill, at the time the intake assessment and throughout the course of the therapy process with our agency, was given numerous homework assignments in regards to a statement of responsibility that he completed on 10/22/08. And, ultimately Mr. Hill was given a therapeutic denial polygraph on 12/17/08 to substantiate and, again, gauge the veracity of his statements. Following that therapeutic test, Mr. Hill was again given an explanation as to why he was assessed deceptive on the therapeutic denial polygraph. *On 12/31/08, Mr. Hill stated, I'm not a sex offender. As a result, Mr. Hill was subsequently discharged from our program*.

(C.R. at 58.) (Emphasis added.) Rundell further testified:

> If Mr. Hill would have admitted to that offense and taken full accountability, we would have continued to treat Mr.

> Hill. If Mr. Hill would have ultimately passed and was assessed as truthful on that therapeutic denial polygraph, I would have successfully discharged him from sexual offender treatment…

(C.R. at 63.)

Rundell admitted at the hearing that Hill did not have any convictions in his background that involved sexual crimes and that he was never convicted of indecent assault or attempted indecent assault, (C.R. at 62), and the certified record contains no evidence of any such conviction. Also, even though Hill's discharge from the sexual offender program was grounded upon unadjudicated allegations that were made against Hill in 1992, the record does not contain the criminal complaint, criminal information, witness statement, or police report that sets forth those allegations.[3] Hence, Hill's insistence during treatment that that he was not a sex offender is an accurate statement of his criminal record and, as such, was truthful as a matter of law. Providing truthful responses to questions posed during treatment does not constitute fault for purposes of revoking parole. Further, by requiring Hill to ignore the fact that he was never convicted of indecent assault or any other sexual crime and confess that he is a sexual offender, the Board disregarded Hill's actual

[3] This Court stated in Wilson that sexual offender treatment programs rehabilitate prisoners who have been convicted of a sexual offense *and* those whose crimes contain a sexual component. However, the record here does not include a guilty plea, trial record, or verdict showing that Hill was convicted of a crime that contained a sexual component. Instead, the matter is premised entirely on allegations, which were never admitted or tested at trial, and there were no criminal records introduced into evidence to establish an "official version" of the alleged offense.

Furthermore, unlike the prisoner in Wilson, who was never granted parole and refused to participate in a treatment program, Hill was paroled by the Board, entered into a sexual offender treatment program as a condition of his parole and was then unsuccessfully discharged from that program. Because the reasons for Hill's unsuccessful discharge are at issue in this appeal, this case is distinguishable from Wilson.

criminal record and focused its attention on unproven allegations, which skewed the question of fault and enforced program requirements that impeded Hill's ability to satisfy the conditions of his parole.[4] See In re Matsock, 611 A.2d 737 (Pa. Super. 1992) (holding that a trial court erred by terminating a father's parental rights based on, among other things, an unsuccessful discharge from sexual offender treatment due to not admitting guilt, when the father was never prosecuted or convicted of a sexual offense).

Indeed, while the Board is statutorily obligated to consider "such additional information regarding the nature and circumstances of the offense committed for which sentence was imposed as may be available," Hill was not sentenced on any sexual offenses. See Section 19 of the Parole Act, Act of August 6, 1941. P.L. 861, *as amended*, 61 P.S. §331.19 (emphasis added), *repealed by* section 11(b) of the Act of August 11, 2009, P.L. 147, effective October 13, 2009, and now codified at 61 Pa C.S. §6135(a)(6); Bandy v. Pennsylvania Board of Probation and Parole, 530 A.2d 507 (Pa. Cmwlth. 1987). The record cannot support a finding that Hill was at fault for continuing to deny allegations that he was a sex offender when he was not sentenced for such a crime, has no prior history, and when the record does

[4] Our decision in Heckman v. Pennylvania Board of Probation and Parole, 744 A.2d 371 (Pa. Cmwlth. 2000), where we declined to consider a challenge to the reasons for a parolee's discharge from a sexual offender program, is distinguishable from the instant case. The parolee in Heckman was subject to a condition of his parole forbidding him from contact with any child under the age of 18. The parolee admitted that he violated the condition, and the record indicated that he had a strong history of inappropriate sexual contact with children. In contrast to Heckman, Hill does not have a strong history of inappropriate sexual acts, but rather a single allegation in a 1992 criminal complaint that is not of record and never resulted in a conviction.

not contain an "official version" of Hill's crime indicating at the time of arrest he was found to be committing a sexual offense. [5]

Moreover, regarding results of the denial polygraph, the Superior Court, in Commonwealth v. Shrawder, 940 A.2d 436 (Pa. Super. 2007), accepted that the therapeutic polygraph is a proper element of a sex offender treatment program and is capable of furthering sentencing goals without excessive deprivations of liberty.[6] Nevertheless, Shrawder recognized that unbridled questioning during a therapeutic polygraph examination is problematic and, thus, the parameters of such an examination must be circumscribed to protect the parolee's right against self incrimination as guaranteed by the Constitution of the United States and the Pennsylvania Constitution. Hence, Shrawder held that a polygraph examination is constitutional, *so long as the questioning relates to the underlying offense for which an offender has been sentenced* and does not compel information that could be used against the offender in a subsequent criminal trial. Accord Commonwealth v. Fink, 990 A.2d 751 (Pa. Super. 2010) (extensive questioning of a parolee on a 21 page pre-polygraph questionnaire violated the parolee's right against self-incrimination).

Although Shrawder and Fink involved the issue of self-incrimination, which is not before us here, they are instructive on the question of when a purportedly deceptive polygraph result constitutes fault for purposes of a parole violation. The Superior Court's analysis informs us that there are limits to the permissible range of

[5] Even under Wilson, this Court implied that an "official version" of the crime would need to indicate that at the time of his arrest the defendant was found to be in the act of committing a sexual offense.

[6] We point out that the validity and reliability of the therapeutic polygraph procedure is disputed by some experts in the field. Ewout H Meijer, Bruno Verschuere, Harald L.G.J. Merckelbach, and Geert Crombez, Sex Offender Management Using the Polygraph: a Critical Review, 31 Int'l J. L. & Psychiatry 423 (2008).

questions that may be asked to a parolee undergoing a therapeutic polygraph examination and that those limits are circumscribed by the criminal convictions of the parolee. Thus, to demonstrate that the parolee was somewhat at fault when discharged from a program based on the results of a therapeutic polygraph examination, the Board must show that the polygraph examination is related to an offense that resulted in a conviction, which is the statutorily imposed parameter on the Board. See former 61 P.S. §331.19; 61 Pa C.S. §6135(a)(6).

Here, the Board abused its discretion by revoking Hill's parole based, in part, on purported deceptive answers to questions that had no connection to Hill's criminal sentence. Hill was required to submit to polygraph questioning regarding the allegations in the 1992 complaint, which allegations were withdrawn and did not result in a conviction. Because the questioning was unrelated to Hill's conviction for burglary, the result of the therapeutic denial polygraph examination was not a proper factor for the Board to consider when determining whether Hill was at fault for violating a condition of his parole. In addition, we note that the parole agent (who essentially functioned as the Commonwealth's counsel at the hearing) did not call the polygraph examiner, Michael Brennan, as a witness to testify that in his professional opinion the results of the denial polygraph were deceptive.

Therefore, for all of the foregoing reasons, we conclude that, under the circumstances of this case, the Board abused its discretion by revoking Hill's parole for failure to complete sexual offender treatment.[7]

[7] We note that the United States Court of Appeals for the Fifth Circuit has held that the State of Texas was required to provide procedural due process before imposing sex offender registration and therapy as conditions to a prisoner's release on parole or mandatory supervision, when the prisoner had never been convicted of a sex crime. Coleman v. Dretke, 395 F.3d 216 (5th Cir. 2004). Following Vitek v. Jones, 445 U.S. 480 (1980), the Coleman Court reasoned as follows:

Accordingly, the Board's order is reversed and the case is remanded for a new parole violation hearing consistent with this opinion.

PATRICIA A. McCULLOUGH, Judge

Senior Judge Kelley concurs in the result only.

> Applying Vitek in the sex offender arena, the Ninth and Eleventh Circuits have held that prisoners who have not been convicted of a sex offense have a liberty interest created by the Due Process Clause in freedom from sex offender classification and conditions. We agree. The facts of the present case are materially indistinguishable from Vitek. As in Vitek, the state imposed stigmatizing classification and treatment on Coleman without providing him any process. The state's sex offender therapy, involving intrusive and behavior-modifying techniques, is also analogous to the treatment provided for in Vitek. Although many parolees are required to participate in some form of counseling or treatment as a condition on their release, we find that, due to its highly invasive nature, Texas's sex offender therapy program is 'qualitatively different' from other conditions which may attend an inmate's release. Accordingly, the Due Process Clause, as interpreted in Vitek, provides Coleman with a liberty interest in freedom from the stigma and compelled treatment on which his parole was conditioned, and the state was required to provide procedural protections before imposing such conditions.

Coleman, 395 F.3d at 222-23 (footnotes omitted).

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Respondent	:	

ORDER

AND NOW, this 29th day of October, 2010, the August 5, 2009, order of the Pennsylvania Board of Probation and Parole (Board) is hereby REVERSED.

This case is remanded to the Board for a new parole violation hearing consistent with the foregoing opinion.

Jurisdiction relinquished.

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PATRICIA A. McCULLOUGH, Judge