

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Horace Butler,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1825 C.D. 2007
	:	Submitted: August 29, 2008
Pennsylvania Board of Probation and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER

FILED: October 23, 2008

Horace Butler seeks review of a denial by the Pennsylvania Board of Probation and Parole (Board) of his request for administrative relief from an order recommitting him as a convicted parole violator. Butler challenges the timeliness of his revocation hearing of May 24, 2007, asserting that it was not held within the 120-day time limit required by 37 Pa. Code §71.4(1).¹

¹ 37 Pa. Code §71.4(1) provides at pertinent part:

The following procedures shall be followed before a parolee is recommitted as a convicted violator:

(1) A revocation hearing shall be held within 120 days from the date the Board received official verification of the plea of guilty or nolo contendere or of the guilty verdict at the highest trial court level except as follows:

(i) If a parolee is confined outside the jurisdiction of the Department of Corrections, such as confinement out-of-State, confinement in a Federal correctional institution or confinement in a county correctional institution where the parolee has not waived

(Footnote continued on next page...)

Butler was sentenced by the Philadelphia County Court of Common Pleas on March 21, 1997 to a 5 to 10-year term for robbery and a concurrent 2-1/2 to 5-year term for aggravated assault. He was paroled on September 23, 2002 with a maximum expiration date of March 22, 2007. On September 8, 2006, Butler was arrested in Philadelphia County for driving under the influence of alcohol or drugs (DUI). The Board filed a warrant to detain him the same day, and Butler posted bail on October 15, 2006. While the DUI charge was pending, Butler was arrested again in Philadelphia on December 5, 2006 for robbery, possession of a firearm and aggravated assault, and on December 6, 2006 bail was set at \$100,000.

On December 27, 2006, Butler pled guilty to the DUI charge and received a sentence of 3 to 6 days of confinement and 6 months of probation. After he served his confinement, Butler remained incarcerated in Philadelphia on the robbery, firearm and aggravated assault charges. On January 18, 2007, the Board issued a decision recommitting Butler when available for a technical parole violation of condition #3A, failure to report; on January 23, 2007 Butler's bail for the robbery, firearm and aggravated assault charges was reduced to ROR; and on January 31, 2007 he was transferred to SCI Graterford. A parole revocation hearing was held before a hearing examiner on May 24, 2007, at which time Butler objected to the timeliness of the hearing. The objection was overruled, and the Board ultimately issued a decision on June 20, 2007 recommitting Butler as both a

(continued...)

the right to a revocation hearing by a panel in accordance with *Commonwealth ex rel. Rambeau v. Rundle*, 455 Pa. 8, 314 A.2d 842 (1973), the revocation hearing shall be held within 120 days of the official verification of the return of the parolee to a State correctional facility.

technical parole violator and convicted parole violator. He filed an administrative appeal, again raising the argument that his revocation hearing was untimely, and his request for relief was denied by letter dated September 17, 2007.²

Butler argues that his revocation hearing was untimely because it was held 121 days after the Board acquired jurisdiction over him by means of his ROR bail for the robbery, firearm and aggravated assault charges. He notes that 37 Pa. Code §71.4(1)(i) provides an exception to the rule that the revocation hearing is to be held 120 days after the date that the Board receives official verification of a finding of guilt. The exception applies when a parolee is confined outside of the jurisdiction of the Board, such as in a county correctional institution, and has not waived the right to a hearing before a full panel.³ In such a case, the revocation hearing must be held within 120 days of the official verification of the return of the parolee to a state correctional facility. *See Hartage v. Pennsylvania Board of Probation and Parole*, 662 A.2d 1157 (Pa. Cmwlth. 1995).

Butler further argues that pursuant to *Taylor v. Pennsylvania Board of Probation and Parole*, 397 A.2d 849 (Pa. Cmwlth. 1979), the exception was no longer applicable once he was being detained in a county facility solely upon the warrant of the Board. Since this occurred on January 23, 2007, the Board acquired jurisdiction over Butler on that date and the 120-day period for the revocation hearing under 37 Pa. Code §71.4(1) began to run.

²The Court's review of the Board's decision is limited to determining whether constitutional rights have been violated, an error of law was committed or the essential findings of fact were unsupported by substantial evidence. *Koehler v. Pennsylvania Board of Probation and Parole*, 935 A.2d 44 (Pa. Cmwlth. 2007).

³*See Commonwealth ex rel. Rambeau v. Rundle*, 455 Pa. 8, 314 A.2d 842 (1973).

When a parolee alleges that the Board held a revocation hearing beyond the 120-day period, the Board must prove by a preponderance of the evidence that the revocation hearing was timely. *Koehler v. Pennsylvania Board of Probation and Parole*, 935 A.2d 44 (Pa. Cmwlth. 2007). The Board argues that Butler's parole agent never verified his constructive return to state custody by means of his posting bail for a different, unrelated charge. The Board must officially verify a parolee's conviction before it holds a revocation hearing, but it has no duty to verify bail posting on a different, unrelated charge. In *Lee v. Pennsylvania Board of Probation and Parole*, 596 A.2d 264 (Pa. Cmwlth. 1991), this Court recognized that a parolee has a due process right to a revocation hearing within a reasonable time after being taken into custody. The Court found that a hearing held within 120 days after receipt of official verification of a parolee's conviction was reasonable as a matter of law. To hold otherwise would impose on the Board the Herculean task of conducting daily searches of dockets around the country to see if a parolee had been convicted. The Board suggests that if searching for convictions without official verification is an unreasonable burden, the task of searching for constructive return of a parolee to state jurisdiction by virtue of bail posting is even more unreasonable.

Unfortunately, neither party in this matter has set forth the date on which the Board received official notification of Butler's guilty plea on the DUI charge. At the hearing, an exhibit identified as "Sentencing Documentation" was marked and was described as having a "raised seal." Notes of Testimony (N.T.), May 24, 2007, Certified Record (C.R.) at 25. The hearing examiner denied the timeliness objection based on the date of that document but he did not put the date

on the record. The certified record does not contain an exhibit with a raised seal, so the Court is unable to determine this critical date.

The Board proposes that the 120-day period began to run in this case on the date Butler was returned to state custody, or January 31, 2007. The May 24, 2007 hearing would then be timely, as it occurred 113 days after Butler was transferred to the state correctional institution. The Board notes that when the time period for holding a hearing begins upon official verification of a parolee's return to a state correctional facility, the 120 days does not actually commence until the Board receives a Department of Corrections Sentence Status Change Form (Form DC-23B). In *McMahon v. Pennsylvania Board of Probation and Parole*, 559 A.2d 595 (Pa. Cmwlth. 1989), the Board received Form DC-23B notifying it of the parolee's return to state custody on December 2, 1987, but the parolee argued that his parole agent had been unofficially notified much earlier of his presence at the state prison. The Court rejected the notion that constructive notice of a parolee's return to state prison was equal to official verification.

Unlike *McMahon* the record in this matter does not contain evidence of any official verification of Butler's return to state custody being received by the Board. This Court has held that when the record contains no official verification of a parolee returning to state custody, the 120-day period begins to run on the date that the Board could have obtained official verification. *Williams v. Pennsylvania Board of Probation and Parole*, 579 A.2d 1369 (Pa. Cmwlth. 1990). The Board believes that this date could only be January 31, 2007 because it had no obligation to determine whether Butler made bail on the 2006 charges. Here, the timeliness objection was raised and was overruled by the hearing examiner based on "the date of verification and actual date of return to state custody" without further

explanation. C.R. at 25. No further evidence was taken concerning the date of official verification of conviction or of Butler's return to state custody.

The present case is similar to the facts of *Mack v. Pennsylvania Board of Probation and Parole*, 654 A.2d 129 (Pa. Cmwlth. 1995). In *Mack* the parolee had been arrested in Philadelphia on new criminal charges while he was on parole. He served his sentence in the Philadelphia County prison until November 2, 1993 and was transferred to SCI-Graterford on November 12. The Board conducted a revocation hearing on March 9, 1994, 117 days after the parolee's physical return to Graterford but 127 days after termination of his sentence in the county facility. The Court held that the parolee was within Board jurisdiction after the termination of his sentence, so the hearing was untimely. The Board distinguishes *Mack* by arguing that it applies only to a case where the parolee is constructively returned to state custody by virtue of completing the sentence of confinement, not where the transfer of jurisdiction to the Board occurs due to a release on bail from different county charges. The Board made no findings as to whether this factual difference affected notification to the Board of Butler's availability to return to state custody.

If the record has not been sufficiently developed as to allow complete appellate review, a remand is appropriate. *See Williams; Fitzhugh v. Pennsylvania Board of Probation and Parole*, 623 A.2d 376 (Pa. Cmwlth. 1993). As critical dates and documents are missing from the record here, the Court cannot complete its appellate review. Accordingly, the Board's order is vacated, and the matter is remanded for proceedings adequate to establish facts relating to receipt of official notification of Butler's conviction and the timing of his transfer to SCI-Graterford.

DORIS A. SMITH-RIBNER, Judge

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Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 23rd day of October, 2008, the order of the Pennsylvania Board of Probation and Parole is vacated, and this matter is remanded to the Board for the necessary fact finding and a new decision in accordance with the foregoing opinion.

Jurisdiction is relinquished.

DORIS A. SMITH-RIBNER, Judge