

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Green, :
Petitioner :
v. : No. 1848 C.D. 2007
 : Submitted: February 22, 2008
Pennsylvania Board of :
Probation and Parole, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: April 22, 2008

Robert Green petitions for review of an adjudication of the Pennsylvania Board of Probation and Parole (Board) that denied his request for credit toward his recalculated maximum sentence date of August 25, 2008. In this appeal we consider whether the Board erred in failing to grant Green credit for a portion of the time he spent at the Minsec York Community Corrections Center (Minsec Center) group home. Specifically, we must determine whether the conditions at Minsec Center were sufficiently custodial to require credit toward Green's sentence.

In April 2002, Green was sentenced in Philadelphia County to a term of imprisonment of two years and six months to five years for theft; the maximum sentence date was October 14, 2005. Green was paroled from the State Correctional Institution at Rockview on January 5, 2004, subject to a special condition requiring him to reside at Minsec Center until he completed drug and alcohol treatment.

Certified Record at 34-35 (C.R. ____). Green remained at Minsec Center from January 5, 2004, until April 26, 2004.¹ On September 1, 2005, Green was sentenced to eight years imprisonment, with three years suspended for an out-of-state offense. Green was returned to the Board's custody on November 16, 2006.

In a combined recommitment and recalculation order dated March 29, 2007, the Board recommitted Green as a technical and convicted parole violator² to serve a total of 15 months backtime, and recalculated his new maximum date as August 25, 2008. C.R. 1. Green appealed, arguing that the Board should have given him credit against his original sentence for the time he spent at the Minsec Center from January 5, 2004, to March 5, 2004, because he was not at liberty on parole during that time.

The Board held an evidentiary hearing on June 13, 2007, at which Green testified regarding the nature of his time spent at the Minsec Center. According to Green, there is a fence around the perimeter, the doors are locked, and residents are counted and constantly monitored by cameras. Green testified that there was a "blackout period" for the first sixty days during which he could not leave the facility; however, this statement was contradicted by his testimony that staff members transported him to and from group meetings during the blackout period. Green testified that if he asked to leave unescorted during the blackout period, the staff would not unlock the door. However, he subsequently acknowledged that he was allowed to leave during the first sixty days to go to the police station and traffic court.

¹ Apparently, Green absconded from parole at that point.

² Green's technical parole violations were violation of condition 1 of his parole (leaving the district without permission), condition 2 (change of residence without permission) and condition 7 (failure to successfully complete the community corrections center program). C.R. 3.

Green testified that after the sixty-day blackout period, residents are permitted to sign out and take public transportation to any meetings they need to attend.

Testimony was presented from Parole Agent Margerum, who monitored the Minsec Center while Green was there. Margerum testified that there is not a fence around the facility, and only the doorways and two other unspecified spots are monitored by cameras. Margerum also stated that Green was free to move about inside the facility and was free to come and go, and that there was not a sixty-day blackout period imposed on Green. To the contrary, Green was permitted to leave for work, leisure activities and social visits. Margerum noted that according to Green's own testimony, he went to the police station and traffic court without escort. Margerum explained that residents must take care of trips to the police station, traffic court, family court and the welfare office within their first two weeks of being in the program, and they go unescorted to these places on an authorized pass.

Margerum stated that the doors have magnetic locks on them which the security staff, sitting near the door, can open by pushing a button to let people in and out of the facility. Staff members will attempt to dissuade a parolee from leaving the facility, but if a parolee insists on leaving the staff will not prevent him from doing so. If a parolee leaves without authorization, he could be considered an absconder, but he will not be charged with escape.³

Following the hearing, the hearing examiner found that Green's stay at Minsec Center from January 5, 2004, to March 5, 2004, did not rise to the level of incarceration. In so finding, she generally relied on the testimony of Margerum and

³ Margerum testified that during the time period in question, Minsec Center housed only parolees; there were no prerelease inmates present.

Green. By notice mailed on July 12, 2007, the Board denied Green's request for credit, informing him that:

The Board finds that the Parolee: (1) has not rebutted the presumption that he was at liberty on parole during his attendance at Minsec [Center]; (2) did not meet his burden of producing evidence to prove that specific characteristics of the Minsec [Center] constituted restrictions on his liberty sufficient to warrant credit on the sentence from which he was on parole during his attendance; and (3) has not persuaded the Board that specific characteristics of the Minsec [Center] constituted restrictions on his liberty sufficient to warrant credit on the sentence from which he was on parole during his attendance.

C.R. 40. On September 14, 2007, the Board denied Green's administrative appeal, affirming its order based on the record in this case. Green now petitions this Court for review.⁴

Green presents one issue on appeal, namely, that the Board erred in failing to credit his original sentence with all time to which he was entitled when it recomputed his new maximum sentence date. Green argues that he should be given credit for the last forty-six days of the sixty-day blackout period because the doors to the facility were locked, and his testimony is uncontradicted that he was not given passes to leave the facility during that time.⁵ This, he asserts, is the equivalent of

⁴ This Court's review of an action of the Board is limited to a determination of whether the Board's findings are supported by substantial evidence, whether an error of law was committed, or whether any of the parolee's constitutional rights were violated. *Carter v. Pennsylvania Board of Probation and Parole*, 936 A.2d 155, 156 n.3 (Pa. Cmwlth. 2007). We will not interfere with a determination unless the Board has acted arbitrarily or plainly abused its discretion. *Houser v. Pennsylvania Board of Probation and Parole*, 874 A.2d 1276, 1278 n.2 (Pa. Cmwlth. 2005).

⁵ Green has dropped his request for credit for the entire first sixty days of his stay at Minsec Center. He admits that because he was permitted to leave the facility unescorted during the first two weeks, he is not entitled to credit for the first fourteen days. Therefore, he now seeks credit for the remaining forty-six days of the "blackout period." Petitioner's Brief at 12.

incarceration such that he could not be considered to be at liberty on parole; therefore, the time should be credited to his original sentence.

The Board counters that it did not act arbitrarily or abuse its discretion when it concluded that Green failed to prove that Minsec Center was a prison equivalent. The Board points out that Green did not prove there was a time when he could not leave the group home without a mandatory coercive security escort.

Section 21.1(a) of the act commonly known as the Parole Act⁶ (Act) provides, in relevant part, that the Board may recommit any parolee who, during the period of parole, “commits any crime punishable by imprisonment, for which he is convicted or found guilty....” 61 P.S. §331.21a(a). If a parolee is recommitted, he must serve the remainder of the term which he would have been required to serve had he not been paroled, and he “shall be given no credit for the time at liberty on parole.” *Id.*

The phrase “at liberty on parole” is not defined in the Act. Our Supreme Court has explained that “at liberty on parole” means “not at liberty from all confinement but *at liberty from confinement on the particular sentence for which the convict is being reentered as a parole violator.*” *Cox v. Pennsylvania Board of Probation and Parole*, 507 Pa. 614, 619, 493 A.2d 680, 683 (1985) (citations omitted) (emphasis in original). In *Cox*, the Court held that a parolee could be allowed credit for time spent in a rehabilitation program if he proves that the restrictions on his liberty while in the program “were the equivalent of incarceration.” *Id.*

⁶ Act of August 6, 1941, P.L. 861, *as amended*, 61 P.S. §331.21a. Section 21.1 was added by Section 5 of the Act of August 24, 1951, P.L. 1401.

This Court has analyzed various cases where credit was sought for time spent in a treatment facility, and noted that “ordinary restrictions such as those that attend many inpatient treatment programs are not so onerous as to require a credit.” *Torres v. Pennsylvania Board of Probation and Parole*, 861 A.2d 394, 400 (Pa. Cmwlth. 2004). However, we have also recognized that “a determination whether a parolee is entitled to credit is very fact specific” and requires an examination of the restrictions associated with each treatment program. *Meleski v. Pennsylvania Board of Probation and Parole*, 931 A.2d 68, 71 (Pa. Cmwlth. 2007).

Green asserts that he is entitled to credit because the blackout period at Minsec Center was at least as restrictive as that found in *Torres* and *Meleski*. In *Torres*, this Court determined that the parolee was entitled to credit for the first forty-five days he spent at a treatment facility because he could not leave the building except to attend required meetings, and when he went to those meetings he had a mandatory staff escort. We held that

a parolee who has been forbidden generally to leave a particular inpatient drug and alcohol rehabilitation facility for a specified period for which credit is sought, who is under 24-hour supervision during the specified period and who is not permitted to make required trips outside of the facility without an escort cannot reasonably be described as being “at liberty on parole.”

Torres, 861 A.2d at 401 (footnote omitted).

In *Meleski*, this Court determined that the parolee was entitled to credit for the first thirty-day blackout period at the facility when he could not leave the building⁷ or contact anyone, and was also entitled to credit for the next sixty-day

⁷ According to *Meleski*, any attempt to leave would set off an alarm.

period when he was only permitted to leave the facility once a week for a walk with a chaperone. The Court employed the rationale expressed in *Torres* that a parolee is not at liberty on parole if he is not permitted to make required trips outside the facility without an escort. *Meleski*, 931 A.2d at 73.

Our review of the relevant case law leads us to agree with the Board's position that this case is distinguishable from *Torres* and *Meleski*, and is actually more akin to *Figueroa v. Pennsylvania Board of Probation and Parole*, 900 A.2d 949 (Pa. Cmwlth. 2006). There, the parolee sought credit for the first ninety days at a treatment center which he claimed was a blackout period during which he could only leave the facility with an escort. The parolee asserted that the doors of the facility were locked and that he would be stopped if he attempted to leave without an escort. The parolee's testimony was contradicted by a manager of the facility who testified that parolees were permitted to leave the facility unescorted and that, although the doors were locked, staff members did not physically restrain the residents.

In concluding that *Figueroa* was not entitled to credit, this Court stated:

In this case, we agree with the Board's determination that *Figueroa* was not constructively incarcerated during the initial 90-day blackout period. Although the doors to the Center are locked, this is only to prevent unauthorized visitors from entering, not to prevent the residents from leaving. Staff members do not physically restrain the residents, nor are the residents charged with escape if they leave the facility. According to the Center's unit manager, the residents are, in fact, permitted to leave unescorted during the blackout period to attend to personal business. Although *Figueroa* may have perceived the restrictions as confining, his subjective impressions are irrelevant, and the fact that he may have chosen not to exercise his right to leave the facility without an escort in no way strengthens his claim that he was in custody.

Id. at 952-953 (footnote omitted). We also pointed out that whereas in *Torres* the parolee's testimony that he could not leave unescorted was confirmed by the program's executive director, Figueroa's claim that he could not leave the facility without an escort was rebutted by the unit manager.

In this case, as in *Figueroa*, the parolee has failed to prove entitlement to credit. Although Green testified that he was subject to a sixty-day blackout period during which he could not leave the facility unescorted, he contradicted his own testimony at the hearing by stating that he went on excursions to the police station and family court. He admits in his appeal that he was permitted to leave unescorted during the first two weeks at Minsec Center. Further, although Green correctly points out that his testimony is uncontradicted that he did not leave Minsec Center unescorted during the last forty-six days of the initial sixty-day period, this shows only that his subjective impression may have been that he could not leave unescorted. However, as explained in *Figueroa*, a parolee's subjective impression is not dispositive. Here, Green's testimony was contradicted by Parole Agent Margerum, who testified that there was never a sixty-day blackout period; that the security staff did not stop parolees from leaving; and that Green could have left the facility to attend to personal matters without a problem.⁸ Therefore, Green failed to prove that the restrictions placed on him at Minsec Center rose to the level of a prison equivalent.

⁸ We reject Green's assertion that because Margerum testified that the trips to the police station, traffic court, family court and welfare office had to be completed within the first two weeks, the remainder of the sixty-day period was necessarily a blackout based on Green's testimony. Margerum did testify that those particular trips had to be completed in the first two weeks, but he did not testify that those were the only trips a parolee was permitted to take or that no trips were permitted after the first two weeks. On the contrary, Margerum specifically rebutted Green's assertion that there was any blackout period.

Based on the circumstances surrounding Green's stay at Minsec Center in the instant case, we must agree with the Board's determination that Green is not entitled to credit toward his recalculated maximum sentence expiration date for any time spent at Minsec Center. Accordingly, we affirm the decision of the Board.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 22nd day of April, 2008, the order of the Pennsylvania Board of Probation and Parole dated September 14, 2007 in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge