

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Douglas Gist, :
 :
 Petitioner :
 :
 v. :
 :
 Pennsylvania Board of Probation :
 and Parole, : No. 1958 C.D. 2007
 Respondent : Submitted: April 25, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: June 4, 2008

Douglas Gist (Gist) challenges a final determination of the Pennsylvania Board of Probation and Parole (Board) that recommitted him to serve eighteen months backtime as a technical parole violator.

Gist was effectively sentenced on June 19, 2003, to a term of three to six years for possession with intent to deliver. He was also sentenced to a term of three to six years for possession with intent to deliver and two to four years for possession with intent to deliver. The three sentences were to be served concurrently so that Gist was essentially sentenced to a term of three to six years. Gist was paroled to Renewal, Inc. on January 26, 2005. On June 15, 2005, the Board ordered that Gist be detained pending the disposition of criminal charges. Gist was ultimately found not guilty on April 10, 2006.

On December 24, 2006, Gist tested positive for MDMA (Ecstasy) and Cannabinoids (marijuana). On January 16, 2007, the Fugitive Task Force went to 2233 North Charles Street, Apartment 2, in Pittsburgh in an attempt to apprehend a fugitive, Natasha Wharton. Gist was present at the residence. A semi-automatic pistol was recovered when the apartment was searched.

On January 16, 2007, the Board issued a warrant to commit and detain Gist. Gist was charged with two technical parole violations: Violation of Condition #5A-abstain from use of controlled substances because he tested positive for MDMA and cannabinoids on December 24, 2006, and Violation of Condition #5D-possession of a firearm because of the pistol recovered in the search of 2233 North Charles Street.¹

On March 16, 2007, the Board held a violation hearing. Gist admitted that he violated Condition #5A.² Further, Parole Agent Robert Thornton introduced results of the positive tests.

¹ This charge was dropped by the Board and is not before this Court.

² The Hearing Examiner questioned Gist about the violation:
The first violation charge is 5A. You shall abstain from unlawful possession or sale of narcotics and dangerous drugs and abstain from the use of controlled substances within the meaning of the Controlled Substance Drug Device and Cosmetics Act without a valid prescription. On 12-24-06, You tested positive for MDMA, which is Ecstasy, and Cannabinoids, which is marijuana. And are you admitted [sic] or denying 5A?
Gist: Admit.

Notes of Testimony, March 16, 2007, at 4-5; Certified Record (C.R.) at 34-35.

In a decision recorded March 26, 2007, and mailed April 5, 2007, the Board recommitted Gist to serve eighteen months backtime for the violation of Condition #5A. The Board listed as aggravating reasons: “Sanction and Supervision History.” Board Decision, April 5, 2007, at 1; C.R. at 43.

On May 4, 2007, Gist petitioned for administrative relief and alleged:

The alleged date of this urine supposedly being tested positive for the use of drugs was 12-24-2006, this particular day was a Sunday and also Christmas Eve. The parole office isn’t open in [sic] Sundays or holidays. The Parole Officer didn’t come to my house to conduct a urine test on 12-24-2006. Parolee [Gist] was not notified or sanctioned for a dirty urine prior to his arrest on 1-16-07. Twenty three [sic] days passed by without notification to parolee [Gist] about this alleged urine he tested positive for [sic].

Administrative Appeal, May 4, 2007, at 2-3.

Gist also alleged that the parole officers coerced him into admitting to the positive test in return for dropping the firearms charge. Gist further alleged that the imposition of eighteen months backtime was arbitrary, unreasonable, not supported by the record, and beyond the presumptive range. In addition, the statement “sanction and supervision history” provided no basis for review and did not justify a back time recommitment in excess of the presumptive range.

The Board³ affirmed:

³ The Board initially issued a decision on June 29, 2007. Gist petitioned for review with this Court. The Board applied for remand on the basis that its decision was issued in error. **(Footnote continued on next page...)**

After weighing the evidence presented at the violation hearing, the Board determined by a preponderance of the evidence that your client [Gist] violated the condition indicated. In support of this conclusion, the Board relied on your client's [Gist] voluntary admission to the violation at the hearing. . . . The record supports the Board's finding.

Additionally, the presumptive recommitment range for your client's [Gist] violation is five to twelve months. . . . Consequently, the decision to recommit him to serve 18 months backtime does exceed the presumptive range. However, the Board is permitted to deviate from the presumptive range so long as it provides a written justification for doing so in the form of an aggravating reason. . . . Here, the Board listed your client's sanction and supervision history as an aggravating reason and the record supports the Board's reasoning. Therefore, the Board was justified in imposing a recommitment period in excess of the presumptive range in this instance. (Citations omitted).

Board Decision, September 19, 2007, at 1; C.R. at 51.

Gist contends that the Board abused its discretion when it imposed a backtime sentence in excess of the presumptive range for a technical parole violation based upon his "sanction and supervision history" as the "aggravating reason." Because Gist was allegedly coerced into admitting to a violation he did not commit, the record contains no reference to a urinalysis test on December 24, 2006, and any record of the urinalysis was not part of the certified record, Gist maintains the matter should be reversed and/or remanded.

(continued...)

On August 29, 2007, this Court in a per curiam order granted the application and remanded the case to the Board with instructions to vacate the June 29, 2007, decision.

With respect to the backtime, the Board's regulation, 37 Pa.Code §75.3(c), provides: "The Board may deviate from the presumptive range or determine that recommitment should not occur provided sufficient written justification is given." The presumptive range for a violation of Condition #5A is five to twelve months. See 37 Pa.Code §75.4.

Here, the Board recommitted Gist to serve eighteen months backtime. The Board's reasoning was "sanction and supervision history." A review of Gist's Sanction and Supervision History contained in the record indicated that he tested positive for cannabinoids on July 27, 2006, and was directed to report to the day reporting unit on July 31, 2006, and complete the program and to report for urinalysis every Thursday for forty-five days. The Sanction and Supervision History also stated that Gist tested positive for marijuana on August 10, 2006, August 18, 2006, August 25, 2006, August 31, 2006, September 7, 2006, and September 14, 2006. He was directed to continue to report every Thursday for testing and to attend Narcotics Anonymous/Alcoholics Anonymous once a week.

The Sanction and Supervision History clearly indicated a pattern of testing positive for marijuana which provided justification for the imposition of backtime in excess of the presumptive range. Gist acknowledges that in Falasco v. Pennsylvania Board of Probation and Parole, 521 A.2d 991, 994-995 (Pa. Cmwlth. 1987), this Court held:

The Board, as an administrative agency, may take official notice . . . of information that is contained in its own files, although the file was not introduced into evidence at Falasco's parole Violation Hearing. . . . The Board may properly utilize such information in determining an

appropriate penalty once the fact of a parole violation has been established. (Footnote and citations omitted).

However, Gist asserts that because the supervision history was not referred to at the hearing and not exhibited at the hearing, he had no opportunity to comment on its content. For support, Gist cites Johnson v. Pennsylvania Board of Probation and Parole, 890 A.2d 45 (Pa. Cmwlth. 2006), where the Board could not utilize a Criminal Arrest and Disposition Report contained in the certified record but not introduced at the hearing to determine whether the parolee, Ricky Johnson (Johnson), had a timely revocation hearing.

Johnson is distinguishable from the present case because, in Johnson, the report was necessary to prove a fact essential to the question of whether the Board could determine that Johnson violated his parole: whether the revocation hearing was timely. Here, as in Falasco, the Sanction and Supervision History was utilized to determine an appropriate penalty once the violation was established.

Gist next asserts that the Board did not provide substantial evidence and sufficient written justification for the imposition of backtime. Gist asserts that a notation of “sanction and supervision history” did not support an aggravated penalty range recommitment because a reviewing body would be unable to determine what the Board considered as justification.

This Court does not agree. The Supervision History is a tabbed portion of the Certified Record. The second page of the Supervision History entitled “Sanction History” contains the listings of the failed drug tests. It is obvious what the Board considered as justification. In addition to the requirement

of “sufficient written justification” contained in the regulation, the Board’s aggravating reasons for imposition of excessive backtime must be supported by substantial evidence. Bandy v. Pennsylvania Board of Probation and Parole, 530 A.2d 507 (Pa. Cmwlth. 1987). Here, the record of seven failed drug tests supported the imposition of excessive backtime.

Gist also asserts that the Board considered the firearms charge which was dropped because that was mentioned in the Supervision History. However, it is not mentioned in the portion of the history called “Sanction History.” Again, the numerous failed drug tests supported the excessive backtime regardless of the reference to the pistol.

Gist next contends that he was coerced into admitting the violation and that he did not submit to a drug test on December 24, 2006. Gist neither explains in his brief who coerced him nor provides any details regarding the alleged coercion other than his bald assertion. Second, Gist did not challenge the date of the test at the hearing when he had the opportunity to do so. Third, the fact remains that Gist admitted to the violation of Condition #5A at the hearing. A parolee’s admission to asserted parole violations constitutes substantial evidence upon which to base the revocation of parole. Heckrote v. Pennsylvania Board of Probation and Parole, 514 A.2d 638 (Pa. Cmwlth. 1983).

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

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Douglas Gist,	:
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Petitioner	:
	:
v.	:
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Pennsylvania Board of Probation	:
and Parole,	:
	:
Respondent	:

No. 1958 C.D. 2007

ORDER

AND NOW, this 4th day of June, 2008, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE FRIEDMAN

FILED: June 4, 2008

I respectfully dissent. The majority concludes that a “sanction and supervision history” showing that Douglas Gist (Gist) failed drug tests on seven prior occasions justifies the Pennsylvania Board of Probation and Parole’s (Board) deviation from the presumptive range for failing a drug test. (Majority op. at 7, stating, “Here, the record of seven failed drug tests supported the imposition of excessive backtime.”) I cannot agree.

General parole condition 5A requires that parolees abstain from the use of controlled substances. The presumptive range for a violation of general condition 5A is five-to-twelve months. 37 Pa. Code §75.4. The presumptive range for multiple violations of general condition 5A is six-to-eighteen months. *Id.* The Board may deviate from a presumptive range provided it gives sufficient written justification. 37 Pa. Code §75.3(c).

Here, in December 2006, while Gist was on parole, Gist failed a drug test in violation of general condition 5A, and the Board recommitted Gist to serve eighteen months backtime, beyond the presumptive range for a single violation. The Board tried to justify the increased backtime by referring to Gist's "sanction and supervision history," which indicates that Gist failed drug tests on seven prior occasions. In other words, the Board gave Gist eighteen months backtime because the presumptive range for **multiple** violations of general condition 5A is six-to-**eighteen** months.

However, the "sanction and supervision history" is not sufficient to establish that Gist violated general condition 5A on seven prior occasions. **Every time** the Board wants to take action against a parolee for a parole violation, the Board must charge the parolee with a violation and hold a violation hearing where the parolee has the right to counsel, the right to present witnesses and evidence, the right to cross-examine adverse witnesses, the right to a written decision and the right to appeal. 37 Pa. Code §71.2. The Board cannot establish multiple violations of general condition 5A simply by stating that its records indicate that the parolee failed drug testing on certain dates.¹

Because Gist's "sanction and supervision history" is not sufficient, by itself, to establish that Gist violated a condition of parole at any time, it does not

¹ The "sanction and supervision history" was not introduced into the record at Gist's violation hearing. **If** the Board had introduced it as evidence, and Gist admitted that he failed seven previous drug tests, **then** the multiple violations would have given the Board justification for imposing eighteen months of backtime.

satisfy the Board’s obligation to provide sufficient written documentation to justify the Board’s deviation from the presumptive range for a **single** violation of general condition 5A.²

Accordingly, I would reverse.

ROCHELLE S. FRIEDMAN, Judge

² As the majority indicates, under *Johnson v. Pennsylvania Board of Probation and Parole*, 890 A.2d 45 (Pa. Cmwlth. 2006), the Board cannot take official notice of documents in its records to prove an essential fact. (Majority op. at 6.) Here, the Board is using the “sanction and supervision history” to **prove the essential fact** that Gist violated general condition 5A on more than one occasion.