IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven Jones,	:	
Petitioner	:	
	:	
v.	:	No. 36 C.D. 2020
	:	Submitted: March 5, 2021
Pennsylvania Board of Probation	:	
And Parole,	:	
Respondent	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE J. ANDREW CROMPTON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: August 31, 2021

Steven Jones petitions for review of an adjudication of the Pennsylvania Board of Probation and Parole (Board)[1] denying his administrative appeal. Jones's appointed counsel, First Assistant Public Defender for Fayette County, Meghann E. Mikluscak, Esquire (Counsel), filed an amended application for leave to withdraw her appearance and an amended no merit letter in support thereof. For the reasons that follow, we grant Counsel's request to withdraw and affirm the Board's decision.

On July 21, 1988, Jones was released on parole from the State Correctional Institution (SCI) at Camp Hill to reside in Compton, California, after

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[1] Following the filing of the petition for review, the Pennsylvania Board of Probation and Parole was renamed the Pennsylvania Parole Board. *See* Sections 15, 16, and 16.1 of the Act of December 18, 2019, P.L. 776, No. 115 (effective February 18, 2020); *see also* Sections 6101 and 6111(a) of the Prisons and Parole Code (Parole Code), *as amended*, 61 Pa. C.S. §§6101, 6111(a).

serving part of his Pennsylvania sentence for robbery and rape convictions.[2] At the time of his 1988 parole, Jones's maximum sentence date was November 28, 2003. On May 18, 1989, Jones was arrested in Los Angeles County, California, and charged with several felonies, including robbery, forcible oral copulation, rape, assault with a deadly weapon, and assault with a firearm. Jones did not post bail. On July 7, 1989, the Board issued a warrant to commit and detain Jones pending disposition of his new criminal charges. On July 17, 1990, Jones was convicted of the felonies and, on August 30, 1990, he was sentenced to 24 years to 56 years and 8 months of incarceration in a California state penitentiary. On June 12, 2018, California authorities released Jones, and he was transferred to SCI-Fayette in Fayette County, Pennsylvania.

On July 3, 2018, the Board presented Jones with a notice of charges and revocation hearing. Jones waived his right to counsel and to a hearing, and admitted to the California convictions. On September 17, 2018, the Board recommitted Jones as a convicted parole violator to serve the unexpired term of 15 years, 4 months, and 17 days on his Pennsylvania sentence. The Board recalculated Jones's maximum sentence date from November 28, 2003, to October 29, 2033.

On October 5, 2018, Jones appealed the Board's decision, asserting that his recalculated maximum sentence date was incorrect. Jones explained that the Board "has taken a 2003 [maximum sentence date] and changed it to 2033 without merit." C.R. 71. By adjudication mailed May 1, 2019, the Board denied Jones's appeal. The Board explained:

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[2] A condition of Jones's parole required him to report immediately upon arrival in person to "B. Bennett Pannell, PA I, Compton II, 405 E. Compton Blvd., Compton, CA" because the Board released him to "a home plan." Certified Record at 5, 54 (C.R. __).

> The Board paroled you from a[n] [SCI] ... on July 21, 1988[,] with a [maximum sentence] date of November 28, 2003. This left you with a total of 5618 days remaining on your sentence at the time of parole. The Board's decision to recommit you as a convicted parole violator authorized the recalculation of your sentence to reflect that you received no credit for the time you were at liberty on parole[.] 61 Pa. C.S. §6138(a)(2). In this case, the [B]oard did not award you credit for time at liberty on parole. This means you still had a total of 5618 days remaining on your sentence based on your recommitment.
>
> You were arrested for new criminal charges in California on May 18, 1989, and you did not post bail. On July 7, 1989[,] the [B]oard lodged its detainer against you. You were sentenced in California on August 30, 1990[,] to a term of twenty-four years to fifty-six years eight months. You were available to be returned from your California charges on June 12, 2018.
>
> Based on these facts, the [B]oard did not award backtime credit. This means you still had a total of 5618 days remaining on your original sentence.
>
> The [] Parole Code provides that convicted parole violators who are paroled from a[n] [SCI] and then receive another sentence to be served in another state must serve the other states [sic] sentence first. Thus, you did not become available to commence service of your original sentence until June 12, 2018[,] when you were available to the [B]oard from your California sentence. Adding 5618 days to that date yields a new maximum sentence date of October 29, 2033.

C.R. 73-74. Jones petitioned for this Court's review.

In his *pro se* petition for review, Jones argues the Board erred in recalculating his maximum sentence date in three respects. First, Jones contends that he is entitled to credit for time spent at liberty on parole because he was not convicted of a crime requiring registration as a sex offender. *See* 61 Pa. C.S.

§6138(a)(2.1).[3] Second, Jones contends that he is entitled to credit for time spent in custody while on the Board's detainer from July 7, 1989, until he was released to

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[3] At the time the Board denied Jones's appeal, Section 6138(a) of the Parole Code stated, in relevant part, as follows:

> (a) Convicted violators.--
>
> > (1) A parolee under the jurisdiction of the [B]oard released from a correctional facility who, during the period of parole or while delinquent on parole, commits a crime punishable by imprisonment, for which the parolee is convicted or found guilty by a judge or jury or to which the parolee pleads guilty or nolo contendere at any time thereafter in a court of record, may at the discretion of the [B]oard be recommitted as a parole violator.
> >
> > (2) If the parolee's recommitment is so ordered, the parolee shall be reentered to serve the remainder of the term which the parolee would have been compelled to serve had the parole not been granted and, except as provided under paragraph (2.1), shall be given no credit for the time at liberty on parole.
> >
> > (2.1) The [B]oard may, in its discretion, award credit to a parolee recommitted under paragraph (2) for the time spent at liberty on parole, unless any of the following apply:
> >
> > > (i) The crime committed during the period of parole or while delinquent on parole is a crime of violence as defined in 42 Pa. C.S. §9714(g) (relating to sentences for second and subsequent offenses) *or a crime requiring registration under 42 Pa. C.S. Ch. 97 Subch. H (relating to registration of sexual offenders)*.
> > >
> > > (ii) The parolee was recommitted under section 6143 (relating to early parole of inmates subject to Federal removal order).
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> > * * *
> >
> > (5) If a new sentence is imposed on the parolee, the service of the balance of the term originally imposed by a Pennsylvania court shall precede the commencement of the new term imposed in the following cases:
> >
> > > (i) If a person is paroled from a State correctional institution and the new sentence imposed on the

Pennsylvania authorities on June 12, 2018. In support, he cites *Gaito v. Pennsylvania Board of Probation and Parole*, 412 A.2d 568 (Pa. 1980). Third, Jones challenges the Board's authority to recommit him and recalculate his maximum sentence date, claiming such authority infringed on the sentencing power of the judiciary. He adds that the Board's recalculation of his sentence has imposed a "harsher" sentence than required by law because the Parole Code mandates that he serve only the original sentence imposed by the Pennsylvania court. *See* 61 Pa. C.S. §6138(a)(5).

By order dated January 22, 2020, this Court granted Jones's application to proceed *in forma pauperis* and appointed the Public Defender of Fayette County to represent him. After review of this matter and pursuant to this Court's order dated December 18, 2020,[4] Counsel filed an amended application for leave to withdraw her appearance and an amended no-merit letter asserting Jones's appeal lacks merit.

> > person is to be served in the State correctional institution.
> >
> > (ii) If a person is paroled from a county prison and the new sentence imposed upon him is to be served in the same county prison.
> >
> > (iii) 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.
>
> (5.1) If the parolee is sentenced to serve a new term of total confinement by a Federal court or by a court of another jurisdiction because of a verdict or plea under paragraph (1), the parolee shall serve the balance of the original term before serving the new term.

61 Pa. C.S. §6138(a) (emphasis added).

[4] Counsel's prior application to withdraw her appearance was denied for failure to address each issue raised in Jones's appeal. *Jones v. Pennsylvania Board of Probation and Parole* (Pa. Cmwlth., No. 36 C.D. 2020, filed December 18, 2020). This Court ordered Counsel to file and serve within 30 days an application for leave to withdraw and no-merit letter that complies with *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), or a brief addressing the merits of Jones's appeal. *Id*.

In *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), our Supreme Court set forth the technical requirements appointed counsel must meet to withdraw from representation of a parolee seeking review of a determination of the Board. Counsel must, after reviewing the case and ascertaining that it lacks merit,

> provide a "no-merit" letter[,] which details "the nature and extent of [counsel's] review and list[s] each issue the petitioner wished to have raised, with counsel's explanation of why those issues are meritless."

Zerby v. Shanon, 964 A.2d 956, 961 (Pa. Cmwlth. 2009) (citing *Turner*, 544 A.2d at 928). Counsel must also send the parolee a copy of the no-merit letter that satisfies the *Turner* requirements, furnish the parolee with a copy of counsel's motion to withdraw, and inform the parolee of his right to retain new counsel or submit a brief on his own behalf. *Zerby*, 964 A.2d at 960. If counsel fails to satisfy the foregoing requirements, we will not reach the merits of the underlying claims but will merely deny counsel's request to withdraw. *Id*.

We conclude that Counsel's amended no-merit letter satisfies the *Turner* requirements. In her letter, Counsel addressed the issues Jones raised on appeal and provided the basis for her conclusion that his appeal lacks merit. Amended No-Merit Letter, 1/21/2021, at 1-4. Counsel sent Jones copies of her amended no-merit letter and amended application for leave to withdraw appearance and advised Jones of his right to retain new counsel or proceed with his appeal on his own behalf. Because Counsel has satisfied the *Turner* requirements, we now address the merits of Jones's underlying claims.

First, Jones contends that the Board abused its discretion when it denied him credit for time spent at liberty on parole because his new conviction in California was not for a crime within a "disqualifying category" under Section 6138(a)(2.1) of

the Parole Code (providing that the Board may, in its discretion, award credit to a recommitted parolee for time spent at liberty on parole, unless the crime committed involves a crime of violence or requires registration as a sexual offender as provided therein). Specifically, Jones asserts that his new conviction did not require him to register as a sex offender. However, Jones did not raise this issue before the Board.

In his Administrative Remedies Form, Jones checked the boxes for an error of law and violation of constitutional law as the basis for his appeal. Jones explained that the "Board has taken a 2003 [maximum sentence] date and changed it to 2033 without merit nor the right to do a judicial process action [sic]." C.R. 71. By this language, Jones challenged the Board's authority to recalculate his maximum sentence date. However, it does not challenge the Board's decision to deny him credit for the time spent at liberty on parole. It is well established that issues not raised before the Board are waived and not reviewable by this Court. *Reavis v. Pennsylvania Board of Probation and Parole*, 909 A.2d 28, 34 (Pa. Cmwlth. 2006) (citing *DeMarco v. Pennsylvania Board of Probation and Parole*, 758 A.2d 746 (Pa. Cmwlth. 2000)). Because Jones failed to raise his first issue with the Board, this Court cannot address it.[5]

Second, Jones contends that he is entitled to credit for time spent while on the Board's detainer from July 7, 1989, until he was released to Pennsylvania

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[5] Even if this Court could address Jones's first issue, we would conclude that it lacks merit. While on parole in California, Jones was arrested for and subsequently convicted of several felonies, including robbery, forcible oral copulation, rape, assault with a deadly weapon, and assault with a firearm. When the Board recommitted Jones as a convicted parole violator, it refused to credit him for the time spent at liberty on parole due to the "serious and violent nature of new crimes." C.R. 60. The Board had the authority to deny him credit for the time he spent at liberty on parole on this basis. *See* 61 Pa. C.S. §6138(a)(1),(2) ("A parolee … who, during the period of parole ... commits a crime punishable by imprisonment for which the parolee is convicted … may at the discretion of the [B]oard be recommitted as a parole violator.… If the parolee's recommitment is so ordered, the parolee … shall be given no credit for the time at liberty on parole.").

authorities on June 12, 2018. He adds that he is being punished for his inability to post bail. Generally, if a defendant "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*, 412 A.2d at 571. However, "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." *Id*. (emphasis added).

An exception to the rule in *Gaito* was established in *Martin v. Pennsylvania Board of Probation and Parole*, 840 A.2d 299 (Pa. 2003). The *Martin* exception applies to cases where the length of a parolee's pretrial confinement exceeds the sentence imposed on the new crimes. In such cases 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." *Id*. at 309. Our Supreme Court recently confirmed that

> *Gaito* remains the general law in this Commonwealth respecting how credit should be allocated for a convicted parole violator who receives a new sentence of incarceration, and the exception to *Gaito* … developed in *Martin*, is limited to cases in which a convicted parole violator receives a term of incarceration for new charges that is shorter than his pre-sentence confinement, such that application of the general *Gaito* rule would result in excess incarceration.

Smith v. Pennsylvania Board of Probation and Parole, 171 A.3d 759, 768-69 (Pa. 2017).

Here, Jones was arrested on new criminal charges in California on May 18, 1989, and did not post bail. Although the Board lodged its detainer against Jones

on July 7, 1989, Jones remained incarcerated on the California charges, not solely on the Board's detainer. Jones was subsequently convicted and sentenced on the new crimes on August 30, 1990. As a result, the time Jones spent incarcerated on the new criminal charges and prior to sentencing, *i.e.*, from May 18, 1989, to August 30, 1990, a total of 469 days, must be applied to his California sentence. *See Smith*, 171 A.3d at 768; *Gaito*, 412 A.2d at 571. California authorities did, in fact, credit Jones for the time he was incarcerated before he received his California sentence. C.R. 40.[6] Because he received credit for this time, Jones's assertion that he is being punished for his inability to post bail is without merit.

Jones does not qualify for the *Martin* exception to receive credit on his Pennsylvania sentence for the time served awaiting disposition of the California charges. Jones's California sentence of 24 to 56 years and 8 months is longer than the 469 days he spent incarcerated. After he received his new sentence on August 30, 1990, Jones served the remainder of his California sentence until he was released on parole to Pennsylvania authorities on June 12, 2018.[7] C.R. 54. Jones is not entitled to credit on his Pennsylvania sentence for time served incarcerated on his California crimes (May 18, 1989, through June 12, 2018); this time was credited to his California sentence. Jones's second issue lacks merit.

Third, Jones challenges the Board's authority to recommit him and recalculate his maximum sentence date, which he argues infringes on the sentencing power of the judiciary. He adds that the Board's recalculation of his sentence has

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[6] California credited Jones with 470 days of "actual local time" and 235 days of "local conduct credits." C.R. 40.

[7] Jones served approximately 10,147 days (27 years) on his California sentence of 24 to 56 years and 8 months' confinement. At the time of Jones's convictions, California law granted him one day of credit for each day served, "essentially reducing his confinement to half of the term." C.R. 54.

imposed a "harsher" sentence than required by law because the Parole Code mandates that he serve only the original sentence imposed by the Pennsylvania court. *See* 61 Pa. C.S. §6138(a)(5).

It is well settled that the Board, when recalculating the sentence of a convicted parole violator, is not encroaching upon "the judicial sentencing power" but merely requiring the parole violator to serve his entire sentence imposed by the sentencing court. The Board has the statutory authority to recalculate a sentence where the parolee violated the terms of parole. *Young v. Pennsylvania Board of Probation and Parole*, 409 A.2d 843, 848 (Pa. 1979). It is the duration of the sentence that controls, not the actual maximum sentence date. *Commonwealth ex rel. Banks v. Cain*, 28 A.2d 897, 901 (Pa. 1942). When recalculating a parolee's maximum sentence date, the Board may impose backtime[8] as long as it does not exceed the remaining balance of the parolee's unexpired term. *See* 61 Pa. C.S. §6138(a)(2) (directing that when recommitted as a convicted parole violator "the parolee shall be reentered to serve the remainder of the term which the parolee would have been compelled to serve had the parole not been granted….").

Here, when recalculating Jones's maximum sentence date, the Board added the time Jones had not yet served on his original sentence, 5,618 days, to the date he was available to the Board, June 12, 2018, to arrive at the maximum sentence date of October 29, 2033. Because the Board's calculation of backtime only included the time that Jones had not yet served on the original Pennsylvania sentence, the Board did not exceed its authority or encroach on "the judicial sentencing power." Moreover, Jones had to serve both the California and Pennsylvania sentences, and in that order. 61 Pa. C.S. §6138(a)(5)(iii) (providing,

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[8] Backtime is "[t]he unserved part of a prison sentence which a convict would have been compelled to serve if the convict had not been paroled." 37 Pa. Code §61.1.

in relevant part, that "the service of the new term for the latter crime shall precede commencement of the balance of the term originally imposed"). *See Jones* v. *Pennsylvania Board of Probation and Parole* (Pa. Cmwlth., No. 36 C.D. 2020, filed December 18, 2020), slip op. at 8. Thus, Jones's third argument lacks merit.

Based on the foregoing, we conclude Counsel has fulfilled the no-merit letter requirements set forth in *Turner* and our independent review of the record confirms Jones's issues lack merit. Accordingly, we grant Counsel's amended application for leave to withdraw her appearance in this matter and affirm the Board's adjudication.

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MARY HANNAH LEAVITT, President Judge Emerita

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

AND NOW, this 31st day of August, 2021, the Amended Application for Leave to Withdraw Appearance filed by Meghann E. Mikluscak, Esquire, is GRANTED, and the adjudication of the Pennsylvania Board of Probation and Parole, dated May 1, 2019, in the above-captioned matter is AFFIRMED.

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MARY HANNAH LEAVITT, President Judge Emerita