

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Troy Phillips,	:	
Petitioner	:	
	:	
v.	:	No. 2040 C.D. 2007
	:	Submitted: April 18, 2008
Pennsylvania Board of Probation and Parole,	:	
	:	
Respondent	:	

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY

FILED: May 22, 2008

Troy Phillips (Petitioner) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board), denying his request for administrative relief and recommitting him as a convicted parole violator to serve eighteen months backtime. We reverse.

In 2001, Petitioner was convicted of drug possession with intent to manufacture, sell or deliver and received a three year, six month to eight year sentence. Petitioner also received a three year, six month to seven year sentence for aggravated assault with a deadly weapon and an eleven month, fifteen day to one year, eleven month, fifteen day sentence for violation of his parole and unauthorized use of a motor vehicle. The sentences were ordered to run concurrent.

On April 27, 2005, Petitioner was released on parole. Petitioner remained on parole until January 4, 2006, when he was arrested in Philadelphia, Pennsylvania on a charge of drug possession with intent to manufacture, sell, or deliver. Petitioner was

convicted of the charge on July 19, 2006, and on December 18, 2006, was sentenced to a three to six year prison term.

A parole revocation hearing was held on July 10, 2007. At the hearing, Petitioner argued that the revocation claim against him should be dismissed because the claim was not brought within 120 days of his new criminal conviction.

Petitioner's parole agent, Mr. Gober,¹ testified that on December 26, 2006, a verification of conviction was requested by his office, but it was not until March 30, 2007, that the official verification of the conviction was received from the Philadelphia Court System. (C.R. at 50-51). Mr. Gober testified as follows:

The only thing I have for verification from Philadelphia is that they did request 2-7. There is a note on the proof of conviction type stuff that they requested documentation 2-7. The file was [sic] unable to locate in the Philadelphia Court System according to documentation on here, and the official, and the verification it wasn't received until the date [Petitioner's counsel] put on record was 3-30-2007, was when they were finally eligible to come up with this, with the documentation for the request for proof of conviction. And then the only documentation sent up for proof of conviction was the sentencing order, which is dated on the 18th of December.

(C.R. at 39-40).

Following the hearing, Petitioner was recommitted to serve eighteen months backtime as a convicted parole violator. Petitioner then filed a petition for administrative review with the Board alleging that it was error not to dismiss the revocation action for failure to hold the hearing in a timely fashion. The Board disagreed; finding that as the revocation hearing was held within 120 days of the parole

¹ Agent Gober's full name is not evident in the record.

agent's receipt of the official verification of Petitioner's new conviction, the hearing was timely.

Petitioner now appeals to this Court.² Petitioner alleges that once he raised the issue of timeliness, his parole agent had the burden of proving that the hearing occurred in a timely fashion. Petitioner argues that the parole agent failed to present sufficient evidence as to timeliness; therefore, the Board erred in not dismissing the case. We must agree with Petitioner.

The Board's own regulations provide, in pertinent part, as follows:

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 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.

37 Pa. Code § 71.4(1)(i).

² Our scope of review in a parole revocation action is limited to concluding whether the findings are supported by substantial evidence, whether a petitioner's constitutional rights were violated, or whether an error of law was committed by the Board. Rosenfelt v. Pennsylvania Board of Probation and Parole, 568 A.2d 1347 (Pa. Cmwlth. 1990).

Pursuant to Section § 71.4(1), the Board has 120 days from its receipt of the official verification of the conviction in which to hold a revocation hearing.³ Official verification is defined as, “[a]ctual receipt by a parolee’s supervising parole agent of a direct written communication from a court in which a parolee was convicted of a new criminal charge attesting that the parolee was so convicted.” 37 Pa. Code § 61.2. We have previously determined that the 120-day period begins to run as of the date that the official verification is actually received, even if a parole agent had earlier personal knowledge of the conviction. Tarant v. Pennsylvania Board of Probation and Parole, 521 A.2d 997 (Pa. Cmwlth.), petition for allowance of appeal denied, 517 Pa. 596, 535 A.2d 84 (1987).

However, in Fitzhugh v. Pennsylvania Board of Probation and Parole, 623 A.2d 376 (Pa. Cmwlth. 1993), we held that when a petitioner alleges that there has been an untimely delay between the time of conviction and the receipt of the official verification, the Board is obligated to justify the delay.⁴ The reason we obligated the Board to justify the delay was to prevent an abuse of the system, wherein “a parolee convicted of a new offense may be forced to wait for an unreasonable period for a revocation hearing until the Board chooses to retrieve his records, even though the Board has actual notice of the new conviction.” Fitzhugh, 623 A.2d at 380. We further determined that “[w]here the Board fails to present evidence sufficient to meet its

³ Petitioner and the Board indicate in their briefs that Petitioner was returned to a State correctional facility in January, 2006, following his arrest on the new criminal charges. Neither party alleges that Petitioner was confined outside the jurisdiction of the Department of Corrections. The Board’s opinion states that Petitioner was returned to a State correction facility prior to his conviction. (C.R. at 82).

⁴ In Fitzhugh, the official verification was received 143 days after the conviction.

burden of proving timeliness, the appropriate remedy is a dismissal of the violation charges with prejudice.” Id.

In Vanderpool v. Pennsylvania Board of Probation and Parole, 874 A.2d 1280 (Pa. Cmwlth. 2005), we explained that we do not expect the Board to randomly search through dockets in an attempt to discover convictions. However, we reiterated our holding in Fitzhugh that when a petitioner challenges the timeliness of the hearing, the Board bears the burden of establishing that the hearing was timely. In Vanderpool, we concluded that the Board met its burden through the parole agent’s testimony that she attempted to secure the official verification but encountered difficulties due to the petitioner’s use of aliases.

Recently, in Taylor v. Pennsylvania Board of Probation and Parole, 931 A.2d 114 (Pa. Cmwlth. 2007), petition for allowance of appeal denied, ___ Pa. ___, ___ A.2d ___ (No. 727 MAL 2007, filed April 3, 2008), a petitioner challenged the timeliness of his revocation hearing, which was held six months after his conviction. A memo, dated September 27, 2005, from a parole investigator was entered into evidence. In the memo, the parole investigator advised that she had requested the verification one month following the conviction, but because of the backlog at the trial court the file was unavailable. Therefore, she was now enclosing a computerized record outlining the conviction, with the trial court’s seal. The petitioner’s parole agent testified that he received this “official verification” on September 27, 2005, and a hearing was held within 120 days of that date. Based on the evidence presented, this Court concluded that the Board established reasonable justification for the delay.

In the present case, Agent Gober did not have any independent knowledge of what transpired between the time of the conviction and the receipt of the official verification. Agent Gober did submit a request for proof of conviction into evidence.

The request was from William Fazio, another parole agent, and was dated December 26, 2006. The request form had a handwritten notation on it indicating that the file could not be located on February 7, 2007.

The evidence offered by Agent Gober establishes that his office sought information regarding the conviction on December 26, 2006. However, Petitioner was convicted on July 19, 2006. Agent Gober did not provide any evidence to explain the five month delay between the date of conviction and the request for proof of conviction made on December 26, 2006. When Petitioner alleged that the hearing was untimely, Agent Gober had the burden to justify the delay. As Agent Gober failed to testify or present evidence in this regard, the Board failed to meet its burden of proof.

Accordingly, the order of the Board is reversed and the parole violation charge against Petitioner is dismissed with prejudice.

JOSEPH F. McCLOSKEY, Senior Judge

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Petitioner	:	
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v.	:	No. 2040 C.D. 2007
	:	
Pennsylvania Board of Probation	:	
and Parole,	:	
Respondent	:	

ORDER

AND NOW, this 22nd day of May, 2008, the order of the Pennsylvania Board of Probation and Parole is reversed and the parole violation charge against Troy Phillips is dismissed with prejudice.

JOSEPH F. McCLOSKEY, Senior Judge