

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Michael C. Schaeffer,	:
Petitioner	:
	:
v.	:
	:
Pennsylvania Board of Probation	:
and Parole,	: No. 214 C.D. 2007
Respondent	: Submitted: November 30, 2007

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge\*  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY  
SENIOR JUDGE COLINS**

**FILED: January 24, 2008**

Michael C. Schaeffer (Petitioner) petitions for review of the order of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief from the Board's order recommitting him to a state correctional institution as a technical parole violator to serve six months of backtime for violation of Parole Condition #7 (failing to successfully complete the sex offender program).

Petitioner had been sentenced in Lehigh County to a term of incarceration of one to five years for criminal attempt; unlawful restraint; simple assault; and reckless endangerment; the victim of Petitioner's offense was a seven-year-old girl. On December 21, 2005, Petitioner was paroled from his original sentence; the

\* The decision in this case was reached after the date that Judge Colins assumed the status of senior judge.

conditions governing his parole required him to comply with the special conditions imposed by the Board and with special conditions imposed by parole supervision staff. Petitioner's parole agent imposed a parole condition that provided:

You must contact the sex offender treatment program at Forensic Treatment Services, 1259 South Cedar Crest Blvd., Suite 200, Allentown, PA 18103 (610-433-1529), by 12/28/05 and enroll in treatment. You must follow all program staff instructions, obey all program rules and complete the program successfully.

(Certified Record, p. 115.) Petitioner enrolled in the program, but on April 19, 2006, he was discharged unsuccessfully from treatment, arrested, and charged with violating his parole. A parole violation hearing was held on July 31, 2006, and by decision mailed October 12, 2006, Petitioner was recommitted. This appeal<sup>1</sup> followed the denial of Petitioner's administrative appeal.

On appeal, Petitioner argues that he was not convicted of any sexual offense, nor does he have a history of sexual offenses;<sup>2</sup> he contends that the requirement that he successfully complete sex offender treatment was arbitrary, capricious, and not premised upon any substantial credible evidence that he is a sex offender. Petitioner avers that it was impossible for him to successfully complete the

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<sup>1</sup> Our review of the merits of this case is limited under Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704, to determining whether necessary findings are supported by substantial evidence, an error of law was committed, or a constitutional right of the parolee was violated. *DeMarco v. Pennsylvania Board of Probation and Parole*, 758 A.2d 746 (Pa. Cmwlth. 2000).

<sup>2</sup> The evidence of record demonstrates that Petitioner was previously convicted of indecent exposure, and received six months probation. During his testimony at the parole hearing, Petitioner denied that his conduct on that occasion constituted a sex crime. (N.T., p. 84.)

program, since he is not a sex offender, and is not therefore amenable to sex offender treatment. He argues that the unavoidable result of the Board's actions was a technical violation of parole, and the loss of his liberty - in violation of his constitutional rights.

Veronique N. Valliere, Ph.D., a licensed psychologist and director of Forensic Treatment Services, an outpatient treatment center for sexual offenders, testified that Petitioner was referred to her for evaluation by parole agent Anthony Mondello. Dr. Valliere testified that since 1997, she has been a member of, and twice reappointed, to the Pennsylvania Sexual Offender Assessment Board. Dr. Valliere cited Petitioner's criminal history, including the earlier charge of indecent exposure, and her perception that he appeared deceptive in his interviews and failed a polygraph examination, as factors she considered in her evaluation process. (N.T., pps. 43-46.) With regard to her treatment of Petitioner and subsequent discharge of Petitioner from the treatment program, Dr. Valliere testified:

He was arrested and classified for a sex offense, later attacked somebody...we were attempting in his individual and group therapy to address these issues...in April, when he was requested to discuss some of his issues, including whatever issues he had, he remained denying that he had sexual intent toward the victim. And the contradictions in his stories were confronted repeatedly. And each week over a course of three to four weeks, his story about his offense changed...he said everybody was lying, despite the fact that there were numerous witnesses to these statements. When asked how we could proceed when he couldn't even take feedback, he said he was unwilling to take any feedback from the group because any feedback he would get was in the context of him being a sex offender and was irrelevant...He said he'll show up, but he wasn't going to listen; that he was in no need of treatment. (N.T., pps. 48-49.)

At the parole violation hearing, Petitioner presented the testimony of Frank M. Dattilo, Ph.D, a board-certified clinical and forensic psychologist. Dr. Dattilo testified that, although Petitioner demonstrates both the substance abuse and personality disorders commonly found with sex offenders, based upon tests he conducted and his personal interview with Petitioner, he found no evidence that would suggest Petitioner was a sexual predator. Dr. Dattilo acknowledged that in this situation, as in any situation where a child is involved, and given the Petitioner's previous incident of indecent exposure, it was not a "bad idea" to evaluate him for sex offender treatment. (Notes of Testimony, July 31, 2006, p. 103.)

Dr. Dattilo testified, however, that Petitioner should have been assessed and evaluated, prior to the commencement of treatment, by an individual who was separate and independent from the actual treatment provider; he opined that by the time Petitioner was evaluated, he was already resistant to treatment. In the opinion of Dr. Dattilo, Petitioner presented to his evaluator with a defensiveness and narcissism typically found in sex offenders; but if Petitioner been subjected to a more extensive battery of tests, he believes, and consideration given to his alcohol abuse and propensity toward using very poor judgment when intoxicated, he would not have been "tagged" as a sex offender. (N.T., p. 66.)

Initially, we note that Petitioner does not challenge the determination that he was not amenable to treatment; he agrees that he was not amenable because he does not believe that he is a sex offender. He argues on appeal that he should not have been subjected to the condition that he successfully complete the program; however, he failed to avail himself of the administrative remedies provided by the Board at the time the condition was imposed. On December 21, 2005, Petitioner was advised:

Should problems arise, or questions occur concerning the special conditions of your parole, consult with your Parole Agent, as it is his responsibility to help you in the interpretation of the Special Conditions of Parole...If you believe the Special Conditions are inappropriate, you may submit a timely complaint in writing first to the supervisor of the district office under which you are being supervised. If your complaint is not resolved to your satisfaction, you may then submit your complaint in writing to the Director of Supervision. If your complaint is still not resolved to your satisfaction, you may then submit your complaint in writing to the Board Secretary for final disposition by the Board. The address for the Director of Supervision and Board Secretary is...

(PBPP-11, Conditions Governing Parole/Reparole, Certified Record, p. 11.)

Petitioner's failure to make a timely complaint to the Board precludes him, *sub judice*, from arguing that the condition requiring successful completion of the sex offender program should not have been imposed. Nonetheless, the record indicates that Petitioner did, in fact, have a prior conviction for indecent exposure, and the victim of the offenses for which he was incarcerated was a seven-year-old girl. Moreover, Dr. Valliere, a highly qualified professional with hundreds of hours of evaluation experience and advanced training in diagnosis and risk assessment of sex offenders, testified that Petitioner required sex offender treatment. Finally, Petitioner's witness, Dr. Dattilio, himself testified that although the psycho-diagnostic tests he performed did not suggest that Petitioner was a sexual predator, he also noted that "there's no specific test to be used for determining whether someone is a sex offender." (N.T., p. 63.)

Petitioner avers that the Board lacked substantial evidence<sup>3</sup> that Petitioner violated the special parole condition. On the contrary, the record demonstrates amply that there was substantial evidence that Petitioner was “at least somewhat at fault” for his discharge from treatment.<sup>4</sup> Petitioner was discharged from the treatment program, not for reasons beyond his control, but as a result of his conduct therein. Petitioner repeatedly voiced his unwillingness to participate in treatment and follow staff instructions.

Accordingly, the order of the Board is affirmed.

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**JAMES GARDNER COLINS, Senior Judge**

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<sup>3</sup> Substantial evidence is such evidence that a reasonable mind might accept as adequate to support a conclusion. *Heckman v. Pennsylvania Board of Probation and Parole*, 744 A.2d 371 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 567 Pa. 717, 785 A.2d 91 (2000).

<sup>4</sup> In *Hudak v. Pennsylvania Board of Probation and Parole*, 757 A.2d 439 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 565 Pa. 657, 771 A.2d 1291 (2001), this Court held that in cases where the Board has fashioned a condition of parole over which the petitioner does not have control, such as a medical condition, the Board is required to show that the petitioner was “somewhat at fault” in order to prove a violation. *Id.*, at 442.

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**ORDER**

AND NOW, this 24<sup>th</sup> day of January 2008, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is affirmed.

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**JAMES GARDNER COLINS, Senior Judge**