

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Ball, :  
 :  
 Petitioner :  
 :  
 v. : No. 2210 C.D. 2007  
 : Submitted: June 27, 2008  
 Pennsylvania Board of Probation and :  
 Parole, :  
 Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

*OPINION NOT REPORTED*

MEMORANDUM OPINION  
BY JUDGE SMITH-RIBNER

FILED: August 14, 2008

Joseph Ball petitions for review of a decision by the Pennsylvania Board of Probation and Parole (Board) that denied administrative relief from Ball's recommitment as a convicted parole violator to serve 24 months backtime. Ball's statement of questions involved is whether he was afforded a timely revocation hearing by the Board based upon his conviction of a new offense and whether the sentence of 24 months backtime should be stricken.

Ball was paroled in April 1998 from a sentence of 9-1/2 to 21 years imposed in 1986 for convictions of multiple counts of robbery and possession of an instrument of crime. On January 22, 2002, Board agents arrested Ball upon their discovery of weapons, ammunition, narcotics and drug paraphernalia at his Philadelphia residence. He was held in state custody on a Board detainer at SCI-Graterford and later at SRCF-Mercer. On March 23, 2002, Ball was charged in Philadelphia with possession with intent to deliver controlled substances, carrying a firearm without a license, possession of firearms by a known felon, forgery and

possession of drug paraphernalia. He requested a continuance at his June 12, 2002 parole violation hearing, which the Board granted with a designation "To await disposition of all outstanding criminal charges." Certified Record (C.R.) at 106.

On September 12, 2002, Ball was indicted by a federal grand jury on charges related to possession with intent to distribute cocaine, possession of marijuana, possession of a firearm in furtherance of a drug trafficking crime, felon in possession of a firearm and ammunition and possession of counterfeit obligations and securities. In view of the federal indictment, all state charges were *nolle prosequied* on September 27. Ball appeared before a federal magistrate for arraignment ten days later, and he subsequently was detained pending trial at the Philadelphia federal detention center. On November 19, 2003, Ball entered into a plea agreement, which was filed with the federal district court on January 12, 2004.

On January 15, 2004, Ball was returned to SCI-Graterford with an order to appear before a federal judge (now deceased Judge Herbert J. Hutton) for a sentencing hearing on May 6, 2004. The sentencing hearing was postponed several times, however, and the case was reassigned to Judge Bruce W. Kauffman. An e-mail sent by parole supervisor Elda Casillas on March 14, 2006 stated: "[Assistant U.S. Attorney Mark S. Miller] informed me that for confidential reasons this case has been dragging for a very long time and that is all he was able to share with me." C.R. at 87. On March 26, 2007, Judge Kauffman accepted the plea agreement and sentenced Ball to 96 months of imprisonment. Following a revocation hearing on June 15, 2007, the Board recommitted Ball as a convicted parole violator when available to serve 24 months backtime.

In his request for administrative relief, Ball alleged that the Board failed to provide a timely revocation hearing. By response mailed November 20, 2007, Board Secretary Cynthia L. Daub denied his request as follows:

A review of the record reflects that: (a) you were returned to a state correctional institution prior to your conviction, (b) the Board received official verification of your conviction on April 5, 2007, and (c) the revocation hearing was held on June 15, 2007. Therefore, the revocation hearing was timely pursuant to 37 Pa. Code § 71.4 because it was held only 71 days after the date the Board received official verification of your conviction. *See Morgan v. Pennsylvania Board of Probation and Parole*, 814 A.2d 300 (Pa. Commw. 2003); *Taylor v. Pennsylvania Board of Probation and Parole*, [931 A.2d 114 (Pa. Cmwlth. 2007)].

C.R. at 122.<sup>1</sup>

Ball argues that the June 15, 2007 revocation hearing was untimely because it was held more than 120 days after he was released from federal custody and returned to SCI-Graterford on January 15, 2004; he remained in continuous state custody until the June 15 hearing. The procedure governing the timeliness of a parole revocation hearing is set forth in 37 Pa. Code §71.4:

(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

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<sup>1</sup>The Court's review of a Board order is limited to determining whether constitutional rights were violated, errors of law were committed or findings of fact were not supported by substantial evidence. *Morgan*.

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.

Although Ball requested a continuance of his 2002 parole violation hearing and executed a waiver pending disposition of the state charges, he argues that the waiver does not affect his right to a timely revocation hearing with respect to the federal charges filed in September 2002. Ball cites *Chancey v. Pennsylvania Board of Probation and Parole*, 477 A.2d 22 (Pa. Cmwlth. 1984) (holding that 120 days did not begin until petitioner's return to state correctional institution from Philadelphia county prison), and *Toth v. Pennsylvania Board of Probation and Parole*, 470 A.2d 206 (Pa. Cmwlth. 1984) (holding that 120 days did not begin until petitioner was released from county prison in Florida and returned to state correctional institution) to support the proposition that under Section 71.4(1)(i) a parolee's revocation hearing should be held within 120 days of official verification of the parolee's return to a state correctional institution. Because the hearing was held more than three years after Ball's return to SCI-Graterford on January 15, 2004, he argues that his parole violation charges should be dismissed.

Ball contends that Hearing Examiner Randolph Parker confused the conviction date with the sentencing date of March 26, 2007. Supervisor Marianne Snider from the Mercer County parole office testified that her records indicated a guilty verdict date of January 12, 2004. Although Snider testified that the official verification date was April 5, 2007, Ball claims that she offered "no testimony or records as to the date the Board received the guilty plea" and that she did not enter "any documents acknowledging a verification date of April 5, 2007." Petitioner's Brief, p. 8. Snider also testified that on May 7, 2007 she queried by e-mail Ball's

parole supervisor Jose A. Alvarado and parole agent Nailah Johnson why the hearing was being held three years after Ball's conviction, but she received no response. Ball states that Snider's inquiry, made one month after the "alleged" verification date, and the subsequent lack of response "casts doubt on Ms. Snider's assertion that official verification of conviction was received on April 5, 2007." *Id.*, p. 9. Citing *Taylor* Ball emphasizes that official verification occurs when the parole agent receives communication from the court that convicted the parolee.

Ball argues that the three-year delay was caused by the Board's failure to act on its knowledge of Ball's return to state custody and of his federal conviction. Ball cites *Williams v. Pennsylvania Board of Probation and Parole*, 579 A.2d 1369 (Pa. Cmwlth. 1990) (remanding for determination of whether Board acted reasonably to retrieve parolee from Georgia), to argue that the Board's unreasonable and unjustifiable delay does not toll the running of the 120 days. Citing *Fitzhugh v. Pennsylvania Board of Probation and Parole*, 623 A.2d 376 (Pa. Cmwlth. 1993) (remanding for determination of whether Board acted properly to secure official verification of conviction), Ball further argues that it was unreasonable for the revocation hearing to take place more than a year after supervisor Casillas gained knowledge of his conviction in March 2006.

When a parolee alleges an untimely revocation hearing, the Board bears the burden of proof by a preponderance of the evidence to show that the hearing was timely under *Morgan*. Under *Johnson v. Pennsylvania Board of Probation and Parole*, 890 A.2d 45 (Pa. Cmwlth. 2006), the Board is limited to the documents in the record to determine the official verification date. Ball maintains that Snider's testimony lacked documentary support and, therefore, that it was insufficient to satisfy the Board's burden of proof.

Acknowledging its burden of proof under *Vanderpool v. Pennsylvania Board of Probation and Parole*, 874 A.2d 1280 (Pa. Cmwlth. 2005), the Board counters that it satisfied its burden. Pursuant to 37 Pa. Code §71.4(1), the Board must hold a revocation hearing within 120 days of official verification of the parolee's conviction. Official verification is defined in 37 Pa. Code §61.1 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." The record reflects that Ball was convicted of the federal charges on March 26, 2007; that the Board received official verification on April 5, 2007; and that Ball's hearing was held on June 15, 2007. The hearing was timely because it was held within 71 days from the date of official verification and 80 days following the conviction.

The Board argues that it could not have held a revocation hearing within 120 days after the filing of the plea agreement in January 2004 because a guilty plea is not in and of itself a conviction. For a conviction to occur, the court must accept the guilty plea and adjudicate the defendant guilty. The Board cites Rule 11(c)(3)(A) of the Federal Rules of Criminal Procedure, which provides that once a plea agreement is filed with the court it may "accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." Here, the plea agreement was not accepted by the court until March 26, 2007 when Ball was sentenced on his federal conviction. To bolster its argument, the Board points out that the March 26, 2007 order uses the present tense in stating the following: "The defendant is adjudicated guilty of these offenses." C.R. at 80. Had it accepted Ball's guilty plea earlier, the court's order would reflect such fact; the order also indicates that "Date of Imposition of Judgment" is March 26, 2007. *Id.* Even

assuming *arguendo* that the conviction occurred earlier, the Board, in any event, received official verification on April 5, 2007, and the hearing was timely. The record includes a Criminal Arrest and Disposition Report (Report) on Form 257-C, which provides April 5, 2007 as the date of official verification.

The Court concludes that the Board met its burden of proving that Ball's June 15, 2007 hearing was timely because it was held within 120 days of official verification of his conviction. *Vanderpool*. Snider testified that the official verification date was April 5, 2007, which was supported by the Report containing signatures of Ball's parole agent Johnson and supervisor Alvarado, bearing the date May 16, 2007. Ball's argument that the official verification date lacked evidentiary support therefore is without merit. Also, the Court rejects Ball's insinuation that the official verification date was fabricated: the fact that Johnson did not explain to Snider the three-year delay that occurred in a federal court proceeding does not support a charge of fraud. Further, the hearing was timely where it was held 80 days following Ball's conviction. Notwithstanding the filing of the plea agreement on January 12, 2004, Ball's guilty plea became final on March 26, 2007 when it was accepted by the federal district court. *See* Fed. R. Crim. P. 11(c)(3)(A).

Ball attempts to characterize his detainment at the Philadelphia federal detention center from October 2002 to January 2004 for purposes of arraignment and trial as "confinement outside the jurisdiction of the Department of Corrections" under Section 71.4(1)(i), such that his return to SCI-Graterford on January 15, 2004 triggered the start of the 120-day period. However, the rule under Section 71.4(1)(i) is an exception to the general requirement of a revocation hearing to be held within 120 days of official verification of conviction. The Court has held that conviction occurred here on March 26, 2007; therefore, Section 71.4(1)(i) is

inapplicable as there was no conviction upon which to hold a revocation hearing when Ball was returned to SCI-Graterford on January 15, 2004. Additionally, Ball's argument regarding supervisor Casillas' prior knowledge of the existence of his plea agreement is irrelevant. *See Vanderpool* (holding that official verification triggered 120-day period, not Board's earlier knowledge of conviction). Because the Board committed no error of law or abuse of discretion, the Court affirms.

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DORIS A. SMITH-RIBNER, Judge



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Pennsylvania Board of Probation and		:	
Parole,		:	
	Respondent	:	

***ORDER***

AND NOW, this 14th day of August, 2008, the Court affirms the order of the Pennsylvania Board of Probation and Parole.

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DORIS A. SMITH-RIBNER, Judge