IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Murray,	:	
Petitioner	:	
	:	
v.	:	No. 2310 C.D. 2007
	:	Submitted: May 9, 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: June 11, 2008

David Murray (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 technical parole violator to serve twelve months backtime. We affirm.

In 2001, Petitioner was convicted of drug possession with intent to manufacture, sell or deliver and received a four to ten year prison sentence. He was released on parole on April 17, 2006. On July 13, 2007, Petitioner received a notice of charges alleging that he violated Conditions 3A, 5A and 7, Count 1 and Count 2, of his parole. Condition 3A required Petitioner to maintain regular contact with parole staff by reporting as instructed and by following written instructions. Condition 5A required that Petitioner abstain from the unlawful possession of controlled substances. Condition 7, Count 1, required that Petitioner comply with a special Condition prohibiting him

from consumption or possession of alcohol. Condition 7, Count 2, required that Petitioner comply with a special Condition prohibiting him from entering "establishments that sell or dispense alcohol (except as approved by the supervision staff)." (C.R. at 14).

At hearing, Petitioner denied that he violated any of the Conditions of his parole. Parole Officer Ron Fine then presented testimony. Officer Fine testified that on March 30, 2007, Petitioner submitted to a urine test that was positive for marijuana. A copy of the report from the laboratory was entered into evidence. Petitioner objected to the report, noting that the report was not signed. The objection was overruled.

Officer Fine further testified that he and Parole Officer John Sartori, Jr., entered the Ragtime, a bar in Homestead Pennsylvania, at 2:30 p.m. on April 3, 2007. Officer Fine stated that he noticed Petitioner leaning on a poker machine and that a bottle of beer was sitting on top of this machine. Officer Fine stated that Petitioner smelled of alcohol. Petitioner was arrested at that time. Officer Fine alleged that following the arrest, Petitioner admitted that he had been drinking alcohol and claimed it was due to stress caused by several recent deaths in his family.

Officer Fine also testified that on March 5, 2007, Petitioner received a written warning regarding his prior conduct while on parole and was placed on a curfew. Officer Fine stated that Petitioner signed an acknowledgement indicating that he was to be on a set curfew until further notice. Petitioner worked during the evenings. As such, he was permitted to be outside of his residence for work purposes from 4:00 p.m. until 5:00 a.m., but under curfew from 5:00 a.m. until 4:00 p.m. During curfew, Petitioner was required to remain in his residence. The only exception to this curfew was for times when Petitioner had to report to the parole office.

Officer Sartori testified next. He stated that he and Officer Fine arrested Petitioner in the Ragtime. He stated that Petitioner smelled strongly of alcohol. Officer Sartori stated that Petitioner cried when he was arrested, claiming that he had been drinking due to a death in the family.

Officer Sartori was questioned regarding the report from the laboratory. He testified that the laboratory reports were typically signed. He agreed that the laboratory report that was placed into evidence had not been signed.

Petitioner also testified on his own behalf. Petitioner stated that in March, 2007, he quit his employment. He stated that he entered the Ragtime bar on April 3, 2007, to seek employment as a dishwasher. He claimed he did not drink any alcohol while in the bar.

Petitioner admitted that he had been given instructions regarding a curfew. He understood the curfew to mean that if he was not working, he was to remain in his house. He claims that on April 3, 2007, he was working as a landscaper and that his shift that day had ended at 12:30 p.m. He then went to the Ragtime for a job interview.

On cross-examination, Petitioner admitted that he had not received permission from parole staff to enter the Ragtime. He also agreed that he did not ask for permission to be outside during curfew. Petitioner submitted a letter from Ms. Charney Larue. In the letter, Ms. Larue indicated that Petitioner did yard work for her on April 3, 2007. Petitioner also submitted a letter from Jim Barua, the alleged owner of the Ragtime. The letter indicated that Petitioner had a job interview at the Ragtime on April 3, 2007, and that he was applying for the position of short order cook. The letters were admitted into evidence, but the hearing examiner noted that the letters constituted hearsay.

Petitioner also attempted to present photographs that depicted Petitioner performing landscaping work on April 3, 2007. He claimed that Ms. Larue took the pictures. He claimed that when the pictures were taken, he was not aware he was being photographed. An objection was raised as to the photographs. It was noted that the pictures did not clearly identify Petitioner's face and were not dated. The hearing examiner sustained the objection.

Following the hearing, the Board found that Petitioner had violated Conditions 3A, 5A, and 7, Count 1 and Count 2, of his parole. He was recommitted as a technical parole violator to serve twelve months backtime. Petitioner filed an administrative appeal. The Board subsequently modified its decision by deleting the violation as to Condition 5A. Nevertheless, the Board reaffirmed its decision to recommit Petitioner a technical parole violator to serve twelve months backtime. Petitioner then filed a petition for review with this Court.

On appeal,[1] Petitioner alleges that he did not willfully violate his curfew. He claims that he was working the day in question as a part-time landscaper and then went to the Ragtime to apply for employment. We cannot agree.

Petitioner was placed under curfew from 5:00 a.m. until 4:00 p.m. Petitioner's curfew did not provide an exception for him should he quit his job and take a new one. Petitioner's curfew also did not provide him with an exception to enter bars to seek alleged employment. While Petitioner may believe that his error was minor, "[t]he Board has broad discretion to demand strict compliance with the terms of its conditions and to determine the appropriate penalty for noncompliance regardless of the

[1] Our scope of review in a parole revocation case is limited to concluding whether the findings are supported by substantial evidence, whether the 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).

reasons for noncompliance or any mitigating circumstances." Krantz v. Board of Probation and Parole, 698 A.2d 701, 703 (Pa. Cmwlth. 1997), petition for allowance of appeal denied, 550 Pa 711, 705 A.2d 1312 (1998).

Petitioner also claims that the hearing examiner improperly refused to consider the letters and photographs he submitted as evidence. Again, we disagree. The letter from Ms. Larue and the letter from the alleged owner of the Ragtime obviously constituted hearsay and were properly excluded. See Pa.R.E. 801. As to the photographs, they are irrelevant to the outcome of this case. Petitioner is charged with violating the Conditions of his parole by entering the Ragtime at 2:30 p.m. He is not charged with violating the Conditions of his parole by working earlier in the day. His whereabouts prior to entering the Ragtime are irrelevant and evidence that is not relevant is not admissible. Pa.R.E. 402. As such, the Board did not err in rejecting the photographs as evidence.

Petitioner further alleges that he did not violate Condition 7, Count 1 of his parole as he did not consume any alcohol at the Ragtime. We reject this claim as Officer Fine and Officer Sartori both testified that Petitioner smelled of alcohol and admitted to drinking alcohol. The Board's determinations must be supported by substantial evidence of record. Testimony that a parolee admitted violating a Condition of his parole constitutes substantial evidence of record. Hobson v. Pennsylvania Board of Probation and Parole, 556 A.2d 917 (Pa. Cmwlth. 1989).

Petitioner also alleges that he did not violate Condition 7, Count 2 of his parole as he was permitted to be employed at an establishment that served alcohol. While Petitioner may have been permitted by parole staff to work at an establishment that served alcohol while on parole, pursuant to the Conditions of his parole, he was only permitted to enter establishments that serve alcohol with prior approval of the

parole staff. He admits that he was aware of this Condition of his parole, yet did not seek such approval prior to entering the Ragtime. As such, the Board did not err in finding that Petitioner violated Condition 7, Count 2 of his parole.

Finally, Petitioner challenges the determination that he serve twelve months backtime. Petitioner notes that the Board initially determined that Petitioner violated Conditions 3A, 5A, and 7, Counts 1 and 2, of his parole. A finding that Petitioner violated these Conditions equals a presumptive range recommittal period of twelve to fifty-four months. (C.R. at 104). At that time, the Board ordered Petitioner to serve twelve months backtime. Following an administrative appeal to the Secretary of the Board, the violation as to Condition 5A was deleted. By deleting Condition 5A, the presumptive range recommittal period changed to nine to forty-two months; however, the order to serve twelve months backtime was not lowered by the Secretary.

Petitioner alleges that as the original calculation of twelve to fifty-four months remained in the record, there is no evidence that the Secretary considered that the presumptive range had been reduced. We reject Petitioner's claim. After Petitioner filed his administrative appeal, the Secretary reviewed the determination that Condition 5A was violated and ultimately rejected the same, thereby deleting the violation relating to Condition 5A. The technical parole violation sheet contained in the record specifically lists Conditions one through seven of parole and their violation ranges. Petitioner does not provide us with any reason to conclude that when the Secretary determined that Condition 5A did not apply, it was not obvious to the Secretary that the presumptive range would change. Further, "[a]s long as the period of recommitment is within the presumptive range for the violation, the Commonwealth Court will not entertain challenges to the propriety of the term of recommitment." Smith v.

Pennsylvania Board of Probation and Parole, 524 Pa. 500, 504, 574 A.2d 558, 560 (1990).

Accordingly, the order of the Board is affirmed.

JOSEPH F. McCLOSKEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Murray, Petitioner	:	
v.	:	No. 2310 C.D. 2007
Pennsylvania Board of Probation and Parole, Respondent	:	

O R D E R

AND NOW, this 11th day of June, 2008, the order of the Pennsylvania Board of Probation and Parole is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge