

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tommy Currie, :  
Petitioner :  
 :  
v. : No. 2402 C.D. 2009  
 : Submitted: May 14, 2010  
Pennsylvania Board of :  
Probation and Parole, :  
Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: September 30, 2010

Tommy Currie petitions for review of an adjudication of the Pennsylvania Board of Probation and Parole (Board) denying his challenge to the Board's calculation of his new maximum sentence date, following his recommitment as a technical and convicted parole violator. Finding no error in the Board's recalculation, we affirm.

On January 13, 2006, Currie was sentenced to serve three to six years incarceration in a state correctional institution after pleading guilty to criminal charges in Washington County.<sup>1</sup> On November 28, 2007, Currie was released on parole. At the time of his release, Currie's maximum sentence date was January 13, 2012; accordingly, 1,507 days remained on his original sentence. When Currie

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<sup>1</sup> Currie was already serving a two to four year sentence in a state correctional institution after pleading guilty to criminal charges in Westmoreland County in January 2005.

failed to successfully complete the community corrections program required under the terms of his parole, the Board issued a notice declaring Currie delinquent as of June 2, 2008. Certified Record, Item No. 3, at 12 (C.R. \_\_\_\_).

Currie remained at large until July 1, 2008, when he was arrested on new criminal charges in York County. The next day, the Board issued a warrant to detain Currie for violating his parole, and he was recommitted as a technical parole violator (TPV) and directed to serve nine months backtime. On August 26, 2008, Currie was released on his own recognizance in lieu of bail for one of the York County criminal charges; however, he was not able to post bail on the remaining criminal charges, as required. He remained incarcerated on the new criminal charges and on the Board's detainer until December 22, 2008, when he pled guilty to the York County criminal charges. He was sentenced to a term of three to six years in a state correctional institution.<sup>2</sup>

As a result of this new conviction, the Board recommitted Currie as a convicted parole violator (CPV) and directed Currie to serve fifteen months back time, concurrently with the TPV backtime. C.R. Item No. 7, at 190. The Board's decision, mailed on March 23, 2009, calculated Currie's new maximum date for his original sentence to be February 6, 2013. C.R. Item No. 7, at 190-191.<sup>3</sup>

In response to the committal, Currie filed a petition for administrative relief, *pro se*, on April 3, 2009, claiming that the Board had

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<sup>2</sup> The sentence was the product of three convictions for forgery, each for three to six years, to be served concurrently. C.R. Item No. 9, at 195-197.

<sup>3</sup> The Board added the 390 days Currie was at liberty on parole from November 28, 2007, until December 22, 2008, to his original parole violation maximum date of January 13, 2012.

miscalculated his maximum date.<sup>4</sup> Specifically, Currie claimed that he was entitled to receive credit for the time that he was detained in York County Prison because he was held solely on the Board's warrant. Further, Currie claimed that the Board failed to give him credit for time he spent at a state correctional boot camp from April to November 2007, and for time spent at the Crispus Attucks Youthbuild program (Youthbuild), a halfway house, between November 2007 and February 2008.<sup>5</sup>

The Board denied Currie's petition for administrative relief in a letter mailed November 10, 2009. The Board explained its calculation of Currie's maximum date of confinement, stating:

When you were released on parole from your original sentence on November 28, 2007, your maximum sentence date was January 13, 2012, which left 1,507 days remaining to serve on your original sentence. As a convicted parole violator, you automatically forfeited credit for all of the time that you spent on parole.... While on parole, you were arrested for twelve (12) York County Court of Common Pleas indictments as shown on your PBPP 39, pages 2 and 3. You were released on your own recognizance in lieu of bail in the 5352-2008 case on August 26, 2008; however, you remained incarcerated based on not posting bail in the 11 other cases. The Board previously lodged its warrant to commit and detain you on July 2, 2008.

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<sup>4</sup> Currie sent a series of petitions for administrative relief to the Board between April 3, 2009, and September 29, 2009. C.R. Item No. 13, at 219. The Board did not address any correspondence received from Currie after the initial letter because Board regulations prevented their consideration. *Id.* 37 Pa. Code §73.1(b)(3) states that “[s]econd or subsequent petitions for administrative review and petitions for administrative review which are out of time under this part will not be received.”

<sup>5</sup> A petitioner who appeals for administrative review of the Board of Probation and Parole's recalculation order bears the burden of specifying the requisite factual or legal basis for the relief sought. *Meehan v. Pennsylvania Board of Probation and Parole*, 783 A.2d 362, 365 n.3 (Pa. Cmwlth. 2001) (citing 37 Pa. Code §73.1).

You were convicted and sentenced in the aforementioned cases on December 22, 2008....

With the above facts in mind, you are not entitled to a back time served credit (i.e. time that you were held solely on the Board's warrant prior to your recommitment order) because you were never incarcerated solely on the Board's warrant.... You became available to begin serving your back time on December 22, 2008, when you were convicted on the aforementioned York County Court of Common Pleas charges. Adding 1,507 days (or 4 years, 1 month, 16 days) to December 22, 2008, yields a new parole violation maximum date of February 6, 2013. Therefore, your parole violation maximum sentence date is correct.

C.R. Item No. 13, at 219. (emphasis in original) (internal citations omitted). Currie now petitions this Court to review the Board's denial of his petition for administrative review.

In his appeal,<sup>6</sup> Currie again contends that the Board failed to credit his original sentence for the time he spent in the York County Prison solely on the Board's warrant. He further contends that the Board erred in not providing him with an evidentiary hearing to establish the custodial nature of the Youthbuild program, where he spent three months between November 28, 2007, and February 29, 2008.<sup>7</sup>

First, we address Currie's claim that he is entitled to credit toward his original sentence for the 118 days he spent in the York County Prison from August

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<sup>6</sup> Our review is limited to determining whether necessary findings are supported by substantial evidence, whether an error of law was committed, or whether constitutional rights were violated. *Melendez v. Pennsylvania Board of Probation and Parole*, 944 A.2d 824, 825 n.1 (Pa. Cmwlth. 2008).

<sup>7</sup> On appeal, Currie abandoned his claim that the Board failed to award credit for the boot camp he attended between April and November 2007, realizing that those seven months had already been credited toward his original sentence.

26, 2008, until December 22, 2008, when he was sentenced on the new criminal charges. Currie argues that he was incarcerated during this period solely on the Board's detainer warrant, but this argument lacks support in the record.

An offender is entitled to credit against his original sentence where he has posted bail on the new criminal charges and is being held solely on the Board's detainer. *Hears v. Pennsylvania Board of Probation and Parole*, 851 A.2d 1003, 1007 n.11 (Pa. Cmwlth. 2004) (citing *Davis v. Cuyler*, 394 A.2d 647 (Pa. Cmwlth. 1978)). In *Gaito v. Pennsylvania Board of Probation and Parole*, 488 Pa. 397, 403-404, 412 A.2d 568, 571 (1980), our Supreme Court established that a parolee incarcerated on new criminal charges must receive credit for that time against whatever sentence he receives on those new criminal charges. In *Martin v. Pennsylvania Board of Probation and Parole*, 576 Pa. 588, 605, 840 A.2d 299, 309 (2003), our Supreme Court clarified *Gaito*, explaining that where a parolee is incarcerated on both a Board detainer and new criminal charges, all time spent in confinement must be credited *either* to the new sentence *or* to the original sentence.<sup>8</sup>

Here, Currie was charged with four crimes. He was released on his own recognizance on one charge, but he remained incarcerated on the three forgery charges because he did not post \$10,000 bail. As the Board explained, Currie was not entitled to credit toward his original sentence for this time because he was never incarcerated solely on the Board's warrant. Rather, he was incarcerated on

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<sup>8</sup> The Court was concerned about the equitable treatment of indigent offenders who may be unable to post bail and offenders who are not sentenced to incarceration on the new criminal charges. Under *Martin*, these offenders receive credit for all time served, whether it is credited against the original or new sentence. 576 Pa. at 605, 840 A.2d at 309.

both the new criminal charges and the Board’s detainer.<sup>9</sup> Thus, the Board correctly denied Currie credit toward his original sentence for the 118 days that he was held on both the new criminal charges and the Board detainer.

Second, Currie contends that he is entitled to credit for his time at Youthbuild because the facility is equivalent to a prison. Currie argues that the Board should have conducted an evidentiary hearing to determine whether Youthbuild is a prison equivalent. This requires consideration of the physical attributes of the facility and the rules and restrictions imposed upon the parolee residents. *Cox v. Pennsylvania Board of Probation and Parole*, 507 Pa. 614, 493 A.2d 680 (1985).<sup>10</sup>

The Board counters that Currie waived this issue because he did not raise it in his administrative appeal. At his hearing, Currie did not offer any evidence about the restrictions at Youthbuild. Thus, he cannot raise the issue for the first time before this Court. We agree.

In *Cox*, a parolee sought credit for time spent at an inpatient hospital drug treatment program. Finding that the record was devoid of “the specifics of the program” necessary to make the determination, our Supreme Court remanded the matter to the Board to conduct an evidentiary hearing to determine the custodial nature of the program. *Id.* at 619, 493 A.2d at 683. The Court held that

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<sup>9</sup> However, as the Board notes, Currie will receive credit for the 118 days in question against his new 3 to 6 year concurrent sentences, which complies with the *Gaito* and *Martin* holdings.

<sup>10</sup> In *Harden v. Pennsylvania Board of Probation and Parole*, 980 A.2d 691, 697-698 (Pa. Cmwlth. 2009), we summarized the three essential principles of *Cox* as follows: a parolee’s attendance at a residential facility is presumed to be “at liberty on parole;” a parolee may rebut this presumption by presenting evidence to show that the residential program was a prison equivalent; and the Board’s factual determination will only be disturbed if it acts arbitrarily or plainly abuses its discretion.

time spent in a rehabilitation facility may constitute a restriction on liberty sufficient to warrant credit for time served. However, the burden is on the parolee to show the specific characteristics of the program that restrict liberty. *Id.* at 620, 493 A.2d at 683. The court in *Cox* recognized that each claim is to be evaluated on a case-by-case basis upon the record made before the Board.

The issue of the restrictive nature of a program such as Youthbuild must be addressed in the administrative appeal to the Board. *Reavis v. Pennsylvania Board of Probation and Parole*, 909 A.2d 28, 36 (Pa. Cmwlth. 2006). The Board is required to develop a record on the issue of whether the program is sufficiently custodial to entitle a parolee to credit for time spent in the program. *Id.* The proper time for a parolee to raise the issue is in his request for administrative relief. As this Court explained in *Beasley v. Pennsylvania Board of Probation and Parole*:

Petitioner could only *offer evidence of the restrictive nature of the program* after the decision to recommit and the calculation of the unexpired term was made. *Petitioner properly raised this issue by offering such evidence in his request for administrative relief.* In its denial of relief, the Board simply stated, “You do not receive credit on backtime for time spent in in-patient treatment in the community while you were on parole status.” They made no findings of fact and did not even address petitioner’s contentions. . . . we remand for a determination of facts regarding the nature of the rehabilitation program in light of *Cox*.

519 A.2d 1069, 1070 (Pa. Cmwlth. 1987) (emphasis added).

In his petition for administrative relief, Currie stated that he did not “understand why his time was taken from 11-28-07 till 2-25-2008 while at a halfway house.” C.R. Item No. 13, at 212. However, at the hearing, Currie did not offer one iota of evidence to show that his liberty was restricted in a manner that

would constitute custody and render the program a prison equivalent. He did not “properly [raise] the issue.” *Beasley*, 519 A.2d at 1070. Even on appeal, Currie still has not described the facility itself or any of the rules it imposes on residents. In short, Currie has waived the issue of whether the Youthbuild program was so restrictive as to allow him to receive credit for time served.

For these reasons, the decision of the Board is affirmed.

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MARY HANNAH LEAVITT, Judge



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**ORDER**

And now, this 30<sup>th</sup> day of September, 2010, the Order of the Pennsylvania Board of Probation and Parole, dated November 10, 2009, is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge