

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kenneth James Price, :
Petitioner :
 :
v. : No. 3 M.D. 2008
 : SUBMITTED: May 2, 2008
 :
Pennsylvania Department of :
Corrections, Camp Hill, Pennsylvania :
and Records Supervisor, SCI-Smithfield, :
Jay Whitesel, Classification & :
Program Manager, SCI-Smithfield, :
Huntingdon, PA, :
Respondents :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: July 9, 2008

Before the court are preliminary objections filed by the Department of Corrections, Records Supervisor at State Correctional Institution (SCI) at Smithfield, and Jay Whitesel, Classification and Program Manager at SCI-Smithfield (collectively, Department of Corrections) to Kenneth Price's petition for review in the nature of mandamus.

Price was paroled on August 2, 1989, after serving approximately 5½ years of a 5- to 10-year sentence for robbery (state sentence); at the time of his parole, his maximum date was January 25, 1994. On July 26, 1990, while on state parole, Price was arrested on charges of theft by unlawful taking and held in

Allegheny County Prison. Price posted bail on June 12, 1991, and was transferred to SCI-Smithfield on a state parole detainer warrant.

On October 31, 1991, Judge Gallo sentenced Price to a period of 10 ½ to 23 months in Allegheny County Prison (county sentence) with “credit for time served.” (PFR, Ex. A.) Price was returned to SCI-Smithfield on November 1, 1991, and parole authorities recommitted him as a convicted parole violator with a recalculated parole violation maximum of July 5, 1996. The Department of Corrections returned Price to Allegheny County authorities on May 22, 1992, to serve his county sentence.

Price avers that pursuant to a negotiated plea and sentencing agreement accepted by the trial court on the record, the county sentence was to be 10½ to 23 months, time served, with immediate parole, and that when he returned to SCI-Smithfield on November 1, 1991, he was held solely on the state parole violation. Price avers that when he learned from the prison records supervisor that the Department of Corrections had no record that he had been immediately paroled on his county sentence, his court-appointed counsel sought to have the county sentence corrected.

Judge Gallo issued an order dated June 1, 1992, paroling Price from the county sentence (PFR, Ex. A),¹ and Price was returned to SCI-Smithfield on June 3, 1992. On June 23, 1992, presumably in response to trial counsel’s motion, Judge Gallo issued an order stating, “the Judgment of Sentence entered . . . on October 31, 1991 be corrected to reflect that the Defendant was paroled as of October 31, 1991 having been given credit for time already served.” (PFR, Ex. B.)

¹ Apparently, when Price was returned to Allegheny County Prison, he applied for county parole (Preliminary Objections, Ex. B), prompting Judge Gallo’s June 1, 1992 paroling order.

Price was reparaoled from his state sentence in August 1992. He was arrested by state parole authorities on March 1, 1996, based on a February 1996 arrest for driving while intoxicated, and in September 1996, he was arrested by federal authorities and held for trial for bank robbery. He was released from federal custody on October 5, 2005, and returned to SCI-Smithfield. State parole authorities extended the parole violation maximum on his original 5- to 10-year state sentence to April 20, 2009.

Price alleges that he was granted county parole on October 31, 1991, and that from November 1, 1991, to June 1, 1992, he was in state custody serving backtime on his original state sentence. He requests an order directing the Department of Corrections to comply with Judge Gallo's July 23, 1992, order, and modify its records to credit him with credit for the seven months from November 1, 1991, to June 1, 1992.

Mandamus is an extraordinary writ designed to compel performance of a ministerial act or mandatory duty where there exists a clear legal right in the petitioner, a corresponding duty in the respondent, and want of any other adequate and appropriate remedy. *Sheffield v. Dep't of Corr.*, 894 A.2d 836 (Pa. Cmwlth. 2006), *aff'd*, 594 Pa. 56, 934 A.2d 1161 (2007). Mandamus is not available to establish legal rights, but is appropriate only to enforce rights that have been established. *Feigley v. Dep't of Corr.*, 731 A.2d 220 (Pa. Cmwlth. 1999). In considering preliminary objections, we must consider as true all well-pleaded material facts set forth in the petition and all reasonable inferences that may be drawn from those facts. *Sheffield*. Preliminary objections will be sustained only where it is clear and free from doubt that the facts pleaded are legally insufficient to establish a right to relief. *Id.* We need not accept as true conclusions of law,

unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Myers v. Ridge*, 712 A.2d 791, 794 (Pa. Cmwlth. 1998).

The Department of Corrections raises two objections: 1) Price's failure to conform to rules in that his petition for review is not divided into consecutively numbered paragraphs; and 2) a demurrer. In establishing that Price fails to state a claim, the demurrer avers that Price seeks to have his county parole applied to his state sentence; that state parole authorities did not give Price credit for the seven-month period when recalculating his parole violation maximum date; and that Price raised the same claim for credit in *Price v. Dep't of Corr.*, (Pa. Cmwlth. No. 265 M.D. 2007, memorandum opinion filed December 10, 2007), and this court dismissed the case for lack of original jurisdiction. The Department of Corrections argues that Price's petition fails to state a cause of action in mandamus for recalculation of his state sentence maximum because Judge Gallo has no authority to parole Price from his state sentence and his order does not purport to do so.

Mandamus

Although Price seeks mandamus to compel the Department of Corrections to comply with Judge Gallo's July 23, 1992, order paroling him effective October 31, 1991, and to credit his state sentence with seven months from November 1, 1991, and June 1, 1992, the facts as averred fail to establish a clear right to the relief he requests.

The facts, as averred, establish that after Price pleaded guilty and was sentenced on October 31, 1991, the Parole Board recommitted him as a convicted parole violator. After Judge Gallo paroled Price on June 1, 1992, the Board

recalculated Price's maximum on his state sentence, giving him backtime credit for time served solely on the Board's detainer after he posted bail. All time from October 31, 1991 (county sentencing date), to June 1, 1992 (county parole date), was applied to the county sentence.

What Price now seeks, *i.e.*, an additional 7 months credited to his original state sentence, is to have his state parole violation maximum as determined in 1992, recalculated retroactively, such that his January 1996 arrest for bank robbery and his February 1996 arrest for driving while intoxicated would not have been committed while he was on parole from his state sentence.

As this court determined in Price's earlier mandamus action, an inmate claim, challenging recalculation of the parole violation maximum date after recommitment as a parole violator, is properly brought in this court's appellate jurisdiction and is, thus, excluded from our original jurisdiction. *Bronson v. Pa. Bd. of Prob. and Parole*, 491 Pa. 549, 421 A.2d 1021 (1980). For sentences with a maximum of over two years, the Pennsylvania Board of Probation and Parole has exclusive authority over parole decisions. Sections 17 and 21 of the law known as the Parole Act,² 61 P.S. §§ 331.17 and 331.21; *Gillespie v. Dep't of Corr.*, 527 A.2d 1061 (Pa. Cmwlth. 1987). The relief Price seeks is not available in a mandamus action against the Department of Corrections.

Judge Gallo's Sentence

Despite state parole authorities having refused to recognize Judge Gallo's July 23, 1992, order, Price now seeks the same relief from the Department

² Act of August 6, 1941, P.L. 861, *as amended*.

of Corrections, by claiming that it refuses to implement the sentencing judge's order.

Even if we accept as true Price's averment that he pleaded guilty to the theft charges pursuant to a negotiated plea and sentencing agreement and expected to be paroled immediately from the county sentence, Exhibit B of the petition for review establishes unequivocally that Judge Gallo actually imposed a sentence of 10½ to 23 months in Allegheny County Prison with credit for time served and did not order immediate parole. Because the new sentence was to be served in Allegheny County Prison, as of the date of sentencing, October 31, 1991, Price was serving his county sentence and statutorily unavailable to serve his state sentence.³

The sentencing courts have no inherent authority to grant paroles; Section 26 of the Parole Act, 61 P.S. § 331.26, authorizes them to grant parole from sentences of imprisonment for less than a maximum period of two years upon petition of the person convicted. *Pressley v. Pa. Bd. of Prob. and Parole*, 748 A.2d 791 (Pa. Cmwlth. 2000) (referencing county parole procedures as set forth in the Act of June 19, 1911, P.L. 1059, *as amended*, 61 P.S. § 314). An order sentencing a defendant to a minimum term with credit for time served cannot have the effect of immediate parole unless a specific order granting parole has been entered. *Id.* Price became available to serve his state sentence after June 1, 1992,

³ Pursuant to Section 21.1(a) of the Parole Act, added by Section 5 of the Act of August 24, 1951, P.L. 1401, 61 P.S. § 331.21a(a), because Price was paroled from a state correctional institution and the new sentence is to be served in a county correctional institution, service of the new term for the latter crime must precede commencement of the balance of the term originally imposed.

the date Judge Gallo paroled him. State parole authorities implemented Judge Gallo's county parole order.

Judge Gallo's July 23, 1992 order, apparently issued upon a motion filed by trial counsel to have the sentence modified or corrected, directs that the sentence entered on October 31, 1991, "be corrected to reflect that the Defendant was paroled as of October 31, 1991 having been given credit for time served." (PFR, Ex. B.) In seeking to have the Department of Corrections give effect to Judge Gallo's order, Price fails to state a claim for which relief may be granted.

The courts of common pleas have no authority to make a grant of parole retroactive. A sentencing court lacks authority to backdate parole to a date prior to the date of sentencing. *Banks v. Pa. Bd. of Prob. and Parole*, 928 A.2d 384 (Pa. Cmwlth.), *petition for allowance of appeal denied*, ___ Pa. ___, 936 A.2d 41 (2007); *Johnson v. Murray*, 888 A.2d 28 (Pa. Cmwlth. 2005). A sentencing judge may not enter an order modifying an earlier grant of county parole to make parole retroactive to the date of sentencing. *Bailey v. Pa. Bd. of Prob. and Parole*, 591 A.2d 778 (Pa. Cmwlth. 1991).

In *Bailey*, the parolee committed a new crime while on parole, and on December 13, 1988, the sentencing court imposed a sentence of 11½ to 23 months on the new charges. Although the sentencing judge paroled Bailey from his county sentence on July 18, 1989, after he served 13 months, the judge issued another order, after Bailey was returned to state custody, modifying the earlier order to reflect a parole date of February 18, 1989. This court concluded that Bailey was not available to serve his backtime until July 18, 1989, and upheld the Board of Probation and Parole's refusal to recalculate Bailey's parole violation maximum based on the sentencing court's order setting a retroactive parole date.

Although in this case Price requests relief from the Department of Corrections rather than the Parole Board, our decisions in *Bailey* and *Pressley* establish that he is not entitled to the relief he requests: credit against his state sentence based on the sentencing court's order backdating his county parole date. Price has no legal right to the relief he requests.

Accordingly, based on our conclusion that Price has failed to state a claim, we sustain the objection in the nature of a demurrer, and dismiss the petition for review. The remaining preliminary objection is dismissed as moot.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 9th day of July, 2008, respondents' preliminary objection in the nature of a demurrer in the above captioned matter is hereby SUSTAINED, and the petition for review is DISMISSED.

BONNIE BRIGANCE LEADBETTER,
President Judge