

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Hoa Nguyen, :  
Petitioner :  
 :  
v. : No. 431 C.D. 2011  
 : Submitted: August 19, 2011  
Pennsylvania Board of Probation :  
And Parole, :  
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: October 19, 2011

Hoa Nguyen (Nguyen) petitions this Court for review of an adjudication of the Pennsylvania Board of Probation and Parole (Board) recommitting him as a convicted parole violator to serve 18 months back time. Nguyen argues that it is unconstitutional for the sentence on his new criminal conviction to run after completion of the sentences imposed for his parole violation and prior criminal conviction. Finding no error in the Board’s decision, we affirm.

On August 18, 2001, Nguyen was sentenced to four and one-half to 10 years in state prison for aggravated assault. Certified Record at 1 (C.R.\_\_). His minimum release date was February 3, 2006, and his maximum release date was August 3, 2011. On October 16, 2006, the Board paroled Nguyen with several conditions, including that he “[c]omply with all municipal, county, state and

Federal criminal laws,” “abstain from the unlawful possession or sale of narcotics and dangerous drugs,” and “refrain from owning or possessing any firearms or other weapons.” C.R. 11.

On March 24, 2009, while still on parole, Nguyen was arrested by the Newtown Township Police Department in Bucks County and charged with offenses under The Controlled Substance, Drug, Device and Cosmetic Act<sup>1</sup> and the Pennsylvania Uniform Firearms Act of 1995, 18 Pa. C.S. §§6101-6162. On January 25, 2010, Nguyen pleaded guilty to four charges related to that arrest. He was sentenced to two concurrent terms of imprisonment of 18-36 months plus one year of probation, to be served consecutively.

On April 5, 2010, the Board held a parole revocation hearing and recommitted Nguyen to serve 18 months backtime as a convicted parole violator. Nguyen’s new minimum release date for reparole was set for June 30, 2011, and the new maximum date was set for October 16, 2014. The Board mailed the revocation decision and recommitment order on May 10, 2010. Significantly, the recommitment order did not include any calculations for Nguyen’s new sentences; it was based solely on Nguyen’s 2001 conviction and parole violation.

Nguyen, *pro se*, filed a timely petition for administrative review with the Board on June 8, 2010, arguing that the Board failed to give him credit for the periods of incarceration from August 18, 2009, through October 20, 2009, and January 25, 2010, through April 5, 2010. He further argued that it was unconstitutional for the Board to order his new sentence to be served after

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<sup>1</sup> Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. §§780-101 - 780-144.

completion of his 2001 sentence. The Board denied Nguyen’s petition, concisely explaining its computation methods and results. Nguyen now petitions for this Court’s review.

Before this Court,<sup>2</sup> Nguyen argues that the Board’s recommitment order is invalid because Section 6138 of the Prisons and Parole Code<sup>3</sup> is

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<sup>2</sup> “Our scope of review is limited to a determination of whether necessary findings are supported by substantial evidence, an error of law was committed, or whether constitutional rights of the parolee were violated.” *Slaymaker v. Pennsylvania Board of Probation and Parole*, 768 A.2d 417, 418 n.1 (Pa. Cmwlth. 2001) (citing Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; *Shaffer v. Pennsylvania Board of Probation and Parole*, 675 A.2d 784 (Pa. Cmwlth. 1996)). “An Act of [the Legislature] will not be declared unconstitutional unless it *clearly, palpably* and *plainly* violates the Constitution.” *Daly v. Hemphill*, 411 Pa. 263, 271, 191 A.2d 835, 840 (1963) (emphasis in original).

<sup>3</sup> Section 6138 of the Prisons and Parole Code states, in relevant part:

(a) Convicted violators.—

- (1) A parolee under the jurisdiction of the board released from a correctional facility who, during the period of parole or while delinquent on parole, commits a crime punishable by imprisonment, for which the parolee is convicted or found guilty by a judge or jury or to which the parolee pleads guilty or nolo contendere at any time thereafter in a court of record, may at the discretion of the board be recommitted as a parole violator.
- (2) If the parolee’s recommitment is so ordered, the parolee shall be reentered to serve the remainder of the term which the parolee would have been compelled to serve had the parole not been granted and shall be given no credit for the time at liberty on parole.

\* \* \*

- (5) If a new sentence is imposed on the parolee, the service of the balance of the term originally imposed by a Pennsylvania court shall precede the commencement of the new term imposed in the following cases:

**(Footnote continued on the next page . . .)**

unconstitutional insofar as it conflicts with Section 9757 of the Sentencing Code.<sup>4</sup> The Board counters that Nguyen has misconstrued the record in advancing this argument. We agree.

To begin, Nguyen is incorrect that the judge imposing the 2010 sentence intended that sentence “to run concurrent with all other sentences.” Petitioner’s Brief at 10. The criminal docket sheet for the Court of Common Pleas of Bucks County shows that the sentence for count 1 (18-36 months jail time) is to run concurrently with count 4 (18-36 months jail time) and consecutive to count 3 (probation). C.R. 68-69. There is nothing in the record to show that the court intended these sentences to run concurrently with any prior sentences.

Nguyen is also mistaken in his belief that the Board determined that his recommitment sentence should run after the sentence on his new criminal conviction. The Board, in recalculating Nguyen’s new maximum date and parole eligibility date, did so based solely on his prior conviction. *See* C.R. 75, Board’s Order to Recommit. In the Board’s order to recommit, the Board calculated

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**(continued . . .)**

- (i) If a person is paroled from a State correctional institution and the new sentence imposed on the person is to be served in the State correctional institution.

61 Pa. C.S. §6138.

<sup>4</sup> Section 9757 of the Sentencing Code states:

Whenever the court determines that a sentence should be served consecutively to one being then imposed by the court, or to one previously imposed, the court shall indicate the minimum sentence to be served for the total of all offenses with respect to which sentence is imposed. Such minimum sentence shall not exceed one-half of the maximum sentence imposed.

42 Pa. C.S. §9757.

Nguyen's new maximum date by applying the time left on his 2001 sentence (1655 days, also referred to as "backtime owed") and subtracting a backtime credit of 97 days for the time after which he posted bail, but was not actually released from custody due to the Board's detainer, until he was convicted of the new charges.<sup>5</sup>

In sum, the record does not support Nguyen's claim that the Board intended his new sentence to run concurrently with his prior sentence. The Board's recommitment and recalculation orders relate solely to Nguyen's 2001 sentence, parole, and recommitment and nothing else. *See* C.R. 32-38, 75-77, 92-94. It is the job of the Department of Corrections, not the Board, to calculate the minimum and maximum dates of Nguyen's new sentences. *Gillespie v. Department of Corrections*, 527 A.2d 1061, 1065 (Pa. Cmwlth. 1987) ("The Department [of Corrections], not the Board, is responsible for calculating the minimum and maximum terms of prisoners committed to its jurisdiction."). It appears that Nguyen has named the wrong respondent in his appeal. Thus, we affirm the Board.

Although our inquiry is ended, we will briefly consider the merits of Nguyen's appeal, in which he asks this Court to review the constitutional validity of the Board's recommitment order. Specifically, Nguyen asks

[w]hether the recommitment order in question is invalid since it is based upon an unconstitutional statute which improperly directs that all [backtime] imposed by the board for a new conviction must run consecutive to any jail sentence imposed

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<sup>5</sup> Nguyen was not credited for the time between his conviction on January 25, 2010, until his recommitment order from the Board on April 5, 2010. The Board explained in its response to Nguyen's administrative appeal that this time period would be credited toward his new sentence of 18-36 months. C.R. 92.

for the new conviction regardless of whether the sentencing judge ordered the new sentence to run concurrent to any backtime imposed.

Petitioner's Brief at 7. Nguyen argues that the Board's recommitment sentence violates the "separation of powers" doctrine. Specifically, Nguyen argues that Section 6138 of the Prison and Parole Code is unconstitutional because it conflicts with Section 9757 of the Sentencing Code. Nguyen cites no case law to support this contention, nor does he cite to any specific section of the Pennsylvania Constitution or the United States Constitution to support his constitutional claim.

In any event, Nguyen's argument lacks merit. Our Supreme Court has held that "[i]t is the province of the Legislature to determine the punishment imposable for criminal conduct," further noting that "mandatory sentencing . . . is constitutional with respect to the doctrine of separation of powers and procedural due process." *Commonwealth v. Moore*, 534 Pa. 527, 549, 633 A.2d 1119, 1130 (1993) (citing *Commonwealth v. Wright*, 508 Pa. 25, 39, 494 A.2d 354, 361 (1985), *aff'd sub nom.*, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)). Further, our Supreme Court has held that a trial court may *not* order a new sentence to run concurrently with a parole violator's back time: "a parole violator convicted and sentenced to prison for another offense *must* serve his or her back time and the new sentence in consecutive order." *Commonwealth v. Dorian*, 503 Pa. 116, 117, 468 A.2d 1091, 1092 (1983) (emphasis added) (quoting *Commonwealth v. Zuber*, 466 Pa. 453, 457, 353 A.2d 441, 443 (1976)). The Court went on to say that "[w]e therefore disapprove of the . . . decision which would hold that Section 9761 of the Sentencing Code enables the sentencing judge to direct that a parolee's 'front time' sentence run concurrent with his 'back time' sentence." *Id.* It is well-settled that

neither the Board nor the trial court may impose a new sentence to run concurrently with back time.

For these reasons, we affirm the Board's decision.

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MARY HANNAH LEAVITT, Judge

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	:	
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**ORDER**

AND NOW, this 19<sup>th</sup> day of October, 2011, the order of the Pennsylvania Board of Probation and Parole dated February 11, 2011, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge