

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Sanders, :
Petitioner :
 :
v. : No. 464 C.D. 2008
 : Submitted: July 11, 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 LEAVITT

FILED: August 12, 2008

Richard Sanders (Sanders), an inmate at the State Correctional Institution at Houtzdale (SCI-Houtzdale), petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) denying him administrative relief from his recommittal to prison as a convicted parole violator. Sanders argues that the parole violation charge against him should be dismissed because the Board failed to hold a timely parole revocation hearing as mandated by the Board's own regulations. Finding no merit to Sanders' positions, we will affirm the Board.

The relevant facts are undisputed. Sanders was paroled on March 7, 2005, while serving a term of four to ten years imprisonment for his conviction of burglary-related charges, with a maximum imprisonment date of March 6, 2009.

On January 8, 2007, Sanders was arrested and charged with various criminal offenses.¹ The Board lodged a detainer on February 16, 2007. Because Sanders did not post bail, he remained incarcerated in the Delaware County Prison on the new arrest. On March 28, 2007, Sanders was convicted of attempted burglary and attempted theft from a motor vehicle and sentenced to a term of two to four years. On April 13, 2007, Sanders was returned to the State Correctional Institution at Graterford (SCI-Graterford), and the Board received official verification of Sanders' convictions on May 21, 2007.

Sanders did not execute a waiver of his right to have a parole hearing before a panel. As a result, a panel revocation hearing was scheduled for June 22, 2007. The hearing was continued to the next available hearing date because Sanders was transferred to SCI-Houtzdale on June 22, 2007. A second panel revocation hearing was scheduled on August 9, 2007, which was continued at the request of Sanders for the purpose of securing counsel. In his request for a continuance, Sanders requested that the revocation hearing be rescheduled for the first available date. A third panel revocation hearing was scheduled on September 7, 2007, but it was continued because Sanders had been transferred on August 30, 2007, to the Delaware County Prison. Sanders was returned to SCI-Houtzdale on September 19, 2007, and a fourth panel revocation hearing was scheduled on October 25, 2007. However, the fourth hearing was also continued at the request of Sanders' counsel.

¹ Sanders was charged with attempted burglary, criminal trespass, attempted theft from a motor vehicle, criminal mischief, public drunkenness, disorderly conduct, and possession of a controlled substance.

Sanders' revocation hearing was held on October 29, 2007, at which Sanders challenged its timeliness. He argued that because the hearing was taking place more than 120 days after Sanders was returned to SCI-Graterford on April 13, 2007, it was untimely under the Board's regulation.² Sanders conceded that his August 9, 2007, request for continuance tolled the 120-day period. However, Sanders argued because his continuance requested the next available hearing date, it should have been held on August 13, 2007, when a panel was scheduled to convene. Sanders argued that the 120-day period for holding his parole revocation hearing began to run again on August 13, 2007, and was reached by August 15, 2007, long before his scheduled hearing date of September 7, 2007.

The panel denied Sanders' objection and recommitted him as a convicted parole violator to serve 1,353 days backtime. Sanders sought administrative relief from the recommitment decision, again arguing that the Board failed to hold a timely hearing in accordance with its regulation.³ The Board denied Sanders' request for relief, finding that 118 days had elapsed between the date of Sanders' return to a state correctional institution, April 13, 2007, and the date on which Sanders requested a continuance, August 9, 2007. The Board also found that any delay after August 9, 2007, was not attributable to the Board but,

² The Board's regulation provides, in pertinent part, as follows:

If a parolee is confined outside the jurisdiction of the Department of Corrections, such as confinement...in a county correctional institution where the parolee has not waived the right to a revocation hearing by a panel...the revocation hearing shall be held within 120 days of the official verification of the return of the parolee to a State correctional facility.

37 Pa. Code §71.4(1)(i).

³ In his request for administrative relief, Sanders again argued that the 120-day time period was tolled by his request for a continuance on August 9, 2007, and that the time period resumed on the date of the next panel revocation hearing on August 13, 2007.

rather, was the result of Sanders' requests for continuances and his transfer from SCI-Houtzdale to the Delaware County Prison. The Board concluded that the October 29, 2007, revocation hearing was timely pursuant to 37 Pa. Code §71.4. Sanders then petitioned for this Court's review.⁴

On appeal, Sanders raises one issue, namely that he did not receive a timely revocation hearing.⁵ Sanders argues that because he requested the next available panel hearing in his continuance, the 120-day period resumed on August 13, 2007, the date on which the next panel convened. Accordingly, the revocation hearing scheduled for September 7, 2007, was untimely.

We begin with a review of the applicable regulation and case law. Due process requires that parolees receive a hearing within a reasonable time after they are taken into custody for a parole violation. *Morrissey v. Brewer*, 408 U.S. 471 (1972). To satisfy due process, the Board adopted 37 Pa. Code §71.4(1), which requires a revocation hearing within 120 days of when the Board acquires jurisdiction over the parolee.⁶ Further, when a parolee asserts that the Board failed

⁴ This Court's review is limited to determining whether constitutional rights were violated, errors of law were committed, or the Board's findings of fact were not supported by substantial evidence. *Taylor v. Pennsylvania Board of Probation and Parole*, 931 A.2d 114, 116 n.2 (Pa. Cmwlth. 2007).

⁵ Sanders also asserts that the official notice of charges and hearings had been altered and was fraudulent. Sanders contends that the Board erred in relying upon the allegedly fraudulent notice and permitting the same to be introduced on the record. Although Sanders raises this issue in his petition for review, he failed to raise and preserve it before the Board. "Failure to raise an issue before the Board results in a waiver and precludes this Court's review." *Reavis v. Pennsylvania Board of Probation and Parole*, 909 A.2d 28, 34 (Pa. Cmwlth. 2006). Accordingly, this issue has been waived and cannot be reviewed by this Court.

⁶ As explained in *Auman v. Pennsylvania Board of Probation and Parole*, 394 A.2d 686 (Pa. Cmwlth. 1978), the current regulation was adopted in 1977 in response to *United States ex rel. Burgess v. Lindsey*, 395 F. Supp. 404, 411 (E.D. Pa. 1975), where it was held that the Board's practice of waiting for a parolee's sentence on a new conviction before scheduling a revocation **(Footnote continued on the next page . . .)**

to hold a timely revocation hearing, the Board has the burden of proof. *See, e.g., Mack v. Pennsylvania Board of Probation and Parole*, 654 A.2d 129, 130 (Pa. Cmwlth. 1995).

The regulation requires a hearing within 120 days of the Board's receipt of "official verification" of a conviction. It states:

- (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 waived the right to a revocation hearing by a panel ... the revocation hearing shall be held within 120 days of the official verification of the return of the parolee to a State correctional facility.

37 Pa. Code §71.4(1). Thus, where the parolee is not confined by the Pennsylvania Department of Corrections, the 120 days do not begin to run until the parolee is returned to a state facility.

The Board has also promulgated 37 Pa. Code §71.5 to guide in the calculation of the 120 days. It states in pertinent part:

- (c) In determining the period for conducting hearings under this chapter, there shall be excluded from the period, a

(continued . . .)

hearing was unreasonable. In *Lindsey*, the District Court concluded that a nine-month gap between the parolee's conviction and the revocation hearing violated due process.

delay in any stage of the proceedings which is directly or indirectly attributable to one of the following:

- (1) The unavailability of a parolee or counsel.
- (2) Continuances granted at the request of a parolee or counsel, in which case the Board is not required to reschedule the hearing until it receives a written request to reschedule the hearing from the parolee or counsel.
- (3) Reasonable or necessary continuances granted to, or occurrences related to, the Board or its employes.
- (4) A change of decision by a parolee either to waive the right to be heard by a panel after asserting it or to assert that right after waiving it. In this case, the hearing shall be held within 120 days of the last change of decision.
- (5) An event which could not be reasonably anticipated or controlled by the Board, including, but not limited to, illness, injury, acts of nature and prison or civil disorder.

37 Pa. Code §71.5(c). Thus, where a hearing is continued, time attributable to the continuance is excluded from the computation of the 120 days. *Chancey v. Pennsylvania Board of Probation and Parole*, 477 A.2d 22 (Pa. Cmwlth. 1984).

Here, Sanders was confined in the Delaware County Prison and was returned to SCI-Graterford on April 13, 2007. On August 9, 2007, Sanders requested that the hearing be continued so that he could secure legal counsel. Certified Record at 73. When he requested his continuance, 118 days had elapsed since his return to SCI-Graterford. Sanders also requested that the hearing be rescheduled for the “FIRST AVAILABLE DATE.” *Id.* A panel convened on

August 13, 2007, to conduct parole revocation hearings, but it did not hear Sanders' case. Instead Sanders' hearing was scheduled for September 7, 2007.⁷ Sanders contends that this rescheduled hearing date violated the 120-day rule in 37 Pa. Code §71.4. We disagree.

The fact that a panel convened on August 13, 2007, does not mean that it was "available" to hear any matters beyond those previously scheduled. There is no evidence to suggest that there were any panels available to hear Sanders' case before September 7, 2007, the date on which his revocation hearing was scheduled. Sanders' continuance was granted at his request so he could secure counsel. *See O'Hara v. Pennsylvania Board of Probation and Parole*, 487 A.2d 90, 99 (Pa. Cmwlth. 1985) (any delay in revocation hearing attributed to the parolee being granted a continuance to obtain counsel is not attributable to the Board for calculating the timeliness of a hearing). Further, although Sanders argues that his hearing should have been rescheduled for August 13, 2007, this was only four days after Sanders requested his continuance. Sanders presented no evidence that he had secured counsel and was ready for a hearing on August 13, 2007. *See Stevens v. Pennsylvania Board of Probation and Parole*, 538 A.2d 108, 111 (Pa. Cmwlth. 1988) (when a parolee requests a continuance, the 120-day period does not begin to run again until the parolee requests in writing that the parole hearing be rescheduled).

⁷ This hearing was also continued because Sanders had been transferred on August 30, 2007, to the Delaware County Prison on a writ issued by the Delaware Court of Common Pleas. Sanders was returned to SCI-Houtzdale on September 19, 2007, and a fourth panel revocation hearing was scheduled on October 25, 2007. However, the fourth hearing was continued at the request of Sanders' counsel.

Based on the foregoing, we hold that Sanders' parole revocation hearing was timely. The decision of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

