

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Damien Washington, :  
Petitioner :  
 :  
v. : No. 497 C.D. 2010  
 : Submitted: July 30, 2010  
Commonwealth of Pennsylvania, :  
Pennsylvania Board of Probation :  
and Parole, Jeffrey A. Beard, :  
Secretary 4 (DOC), Kenneth R. :  
Cameron, Superintendent, :  
Respondents :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: December 15, 2010

Damien Washington petitions for review of an adjudication of the Pennsylvania Board of Probation and Parole (Board) denying his challenge to his parole revocation. Washington asserts that he was denied effective assistance of counsel at his revocation hearing and that the Board failed to properly calculate his new maximum sentence date. Concluding these claims lack merit, we affirm.

In November 1998, Washington was convicted of reckless endangerment and criminal conspiracy and sentenced to a term of imprisonment of five to eleven years, with a maximum sentence date of November 9, 2008. On December 17, 2002, Washington was paroled to a community correction center, from which he absconded on June 30, 2003. On September 9, 2003, Washington was arrested and returned to

the Board's custody. The Board recommitted Washington as a technical parole violator to serve twelve months back time and recalculated his new maximum date as January 18, 2009. In this calculation, the Board denied Washington credit for 70 of the 72 days he was delinquent from parole, *i.e.*, the period between June 30, 2003, to September 10, 2003.

On February 7, 2005, the Board reparaoled Washington to an inpatient rehabilitation center in Philadelphia, from which he absconded. He was arrested on August 30, 2005, and on March 8, 2007, the Board recommitted Washington as a technical parole violator. Washington's maximum sentence date remained January 18, 2009.

On October 8, 2007, Washington was paroled again to live with his mother, Annette Toney, in Lansdowne, Pennsylvania. On August 21, 2008, Upper Darby Township Police arrested an individual known as "Damon Toney" and charged him with criminal possession of a weapon, drug charges and retail theft. The criminal complaint against "Damon Toney" showed that he had the same date of birth, same social security number and same home address in Lansdowne as Damien Washington. Certified Record, Exhibit 21 (C.R. \_\_\_\_). On July 19, 2009, Washington pleaded guilty to the charges that had been lodged against "Damon Toney" and was sentenced to serve a 20 to 40-month term in State prison for the drug charges. He received two years of probation on the other charges.

On September 10, 2009, a revocation hearing was held at SCI-Cresson where Washington was serving his sentence for his July 19, 2009, conviction. During the hearing, Washington's counsel did not object to the admission of a sentencing document from Delaware County Court of Common Pleas with the name "Damon Toney." C.R., Exhibit 27. In addition, Washington's counsel stipulated that his July

19, 2009, guilty plea was entered on the August 2008 charges filed against “Damon Toney.” C.R. 105. On November 3, 2009, the Board recommitted Washington as a convicted parole violator, and it recalculated his new maximum sentence date on the original 11-year sentence as December 3, 2011. In doing so, the Board did not credit Washington for 195 days he spent on parole from December 17, 2002, to June 30, 2003, and the 206 days from February 7, 2005 until September 1, 2005.

Washington requested administrative relief, and the Board affirmed its order. Washington now petitions this Court for review.<sup>1</sup>

Washington presents three issues on appeal. First, he claims that his counsel at his parole revocation hearing was ineffective for failing to object to the admission of his July 19, 2009, guilty plea because the charges had been lodged against “Damon Toney,” not Washington. Second, Washington claims the Board failed to credit the time he spent on parole in calculating his new sentence date. Third, Washington contends that the Board should have credited the time he spent at a halfway house and inpatient rehabilitation center in calculating his maximum sentence date. We address these issues *seriatim*.

In his first issue, Washington contends that his counsel was ineffective because she stipulated that Damien Washington had pleaded guilty to charges lodged against “Damon Toney.” Washington argues that the Commonwealth had the burden of proving that he and Toney are one and the same, and his counsel erred in conceding his identity. Washington asserts that but for his counsel’s mistake in stipulating that Washington was Toney, the outcome of this case would have been

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<sup>1</sup> This Court’s review of an action of the Board is limited to a determination of whether the Board’s findings are supported by substantial evidence, whether an error of law was committed, or whether any of the parolee’s constitutional rights were violated. *McKenna v. Pennsylvania Board of Probation and Parole*, 782 A.2d 1105, 1106 (Pa. Cmwlth. 2001).

different. The Board responds that Washington has waived the issue of ineffective assistance of counsel because it was not raised in his petition for administrative relief.

A parolee who seeks judicial review of the Board's revocation order must first seek administrative relief from the Board. *St. Clair v. Pennsylvania Board of Probation and Parole*, 493 A.2d 146, 151-52 (Pa. Cmwlth. 1985). The request for administrative relief must be filed within 30 days of the Board's revocation order. 37 Pa. Code §73.1(a)(1).<sup>2</sup> Further, all issues must be presented in the request for administrative relief in order to be preserved. *Rackley v. Pennsylvania Board of Probation and Parole*, 881 A.2d 69, 72 (Pa. Cmwlth. 2005). Here, Washington did not challenge the effectiveness of his counsel at the revocation hearing in his request for administrative relief. Accordingly, it cannot be raised in his appeal to this Court.

In any case, Washington's argument fails on the merits. In order to establish ineffective assistance of counsel, the parolee must prove that: (1) counsel made errors so serious that, in effect, the parolee had no legal representation; and (2) that counsel's deficient performance was so serious that but for counsel's errors the outcome of the revocation proceeding would have been different. *Adams v. Pennsylvania Board of Probation and Parole*, 885 A.2d 1121, 1124-1125 (Pa. Cmwlth. 2005).<sup>3</sup> Courts will give deference to counsel's trial strategy in evaluating

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<sup>2</sup> It states:

An interested party, by counsel unless unrepresented, may appeal a revocation decision. Appeals shall be received at the Board's Central Office within 30 days of the mailing date of the Board's order. When a timely appeal of a revocation decision has been filed, the revocation decision will not be deemed final for purpose of appeal to a court until the Board has mailed its decision on the appeal.

37 Pa. Code §73.1(a)(1).

<sup>3</sup> Washington contends that he was only required to show that he was prejudiced by counsel's ineffectiveness. However, Washington has not fully stated the law as it is not any prejudice by counsel that will warrant a remedy for ineffective assistance of counsel; rather, the prejudice by **(Footnote continued on the next page . . .)**

the seriousness of the error committed, if an error was committed at all. *Commonwealth v. Dunbar*, 503 Pa. 590, 596, 470 A.2d 74, 77 (1983).

Washington cannot satisfy the test for ineffective assistance of counsel, *i.e.*, that, but for counsel's serious error, the outcome of the revocation hearing would have been different. Washington's counsel had no basis for objecting to the admissibility of Washington's sentencing document that identified him as "Damon Toney." Washington was in prison. He was there under a sentencing document that listed Washington's address, date of birth and social security number. The Commonwealth could have easily proved that Washington and Toney were one and the same had Washington's counsel not so stipulated.<sup>4</sup> In effect, Washington's arguments about the fact that the charges were brought against "Damon Toney" is nothing more than a collateral attack on his conviction. In short, it cannot reasonably be inferred that counsel's willingness to stipulate to Washington's guilty plea in any way could have affected the outcome of the revocation hearing.

Next, Washington challenges the Board's calculation of his new maximum sentence date because the Board did not credit his sentence for the time he was on parole. Washington was on parole from December 17, 2002, through June 30, 2003, a period of 195 days, and again for 206 days from February 7, 2005, until December 1, 2005. Time on parole is known as "street time," *i.e.*, the time a parolee

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**(continued . . .)**

counsel must be so damaging to his client's case that a reasonable probability exists that but for counsel's error, the outcome of the proceeding would have been different. *Rudd v. Pennsylvania Board of Probation and Parole*, 577 A.2d 955, 956 (Pa. Cmwlth. 1985).

<sup>4</sup> Rule 3.3(a) of the Pennsylvania Rules of Professional Conduct states in relevant part that "[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." PA. R.P.C. 3.3(a)(1). Therefore, parolee's counsel could not deny the fact "Damon Toney" and Damien Washington are the same person because doing so would have violated Rule 3.3(a).

spends at liberty on parole. *Dorsey v. Pennsylvania Board of Probation and Parole*, 854 A.2d 994, 996 n.3 (Pa. Cmwlth. 2004). Washington asserts that he should have received credit of 401 days, *i.e.*, his street time, towards his original sentence. He is wrong.

Section 6138 of the Prisons and Parole Code (Code)<sup>5</sup> requires that a parolee convicted of a crime committed while the parolee is on parole forfeits any street time earned and “shall be given no credit for the time at liberty on parole.” 61 Pa. C.S. §6138(a)(2).<sup>6</sup> This Court has explained:

Upon recommitment as a convicted parole violator, the parolee must serve the remainder of the term which he would have been compelled to serve had he not been paroled with no credit given for street time.

*Armbruster v. Pennsylvania Board of Probation and Parole*, 919 A.2d 348, 351 (Pa. Cmwlth. 2007). Section 6138(c)(2) of the Code states that a technical parole violator “shall be given credit for the time served on parole in good standing.” 61 Pa. C.S. §6138(c)(2). However, Section 6138(a) states that such street time is not insulated from forfeiture where the parolee is convicted of a new crime and is recommitment as a

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<sup>5</sup> Act of August 11, 2009, P.L. 147, No. 33, 61 Pa. C.S. §6138. Forfeiture of street time was previously governed by Section 21.1 of the Act commonly referred to as the Parole Act, Act of August 6, 1941, P.L. 861, *as amended*, 61 P.S. §331.21a, added by the Act of August 24, 1951, P.L. 1401, *as amended*. The Parole Act was repealed by the Act of August 11, 2009, P.L. 147, No. 33.

<sup>6</sup> It states:

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.

61 Pa. C.S. §6138(a)(2).

convicted parole violator. *Houser v. Pennsylvania Board of Probation and Parole*, 682 A.2d 1365, 1368 (Pa. Cmwlth. 1996).

In sum, the Board's forfeiture of Washington's street time was mandated by the Code. Indeed, Washington acknowledges that his request requires this Court to reverse our prior holdings. This we cannot do without a change in the Code by the legislature.

In his last argument, Washington argues that the Board erred in failing to credit him for the 117 days he spent in a halfway house and in an inpatient drug and alcohol center. Washington equates his time spent at Philadelphia's Joseph E. Coleman Center and the inpatient Diagnostic & Rehabilitation Center to that of a prison which, therefore, should be credited towards his maximum sentence date.

Time spent in a rehabilitation program can be so restrictive of liberty that it is prison-like and, thus, is time that should be counted towards serving a sentence. *Cox v. Pennsylvania Board of Probation and Parole*, 507 Pa. 614, 620, 493 A.2d 680, 683 (1985). It is the parolee's burden to prove that the restrictive nature of the program is comparable to imprisonment. *Reavis v. Pennsylvania Board of Probation and Parole*, 909 A.2d 28, 36 (Pa. Cmwlth. 2006).

Washington did not raise this issue at the revocation hearing or in his request to the Board for administrative relief. It is the Board's duty to hold a hearing and make factual determinations on the restrictive nature of the program where the issue is raised. *Torres v. Pennsylvania Board of Probation and Parole*, 861 A.2d 394, 397 (Pa. Cmwlth. 2004). In *Reavis*, the parolee did not raise the issue or present evidence relevant thereto at his revocation hearing. In the absence of any evidence on the custodial nature of the treatment center, this Court determined the issue was waived. *Reavis*, 909 A.2d at 36. Likewise, here, Washington never presented any

evidence to the Board that the centers where he spent time during parole were prison-like. Therefore, he has waived this issue.

For the above-stated reasons, we affirm the decision of the Board.

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MARY HANNAH LEAVITT, Judge



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Cameron, Superintendent,	:	
Respondents	:	

**ORDER**

AND NOW, this 15<sup>th</sup> day of December, 2010, the order of the Pennsylvania Board of Probation and Parole dated February 26, 2010 in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge