

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stewart C. Smith, :
 : No. 505 C.D. 2012
 Petitioner : Submitted: November 2, 2012
 :
 v. :
 :
 Pennsylvania Board of Probation :
 and Parole, :
 :
 Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE PATRICIA A. McCULLOUGH, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE FRIEDMAN

FILED: January 8, 2013

Stewart C. Smith petitions for review of the August 29, 2011, order of the Pennsylvania Board of Probation and Parole (Board), which denied Smith's administrative appeal from the Board's decision recommitting him as a convicted parole violator with a July 9, 2020, maximum sentence date. We affirm.

On September 14, 1998, Smith received 3 concurrent 6- to 20-year sentences for burglary. (C.R. at 70.) His original maximum sentence date was February 10, 2018. (C.R. at 8.) The Board paroled Smith on November 13, 2006. (C.R. at 11.) Following Smith's initial release on parole, the Board paroled and recommitted Smith several times and increased his maximum sentence date each time. (C.R. at 10, 17, and 71.)

On July 2, 2009, the Board again released Smith on parole. (C.R. at 23.) Because Smith failed to report as instructed, the Board declared him delinquent effective March 11, 2010. (C.R. at 27.) On March 17, 2010, York City Police arrested Smith on new criminal charges,¹ but he was not immediately held on those charges. (C.R. at 44.) Instead, the Board lodged its detainer against Smith on March 17, 2010. (C.R. at 29.)

Though the trial court set bail for the new charges on May 7, 2010, Smith did not post bail until March 10, 2011. (C.R. at 50, 55.) On April 6, 2011, Smith pled guilty to the new charges and received a 6- to 12-month sentence. (C.R. at 32, 33.) The trial court credited him with 180 days for time served. (C.R. at 32.)

On May 24, 2011, the Board recommitted Smith as a convicted parole violator and imposed 12 months of backtime. (C.R. at 58.) On June 27, 2011, the Board calculated a new maximum sentence date of July 9, 2020. (C.R. at 61.) The Board did not give Smith further credit for the time served while in prison under the Board's detainer and the new criminal charges.

Smith filed an administrative appeal on August 2, 2011, challenging the Board's calculations. (C.R. at 64.) On August 29, 2011, the Board affirmed the decision. (C.R. at 68-69.) Smith filed a petition for review with this court.²

¹ The new charges included: intentional possession of a controlled substance by a person not registered, resisting arrest, use/possession of drug paraphernalia, and possession of a small amount of marijuana. (C.R. at 47.)

² Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law has been committed, or whether the findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Smith spent 307 days in prison, from May 7, 2010, to March 10, 2011, on both the Board's detainer and the new criminal charges for which bail had not been posted. Because the trial court credited him with 180 days, Smith argues that in accordance with *Martin v. Pennsylvania Board of Probation and Parole*, 576 Pa. 588, 840 A.2d 299 (2003), the Board should have credited his original sentence with the remaining 127 days. We disagree.

In *Martin*, our Supreme Court addressed the issue of what credit is owed to a paroled offender when the length of pre-trial confinement exceeds the sentence imposed for new criminal charges. The *Martin* Court held that "where an offender is incarcerated on both a Board detainer and new criminal charges, all time spent in confinement must be credited to either the new sentence or the original sentence." 576 Pa. at 605, 840 A.2d at 309.

Following the Supreme Court's decisions in *McCray v. Pennsylvania Department of Corrections*, 582 Pa. 440, 872 A.2d 1127 (2005), and *Melhorn v. Pennsylvania Board of Probation and Parole*, 589 Pa. 250, 908 A.2d 266 (2006), this court has limited the application of *Martin* to the allocation of excess pre-trial confinement. See *Koehler v. Pennsylvania Board of Probation and Parole*, 935 A.2d 44, 54 (Pa. Cmwlth. 2007); *Banks v. Pennsylvania Board of Probation and Parole*, 928 A.2d 384, 388 (Pa. Cmwlth. 2007); *Armbruster v. Pennsylvania Board of Probation and Parole*, 919 A.2d 348, 355 (Pa. Cmwlth. 2007). Thus, credit must be applied to the offender's original sentence only "where a parole violator is confined on both the Board's warrant and the new criminal charges and it is not possible to award all of the credit on the new sentence because the period of pre-sentence

incarceration *exceeds* the maximum term of the new sentence” *Armbruster*, 919 A.2d at 355.

Here, Smith’s pre-sentence incarceration of 307 days does not exceed the maximum term of 12 months imposed by the trial court. As such, *Martin* does not apply. Although the trial court failed to credit Smith with all time served, where a sentencing court fails to order credit for time served, the Board is without the power to do so. *Koehler*, 935 A.2d at 54. “[I]ssues regarding the proper allocation of credit on a new sentence must be addressed by the sentencing court, or the Superior Court on appeal.” *Armbruster*, 919 A.2d at 355. Thus, the Board properly refused to apply the time served towards Smith’s original sentence. *See Gaito v. Pennsylvania Board of Probation and Parole*, 488 Pa. 397, 403-04, 412 A.2d 568, 571 (1980) (holding that time spent in custody should be credited to the new sentence where a defendant is incarcerated prior to trial without posting bail). Smith’s appropriate remedy was in the trial court and through the direct appeal process. *See McCray*, 582 Pa. at 451, 872 A.2d at 1133.

Accordingly, we affirm the Board’s order.³

ROCHELLE S. FRIEDMAN, Senior Judge

³ We note, however, that the Board’s order to recommit used an erroneous maximum sentence date of May 13, 2018, when the maximum sentence date should have been May 19, 2018, in accordance with an order issued by the Board on May 5, 2010. (C.R. at 61, 30.)

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and Parole,	:
	:
Respondent	:

ORDER

AND NOW, this 8th day of January, 2013, the order of the Pennsylvania Board of Probation and Parole dated August 29, 2011, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge