

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles White, :
Petitioner :
 :
v. : No. 549 C.D. 2007
 : SUBMITTED: October 5, 2007
Pennsylvania Board of Probation :
and Parole, :
Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: January 23, 2008

Charles White petitions for review of the order of the Pennsylvania Board of Probation and Parole (Board) affirming his recommitment as a technical and convicted parole violator and recalculating his parole violation maximum date. White asks this court to determine whether his revocation hearing was timely and whether the Board failed to credit him with time served solely under its warrant.

On June 2, 2003, White was re-paroled from his 3- to 10-year sentence for possession with intent to deliver a controlled substance; at the time, his parole violation maximum was April 5, 2006. He was declared delinquent effective September 16, 2004. White was arrested in Albany, New York on June 25, 2005, on charges of criminal impersonation, and the Board issued a warrant for

his arrest. He entered a guilty plea to disorderly conduct on October 28, 2005, and was sentenced that same day to time served. White remained in prison in Albany County on the Board's warrant until he waived extradition on March 6, 2006, and returned to SCI Mahanoy on March 13, 2006.

A revocation hearing was conducted on May 18, 2006, and by decision mailed on July 19, 2006, the Board recommitted White as a technical and convicted parole violator to serve a total of 6 months of backtime and recalculated his parole violation maximum date to September 26, 2010. White's administrative appeal was denied by decision mailed on September 14, 2006, and White's appeal to Commonwealth Court, at No. 1802 C.D. 2006, was remanded on the Board's motion for a new hearing because the initial revocation hearing was inadvertently not recorded. After a second hearing held on January 11, 2007, the Board issued a new revocation/recommitment decision, mailed January 12, 2007, and the administrative appeal was denied by decision mailed on March 13, 2007. This appeal followed.

White argues that the Board failed to hold a timely revocation hearing. He argues that the Pennsylvania Interstate Compact Service (ICS)¹ received a fax of his release from New York custody on October 31, 2005, and that ICS took no further steps to obtain custody of White or to execute the Board's warrant until February 9, 2006. He further argues that the Board was aware of his October 2005 New York conviction and his availability for transfer but that it failed to retrieve him.

¹ Pennsylvania enacted the Interstate Compact for the Supervision of Adult Offenders Act, Act of June 19, 2002, P.L. 377, *as amended*, 61 P.S. §§ 324-324.4.

Where a parolee alleges that his revocation hearing was held beyond the 120-day period, the Board bears the burden of proving by a preponderance of the evidence that the hearing was timely. *Abbruzzese v. Pa. Bd. of Prob. & Parole*, 524 A.2d 1049 (Pa. Cmwlth. 1987). If the Board fails to sustain its burden, the appropriate remedy is a dismissal of the parole violation charges with prejudice. *Taylor v. Pa. Bd. of Prob. & Parole*, 624 A.2d 225 (Pa. Cmwlth. 1993).

Board regulations provide that before a parolee is recommitted as a convicted parole violator, the Board must hold a revocation hearing within 120 days from the date the Board received official verification of the plea of guilty; however, if the parolee is confined out of state, the revocation must be held within 120 days of the official verification of the parolee's return to a state correctional institution. 37 Pa. Code § 71.4(1). The Criminal Arrest and Disposition Report of record shows an official verification of conviction date of October 31, 2005, and White returned to a state correctional institution on March 13, 2006. Because White was confined outside the jurisdiction of the Department of Corrections, Section 71.4(1)(i) applies, and it is undisputed that the revocation hearing was held within 120 days of White's return to SCI Mahanoy.

White argues that the 120-day period commenced not on the date of his return to state custody but on October 28, 2005, the date New York authorities made him available for return to Pennsylvania, because unreasonable and unjustifiable delays that are not attributable to the parolee or his counsel do not toll the running of the 120-day period. *Fitzhugh v. Pa. Bd. of Prob. & Parole*, 623 A.2d 376 (Pa. Cmwlth. 1993); *Williams v. Pa. Bd. of Prob. & Parole*, 579 A.2d 1369 (Pa. Cmwlth. 1990). White argues that the Board failed to act with reasonable dispatch to secure his return. The Board counters that the record does

not reflect that it attempted to toll the limitations period by leaving White in New York or delaying his return to Pennsylvania.

This court has recognized an exception to the limitations periods set forth in Code Section 71.4(1): where there is an unreasonable and unjustifiable delay between a parolee's date of availability and his date of return to Pennsylvania custody, and the delay is not attributable to the parolee or his counsel, the 120-day period begins to run from the date of availability. *Brooks v. Pa. Bd. of Prob. & Parole*, 704 A.2d 721 (Pa. Cmwlth. 1997) [citing *Williams*].² Code Section 71.4(1)(i) "places a reasonable burden on the Board to begin the process of scheduling a revocation hearing when state authorities assume custody of a parolee, and to take affirmative steps to discover the basis for its jurisdiction if that basis is unclear." *Taylor*, 624 A.2d at 228.

The record in the present case establishes that after he completed serving his New York sentence on October 25, 2005, White was held in Albany County, New York, solely on the Board's warrant. The Board's Supervision History Report (Record, p. 35) states that once the ICS received a fax of White's release from custody, Pennsylvania authorities contacted the New York county jail about transferring custody of White. Despite having been informed that no extradition was necessary pursuant to the Interstate Compact and despite White's having waived extradition as a condition of his parole, the local district attorney

² In *Williams*, the parolee was convicted and served a sentence in Georgia for a crime committed while on parole from Pennsylvania. The parolee was available for parole and transfer to Pennsylvania in December 1988, but was not paroled and transferred to Board custody until August 1989. Having found no official verification in the record to indicate when the Board learned that the parolee was available for transfer, we held that when the record contains no official verification of when the parolee became available for transfer, the 120-day period begins to run on the date the Board could have obtained official verification.

refused to permit transfer until an extradition hearing was conducted. *Id.* The transfer was further delayed by the unavailability of a public defender willing to represent White at an extradition hearing, and finally, Pennsylvania authorities were notified that White was available for transfer on March 6, 2006, because he had signed a waiver of extradition. *Id.*

The record establishes that the delay in White's return to the Board's jurisdiction was, at least initially, attributable solely to the New York authorities' unwillingness to release White to Pennsylvania authorities, however unfounded.³ The Supervision History Report reflects that after October 31, 2005, the Board's next contact with the New York authorities about the status of White's availability for transfer was not made until February 9, 2006, and White was not made available until March 6, 2006. Although White was arguably "available" for transfer when he completed his New York sentence and was held solely on the Board's warrant, he was not physically "available" until March 6, 2006, when New York authorities notified ICS that White waived extradition. The record reflects that the Board took affirmative steps to discover the basis for its jurisdiction and to take custody of White. We cannot conclude from the record that the Board is responsible for an unreasonable and unjustifiable delay in returning White to Pennsylvania based solely on its apparent failure to contact New York authorities

³ At the revocation hearing, counsel for White remarked that once White served his New York sentence and was being held solely on the Board's warrant, New York had no basis for opposing his transfer to Pennsylvania. Article IX, Section D of the Compact provides that the sending state may at all times enter the receiving state and there apprehend and retake any person on probation or parole with no formalities other than establishing the authority of the offices and the identity of the person to be retaken, 61 P.S. § 324.1, and New York is apparently a Compact state. The court takes no position on whether New York authorities were justified in refusing to permit White's transfer.

between October 31, 2005 and February 9, 2006. Moreover, we have no basis upon which to conclude that an earlier inquiry by the Board would have hastened White's return to Pennsylvania custody.

White's second issue on appeal is that he is entitled to credit on his Pennsylvania sentence for time spent in New York custody solely on the Board's warrant. The Board concedes that White is entitled to credit against his parole violation maximum for the period from October 28, 2005 through March 6, 2006, and seeks a remand for recalculation of that date.

Accordingly, this matter is remanded to the Board for recalculation of White's parole violation maximum date to reflect credit for the period from October 28, 2005 through March 6, 2006. The order of the Board is otherwise affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

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Petitioner	:	
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v.	:	No. 549 C.D. 2007
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Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 23rd day of January, 2008, the order of the Pennsylvania Board of Probation and Parole in the above captioned matter is hereby AFFIRMED IN PART and REVERSED IN PART, and this case is REMANDED for recalculation of White's parole violation maximum date consistent with the foregoing opinion.

Jurisdiction is relinquished.

BONNIE BRIGANCE LEADBETTER,
President Judge