

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lonnie Gainer,	:	
Petitioner	:	
	:	
v.	:	No. 714 C.D. 2008
	:	Submitted: September 19, 2008
Pennsylvania Board of Probation and Parole,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY

FILED: November 3, 2008

Lonnie Gainer (Gainer) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) that denied Gainer's request for administrative relief from a Board decision dated February 15, 2008, that determined Gainer's new maximum release date was January 1, 2009.¹ We affirm.

The pertinent facts as revealed in the record are as follows. Gainer was convicted of theft and sentenced on July 20, 2004, to a term of nine months to three years. Consequently, he came under the Board's jurisdiction for probation and parole purposes. At the time of his conviction, Gainer's maximum date for this sentence was March 26, 2007. The Board granted Gainer parole on April 14, 2005.

¹ The Board's March 28, 2008, decision indicated that Gainer sought relief through correspondence and that it deemed that correspondence to be a petition for administrative relief.

On February 17, 2006, Gainer was the driver of an automobile that was involved in an accident. Following this accident, on February 28, 2006, Gainer was arrested by his supervising parole officer for violating Condition No. 7 of his parole, i.e., driving a motor vehicle without a valid license. By Board decision mailed May 17, 2006, the Board recommitted Gainer as a technical parole violator to serve three months backtime. On June 20, 2006, the Pennsylvania State Police arrested Gainer and charged him with new criminal violations arising from the February, 2006, automobile accident.

Gainer did not post bail on these new charges until March 14, 2007. On March 26, 2007, the Board lifted its warrant and released Gainer because he had reached the previously determined maximum date of his original sentence. However, on March 28, 2007, the Board declared Gainer delinquent for control purposes while awaiting disposition of the new criminal charges.

Ultimately, on June 22, 2007, Gainer pleaded guilty before the Court of Common Pleas of Lycoming County (trial court) to one of the new charges and the trial court imposed a county sentence of forty-eight hours to six months, to be effective on June 25, 2007. Pertinent to this case, the trial court's order did not provide Gainer with any pre-sentence credit. According to the Board, Gainer was paroled from this county sentence on June 27, 2007.²

The Board re-lodged its warrant against Gainer on August 17, 2007, and he was later detained on that warrant in Lycoming County Prison. The Board conducted a

² In stating that June 27, 2007, the minimum date of his county sentence, was the date Gainer was paroled from his county sentence, the Board refers the Court to page 59 of the Certified Record; however, this Court's review of that page, and, in fact, of the entire document, does not clearly indicate the date on which Gainer was paroled. Gainer's recitation of the facts states that he was paroled sometime between June 27, 2007, and August 13, 2007, the latter date correlating to the date Gainer's parole officer became aware of the conviction and located him in Lycoming County. Nevertheless, the exact date of his parole from the county sentence is not at issue in this appeal.

revocation hearing on October 30, 2007. On November 26, 2007, the Board mailed a decision recommitting Gainer to serve six months backtime as convicted parole violator based upon the June, 2007, guilty plea and sentence, to run concurrently with the previous three-month backtime period for the technical violation. In a decision mailed February 11, 2008, the Board recalculated Gainer's new maximum sentence date to be July 16, 2009. However, by a decision mailed February 20, 2008, the Board corrected the maximum date to January 1, 2009.

The Board arrived at the recalculated date as follows: (1) 711 days remained on Gainer's original sentence from the date of his parole, April 14, 2005, through his original maximum sentence date, March 26, 2007; (2) the Board acknowledged a credit of 208 days backtime for (a) the period from the date the Board issued a warrant on February 28, 2006, through the date of his arrest on new charges on June 20, 2006 (112 days), (b) the period from December 20, 2006, through March 14, 2007 (84 days), and (c) the period from March 15, 2007, through March 26, 2007, for days confined based solely on the Board's warrant (12 days). The Board subtracted the credited time from the remaining period on his original sentence (711 minus 208 equals 503) to arrive at the new maximum date by adding those 503 days to August 17, 2007, the date upon which he became available to serve his original sentence.

Gainer filed a pro se petition for administrative review seeking to challenge his new maximum date of January 1, 2009, as calculated by the Board. The Board, however, affirmed that calculation, and Gainer, now represented by counsel, filed a petition for review with this Court. The sole question raised in this appeal is whether the Board erred in calculating Gainer's new maximum date by failing to allocate the

proper credit for time served in prison while detained on the basis of both a Board detainer and his failure to post bail on his new criminal charges.³

Gainer makes two arguments in seeking a reversal of the Board's decision. First, Gainer, noting the general rule that when a parolee has posted bail and is held solely on the basis of a Board warrant, the Board must credit that time to his original sentence,⁴ suggests that our Supreme Court frowns upon the failure to credit either an original sentence or a new criminal sentence for time served where a parolee is held both in lieu of bail and on a Board detainer.

The focus of this case is on the period from June 20, 2006, when Gainer was arrested on the new criminal charges, through March 14, 2007, when Gainer posted bail on those new charges. For this period of time, the Board refused Gainer credit on his original sentence for the six month period between June 20, 2006, and December 20, 2006, when he was incarcerated both due to the Board's detainer and his failure to post bail on the new criminal charges. However, the Board granted Gainer a ninety-six day credit for the period from December 20, 2006, which reflects the expiration of Gainer's six-month maximum sentence on the new charges, through March 26, 2007, which was the date the Board lifted its warrant because of the expiration of Gainer's original maximum sentence.

Gainer asserts that the Board, rather than allocating the six-month period of pre-sentence confinement from June 20 through December 20, 2006, to his sentence for the new criminal charges, should have credited his original sentence with that six-month

³ This Court's standard of review of a Board's calculation of a maximum date of the expiration of a sentence is limited to determining whether necessary factual findings are supported by substantial evidence and whether the Board erred as a matter of law or committed a constitutional violation. 2 Pa.C.S. §704; Lee v. Pennsylvania Board of Probation and Parole, 885 A.2d 634 (Pa. Cmwlth. 2005).

⁴ Gaito v. Pennsylvania Board of Probation and Parole, 488 Pa. 397, 412 A.2d 568 (1980)

period. If the Board had credited his original sentence in this manner, then his new maximum date would have been June 1, 2008. Gainer, in addition to relying upon the disinclination of the courts to deprive an inmate of time served on a sentence, also points to the fact that the trial court that sentenced him on his new criminal conviction provided in its order that the effective date of his sentence should not begin until June 25, 2007.

Both parties agree that our Supreme Court's decision in Gaito provides for the general rule that, when "a defendant ... remains incarcerated prior to trial because he has failed to satisfy bail requirements on the new criminal charges, then the time spent in custody shall be credited to his new sentence." Id. at 403-4, 412 A.2d at 571. Because Gainer did not post bail on his new charges, he was not confined based solely on the Board's detainer, and, consequently, Gaito requires that the time be applied to his new sentence.

However, Gainer directs us to our Supreme Court's more recent decision in Martin v. Pennsylvania Board of Probation and Parole, 576 Pa. 588, 840 A.2d 299 (2003), wherein the Court carved out an exception to the Gaito rule. In that case, the Board did not give any pre-sentence credit to Martin's original sentence because he had not been confined solely on the basis of a Board detainer, despite the fact that the time he served awaiting conviction and sentencing exceeded the forty-eight hour (plus probation) sentence he ultimately received for conviction on the new charges. The Supreme Court held that "[w]here 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." Martin, 576 Pa. at 605, 840 A.2d at 309.

The Board contends that, while Martin is applicable to this case, the Board did not violate the holding in Martin because it gave Gainer credit on his original

sentence for the amount of time he served over and above the sentence the trial court imposed on the new criminal conviction.

In response to Gainer's arguments, the Board points to our Supreme Court decision in Melhorn v. Pennsylvania Board of Probation and Parole, 589 Pa. 250, 908 A.2d 266 (2006), reversing an earlier decision by this Court. In Melhorn, this Court had reversed the Board's decision to deny Melhorn any credit on his original sentence for pre-sentence time served. This Court opined that the Board had erred, because allocating the time served to the original sentence was the only way to credit Melhorn for time he served. However, our Supreme Court reversed, citing only to its decisions in Gaito and McCray v. Pennsylvania Department of Corrections, 582 Pa. 440, 872 A.2d 1127 (2005).

As the Board notes, following the Supreme Court's reversal in Melhorn, this Court decided Armbruster v. Pennsylvania Board of Probation and Parole, 919 A.2d 348 (Pa. Cmwlth. 2007), in which it reasoned that, when a sentencing court does not apply credit for time served on a new sentence to a parole violator who served pre-sentence time while awaiting trial without posting bail and who is confined also on the basis of a Board detainer, Melhorn and McCray stand for the proposition that the parole violator's sole remedy is to seek redress in the trial court rather than through the Board. Id. at 356.⁵

Although these decisions support the Board's order in this case, Gainer argues that, because the trial court's order makes the effective date of Gainer's new sentence June 25, 2007, the Board acted erroneously, because, by its terms, the trial

⁵ The Board points out that this Court has continued to apply this rationale in subsequent cases, including Bowman v. Pennsylvania Board of Probation and Parole, 930 A.2d 599 (Pa. Cmwlth. 2007), petition for allowance of appeal denied, ___ Pa. ___, 945 A.2d 172 (2008) and Koehler v. Pennsylvania Board of Probation and Parole, 935 A.2d 44 (Pa. Cmwlth. 2007).

court's sentence, which did not give Gainer credit for time served, should be applied only after the effective date of the order. Gainer, relying upon Feilke v. Pennsylvania Board of Probation and Parole, 648 A.2d 121 (Pa. Cmwlth. 1994), argues that the reason the trial court gave him no credit for the pre-sentence time he served is that the sentence reflects a negotiated plea agreement providing for no pre-sentence credit. In Feilke, the Court concluded that the Board erred by failing to consider whether the effective date of a sentence was the result of a negotiated plea agreement.

This Court, citing Commonwealth v. Zuber, 466 Pa. 453, 353 A.2d 441 (1976), accepted the principle that a parole violator is entitled to the benefit of the terms to which he agreed in a negotiated plea bargain. The Court noted that the Board's records included a reference to the plea bargain, but lacked details regarding the circumstances surrounding the plea bargain, i.e., the full terms of the agreement, whether the plea bargain was made in open court and included in the record of the sentencing proceedings and whether the trial court accepted all of the terms of the agreement. Hence, the Court vacated the Board's order and remanded the case to the Board to make a determination as to whether the Board was required to honor the agreement.

The Board here argues that Feilke is distinguishable. First, the Board asserts that its action in calculating Gainer's new maximum date is not tantamount to backdating or changing the effective date of the trial court's sentence. Second, the Board points out that the record in this case, unlike the record in Feilke, contains no reference to a plea bargain. As the Board notes, it was the reference in the record to a plea bargain that triggered this Court's decision in Feilke to remand the case to the Board to flesh out the details of the plea bargain mentioned in the record.

In the present case, our review of the record does not reveal any information regarding the circumstances under which Gainer pleaded guilty. The summary sheet from the trial court lists several initial charges the district attorney's office brought against Gainer, and notes that some of those charges were either withdrawn or nolle prossed. The only reference to the specific charge upon which the trial court sentenced Gainer states "Guilty Plea." There is no way to determine from this minimal reference whether this plea was the result of a negotiation. Further, we note that the hearing transcript does not mention the nature of the guilty plea, and, additionally, when Gainer first sought to appeal the Board's calculation, he mentions his belief that he is entitled to six additional months of credit, but he does not reference the trial court's sentencing order or the circumstances relating to his guilty plea.

Hence, we agree with the Board that the facts in this case are distinguishable from those in Feilke. Based upon the Supreme Court's holding in Martin, its decision in Melhorn, and this Court's decisions in Armbruster and the cases that followed, we agree with the Board that Gainer's recourse was limited to seeking relief from the trial court.⁶

Accordingly, we affirm the decision of the Board.

JOSEPH F. McCLOSKEY, Senior Judge

⁶ We note here our agreement with the Board that the trial court's designation of an effective date has little effect on this issue in and of itself. In this regard, we point out that there is no proper way for a court to assume from the fact of an effective date that the sentencing court intended for pre-sentence time served either to be credited to an original or new sentence.

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	:	
Pennsylvania Board of Probation	:	
and Parole,	:	
Respondent	:	

ORDER

AND NOW, this 3rd day of November, 2008, the order of the Pennsylvania Board of Probation and Parole is affirmed.

JOSEPH F. McCLOSKEY, Senior Judge