IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacob Spinney, Petitioner	:	
v.	:	No. 753 C.D. 2012
	:	Submitted: October 5, 2012
Pennsylvania Board of Probation and Parole, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: November 13, 2012**

Petitioner Jacob Spinney (Spinney) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board). The Board's order denied Spinney's request for administrative relief, thereby rejecting his claim that the Board erred in its calculation of his new maximum sentence date following the Board's recommitment of Spinney based upon a new criminal conviction. We affirm in part, reverse in part, and remand the matter to the Board.

On July 3, 2008, Spinney was sentenced to serve two concurrent terms of one (1) year and six (6) months to four (4) years for his conviction on two (2) criminal counts—"violation of intermediate punishment" and "theft of movable property." (Certified Record (C.R.) at 1.) After serving a portion of his sentence, the Board granted parole to Spinney and released him on November 16, 2009. The Board took Spinney into custody on July 9, 2010, when Spinney's parole agent

conducted an in-home visit and determined Spinney had committed technical violations of his parole. That same day, the Board lodged a detainer and returned Spinney to a state correctional institution. The Board issued a decision on September 15, 2010, recommitting Spinney as a technical parole violator.

On September 20, 2010, the Warren City Police filed a criminal complaint against Spinney as a result of discoveries made at the time Spinney's parole agent visited his home, but Spinney was not arrested or detained by the local authorities until October 6, 2010. Spinney never posted bail on the new criminal charges. On June 9, 2011, Spinney pleaded guilty to the crimes of intentional possession of a controlled substance by a person not registered and use/possession of drug paraphernalia. The pre-sentence report provided to the trial court included a reference relating to time served which stated "TOTAL CREDIT TIME SERVED: 0 days . . . Currently incarcerated on State Parole detainer from SCI Forest." The pre-sentence report did not make any reference to the fact that Spinney had not posted bail. On September 13, 2011, the sentencing judge imposed a term of incarceration of five (5) to twelve (12) months for the new convictions to run concurrently with his original sentence, and a consecutive term of probation of one (1) year. On September 28, 2011, the Board amended its initial recommitment order (relating to the technical violations of parole) to indicate that Spinney would begin to serve his backtime "when available" after the resolutions of the new criminal charges.

On October 5, 2011, Spinney waived his right to a Board revocation hearing and admitted to his convictions. The Board, by decision mailed November 22, 2011, recommitted Spinney as a convicted parole violator. In that November 2011 order, the Board recalculated Spinney's maximum sentence date to be

December 27, 2013. In calculating his maximum date, the Board credited Spinney with seventy-three (73) days for the period he was incarcerated between July 9, 2010, and September 20, 2010. As indicated above, Spinney filed a request for administrative relief, which the Board denied.

In its order denying Spinney's challenge to his new maximum sentence date, the Board noted that Spinney had 909 days left on his original sentence when the Board first released him on November 16, 2009. The Board observed that Spinney was detained, arrested, and returned to the state correctional institution on July 9, 2010. As noted above, the Board credited Spinney's original sentence with the seventy-three (73) days he spent incarcerated following his arrest and detention on the technical violations, but did not credit Spinney for any of the period between September 20, 2010 (the date that the Board initially identified as when local authorities arrested Spinney on new criminal charges) and September 13, 2011 (the date that the Board determined Spinney became available again to serve time on his original sentence). The Board concluded that it had correctly calculated the maximum sentence date and rejected Spinney's request for administrative relief.

Spinney petitioned this Court for review,[1] raising the general assertion that the Board erroneously failed to attribute the proper amount of credit to his original sentence. In this appeal, Spinney primarily seeks to have the period following his arrest on the new charges (on October 6, 2010) through September

[1] This Court's standard of review of a Board order calculating a new sentence maximum date is limited to considering whether necessary facts are supported by substantial evidence, whether the Board erred as a matter of law, or whether the Board violated any constitutional rights of a parolee. 2 Pa. C.S. § 704.

13, 2011, credited against his original sentence. Spinney's primary argument is that Board's first recommitment order did not state that he would begin to serve backtime "when available." Spinney appears to suggest that the lack of reference to serving backtime "when available" on the initial recommitment order mislead the trial court into believing that Spinney had not served any time attributable to the new conviction. Thus, Spinney argues that it was legal error for the Board not to credit his original sentence for the period in question. Spinney also seeks credit toward his original sentence for the period from September 20, 2010, through October 6, 2010, and the Board now concedes that it erred in denying Spinney credit for that time.[2]

In *Gaito v. Pennsylvania Board of Probation and Parole*, 488 Pa. 397, 412 A.2d 568 (1980), our Supreme Court held that parolees are entitled to credit on an original sentence for time served while imprisoned awaiting a resolution of new criminal charges when the parolee has posted bail on the new charges and,

[2] We note that, after Spinney filed his petition for review, the Board filed a motion for remand. In its remand motion, the Board indicated that it erred in failing to credit Spinney's original sentence for the period from September 20, 2010, through October 6, 2010. The Board admitted that Spinney was entitled to credit for this limited period because it erroneously believed that September 20, 2010 was the date upon which Spinney was first held on the new criminal charges, when the actual date upon which Spinney began to be held on the new criminal charges, without posting bail, was October 6, 2010. Thus, the Board in its brief acknowledged that Spinney was entitled to credit on his original sentence for that period, because he was being held during that time solely on the basis of the Board's detainer. Based upon this acknowledged error, the Board requested the Court to defer consideration of Spinney's claims regarding the remaining challenge to the period from October 6, 2010, through September 13, 2011, but we conclude that there is no impediment to this Court's consideration of Spinney's argument regarding that period of time, and, consequently, we will deny the Board's motion and proceed to consider whether Spinney is correct in arguing that he is entitled to credit on his original sentence for that period of time.

consequently, the only reason why the parolee is imprisoned is a detainer lodged by the Board. When, however, a parolee is being incarcerated on the basis of both a Board detainer and a failure post bail, the time spent in prison during that period must be credited to any sentence imposed for a new criminal conviction. *Gaito*, 488 Pa. at 403-04, 412 A.2d at 571.

The Prisons and Parole Code[3] does not permit sentencing courts to sentence parolees who are recommitted as convicted parole violators to serve new sentences concurrently with an original sentence. 61 Pa. C.S. § 6138(a); *Com. v. Dorian*, 503 Pa. 116, 117, 468 A.2d 1091, 1092 (1983). When a trial court violates this provision, the Board is not required or permitted to correct an alleged sentencing error by a trial court through an adjustment to a credit on an original sentence. *McCray v. Dep't of Corrections*, 582 Pa. 440, 448-49, 872 A.2d 1127, 1132 (2005).

Our Supreme Court in *Martin v. Pennsylvania Board of Probation and Parole*, 576 Pa. 588, 840 A.2d 299 (2003), observed an exception to the credit rule whereby a parolee may be entitled to credit on an original sentence. When a parolee serves more time while awaiting sentencing on a new criminal charge than the actual sentence the trial court imposed for the new conviction, he may be entitled to credit on his original sentence. In *Martin*, the Supreme Court held:

> Our decision in the instant matter does not create a "penal checking account." It merely provides for the allocation of all periods of confinement: (1) where confinement is the result of both a Board warrant and pending criminal charges; (2) where there is no period of incarceration imposed; (3) where the charges are nolle

[3] 61 Pa. C.S. §§ 101-7123.

> prossed; (4) or the parolee is acquitted. Accordingly, we hold 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.
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> . . . .
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> There are two purposes for awarding pre-sentence credits: (1) eliminating the unequal treatment suffered by indigent defendants who, because of their inability to post bail, may serve a longer overall confinement for a given offense that their wealthier counterparts; and (2) equalizing the actual time served in custody by defendants convicted of the same offense.

Martin, 576 Pa. at 605-06, 840 A.2d at 309.

In this case, Spinney, unlike the parolee in *Martin*, did not serve a period of time that exceeded the ultimate maximum sentence that the trial court imposed for the new criminal conviction. In our decision in *Armbruster v. Pennsylvania Board of Probation and Parole*, 919 A.2d 348 (Pa. Cmwlth. 2007), we followed *Martin* and similarly held that, because the sentence the parolee received for a new criminal conviction exceeded the pre-sentence period of confinement, the parolee was not entitled to credit during that period for his original sentence.

Spinney suggests, however, that because the Board's initial recommitment order did not specifically state that he would begin to serve his backtime "when available," he is entitled to credit because the lack of such a reference means that he was serving his backtime during that period. Although Spinney is correct in pointing out that our Supreme Court in *Martin* was guided by equitable concerns, we do not view the lack of a "when available" reference on the initial recommitment order as triggering an equitable concern of the type the Supreme Court referenced in *Martin*. Spinney does not offer any other discussion

or evidence regarding the pertinence of the Board's alleged error. Spinney simply suggests that the Court accept the inference that the absence of such a reference creates a presumption that a parolee is serving backtime such that the author of the pre-sentence report reasonably assumed that Spinney was serving time on his original sentence while being held sporadically in the state correctional institution between the time of his arrest and sentencing. Even if the facts in the record were clear regarding the basis of the trial court's sentence, Spinney would have the same avenue of relief available to other similarly situated parolees—he could seek reconsideration of the trial court's sentencing order on the basis of the alleged misunderstanding. Thus, Spinney has not persuaded us that the decision in *Martin* or *Armbruster* entitle him to additional credit.

As the Board further points out, mandamus is not a proper method by which to challenge an allegedly improper allocation of sentence credit arising from an error on the part of a sentencing court. *McCray*. Our Supreme Court in *McCray* held that a parolee must first seek relief from the sentencing court in order to address the effect of an improper sentence on a credit issue. In seeking to distinguish *McCray*, Spinney again relies upon the lack of a statement in the Board's first recommitment order indicating that Spinney would serve backtime "when available." We reject this argument for the same reasons we expressed above regarding the application of *Martin* and *Armbruster*. Spinney has failed to demonstrate why, even if he is correct in asserting that the Board's order misled the trial court, that factor would relieve him from the requirement first to seek a correction by the sentencing court.

Although Spinney is not entitled to credit for the period of time from October 6, 2010, through September 13, 2011, Spinney also seeks credit toward his

original sentence for the period from September 20, 2010, through October 6, 2010. As noted above, in its motion requesting remand, the Board indicated that it erred in failing to credit Spinney's original sentence for the period from September 20, 2010, through October 6, 2010. For that reason, we remand this matter for a recalculation of Spinney's maximum sentence date.

Accordingly, we affirm that part of the Board's order which denies Spinney credit for the period of time from the date of his arrest by the local authorities on October 6, 2010, through September 13, 2011, and we reverse the part of the Board's order that denied Spinney credit toward his original sentence for the period from September 20, 2010, through October 6, 2010. We remand the matter to the Board for a recalculation of Spinney's maximum sentence date. Because we have addressed the merits of the only remaining issue and are remanding this matter for a recalculation, we deny the Board's motion to remand as moot.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 13th day of November, 2012, the order of Respondent Pennsylvania Board of Probation and Parole (Board) is AFFIRMED in part and REVERSED in part. The order is AFFIRMED to the extent that it denies Petitioner Jacob Spinney (Spinney) credit for the period of time from the date of his arrest by the local authorities on October 6, 2010, through September 13, 2011, and the order is REVERSED to the extent that it failed to provide Spinney credit toward his original sentence for the period from September 20, 2010, when the new criminal charges were filed against him, through October 6, 2010, when he was actually arrested on the new criminal charges. The matter is REMANDED to the Board for a recalculation of Spinney's maximum sentence date. As a result, the Board's motion for remand is DENIED as moot.

Jurisdiction relinquished.

P. KEVIN BROBSON, Judge