

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Percy Favors, :  
Petitioner :  
 :  
v. : No. 766 C.D. 2008  
 : Argued: October 16, 2008  
Pennsylvania Board of Probation :  
and Parole, :  
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: November 7, 2008

Percy Favors (Favors) appeals from an order of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief because he was not denied a timely revocation hearing. We affirm.

On December 13, 1992, Favors was paroled from his 13-30 year sentence for burglary and criminal conspiracy with a parole violation maximum date of March 13, 2007. He was paroled to a detainer sentence which expired on December 13, 2002, on which date he was released from prison. On April 10, 2005, he was arrested on charges of rape, unlawful restraint, false imprisonment, sexual assault, indecent assault, indecent exposure, corrupting the morals of a

minor and contact with a minor, and the Board issued a warrant to commit and detain. Favors was returned to the State Correctional Institution (SCI) at Graterford on May 7, 2005. By a revocation decision mailed July 15, 2005, the Board recommitted him as a technical parole violator to serve nine months backtime.<sup>1</sup> Favors was moved to Philadelphia County on December 13, 2006, and on December 22, 2006, he was found guilty in the Philadelphia County Court of Common Pleas (trial court) of the charges that he committed rape, sexual assault and corruption of the morals of a minor while out on parole. On January 4, 2007, he was moved to SCI-Rockview. Approximately nine months later, on October 24, 2007, the trial court found Favors to be a lifetime sexual violent offending predator and sentenced him to serve two new 25-50 year state prison terms because of his new guilty verdicts.

On November 16, 2007, 23 days later, the Board's Philadelphia West Division received the trial court's sentencing order. Based on that order, the Board held a revocation hearing on January 4, 2008, at which Favors raised the issue of the timeliness of his revocation hearing. He alleged that he was found guilty by a jury in December 2006 and returned to SCI-Rockview on October 31, 2007, but the revocation hearing was not held until January 2008, well after the 120-day required time period. At the close of the hearing, the hearing examiner stated that she would allow the "257C" (criminal arrest and disposition report that reported a verification date of November 19, 2007) to be made part of the record, along with

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<sup>1</sup> The Board found that he had changed his residence without permission and had failed to report the change of residence to his parole supervisor as instructed.

the “sentencing order” that showed the date stamp of November 16, 2007, as the date it was received by the Board. By a decision mailed February 11, 2008, the Board recommitted Favors as a convicted parole violator to serve 48 months concurrent with the recommitment for technical violations and established a parole violation maximum date of July 10, 2019.

Favors filed a request for administrative relief, which the Board denied, stating that Favors was initially returned to a state correctional institution prior to his new conviction, and the Board received official verification of his new conviction on November 19, 2007. Because his revocation hearing was held on January 4, 2008, it was timely held pursuant to 37 Pa. Code §71.4 because it was held only 46 days after the date the Board received official verification of his conviction. This appeal by Favors followed.<sup>2</sup>

Favors first contends that he was denied his due process rights and his revocation hearing was not timely held because he was found guilty of his criminal charges on December 22, 2006, but his revocation hearing was not held until January 4, 2008, well outside of the 120-day requirement. The Board responds by arguing that despite the lengthy period of time between the date Favors was actually found guilty by a jury and the time his revocation was held, it did not receive “official verification” of the guilty verdict, i.e., the sentence from the trial court, until November 19, 2007. Once it received “official verification,” it then

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<sup>2</sup> Our scope of review of the Board’s order is limited to determining whether there was a constitutional violation or an error of law, and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency law, 2 Pa. C.S. §704.

held the revocation hearing timely within 120 days; actually, 46 days after it received the verification.

Pursuant to 37 Pa. Code §71.4(1):

(1) A revocation hearing shall be held within 120 days from the date the Board **received official verification** of the plea of guilty or nolo contendere or **of the guilty verdict at the highest trial court level.** (Emphasis added.)

37 Pa. Code §61.1 defines “official verification” as “actual receipt by a parolee’s supervising parole agent of a direct written communication from a court in which a parolee was convicted of a new criminal charge attesting that the parolee was so convicted.” That means that the 120-day period begins to run when official verification of the guilty plea is received, not when certification of the conviction is received. The Board bears the burden of proving by a preponderance of the evidence that the hearing was timely. *Ramos v. Pennsylvania Board of Probation and Parole*, 954 A.2d 107 (Pa. Cmwlth. 2008). “We have declined to require that the 120-day period commence with the date of a parolee’s actual conviction because such a requirement would impose on the Board a Herculean task of searching the dockets of every court of record in the United States on a daily basis.” *Id.* at 109. “However, if there is a delay between the time the Board has notice of the conviction and the time when the Board receives official verification of the conviction, the Board has the burden of proving that the delay was not unreasonable and unjustifiable.” *Id.*

In this case, the official verification of the guilty plea was the October 24, 2007 order from the trial court indicating that Favors had been convicted and sentenced by the trial court to a term of 25-50 years on two separate counts. While the order was dated October 24, 2007, it was not received by the Board until November 16, 2007. Once the Board received the trial court's order, it scheduled and held Favors' revocation hearing on January 4, 2008, well within the 120 days allotted by the statute.

Even if the Board only has to hold a hearing from the date it receives verification of the conviction, Favors then argues that the Board never presented any evidence of the date. He explains that the Board itself did not offer any evidence, but rather the Board's hearing examiner *sua sponte* improperly entered Form 257C (the criminal arrest and disposition report) into evidence to establish when it received the Board's verification notice.

The Board's hearing examiner, however, may *sua sponte* admit official documents into evidence. Under Section 22 of the Parole Act,<sup>3</sup> the Board, in revoking parole, "[m]ay act on reports submitted to them by their agents and employes, together with any pertinent and adequate information furnished to them by fellow members of the board or by others." Moreover, this Court has held that the Board, as an administrative agency, can take official notice of information contained in documents in its own files. *See generally Johnson v. Pennsylvania Board of Probation and Parole*, 890 A.2d 45 (Pa. Cmwlth. 2006); *Taylor v. Pennsylvania Board of Probation and Parole*, 569 A.2d 368 (Pa. Cmwlth. 1989).

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<sup>3</sup> Act of August 6, 1941, P.L. 861, *as amended*, 61 P.S. §331.22.

*See also* Section 35.173 of the General Rules of Administrative Practice and Procedure, 1 Pa. Code §35.173 (“Official notice may be taken by ... the presiding office of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. Any participant shall, on timely request, be afforded an opportunity to show the contrary....”). However, the Board may not take official notice of documents contained in its files that are not made part of the record at the hearing because the parolee has to have an opportunity to challenge the correctness of information contained in those documents. *Johnson*, 890 A.2d at 49-50. *See also Sanchez v. Pennsylvania Board of Probation and Parole*, 616 A.2d 1097 (Pa. Cmwlth. 1992).

Favors then argues that because the hearing examiner admitted the documents so quickly at the close of the hearing, his counsel had no opportunity to object to the admission of those documents. What this argument overlooks is that Favors’ counsel had an opportunity to object to the introduction of those records. At the hearing, the hearing examiner stated the following:

MS. JOHNSON (Hearing Examiner): Any evidence you’d like to present?

MR. CROWLEY (Favors’ Counsel): Nothing evidentiary wise. Dispositionally, we’d indicate the case is on appeal and we have no statements to make.

MS. JOHNSON: Mr. Burke, do you have any disposition or information you’d like to place on record?

MR. BURKE (for the Board): Nothing.

MS. JOHNSON: Okay, at this point in time then, I'm going to close the record. To be made part of the record is the 257N, the Notice of Charges of hearing; the 257C, the Criminal Arrest and Disposition Report; the 257H, the Supervision, History, and Copy of the Warrant to Commit and Detain dated April the 10<sup>th</sup> of 2005; a copy of Mr. Favor's release orders. This says he was released from SCI Pittsburgh. Mr. Favores at the beginning of the hearing told us he was released from SCI Rockview dated 12/13, '92. S-1, D-1, D-2, the waiver of panel hearing, an entrance of appearance by counsel, all documents in the central office file, and the tape recording we're making of today's proceeding. At this point in time, *we're going to close the record.* (Emphasis added.)

(Original Record at 20-21.) Consequently, when the hearing examiner was finished citing the documents she was placing on the record, Favors' counsel could have placed an objection on the record, but did not.

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

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**ORDER**

AND NOW, this 7<sup>th</sup> day of November, 2008, the order of the Pennsylvania Board of Probation and Parole, dated April 18, 2008, is affirmed.

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DAN PELLEGRINI, JUDGE