

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Curtis Shiver,	:	
Petitioner	:	
	:	
v.	:	No. 796 C.D. 2008
	:	Submitted: October 10, 2008
Pennsylvania Board of Probation and Parole,	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: December 26, 2008

Curtis Shiver (Shiver) petitions for review of a determination of the Pennsylvania Board of Probation and Parole (Board) denying Shiver’s request for administrative relief. In this case we consider whether the Board properly recalculated Shiver’s maximum date of confinement after he was recommitted as a technical and convicted parole violator. Finding no error in the Board’s recalculation, we affirm.

On November 1, 2002, Shiver was sentenced to two to five years incarceration in a state correctional institution after pleading guilty to criminal charges in Lycoming County (Lycoming County Sentence). On April 19, 2004, Shiver was released on parole from the Lycoming County Sentence. Shiver was at liberty for eighty days, until he was detained on a Board warrant on July 8, 2004, for failure to successfully complete the community corrections program required

under the terms of his parole. Consequently, Shiver was recommitted as a technical parole violator (TPV).

On April 11, 2005, Shiver was again released on parole from the Lycoming County Sentence. At the time of his release, Shiver's maximum sentence date was April 2, 2007; accordingly, 721 days remained on the Lycoming County Sentence. Shiver failed to report to the Community Corrections Center at the time of his release as required by the conditions of his parole,<sup>1</sup> and he remained at large until he was arrested by the Philadelphia Police Department on new criminal charges on August 25, 2005. Shiver posted bail on the Philadelphia charges on August 27, 2005, and was immediately incarcerated on the Board's detainer. Shiver was recommitted to a state correctional institution as a TPV and remained incarcerated on the Board's detainer until May 1, 2006, when he pled guilty to charges relating to the Philadelphia arrest. He was sentenced to an aggregate term of eight to forty-six months in the Philadelphia Prison System (Philadelphia County Sentence).<sup>2</sup> Thereafter, on November 7, 2006, Shiver was recommitted to a state correctional institution as a convicted parole violator (CPV) because of the Philadelphia County Sentence.<sup>3</sup>

Shiver served his Philadelphia County Sentence from the date of sentencing, May 1, 2006, until December 3, 2007, when he was released on parole from his Philadelphia County Sentence and returned to a state correctional

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<sup>1</sup> As a result, the Board issued an administrative action notice on April 21, 2005, declaring Shiver delinquent effective April 11, 2005. Certified Record 25 (C.R. \_\_\_\_).

<sup>2</sup> The aggregate sentence was the product of two convictions for simple assault, each for four to twenty-three months, to be served consecutively. C.R. 91, 95.

<sup>3</sup> The Board's decision directed that Shiver serve twelve months as a technical parole violator and serve the remainder of the unexpired term of his Lycoming County Sentence as a convicted parole violator. The TPV and CPV sentences were to be served concurrently. C.R. 89.

institution to begin serving the balance of his Lycoming County Sentence. On April 16, 2007, the Philadelphia prison staff calculated Shiver's minimum release date for his Philadelphia County Sentence as December 2, 2006, and his maximum release date as January 30, 2010. Shiver's sentencing date, May 1, 2006, was the effective date of the Philadelphia County Sentence. C.R. 91.

The Board's decision, mailed January 14, 2008, established Shiver's new maximum date for his Lycoming County Sentence to be June 9, 2009. C.R. 100. In response, Shiver filed a petition for administrative relief on January 18, 2008,<sup>4</sup> claiming that the Board had miscalculated his maximum date by failing to give him credit for all time served strictly pursuant to the Board's warrant. C.R. 101. Specifically, Shiver claimed that he was entitled to a credit for the period between his transfer to state custody on September 26, 2005, until he was convicted of new criminal charges on May 1, 2006.<sup>5</sup>

The Board denied Shiver's petition for administrative review of the recalculation order in a letter mailed April 3, 2008, because the Board had already granted the relief he requested. The Board thoroughly explained its calculation of Shiver's maximum date of confinement, stating:

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<sup>4</sup> Shiver sent a series of petitions for administrative relief to the Board between January 18, 2008, and March 21, 2008. C.R. 101-15. The Board did not address any correspondence received from Shiver after the initial January 18, 2008, letter because Board regulations prevented their consideration. C.R. 116. 37 Pa. Code §73.1(b)(3) states that "[s]econd or subsequent petitions for administrative review and petitions for administrative review which are out of time under this part will not be received."

<sup>5</sup> A petitioner who appeals for administrative review of the Board of Probation and Parole's recalculation order bears the burden of specifying the requisite factual or legal basis for the relief sought. *Meehan v. Pennsylvania Board of Probation and Parole*, 783 A.2d 362, 365 n.3 (Pa. Cmwlth. 2001) (citing 37 Pa. Code §73.1).

When you were paroled on April 11, 2005, your maximum sentence date was April 2, 2007, which left 721 days remaining on your original sentence. As a convicted parole violator, you automatically forfeit credit for all of the time that you spent on parole.... You also forfeited credit (i.e. time was added to your sentence) for the 80 days you were previously on parole from April 19, 2004 to July 8, 2004.... Adding 80 days to 721 days results in your owing 801 days of back time on your original sentence. *However, the Board provided you with 247 days of back time served credit (i.e. time that you were held solely on the Board's warrant prior to your recommitment order) for the period of August 27, 2005, to May 1, 2006.* Thus, your 801 days of back time owed was reduced by 247 days, resulting in 554 days of back time that you owe on your original sentence. You became available to begin serving your back time on December 3, 2007, when you were paroled from your Philadelphia County Court of Common Pleas sentence .... Adding 554 days (or 1 year, 6 months, 6 days) to December 3, 2007, yields a new parole violation maximum date of June 9, 2009. Therefore your parole violation maximum sentence date is correct.

C.R. 116 (emphasis added) (internal citations omitted). Shiver now petitions this Court to review the Board's denial of his petition for administrative review.

In his appeal to this Court,<sup>6</sup> Shiver contends that the Board failed to give him credit for all of the time before and after the parole revocation hearing that he remained in state custody due solely to the Board's warrant and detainer. Shiver argues that he could not have started serving his Philadelphia County Sentence until he returned to the Philadelphia County Prison and, thus, he had served the entire balance of the Lycoming County Sentence prior to being

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<sup>6</sup> Our review is limited to determining whether necessary findings are supported by substantial evidence, whether an error of law was committed, or whether constitutional rights were violated. *Melendez v. Pennsylvania Board of Probation and Parole*, 944 A.2d 824, 825 n.1 (Pa. Cmwlth. 2008).

transferred to the Philadelphia County Prison on April 11, 2007.<sup>7</sup> He further contends that he completely served his Philadelphia County Sentence with the eight months he spent in Philadelphia County prison from April 11, 2007, to December 3, 2007.<sup>8</sup> Therefore, the Board should not have applied any of his state prison time to the Philadelphia County Sentence. Neither of Shiver's contentions is supported by the record.

First, we address Shiver's claim that the entirety of his Philadelphia County Sentence had to be served in the Philadelphia County Prison system and that the eleven months he served at a state correctional institution between May 1, 2006, and April 11, 2007, had to be credited toward his Lycoming County Sentence. The cases that Shiver cited do not support his position; to the contrary, the cited cases do not even deal with the manner in which a CPV's parole violation maximum date should be calculated. Shiver misapprehended his place of confinement to be an indicator of which sentence he was serving. His argument that he must have been serving a "state sentence" if confined at a state correctional facility is without merit.<sup>9</sup>

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<sup>7</sup> From May 1, 2006, until April 11, 2007, Shiver served his Philadelphia County Sentence in the state correctional institution. He was transferred to the Philadelphia County Prison on April 11, 2007, and continued to serve his Philadelphia County Sentence until December 3, 2007.

<sup>8</sup> The minimum term of his Philadelphia County Sentence was eight months; the maximum was forty-six months.

<sup>9</sup> Section 9762 of the Judicial Code provides:

All persons sentenced to total or partial confinement for:

- (1) maximum terms of five or more years shall be committed to the Bureau of Correction for confinement;
- (2) maximum terms of two years or more but less than five years may be committed to the Bureau of Corrections for confinement or may be committed to a county prison within the jurisdiction of the court;

**(Footnote continued on the next page . . .)**

The manner in which a CPV is required to serve his sentences is governed by Section 21.1(a) of the Parole Act, Act of August 6, 1941, P.L. 861, added by section 5 of the Act of August 24, 1951, P.L. 1401, *as amended*, 61 P.S. §331.21a(a), which provides that:

[a]ny parolee under the jurisdiction of the Pennsylvania Board of Parole released from any penal institution of the Commonwealth who, during the period of parole or while delinquent on parole, commits any crime punishable by imprisonment ... may, at the discretion of the board, be recommitted as a parole violator. If his recommitment is so ordered, he shall be reentered to serve the remainder of the term which said parolee would have been compelled to serve had he not been paroled, and he shall be given no credit for the time at liberty on parole.... The period of time for which the parole violator is required to serve shall be computed from and begin on the date that he is taken into custody to be returned to the institution as a parole violator.

If a new sentence is imposed upon such parolee, the service of the balance of said term originally imposed shall precede the commencement of the new term imposed in the following cases:

- (1) If a person is paroled from any State penal or correctional institution under the control and supervision of the Department of Justice and the new sentence imposed upon him is to be

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**(continued . . .)**

- (3) maximum terms of less than two years shall be committed to a county prison within the jurisdiction of the court except that as facilities become available on dates and in areas designated by the Governor in proclamations declaring the availability of State correctional facilities, such persons may be committed to the Bureau of Correction for confinement.

42 Pa. C.S. §9762. Subsection (3) indicates that even in cases where a maximum sentence of less than two years is imposed, state custody is permissible. Here, the maximum sentence was three years and eight months; thus, either state or county confinement was acceptable.

served in any such State penal or correctional institution.

- (2) If a person is paroled from a county penal or correctional institution and the new sentence imposed upon him is to be served in the same county penal or correctional institution.

*In all other cases, the service of the new term for the latter crime shall precede commencement of the balance of the term originally imposed.*

(Emphasis added). Here, neither of the two conditions under which the Lycoming County Sentence had to be served first applies. The first condition does not apply because there is no indication that the trial judge ordered Shiver's Philadelphia County Sentence to be served at a state correctional institution. The second condition does not apply because Shiver was not paroled from a county prison. Accordingly, the case at hand falls under the catchall provision of the statute: Shiver's Philadelphia County Sentence was to be served prior to the balance of the Lycoming County Sentence.

The Board's sentence status report shows that Shiver's Philadelphia County Sentence began to run on May 1, 2006, when he was sentenced. C.R. 91. He continued to serve the Philadelphia County Sentence until December 3, 2007, when he was released on parole to the Board's backtime detainer to serve the remainder of his original Lycoming County Sentence. C.R. 92, 98. Shiver began to serve the 554 days remaining on his Lycoming County Sentence on December 3, 2007; thus, Shiver's parole violation maximum date was correctly determined to be June 9, 2009.<sup>10</sup>

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<sup>10</sup> The Board credited Shiver with back time for the 247 days he was incarcerated solely under the Board's warrant from August 27, 2005, to May 1, 2006, and added the eighty days of parole **(Footnote continued on the next page . . .)**

Shiver's second issue on appeal is that he served his total Philadelphia County Sentence with the time he spent in Philadelphia County Prison. This claim is directly controverted by the record. From May 1, 2006, to December 3, 2007, Shiver served nineteen months of the eight to forty-six month Philadelphia County Sentence; part of that sentence was served in county prison and part was served in state prison.

Accordingly, the decision of the Board is affirmed.

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MARY HANNAH LEAVITT, Judge

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**(continued . . .)**

time from April 19, 2004, to July 8, 2004, pursuant to Section 21.1(a) of the Parole Act, 61 P.S. §331.21a(a), which states that a CPV should not be given credit for any time spent at liberty on parole.



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

**ORDER**

And now, this 26<sup>th</sup> day of December, 2008, the Order of the Pennsylvania Board of Probation and Parole, dated April 3, 2008, is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge