IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tariq Brooks, Petitioner	:	
v.	:	
Pennsylvania Board of Probation and Parole, Respondent	:	No. 856 C.D. 2012
	:	Submitted: November 16, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: January 14, 2013

Tariq Brooks (Brooks) petitions for review from final determinations of the Pennsylvania Board of Probation and Parole (Board) that recommitted him to serve eighteen months backtime as a convicted parole violator and established his maximum date as December 25, 2012.[1]

I. Background.

Brooks was effectively sentenced on February 18, 2007, to a term of six to twelve months for reckless endangerment. He was consecutively sentenced to a term of four months to a year for fleeing or attempting to elude an officer, one

[1] This Court's review is limited to determining whether the Board's findings are supported by substantial evidence, are in accordance with the law, and whether constitutional rights have been violated. Krantz v. Pennsylvania Board of Probation and Parole, 483 A.2d 1044 (Pa. Cmwlth. 1984). This Court will interfere with the Board's exercise of administrative discretion only where it has been abused or exercised in an arbitrary or capricious manner. Green v. Pennsylvania Board of Probation and Parole, 664 A.2d 677 (Pa. Cmwlth. 1995).

month to six months for accidents involving damage to attended vehicle or property, one month to six months for falsely incriminating another, and one month to six months for unauthorized use of automobiles or other vehicles. Aggregated together, Brooks was sentenced to a term of thirteen months to three years and six months.

Brooks was released on parole on January 8, 2009. On July 9, 2009, the Board declared Brooks delinquent effective July 6, 2009. On June 22, 2010, Brooks was arrested by the Easton Police Department and charged with false report to law enforcement authorities, Possession and Use, Opium - Cocaine- 2nd, Possession and Use, Opium – Cocaine -3rd, and driving without a license. In a decision mailed August 25, 2010, the Board detained Brooks pending disposition of criminal charges and recommitted him as a technical parole violator to serve six months backtime, when available, for changing his residence without permission, failure to report, and use of drugs. On March 8, 2011, the Court of Common Pleas of Northampton County convicted Brooks for possession with intent to deliver (cocaine) and sentenced him to serve eleven months to twenty-three months to run concurrent with his state parole. In a decision recorded on June 24, 2011, and mailed July 1, 2011, the Board recommitted Brooks to serve eighteen months backtime as a convicted parole violator to run concurrently with the six month backtime recommitment as a technical parole violator.

II. Request for Administrative Relief.

On July 12, 2011, Brooks requested administrative relief and argued that his eighteen month recommitment exceeded the presumptive range for

possession with intent to deliver, that he was entitled to credit for time spent at a drug treatment facility, Keenan House, from February 9, 2009, to May 4, 2009, and that his new maximum date of February 10, 2013, was incorrect.

In a decision mailed October 28, 2011, the Board affirmed the revocation:

> First, the record reflects that, on May 5, 2011, you chose to waive your right to a revocation hearing and admit to being convicted of Manufacture/Deliver[y]/Possession with Intent to Deliver a Controlled Substance – Cocaine. The waiver/admission form specifically indicates that you chose to take said action of your own free will, without promise, threat or coercion. You also failed to withdraw the waiver/admission within the prescribed ten-day grace period. As such, there is no indication that you were promised anything in exchange for your waiver/admission and the Board was justified in recommitting you for that offense.
>
> Second, you were recommitted as a convicted parole violator to serve 18 months for Manufacture/Deliver[y]/Possession with Intent to Manufacture or Deliver – Cocaine, 35 P.S. 780-113(a)(30). The maximum term of imprisonment that could be imposed for this offense under the Board's regulation is 18 to 24 months for each count. . . . Thus the 18-month recommitment imposed by the Board falls within the presumptive range and is not subject to challenge. . . . . (Citations omitted).

Board Decision, October 28, 2011, at 1-2; Certified Record (C.R.) at 32-33.

III. Evidentiary Hearing.

With respect to the issue of credit for time spent at Keenan House, the Board granted an evidentiary hearing which was held on February 29, 2012. Brooks testified that he resided at Keenan House from February 9, 2009, to May 4,

2009. Notes of Testimony, February 29, 2012, (N.T.) at 8; C.R. at 47. Brooks testified that he was not locked in his room at night, there was a head count, he was not allowed to leave the building without a supervisor, and there was a blackout period for his first ten days at Keenan House, where he could not "go to the park supervised or whatever, you have to stay there." N.T. at 9-11; C.R. at 48-50. He also testified that the staff did not have weapons. N.T. at 11; C.R. at 51. On cross-examination, Brook admitted that the front door was not locked. N.T. at 13; C.R. at 52.

Diana Hopkins (Hopkins), an employee of Keenan House, testified that the doors were locked from the outside to prevent intruders from entering not to prevent residents from leaving. N.T. at 15; C.R. at 54. Hopkins also testified that the staff did not have permission to physically restrain someone who attempted to leave without staff permission. Further, no parolee who was absent without authorization from the residence was ever charged with escape. N.T. at 16; C.R. at 55.

In a decision recorded March 21, 2012, and mailed on March 22, 2012, the Board determined that Brooks was not entitled to credit for the time he spent at Keenan House because the restrictions on his liberty were not the equivalent of incarceration. He could leave at any time and he would not be charged with escape in the event that he did leave.

IV. Second Request for Administrative Relief.

Brooks requested administrative relief and argued that Keenan House was a secure facility which sufficiently restricted his liberty such that he should receive credit. He also argued that his maximum date of February 10, 2013, was inaccurate because his new sentence was to run concurrent to his backtime. He also argued:

> I am seeking relief on my May date also. On 10/1/05 I was arrested for various offenses which I am serving now. I was sentenced 1/19/2007 which is 15 months that Judge gave me credit for. The board took 65 days away which they are not authorize [sic] to do, regardless of where it went I am entitle [sic] to that credit by law. Not to mention the board took custody of me on 3/6/2007. I am not responsible for mistake by the parole board.

Request for Administrative Relief, March 26, 2012, at 3; C.R. at 65.

> In a decision mailed April 24, 2012, the Board ruled:
>
> After review of the record, the Board has reversed those decisions in regards to the maximum sentence date calculation. In accordance with that decision, the Board mailed a modified recalculation decision on April 23, 2012 that changed your maximum sentence date from February 10, 2013 to December 25, 2012. Thus, your objection to the prior maximum sentence date calculation is now moot."

Board Decision, April 24, 2012, at 1; C.R. at 68.

V. Third Request for Administrative Relief.

On May 15, 2012, Brooks again requested administrative relief and asserted the following:

> I received a green sheet on April 24, 2012 with a new max date of 12-25-12 there is an additional 60 days that is also suppose [sic] to be applied from 11/15/06 to 1-19-07, at this time I had maxed out and I had no detainer on me from state parole it was reinstated after I pled guilty of my new charges on 1/19/07. That's why I was awarded credit by the Judge from 10-1-05 to 1/19/07.
>
> #2 I also requested relief for the 11 months I was in Northampton County from 6/22/10 to 5/2011. I signed my notice of hearing and waived my rights to a hearing on new charges, the new sentence I recieved [sic] was a[n] 11 to 23 months with completion of the C.E.C. program. This sentence was to run concurrent to my backtime. This also was agreed to by the state parole board. This shows on my notice of hearing form. . . .
>
> #3. I never recieved [sic] an answer on my appeal from my evidentiary hearing, which I should have been entitled to time spent in a treatment center, Kennan House.

Request for Administrative Relief, May 15, 2012, at 1; C.R. at 70.

> On May 25, 2012, the Board responded:
>
> When you were released on parole from your original sentence on January 8, 2009, your maximum sentence date was August 18, 2010, which left 587 days remaining to serve on your original sentence. While on parole, you were arrested and placed into SCI-Frackville on May 25, 2011 for possible parole violation. The Board lodged its warrant to commit and detain you on June 23, 2010 due to violations of your parole. You were arrested on June 23, 2010 by Easton Police Department of Northampton County . . . and convicted on March 8, 2011. You were released to Pennsylvania authorities on May 18, 2011, and placed in SCI-Frackville in 'parole violator pending' status. The Board decision recorded June 24, 2011 (mailed 07/01/2012) recommitted you as a convicted parole violator.

> With the above facts in mind, as a convicted parole violator you automatically forfeited credit for all of the time that you spent on parole. . . . You are not entitled to a back time served credit (i.e. time that you were held solely on the Board's warrant prior to your recommitment order) because you were never incarcerated solely on the Board's warrant. . . . You became available to begin serving your back time on May 18, 2011, when you were paroled from your Northampton County sentence and released to Pennsylvania authorities. Adding 587 days (or 1 year, 7 months, 10 days) to May 18, 2011, yields a new parole violation maximum date of December 25, 2012. Therefore, your parole violation maximum sentence date is correct.
>
> To the extent that you have not received correspondence regarding your March 28, 2012 appeal of the recorded March 21, 2012 (mailed 03/22/2012) Board action (denying credit for time spent in the Keenan House Inpatient program), the record reflects that the Board received your correspondence on March 28, 2012 and responded on April 24, 2012. Therefore, your request for a determination of your March 28, 2012 petition is deemed second or subsequent and will not be addressed pursuant to Board regulations. (Emphasis in original. Citations omitted).

Board Decision, May 25, 2012, at 1; C.R. at 72.

VI. Issue before this Court.

Before this Court, Brooks contends that the Board failed to give him credit for the ninety day period he spent at Keenan House.[2]

[2] In his Statement of the Questions Involved in his brief, Brooks also contends that the Board failed to give him credit for time served between October 1, 2005, to January 19, 2007, and that the Board failed to give him credit under the agreed sentence of March 8, 2011, from the Court of Common Pleas of Northampton County of eleven and one-half to twenty-three months to run concurrently with his state parole. In the argument section of his brief, Brooks **(Footnote continued on next page…)**

VI. A. Applicable Statuory Law.

Section 6138(a) of the Prisons and Parole Code (Code), 61 Pa.C.S. §6138(a), provides in pertinent part that the Board has the authority to recommit a parolee who during the period of parole . . . commits any crime punishable by imprisonment, from which the parolee is convicted or found guilty by a judge or jury or to which he pleads guilty or *nolo contendere* at any time thereafter. . . ." If a parolee is recommitted under this section of the Code, he must serve the remainder of his term of imprisonment that he would have had to serve had he not been paroled and does not receive credit for time spent "at liberty on parole." Section 6138 of the Code, 61 Pa.C.S. §6138(a)(2).

VI. B. Applicable Case Law.

The phrase "at liberty on parole" is not defined in the Act. In Cox v. Pennsylvania Board of Probation and Parole, 507 Pa. 614, 493 A.2d 680 (1985), our Pennsylvania Supreme Court stated that "at liberty on parole" means "not at liberty from all confinement but at liberty from confinement on the particular sentence for which the convict is being reentered as a parole violator." Cox, 507 Pa. at 618, 493 A.2d at 683 (quoting Haun v. Cavell, 154 A.2d 257, 261 (Pa. Super. 1959), *cert. denied*, 363 U.S. 855 (1960)).

(continued…)

does not seek the credit from 2005 to 2007, which occurred prior to the sentence for which he seeks credit. He further concedes that he is not entitled to any credit for the 2011 sentence because the sentence for the crime committed while on parole cannot run concurrently with the original sentence. Commonwealth ex rel. Godfrey v. Banmiller, 404 Pa. 401, 171 A.2d 755, (1961).

In Detar v. Pennsylvania Board of Probation and Parole, 890 A.2d 27 (Pa. Cmwlth. 2006), this Court explained the phrase "at liberty on parole:"

> Every in-patient hospitalization, for treatment of any kind, involves 24-hour supervision that may be viewed by the patient as confining. Cox teaches that 'at liberty on parole' does not mean that the parolee is literally 'on the street.' To the contrary, it teaches that 'at liberty on parole' may encompass a variety of confinements. Whether one is undergoing drug and alcohol rehabilitation at the Betty Ford Clinic or at a community corrections center, that individual may find the experience confining. We learned from Cox, however, mere confinement does not render parole *not* at liberty. The inquiry is a factual one, but the most important factor is whether the patient, or resident, is locked in and whether the patient may leave without being physically restrained. (Emphasis in original).

Detar, 890 A.2d at 31.

A review of the relevant case law reveals that entitlement to credit based on the restrictions on a parolee is very fact specific. In Figueroa v. Pennsylvania Board of Probation and Parole, 900 A.2d 949 (Pa. Cmwlth. 2006), Ismael Figueroa (Figueroa) was paroled to Joseph E. Coleman Center (Center). Figueroa was subsequently arrested and convicted of new criminal charges. The Board recommitted Figueroa as a convicted parole violator and recalculated his new maximum as August 11, 2006. Figueroa petitioned for administrative review and alleged that the Board failed to credit him for the first ninety days he spent at the Center during a "black out" period. Figueroa, 900 A.2d at 950-951.

The Board held an evidentiary hearing. Figueroa testified that he was in custody during the "black out" period and that he was escorted when he attended

a medical appointment. Figueroa believed that he would have been stopped if he attempted to leave the Center without an escort, that the doors were locked, there were no windows, and the Center was surrounded by a fence.

Kelly Roscoe (Roscoe), a unit manager at the Center, testified that the doors were locked to keep visitors out and to monitor those going in and out of the facility. Roscoe explained that the fence, to which Figueroa referred, was designed to keep out unauthorized visitors and was erected only around the Center recreational areas. According to Roscoe, if a parolee attempted to leave the Center, staff would advise him to remain and his parole agent would be notified if he left. Staff members did not physically restrain residents and no parolee had ever been charged with escape for leaving the Center. Roscoe testified that during the "black out" period residents could leave the facility, unescorted, in order to tend to personal business such as looking for a job or obtaining funds for fines, costs, and restitution. Roscoe remembered that Figueroa left the Center unescorted though he did not remember the date.

The Board determined that Figueroa failed to prove that the characteristics of the Center were sufficiently restrictive to warrant credit. Figueroa requested administrative relief which the Board denied. Figueroa petitioned for review with this Court and alleged that he was entitled to credit for his whole stay at the Center or at least through the ninety day "black out" period. Figueroa, 900 A.2d at 951.

This Court affirmed:

> [A]n individual's subjective impression of those restrictions is not dispositive of the question of whether confinement is the equivalent of incarceration. Detar v. Pennsylvania Board of Probation and Parole, 890 A.2d 27, 31, n. 10 (Pa. Cmwlth. 2006). The most important factors are 'whether the patient, or resident, is locked in and whether the patient may leave without being physically restrained.' Id. at 31 (citing Cox).
>
> In this case, we agree with the Board's determination that Figueroa was not constructively incarcerated during the initial 90-day blackout period. Although the doors to the Center are locked, this is only to prevent unauthorized visitors from entering, not to prevent the residents from leaving. Staff members do not physically restrain the residents, nor are the residents charged with escape if they leave the facility. . . . According to the Center's unit manager, the residents are, in fact, permitted to leave unescorted during the blackout period to attend to personal business. Although Figueroa may have perceived the restrictions as confining, his subjective impressions are irrelevant, and the fact that he may have chosen not to exercise his right to leave the facility without an escort in no way strengthens his claim that he was in custody. (Footnote omitted and emphasis added).

Figueroa, 900 A.2d at 952-953.

Similarly, in Meehan v. Pennsylvania Board of Probation and Parole, 808 A.2d 313 (Pa. Cmwlth. 2002), *petition for allowance of appeal denied*, 573 Pa. 669, 820 A.2d 706 (2003), Michael Meehan (Meehan) was released on parole to treatment at Keenan House, where he remained until he completed the program. Meehan was subsequently declared delinquent by the Board and was arrested three times for driving under the influence. The Board recommitted Meehan to serve twelve months backtime as a convicted parole violator. When the Board recomputed Meehan's maximum date, he did not receive credit for the time spent

at Keenan House. Meehan filed an administrative appeal which the Board denied. He petitioned for review with this Court which remanded for the Board to conduct a hearing to determine whether he was "at liberty on parole" during his residency at Keenan House. The Board determined that he was at liberty and did not grant him the credit he sought. Meehan petitioned for review with this Court and argued the restrictive nature of the program was "akin to incarceration." Meehan, 808 A.2d at 315.

After analyzing the evidence presented at the hearing and the Board's decision, this Court affirmed:

> Although the evidence indicates that parolees are closely monitored at Keenan House, we nonetheless believe that it supports the Board's determination that Meehan failed to meet his burden of proving that the conditions at Keenan House were so restrictive as to constitute the equivalent of incarceration. In particular, as the Board noted, Meehan was not locked in and could have walked right out the door. Nobody at Keenan House would have been authorized to stop him. In addition, a parolee who left Keenan House would not be considered an escapee, but a parole absconder.
> . . . .
> . . . [W]e believe that the conditions at Keenan House are not so restrictive as to be considered the equivalent of incarceration. Hence, we conclude that the Board neither acted arbitrarily nor abused its discretion in determining that Meehan was at liberty on parole while at Keenan House. . . . (Citation omitted).

Meehan, 808 A.2d at 316-317.

VI. C. Conclusion.

Here, as in Figueroa and Meehan, Brooks could leave his treatment facility, Keenan House, at any time, the doors were not locked, no one would have attempted to physically restrain Brooks had he tried to leave the facility, and he would not have been charged with escape but as a parole absconder. This Court determines that the Board's decision was supported by substantial evidence and was in accordance with the law.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tariq Brooks, Petitioner	:	
v.	:	
Pennsylvania Board of Probation and Parole, Respondent	:	No. 856 C.D. 2012

O R D E R

AND NOW, this 14th day of January, 2013, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge