

possession with intent to deliver drugs to be served concurrently. Peluso was released on parole on April 11, 2006. On July 11, 2006, the Board declared him delinquent effective July 10, 2006.

On July 19, 2006, the City of Pittsburgh Police Department arrested Peluso and charged him with felony possession with intent to deliver a controlled substance, two misdemeanor counts of possession of controlled substance, misdemeanor possession of drug paraphernalia, and false identification to law enforcement. On July 20, 2006, the Board issued a warrant to commit and detain Peluso. On September 1, 2006, the Board recommitted Peluso as a technical parole violator to serve nine months backtime when available for changing his residence without permission, failing to report as instructed, and use of drugs. The Board also detained Peluso pending disposition of criminal charges.

In the Court of Common Pleas of Allegheny County (trial court), Peluso pled guilty. On October 17, 2007, the trial court sentenced him to “9 months to 18 months . . . effective 10/16/07 Additional Credit 7/20/06-12/7/0[7] . . . Defendant to be PAROLED forthwith . . . PROBATION . . . for a period of 8 years effective consecutive to Jail Sentence.” Trial Court Order, October 17, 2007, at 1; Certified Record (C.R.) at 58.

The Board held a revocation hearing on December 17, 2007. Peluso admitted to the convictions. Peluso testified regarding the credit he received from the trial court:

[T]hey took my time credit was from 7/20/06 to 12/7/06.
It was four months and 18 days. He gave me early parole

from the day that I got transferred to the state because the county don't [sic] take no [sic] time you were – they only take the time you were held on bond toward your case. The rest of that time when you get transferred to the state, they give back to the state.

Notes of Testimony, December 17, 2007, at 11; C.R. at 30.

In a decision recorded January 30, 2008, and mailed February 4, 2008, the Board recommitted Peluso to serve eighteen months backtime as a convicted parole violator to be served concurrently with the nine months backtime already assessed as a technical parole violator. The Board established Peluso's maximum date as October 16, 2010.

Peluso petitioned for administrative relief and alleged that he was entitled to credit from December 7, 2006 to October 17, 2007.²

The Board denied the petition:

Briefly, when Mr. Peluso was released on parole on April 11, 2006, his maximum sentence date was April 10, 2009, which left 1,095 days remaining for him to serve on his original sentence. As a convicted parole violator, he automatically forfeited credit for all of the time that he spent on parole. . . . On July 19, 2006, Peluso was arrested for charges related to Allegheny County Court of Common Pleas indictment number 2006-16027-Counts 1 and 2. The Board's records indicate that Mr. Peluso did not post bail on the charges and remained confined. The Board issued its warrant to commit and detain Mr. Peluso on July 20, 2006. On October 17, 2007 your client pled

² Peluso's attorney also requested credit from October 18, 2007, until the present. The Board explained that Peluso's backtime commenced on October 17, 2007, so the Board accounted for that period of time. The time from October 17, 2007, forward is not at issue.

guilty, and was sentenced (in relevant part) that same day to a term of 9 to 18 months of county confinement, provided with a time credit from July 20, 2006 to December 7, 2006, and paroled from the sentence 'forthwith.'

With the above facts in mind, you argue that Mr. Peluso is entitled to a back time served credit (i.e. time that he was held solely on the Board's warrant prior to his recommitment order) for the period of December 7, 2006, to October 17, 2007. However, the Board cannot provide him with a time credit for that period because he was not incarcerated solely on the Board's warrant for this time period; instead, he was serving that time for the Allegheny County Court of Common Pleas since he did not post bail on the aforementioned charges. . . . In this regard, please note that the Board used October 17, 2008 [2007] as the effective date of return to Board custody; therefore, since October 17, 2007 Mr. Peluso has been serving the back time on his original sentence. Adding 1,095 days (or 2 years, 11 months, 30 days) to October 17, 2007, yields a new parole violation maximum date of October 16, 2010. Therefore, Mr. Peluso's parole violation maximum sentence date is correctly calculated. (Citations omitted. Emphasis in original).

Board Decision, April 17, 2008, at 1-2; C.R. at 63-64.

Peluso contends that the Board improperly denied him credit on his original sentence for the period from December 7, 2006, to October 17, 2007, and then incorrectly recalculated his parole review and his maximum sentence dates. Peluso asserts that he is entitled to have this period credited to his original sentence since he did not receive credit for that period to his new sentence because he was paroled on the new sentence and he was confined to a State Correctional Institution under the jurisdiction of the Board's detainer warrant. Peluso argues that the Board's determination that he was not entitled to credit from December 7, 2006, to

October 17, 2007, on his original sentence because he never posted bail on his new charges was in error. Peluso asserts that because he was paroled from the new sentence on December 7, 2006, then all time spent in confinement after December 7, 2006, must be credited to his original sentence and his failure to satisfy bail requirements on the new sentence is not determinative because he was already paroled from his new sentence on December 7, 2006.

In Gaito v. Pennsylvania Board of Probation and Parole, 488 Pa. 397, 412 A.2d 568 (1980), our Pennsylvania Supreme Court established the general rule that “time spent in custody pursuant to a detainer warrant shall be credited to a convicted parole violator’s original term . . . only when the parolee was eligible for and had satisfied bail requirements for the new offense and thus remained incarcerated only by reason of the detainer warrant lodged against him.” Id. at 403, 412 A.2d at 571. If the parolee was not convicted or if no new sentence was imposed on the conviction for the new charge, then “the pre-trial custody time must be applied to the parolee’s original sentence.” Id. at 404, 412 A.2d at 571 n.6.

In Martin v. Pennsylvania Board of Probation and Parole, 576 Pa. 588, 840 A.2d 299 (2003), our Supreme Court refined its interpretation of Gaito as it related to the allocation of pre-sentence confinement time when a new sentence was imposed. In Martin, James T. Martin (Martin) was reparaoled on March 8, 1999, with a maximum date of June 17, 2002. On May 30, 2000, Martin was arrested and charged with two counts of DUI. The Board lodged a detainer that same day. Martin did not post bail. On July 19, 2001, Martin was convicted and

sentenced to forty-eight hours time served, with a one year period of probation to be served consecutively to the robbery sentence he was already serving. By order dated November 6, 2001, Martin was recommitted to serve six months backtime as a convicted parole violator and his maximum date was recalculated as October 28, 2004. Martin petitioned the Board and alleged that the Board erred when it failed to give him credit for the time he served pursuant to the Board's warrant. He argued that he should receive credit for all but the two days he received on his new sentence and should have received credit from June 1, 2000, to July 19, 2001. The Board denied the credit. This Court affirmed. Martin, 576 Pa. at 591-593, 840 A.2d at 299-300.

Our Pennsylvania Supreme Court reversed and determined:

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 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. . . . We further hold that the indigency of a detainee in failing to satisfy the requirements for bail is not determinative as to whether the offender receives credit for time served.

Were Appellant [Martin] here to serve the full term of his sentence, he would be imprisoned for one year, one month, and nineteen days in excess of that of an individual similarly situated who was able to post bail. Such a disparity can have no conceivable penological justification. (Footnote omitted).

Martin, 576 Pa. at 605-606, 840 A.2d at 309.

In McCray v. Department of Corrections, 582 Pa. 440, 872 A.2d 1127 (2005), our Pennsylvania Supreme Court explained that issues concerning the proper allocation of credit to the new sentence must be raised before the sentencing court or, if on appeal, to the Superior Court. Under McCray, if a court of common pleas fails to give an inmate full credit for time served, the inmate's remedy is in the court of common pleas.

In Armbruster v. Pennsylvania Board of Probation and Parole, 919 A.2d 348 (Pa. Cmwlth. 2007), Matthew Armbruster (Armbruster) was on parole when he was arrested on new criminal charges on January 13, 2005. He failed to post bail on these charges. The Board lodged a detainer against him the same day. On July 6, 2005, Armbruster was convicted on the new criminal charges. He was sentenced on August 30, 2005, to a term of eight to twenty-four months. The sentencing order did not indicate whether Armbruster received credit for time served. On March 8, 2006, the Board recommitted Armbruster as a technical and convicted parole violator. The Board recalculated Armbruster's maximum date as June 22, 2027. Armbruster's request for administrative relief was denied. He petitioned for review with this Court and asserted that he did not receive credit for all time to which he was entitled and received a harsher sentence due to his inability to post bail on the new charges. Armbruster, 919 A.2d at 349-350. Specifically, Armbruster asserted that he was entitled to 250 days credit on his original sentence for the period he was incarcerated from January 13, 2005, to September 20, 2005, on both the new criminal charges and the Board's detainer

because the credit was not applied to his new sentence. Armbruster, 919 A.2d at 352.

Based on our Pennsylvania Supreme Court's decision in Melhorn v. Pennsylvania Board of Probation and Parole, 589 Pa. 250, 908 A.2d 266 (2006) which applied McCray, this Court determined:

Armbruster, having failed to post bail, was incarcerated on the new criminal charges and the Board's warrant from January 13, 2005 to September 20, 2005 (250 days). Armbruster was ultimately sentenced to eight to twenty-four months on the new criminal charges. Significantly, Armbruster's new sentence exceeds his pre-sentence confinement. . . . As a result, there is no 'excess' pre-sentence confinement time to apply to Armbruster's original sentence.

Armbruster's sole basis for requesting credit from the Board is that he was not given credit on his new sentence. Pursuant to Melhorn and McCray, where a sentencing court does not give an inmate full credit for time served, the inmate's remedy is in the trial court and through the direct appeal process, not through the Board.

Under the facts presented here, we conclude that the Board properly refused to apply Armbruster's pre-sentence confinement time towards the original sentence. Having determined that Armbruster is not entitled to credit on his original sentence for the period of his incarceration from January 13, 2005 to September 20, 2005, there is no basis upon which to conclude that he is entitled to parole review earlier than July 2007. (Footnote omitted).

Armbruster, 919 A.2d at 355-356.

Similarly, in Banks v. Pennsylvania Board of Probation and Parole, 928 A.2d 384 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 594 pa. 706, 936 A.2d 41 (2007), Marquis Banks (Banks) was arrested on drug charges while on parole on July 25, 2004. The Board lodged a detainer against him pending disposition of the new charges and recommitted him as a technical parole violator when available. Banks did not post bail. On January 10, 2006, Banks pled guilty to the new charges. The Court of Common Pleas of Montgomery County sentenced him to eleven and one-half to twenty-three months on the new charges and retroactively paroled him as of June 10, 2005. The Board recommitted Banks as a convicted parole violator to serve twelve months backtime concurrent with the fifteen months imposed for the technical violation. The Board recalculated Banks's maximum date as of July 9, 2008. The maximum date did not include time served in county pre-sentence confinement while awaiting disposition of the new county charges. Banks petitioned for administrative relief and alleged that he deserved credit for the period from June 10, 2005, the retroactive parole date on the new sentence, to January 10, 2006, the date of his conviction on the new county charges. Banks argued to the Board that the sentencing court failed to credit his new county sentence for the period from June 10, 2005, to January 10, 2006. Banks offered no proof that that was the case, and the Board relied instead on the certified record. The Board denied relief. Banks, 928 A.2d at 385-386. This Court affirmed on the basis that Banks did not become available to begin serving backtime on his original state sentence on the date of the retroactive parole because the retroactive parole had no legal effect on his availability to serve an existing state sentence. This Court determined that Banks continued to serve his

new county sentence until that sentence was actually pronounced. Banks, 928 A.2d at 387.

Here, Peluso was arrested on July 19, 2006. The Board issued its warrant to commit and detain Peluso on July 20, 2006. Peluso was imprisoned both for the new charges and pursuant to the Board's warrant. On October 17, 2007, he was sentenced to a term of nine months to eighteen months on the felony possession with intent to deliver and was ordered paroled forthwith. Peluso was incarcerated for approximately fifteen months before he was sentenced on the new charges. As in Armbruster, Peluso's new sentence was longer than his pre-sentence period of confinement.³ Like Armbruster, Peluso had no excess pre-sentence confinement time to apply to his new sentence. Further, as in Banks, Peluso could not begin serving backtime on his original sentence until his new sentence was pronounced and the new sentence was longer than the period of pre-sentence confinement. The Board correctly determined that Peluso was not incarcerated solely on the Board's warrant until October 17, 2007. The Board did not err when it recalculated Peluso's maximum date.⁴

³ When determining whether a new sentence is longer than the pre-sentence period of confinement, the maximum sentence is used not the minimum. See Armbruster.

⁴ It is true that the trial court's order indicated that Peluso received credit from July 20, 2006, until December 7, 2006, and was paroled when he was sentenced. However, the trial court sentenced Peluso to a term of nine to eighteen months with parole forthwith. In order to be paroled from a sentence with a minimum sentence of nine months, Peluso would have to serve at least nine months. The period from July 20, 2006, until December 7, 2006, is approximately four and one-half months. Therefore, the trial court should have specified for what portion of the period from December 7, 2006, to October 17, 2007, Peluso received credit on his new sentence. He could have received the portion added to the earlier credit to equal nine months or the whole amount could have been allocated to the new sentence. The trial court failed to make this clear. However, it is not the province of the Board to determine the trial court's intention. If Peluso
(Footnote continued on next page...)

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

(continued...)

had an issue with the trial court's allocation of credit, his recourse was with the trial court not with this Court. See McCray.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony Peluso,	:
	:
Petitioner	:
	:
v.	:
	:
Pennsylvania Board of	:
Probation and Parole,	:
	: No. 911 C.D. 2008
Respondent	:

ORDER

AND NOW, this 22nd day of October, 2008, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge