

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Andrew Quinn,	:
Petitioner	:
	:
v.	:
	:
Pennsylvania Board of Probation and Parole,	:
Respondent	: No. 976 C.D. 2008
	: Submitted: October 17, 2008

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: November 21, 2008

Andrew Quinn (Quinn) petitions this Court for review of the order of the Pennsylvania Board of Probation and Parole (Board) recorded on March 14, 2008, denying his request for administrative relief and affirming the Board's decision.

On November 16, 1992, Quinn was sentenced to three consecutive terms of two to four years for three counts of conspiracy to commit burglary. This sentence gave Quinn a maximum sentence date of June 23, 2008.¹ On December 12, 2006, the Board granted Quinn parole. Quinn's parole became effective January 29, 2007, when he was released to Minsec Chester CCF (Minsec), a

¹ This is not the first offense for which Quinn is serving time, but it is the first relevant sentence for purposes of this opinion.

community corrections residency. Quinn had a poor adjustment at Minsec, resulting in the Board declaring him delinquent and placing him at a halfway back program at the Gaudenzia House on April 16, 2007. An hour after his arrival, Quinn absconded.

On April 30, 2007, Quinn was arrested for retail theft, and the Board issued a warrant to commit and detain him. On May 24, 2007, Quinn was granted bail on the retail theft case. On June 14, 2007, Quinn was recommitted as a technical parole violator, with a parole violation maximum sentence date of June 23, 2008, subject to change if he was convicted of the open charges. On August 21, 2007, Quinn pled guilty to retail theft and was sentenced to a term of six to twenty-four months. On November 27, 2007, Quinn was recommitted as a convicted parole violator. Quinn was subsequently advised by the Board's decision recorded on March 14, 2008, that his new maximum sentence date was May 1, 2009. On May 1, 2008, Quinn timely filed a petition with the Board for administrative review. The Board denied Quinn's request and affirmed its decision. On June 2, 2008, Quinn timely filed a petition for review.

In Quinn's petition to the Board for administrative review, he contended he should receive credit for his time served under the warrant from May 24, 2007, when he was granted bail on the retail theft case, until his sentencing on August 21, 2007. Quinn further contended he should receive credit for his time served from March 5, 2008, when he was granted parole on his retail theft case, until present. His new maximum sentence date should thus be calculated at July 30, 2008.

In Quinn's petition for review before this Court, he contends he should have received credit for all time served solely under the Board's warrant.

In his brief, Quinn contends Judge Jenkins erred when he gave him credit for serving six months on his retail theft case. Quinn's contention is that his sentence was supposed to be served as work release beginning after Quinn served his state sentence. Thus, those six months should have been credited to Quinn's back time, giving him credit for all the time he served after May 24, 2007. In addition, Quinn contends he should have been credited for the time he served at Minsec. His new maximum sentence date should therefore be recalculated.

The issue raised before the Board in Quinn's petition for administrative review, i.e., whether he should get credit for the time he served between May 24, 2007, and August 21, 2007, and the time he served after March 5, 2007, was specifically addressed by the Board in its response to the petition. In fact, Quinn did receive credit for his time served between May 24, 2007, and August 21, 2007, as well as his time served after March 5, 2008. Accordingly, the Board's decision is in accordance with the law, is supported by substantial evidence, and does not violate Quinn's rights.

The issue now before this Court is whether the contentions not raised before the Board can be addressed at this time.² Pennsylvania Rule of Appellate Procedure (Pa. R.A.P.) 1551(a) states in pertinent part: "[r]eview of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which was not raised before the government unit" There is, however, an exception for "[q]uestions

² In reviewing decisions of the Board, this Court is limited to determining whether the Board's decision is in accordance with the law, is supported by substantial evidence, or violates the parolee's constitutional rights. *Smith v. Pennsylvania Bd. of Prob. & Parole*, 539 A.2d 55 (Pa. Cmwlth. 1988).

which the court is satisfied that the petitioner could not by the exercise of due diligence have raised before the government unit.” Pa. R.A.P. 1551(a)(3).

While Quinn originally contended before the Board that the only time he should be given credit for under the warrant was between May 24, 2007, and August 21, 2007, and after March 5, 2008, he now contends before this Court, that he should be given credit under the warrant for all time served after May 24, 2007. This is not only an additional argument, but a contrary argument to that which was presented to the Board. As such it was clearly not raised before the Board, and has therefore been waived. Pa. R.A.P. 1551; *Smith v. Pennsylvania Bd. of Prob. & Parole*, 539 A.2d 55 (Pa. Cmwlth. 1988).

Concerning Quinn’s credit for his time served at Minsec, however, it is unclear whether he could not, by the exercise of due diligence, have raised this issue before the Board. In the Board’s response to Quinn’s petition for administrative review, the Board stated that he had forfeited his credit for time served while he was on parole, i.e., his time served at Minsec. It is possible that Quinn was unaware prior to receiving that response that he was not getting credit for his time served at Minsec. In light of the large discrepancy between Quinn’s actual maximum sentence date, and his proposed maximum sentence date in his petition for administrative review, he was clearly crediting himself with more time served than the time specifically referenced in his petition. Under these circumstances, this Court will give Quinn the benefit of the doubt, and hold that Quinn could not have raised this issue before the Board as he was unaware the issue existed.

This is not the first time the issue of whether a petitioner can be credited for time served at a facility has been before the Court. In order to

determine the issue in this particular case, an examination of the program's characteristics must be made to determine the restrictive nature of the conditions. *McNally v. Pennsylvania Bd. of Prob. & Parole*, 940 A.2d 1289 (Pa. Cmwlth. 2008). However, because this issue was not presented to the Board, there is no record upon which to make such a determination. In order to effectuate a proper review of the issue, the case must be remanded to the Board so that Quinn may be given the opportunity to present evidence to establish the conditions at Minsec during his stay. *Id.* Accordingly, this Court will remand this case to the Board for determination as to the issue of whether Quinn should receive credit for his time served at Minsec.

For the above reasons, the Board's order is affirmed with respect to the issues raised in Quinn's petition to the Board, and the matter is remanded to resolve the issue of whether Quinn is entitled to credit for his time served at Minsec.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 21st day of November, 2008, the order of the Pennsylvania Board of Probation and Parole Board is affirmed in-part. The above-captioned matter is remanded to the Board for further disposition in accordance with this opinion.

Jurisdiction relinquished.

JOHNNY J. BUTLER, Judge