

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
FLOYD JOHNSTON, A/K/A FLOYD	:	No. 177 WDA 2012
WILLIAM JOHNSTON,	:	
	:	
Appellant	:	

Appeal from the Judgment of Sentence, December 27, 2011,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0002369-2009,
CP-02-CR-0008827-2008, CP-02-CR-0008832-2008,
CP-02-CR-0019016-2008

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E. AND MUNDY, J.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: January 15, 2013

Floyd Johnston appeals from the judgment of sentence of December 27, 2011, following remand for the trial court to award additional credit time against appellant's sentence.

The history of this case is long and tortured. On September 9, 2009, appellant pled guilty to various charges at the above case numbers in exchange for a negotiated sentence of 2 to 4 years plus 364 days' imprisonment. Appellant filed a timely *pro se* PCRA¹ petition, and counsel was appointed. An amended petition was filed on appellant's behalf, and the Commonwealth filed an answer, acknowledging that appellant was entitled

¹ Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546.

to credit for time served. Appellant was re-sentenced on December 20, 2010, to an aggregate of 2 to 4 years plus 181 days' imprisonment, with credit for time served at each case number as follows: at No. 2369 of 2009, from January 20, 2009 to the date of his re-sentencing, December 20, 2010; at No. 8827 of 2008, credit from May 19, 2008 to May 27, 2008, and from February 25, 2009 to December 20, 2010; at No. 19016 of 2008, from August 7, 2008 to December 9, 2008, and from September 9, 2009 to December 20, 2010; and at No. 8832 of 2008, from May 21, 2008 to June 19, 2008, and from February 25, 2009 to December 20, 2010. (Notes of testimony, 12/20/10 at 4-5.) At that time, it was indicated that appellant would be eligible for parole on May 8, 2011. (*Id.* at 13.)

Notice of appeal was filed on December 22, 2010. On June 17, 2011, the trial court vacated its sentence of December 20, 2010, and re-sentenced appellant to 2 to 4 years plus 181 days' imprisonment, with credit for time served. (Docket No. 52.) The only discernible difference is that appellant was not awarded any credit at case number 2369 of 2009. (*Id.*) On September 30, 2011, appellant filed a petition for parole and a "supplement to concise statement of matters complained of on appeal," raising the following issue: "Whether the sentence at Count 1 at No. CC200902369 is illegal – in violation of 42 Pa.C.S. § 9760 and/or other law – where defendant was not granted any credit towards said sentence but was supposed to receive credit from January 20, 2009?" (Docket No. 57.)

On November 16, 2011, appellant's petition for parole was denied. The trial court opined that because appellant was serving a state sentence, it was without jurisdiction to grant appellant parole. (Docket No. 59.) On December 5, 2011, upon consideration of the parties' December 1, 2011 "consent application for relief for remand for re-sentencing," this court remanded the matter to the trial court. *Commonwealth v. Johnston*, No. 1979 WDA 2010 (*per curiam* order filed December 5, 2011). We directed the trial court to amend its sentencing order at No. 2369 of 2009 to grant appellant pre-sentence credit from January 20, 2009. *Id.* We dismissed the appeal and relinquished jurisdiction. *Id.*

On December 27, 2011, appellant was re-sentenced to 2 to 4 years plus 181 days' imprisonment, with credit for time served, including credit from January 20, 2009 at case number 2369 of 2009. (Docket No. 61.) On January 4, 2012, appellant filed a post-sentence motion, reasserting his request for parole. On January 12, 2012, appellant's post-sentence motion requesting parole was denied. Again, the trial court stated that as appellant was subject to state supervision, it was without jurisdiction to grant parole. (Docket No. 63.)

A timely notice of appeal was filed on January 31, 2012. Appellant attached a concise statement of matters complained of on appeal to his appeal notice, in which he raised a single issue, challenging the trial court's refusal to grant him parole on the basis that it lacked jurisdiction.

(Docket No. 65.) On April 27, 2012, appellant filed a supplemental statement, raising an additional issue, whether he was entitled to additional credit for time spent in custody on a probation detainer at case number 14029 of 2006. (Docket No. 68.) According to appellant, he was detained on a probation violation as a result of the instant charges, remained in custody from May 28, 2008 to August 7, 2008 and from December 10, 2008 to January 20, 2009, and that time was not applied to any sentence. (*Id.*) Appellant states that the probation violation proceedings at No. 14029 of 2006 were closed on December 30, 2009. (*Id.*)

On June 15, 2012, the trial court entered an order granting appellant immediate parole. The order has been made part of the certified record on appeal. (*See* order of August 24, 2012, granting appellant's motion for transmittal of supplemental certified record). On July 20, 2012, the trial court filed an order to transmit the record and stated that the issues raised in appellant's Rule 1925(b) statement were moot. (Docket No. 71.)

Appellant has raised the following two issues for this court's review:

1. Whether the Court of Common Pleas erred in denying [appellant]'s post-sentence motion and request for parole on the basis that said court lacked jurisdiction to grant parole when, in fact, said court had such jurisdiction pursuant to 42 Pa.C.S. § 9776(a) since – pursuant to 61 Pa.C.S. 6132(a) and (b) and 42 Pa.C.S. § 9762(b)(2) – the Pennsylvania Board of Probation and Parole did not have exclusive jurisdiction over parole of [appellant] whose maximum sentence is less than 5 years and he

is serving said sentence in the county prison within the jurisdiction of that court?

2. Whether the sentence at Count 1 at CC200902369 is illegal – in violation of 42 Pa.C.S. § 9760 and/or other law – where [appellant] was not granted any credit towards said sentence but was supposed to receive credit from January 20, 2009?

Appellant's brief at 4.

Obviously, both issues above are moot. The trial court, in fact, granted appellant's request for immediate parole on June 15, 2012.² In addition, on December 27, 2011, following remand, the trial court granted

² As stated above, earlier the trial court denied appellant's requests for parole, asserting that it lacked jurisdiction. Ordinarily, the Pennsylvania Board of Probation and Parole has the exclusive authority to determine parole when the offender is sentenced to a maximum term of imprisonment of two or more years. *Commonwealth v. Mears*, 972 A.2d 1210, 1212 (Pa.Super. 2009); *Commonwealth v. Camps*, 772 A.2d 70, 74 (Pa.Super. 2001). Here, appellant was sentenced to an aggregate of 2 to 4 years plus 181 days' imprisonment, with credit for time already served; however, appellant was ordered to serve out his sentence in the Allegheny County Jail. Because appellant was sentenced to county confinement pursuant to 42 Pa.C.S.A. § 9762(a)(2) ("Maximum terms of two years or more but less than five years may be committed to the Department of Corrections for confinement or may be committed to a county prison within the jurisdiction of the court."), the trial court retained the authority to grant appellant parole. *See* 61 Pa.C.S.A. § 6132(a)(2)(ii), "Specific powers of board involving parolees" ("the powers and duties conferred by this section shall not extend to persons sentenced for a maximum period of less than two years and shall not extend to those persons committed to county confinement within the jurisdiction of the court[.]") (emphasis added); 61 Pa.C.S.A. § 6132(b) ("Nothing contained in this section shall be construed to prevent a court from paroling any person sentenced by it for a maximum period of less than two years or from paroling a person committed to county confinement within the jurisdiction of the court pursuant to 42 Pa.C.S. § 9762.") (emphasis added). Thus, the trial court's order of June 15, 2012, granting appellant immediate parole, was properly entered.

appellant time credit on his sentence at No. 2369 of 2009 from January 20, 2009 to the present.

However, in the argument section of his brief, appellant raises another issue, whether he is entitled to additional credit time for time spent in custody on a probation violation detainer at case number 14029 of 2006. According to appellant, a detainer was issued in that case as a result of the instant charges. The violation proceedings were eventually closed but appellant never received credit for time spent in custody on the probation detainer in any other case. Appellant asserts that he is entitled to credit from May 28, 2008 to August 7, 2008, and from December 10, 2008 to January 20, 2009. (Appellant's brief at 16-18.)

As the Commonwealth observes, ordinarily this claim could be found waived on multiple bases. (Commonwealth's brief at 13-14.) Appellant failed to raise it in the court below or in his statement of questions involved. Certainly it could have been presented to the trial court in December 2011, when this court remanded for re-sentencing. Nonetheless, appellant's claim implicates the legality of his sentence and is non-waivable. **See *Commonwealth v. Clark***, 885 A.2d 1030, 1032 (Pa.Super. 2005), citing ***Commonwealth v. Newton***, 875 A.2d 1088 (Pa.Super. 2005) (allegation that trial court failed to award credit for time in custody prior to sentencing goes to legality of sentence), ***appeal denied***, 586 Pa. 724, 890 A.2d 1058 (2005), ***overruled on other grounds by Commonwealth v. Jacobs***, 900

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A.2d 368 (Pa.Super. 2006) (*en banc*), *appeal denied*, 591 Pa. 681, 917 A.2d 313 (2007) (additional citation omitted).

It appears that appellant may be entitled to time credit, assuming, as he avers, that the time he spent incarcerated on the Allegheny County detainer as the result of the new charges was not already applied somewhere else. *Commonwealth v. Smith*, 853 A.2d 1020 (Pa.Super. 2004) (defendant entitled to have his pre-trial, probation detainer incarceration credited toward his current sentence because the pre-trial incarceration resulted, at least in part, from the new charges); 42 Pa.C.S.A. § 9760 (1), (4). *See also Commonwealth v. Mann*, 957 A.2d 746, 749 (Pa.Super. 2008) (“Where an offender is incarcerated on both a Board [of Probation and Parole] detainer and new criminal charges, all time spent in confinement must be credited to either the new sentence or the original sentence.”), quoting *Martin v. Pa. Bd. of Probation & Parole*, 576 Pa. 588, 605, 840 A.2d 299, 309 (2003) (emphasis deleted).

We note that we do not consider the matter moot because although appellant has been released on parole, he is still serving a sentence. If he is entitled to additional time credit against his current sentence it would shorten his remaining parole period. We also observe that given the state of the record, we do not express any opinion on the ultimate merits of appellant’s argument. We defer to the trial court’s judgment in examining the time credit issue vis-à-vis appellant’s probation detainer. Since it is

unclear from the existing record whether appellant is statutorily entitled to such time, we are constrained to remand for the trial court to consider the matter.

The Commonwealth is also correct that the record is insufficient for meaningful review of the issue, *e.g.* certain documents appellant attached to his "supplement to concise statement of matters complained of on appeal" (Docket No. 68) are not part of the certified record and may not be considered. (Commonwealth's brief at 14-15.) Therefore, it is necessary to remand for the trial court to determine whether appellant is statutorily entitled to credit towards his sentence in the instant case for time served while incarcerated on the probation detainer. ***See Commonwealth v. Kennedy***, 868 A.2d 582, 593 (Pa.Super. 2005) ("because the state of the certified record at this time does not permit us to fully and properly address Appellant's claim for credit, we direct the trial court to address this issue at resentencing, whereby Appellant will have an opportunity to present pertinent documents and other evidence into the record.").

Case remanded for proceedings consistent with this Memorandum.
Jurisdiction relinquished.