NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. TARIG BUCKNER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2854 EDA 2011

Appeal from the Judgment of Sentence of September 16, 2011
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0006009-2006

BEFORE: GANTMAN, J., PANELLA, J., and OTT, J.

MEMORANDUM BY OTT, J.: Filed: March 15, 2013

Tarig Buckner appeals[1] *pro se* from the judgment of sentence entered on September 16, 2011, following the second revocation of his parole sentence for one count each of forgery (unauthorized act in writing), forgery (utters forged writing), access device issued to another who did not authorize use, theft by deception (false impression), receiving stolen property, identity theft, and bad checks.[2] He asserts the following arguments: (1) the trial court erred in sentencing Buckner to serve 180

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[1] We already determined in our prior decision that Buckner's notice of appeal was timely filed pursuant to the mailbox rule. ***See Commonwealth v. Buckner***, 2012 Pa. Super. LEXIS 4154 [2854 EDA 2011] (Pa. Super. Sept. 12, 2012) (unpublished memorandum, at 4 n.3).

[2] 18 Pa.C.S. §§ 4101(a)(2), 4104(a)(3), 4106(a)(1)(ii), 3922(a)(1), 3925(a), 4120(a), and 4105(a)(1), respectively.

days backtime; and (2) the court erred in failing to hold the violation of parole ("VOP") hearing within 120 days as required by Pennsylvania Rule of Criminal Procedure 708. After reviewing the official record, submissions by the parties, and relevant law, we affirm the judgment of sentence.

The trial court set forth the underlying facts as follows:

> On or about April 14, 2006, [Buckner] (a/k/a Timothy R. Jones), received and endorsed a fraudulent check payable to Timothy R. Jones in the amount of $4,500. The funds were deposited into Wachovia Bank account titled to Timothy R. Jones at 1628 West Edgely Street, Philadelphia, PA. Subsequently, Timothy R. Jones made eleven Automated Teller Machine (ATM) withdraw[al]s and or debit card purchases using a debit card titled to the aforementioned account. Newtown Township police, Bucks County, had been investigating the report of fraudulent checks cashed. On June 12, 2006, Snehal T. Patel reported four fraudulent checks amounting to $16,000 drawn against his Wachovia Bank account on April 14th through April 17th, 2006. The police and Wachovia Bank investigation revealed that an unknown individual, without the knowledge of Patel, changed the address and phone number from Patel's address in Newtown, PA, to 5323 Lesher Street, Philadelphia, PA and (215)-744-3135, respectively. Patel did not authorize or have knowledge of the account changes made through the bank. Police traced the bank account information, Pennsylvania driver's license, and other personally identifiable information to determine that Timothy R. Jones is an alias for Tarig Buckner. Police obtained surveillance photos from the Wachovia Bank branch in which the $4,500 check was deposited on April 14, 2006. The surveillance and driver's license photos were compared in order to positively identify [Buckner] in order to initiate an arrest.

Trial Court Opinion, 12/21/2011, at 3-4.

The court also recited the procedural history:

> [Buckner] was arrested on August 1, 2006 and held in the Bucks County Correctional Facility. On October 23, 2006, [Buckner] pled guilty to several charges committed in Bucks County and was sentenced to [six] to 23 months with

presumptive parole and given credit for time served since August 1st. [Buckner] was further ordered to pay $4,500 restitution and to have no victim contact. The Adult Probation and Parole department ordered a garnishment of wages from [Buckner]'s employer in order to pay this restitution of $4,500. The case was transferred to Philadelphia for courtesy supervision. At some point in 2008, [Buckner] ceased working for the employer in which wages were garnished, and the automatic payments ceased.

On July 8, 2008, [Buckner] was returned from Philadelphia County to Bucks for failure to pay restitution. A violation hearing was held on August 12, 2008 where Judge Rubenstein found [Buckner] in violation of his parole, revoked parole and sentenced him to serve back time with immediate parole conditioned upon the payment of $249 per month to satisfy the outstanding restitution balance. On September 2, 2008, [Buckner]'s case was again transferred to Philadelphia County for courtesy supervision. On April 13, 2009, the Bucks County Adult Probation/Parole Department received a JNET notification that [Buckner] was arrested in Philadelphia on April 14th for possessing a firearm and carrying it in public without a license or permit. Bucks County Adult Probation department lodged a detainer on the State and [Buckner] was subsequently transferred to Bucks County Correctional Facility on July 29, 2009. On December 8, 2009, in Philadelphia, [Buckner] was found guilty of these new charges of possession of prohibited firearms. On January 5, 2010, bail was denied during a Bucks County hearing with Judge Cepparulo, and the probation officer submitted a violation request at that time.

[Buckner's] violation of parole hearing ("VOP") was originally scheduled for March 10, 2010, but was continued due to a sentencing hearing in Philadelphia. On April 27, 2010, [Buckner] was sentenced in Philadelphia to [three] to [six] years in the State Correctional Institution with a consecutive [two]-year probation for the firearms violation conviction. On May 4, 2010, [Buckner] was released from Bucks County Correctional Facility to begin serving the [three] to [six] year State sentence. Philadelphia was the committing county and Bucks County subsequently lodged a detainer. This Court held the VOP hearing on September 16, 2011 and found [Buckner] in violation of his parole, specifically as a result of a new arrest on a Philadelphia weapons offense and not in any part due to the

> failure to pay restitution while in custody. This Court revoked parole and ordered [Buckner] to serve back time, consecutive to his State sentence, in the Bucks County Correctional Facility, upon being paroled from the State sentence; [Buckner] was credited time from July 29, 2009 to January 13, 2010. [Buckner] will be eligible for parole after serving 180 days of the back time and must continue to pay restitution. It was further ordered that the case be removed from collections and be closed once restitution is paid.

Id. at 1-3 (footnotes omitted). This appeal followed.[3]

Preliminarily, we note that on September 12, 2012, we remanded the case to determine the status of trial counsel's (Michael Lacson, Esquire) representation in this matter. ***Buckner***, 2012 Pa. Super. LEXIS 4154 [2854 EDA 2011] (Pa. Super. Sept. 12, 2012) (unpublished memorandum, at 5).[4] On September 28, 2012, the trial court conducted a video hearing, with Buckner's consent, to address the issue and found the following:

> Prior to the video hearing, counsel and [Buckner] were provided with the opportunity to privately discuss the case. Once the hearing commenced, [Buckner] clearly indicated his

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[3] On November 10, 2011, the trial court ordered Buckner to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Buckner filed a concise statement on November 21, 2011. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on December 21, 2011.

[4] A review of the certified record revealed the following: (1) Buckner was appointed counsel on October 13, 2006; (2) Buckner filed several *pro se* filings, including a notice of appeal and a concise statement; (3) Lacson did not file a motion to withdraw as counsel during the period between the VOP hearing and the notice of appeal and did not make an oral motion to withdraw; and (4) Buckner did not waive his right to counsel and the court did not conduct a waiver colloquy pursuant to Pa.R.Crim.P. 121(A)(2). ***Id.*** at 6-7.

> desire to proceed pro se. Counsel and [Buckner] acknowledged that counsel was never requested by [Buckner] to file an appeal. Moreover, counsel informed us that, at all times relevant hereto, he was, and remains, ready, able and willing to file an appeal on behalf of [Buckner]. Nevertheless, [Buckner] stated that he would continue to represent himself on appeal.
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> After conducting an on-the-record colloquy, we are satisfied that [Buckner] has knowingly, intelligently and voluntarily waived his right to counsel. [Buckner] understood he was entitled to free court appointed counsel, that by waiving his right he may be losing certain rights and that counsel would be able to assist him with legal argument, and that counsel is familiar with rules that may be unfamiliar to [Buckner]. [Buckner], after being advised of the above rights, unequivocally stated his desire to proceed pro se with his appeal. As such, after complying with ***Commonwealth v. Grazier***, [713 A.2d 81 (Pa. 1998),] and the Pennsylvania Rule of Criminal Procedure 121, we granted [Buckner]'s request to proceed pro se on appeal and permitted trial counsel to withdraw from further representation of [Buckner].

Trial Court Opinion, 10/3/2012, at 1-2. On November 14, 2012, the court entered an order, which relieved Lacson of further responsibility and permitted Buckner to proceed *pro se*. We may now address the merits of his claims.

In Buckner's first argument, he claims the trial court erred in finding him in violation of his parole at the September 16, 2011 violation hearing and recommitting him to serve his "backtime" sentence. He states that his

original sentence began on August 1, 2006, and expired on July 1, 2008.[5] Therefore, he contends he could not be found in violation or recommitted because the underlying sentence had expired before his first VOP hearing on August 12, 2008. Moreover, he asserts that trial court does not establish on improper conduct on his part except for his inability to pay restitution.

A trial court's revocation of parole and recommitment of a parolee will not be disturbed absent an abuse of discretion or error of law. ***Commonwealth v. Mitchell***, 632 A.2d 934, 937 (Pa. Super. 1993).

> [T]o support a revocation of parole, the Commonwealth need only show, by a preponderance of the evidence, that a parolee violated his parole. ***Commonwealth v. Smith***, 534 A.2d 120, 122 ([Pa. Super.] 1987), *appeal denied* 518 Pa. 639, 542 A.2d 1368 (1988). In ***Smith***, the court reasoned that "the primary purpose of a parole revocation hearing is not to determine whether the parolee has, in fact, been convicted of a crime, rather its purpose is to determine whether parole … remains a viable means of rehabilitation and deterring future antisocial conduct." ***Id.***

Commonwealth v. Shimonvich, 858 A.2d 132, 135 n.3 (Pa. Super. 2004), *quoting* ***Mitchell, supra*** at 936-37) (some internal citations and quotation marks omitted).

> In [***Mitchell***], this Court set forth the following, which guides our analysis in the present case:

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[5] Buckner's original judgment of sentence was imposed on October 23, 2006, but he was given credit for time served dating back to August 1, 2006. Therefore, Buckner's minimum release date was February 1, 2007 and his maximum release date was July 1, 2008.

> Clearly, the order revoking parole does not impose a new sentence; it requires appellant, rather, to serve the balance of a valid sentence previously imposed. ***See Commonwealth v. Carter***, 336 Pa. Super 275, 281 n.2, 485 A.2d 802, 805 n.2 (1984). Moreover, such a recommittal is just that -- a recommittal and not a sentence. ***Abraham v. Dept. of Corrections***, 150 Pa. Cmwlth. 81, 97, 615 A.2d 814, 822 (1992). Further, at a "Violation of Parole" hearing, the court is not free to give a new sentence. The power of the court after a finding of violation of parole in cases not under the control of the State Board of Parole is "to recommit to jail…." ***See Commonwealth v. Fair***, 345 Pa. Super. 61, 64, 497 A.2d 643, 645 (1985), citing 61 P.S. § 314. There is no authority for giving a new sentence with a minimum and maximum. ***Id.*** at 61, 497 A.2d at 645. Therefore, an appellant contesting a revocation of parole need not comply with the provisions of Pa.R.A.P. 2119(f) by first articulating a substantial question regarding the discretionary aspects of sentencing. … The sole issue on appeal is whether the trial court erred, as a matter of law, in revoking appellant's parole and committing him to a term of total confinement.

Id. at 936. ***See also Commonwealth v. Ware***, 1999 PA Super 166, 737 A.2d 251, 253 (Pa. Super. 1999) (relying on ***Mitchell*** and reaffirming that "upon revocation of parole, the only sentencing option available is recommitment to serve the balance of the term initially imposed").

Commonwealth v. Galletta, 864 A.2d 532, 538-539 (Pa. Super. 2004).

Here, the court found the following:

> In this case, [Buckner] did not specify the basis of this Court's error in sentencing him to back time. At the time of the VOP hearing on September 16, 2011, [Buckner] received credit for the July 29, 2009 to January 13, 2010, and the remaining back time was 11 months and 15 days. This Court was within its sound discretion to order that [Buckner] serve 180 days of this back time consecutive to the State sentence and to resume restitution payments as a condition of his subsequent parole. The back time was credited appropriately, considering all

> incarceration time in the Bucks County Correctional Facility pursuant to the original sentence imposed on October 23, 2006.

Trial Court Opinion, 12/21/2011, at 5.

We agree with the trial court's sound reasoning. There were various periods of time where Buckner was not incarcerated and, in light of his past parole violations,[6] there remained an unexpired balance of his sentence at the time of the September 16, 2011 VOP hearing. ***See Galletta***, ***supra***. In this regard, the trial court found he violated his parole based his April 14, 2009 arrest for the crimes of possessing a firearm and carrying it in public without a license or permit and his December 8, 2009 conviction of these new charges. ***See*** N.T., 9/16/2011, at 17 ("Well, he is in violation of his parole and it's revoked. And let me just say I find him in violation because of the new arrest and the weapons offense. I don't think I am inclined to find that he violated parole because he didn't pay restitution while he was in custody."). Therefore, the court did not err in revoking his parole and

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[6] Although Buckner maintains that his original sentence expired on July 1, 2008, we note that the Commonwealth properly gave Buckner notice of the technical parole violation on July 14, 2008, and following a hearing on August 12, 2008, the trial court found Buckner in violation of his parole. ***See Commonwealth v. Hackman***, 623 A.2d 350, 351-352 (Pa. Super. 1993) (stating "that notice of an alleged parole violation need not be issued prior to the expiration of the parole period so long as the Commonwealth complied with all of the required provisions regarding notice of the charges and the subsequent parole revocation hearing"); ***see also Commonwealth v. Dorsey***, 328 476 A.2d 1308 (Pa. Super. 1984). Therefore, Buckner's argument that he could not be found in violation even though the underlying sentence had expired prior to his first VOP hearing is without merit.

recommitting him to a term of confinement. Accordingly, his first argument fails.

In Buckner's second argument, he claims the trial court erred by not holding a VOP hearing within the required 120 days where he was in custody for approximately 20 months prior to the hearing. He states that the Commonwealth failed in their duty to prosecute in a timely manner and this delay has resulted in a manifest injustice.

Pennsylvania Rule of Criminal Procedure 708 states the following with respect to a parole violation hearing:

> (B) Whenever a defendant has been . . . placed on parole, the judge shall not revoke such . . . parole as allowed by law unless there has been:
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> (1) a hearing held as **speedily as possible** at which the defendant is present and represented by counsel[.]

Pa.R.Crim.P. 708(B)(1) (emphasis added).

Here, the trial court properly found the following:

> The statute does not establish a presumptive period in which the Commonwealth must revoke probation, and, as such, this Court committed no error as there is no 120 day requirement to a VOP hearing. Pa.R.Crim.P. § 708. Additionally, [Buckner] was not prejudiced due to his presumptive violation of the Bucks County parole by pleading guilty to new charges on the Philadelphia felony on January 13, 2010.
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> To demonstrate a violation of his right to a speedy probation revocation hearing, a defendant must allege and prove the delay in holding the revocation hearing prejudiced him. *Com. v. Woods*, 965 A.2d 1225, 1229 (Pa. Super. 2000); *see also Com. v. Clark*, 847 A.2d 122, 135 (Pa. Super. 2004); and *Com. v. Bischof*, 616 A.2d 6, 9 (Pa. Super. 1992). There is no per se rule of prejudice for technical violations of the Rules of

Criminal Procedure. *Com. v. Marchesano*, 544 A.2d 1333, 1336-7 (1988). "[T]he controlling consideration at a revocation hearing is whether the facts presented to the court are probative and reliable and not whether traditional rules of procedure have been strictly observed." *Id.* at 1336. Where there is a delay in scheduling a VOP hearing, the court must determine whether the delay was reasonable under the circumstances of the specific case and whether the appellant was prejudiced by the delay. *Id.* In evaluating the reasonableness of a delay, the court examines three factors: the length of the delay, the reasons for the delay; and the prejudice resulting to the defendant from the delay. *Woods*, 965 A.2d 1227; (quoting *Clark*, 847 A.2d at 123-24). Where the Commonwealth provides no explanation for the delay, the court should analyze whether the delay prejudiced the defendant. *Id.*

If a defendant is already incarcerated on the charges that triggered the probation revocation, he cannot claim the delay in holding his revocation hearing caused him any loss of personal liberty. *Clark*, 847 A.2d 122; *see also Bischof*, 616 A.2d at 9. Likewise, where a conviction on new charges conclusively establishes the defendant's probation violation, the defendant cannot claim a delay in his VOP hearing prejudiced him because he lost favorable witnesses and evidence. *Id.* "Prejudice in this context has been interpreted as being something which would detract from the probative value and reliability of the facts considered, vitiating the reliability of the outcome itself." *Woods*, 965 A.2d 1225. One specific purposes of the rule in requiring a prompt revocation hearing is to avoid such prejudice by preventing the loss of essential witnesses or evidence, the absence of which would contribute adversely to the determination and another is to prevent unnecessary restraint of personal liberty. *Marchesano*, 544 A.2d at 1336.

Moreover, there is no error where an appellant cannot establish the necessary level of prejudice by such a delay. For example, in a 2010 Superior Court case, *Commonwealth v. Christmas*, the defendant filed a 1925(b) statement and claimed that a 20 month delay for his VOP hearing violated his "due process" rights. 995 A.2d 1259 (Pa. Super. 2010). In *Christmas*, the defendant's statement failed to specifically allege a violation of his Pa.R.Crim.P. § 708 right to a speedy VOP hearing, and the court acknowledged that this omission created an arguable waiver of this issue on appeal. *Id.* The defendant in

Christmas was arrested in 2003 for carrying a firearm without a license in Philadelphia, sentenced to forty-eight (48) months of probation. *Id.* Subsequently in 2005, the defendant in *Christmas* was arrested on new charges, third degree murder, and the probation department initiated VOP proceedings. The probation department continued the VOP hearings pending the resolution of the new criminal charges, but they eventually "lost track" of defendant's case, never rescheduling the hearing. In February 2009, the *Christmas* Court finally held a revocation hearing, twenty (20) months after his new conviction. The *Christmas* Court revoked the defendant's 2003 probation and imposed a sentence of six (6) to twelve (12) years of incarceration to run consecutive to the new murder conviction. The *Christmas* Court held that defendant was already incarcerated for the entire twenty months on his new conviction and, thereby, "suffered no prejudice arising from a loss of personal liberty during the delay." *Id.* at 1264. "Appellant's guilty plea to third degree murder and possession of a firearm [(the new charges)] conclusively established his probation violations. . . . [t]hus, [he] suffered no prejudice due to the loss of favorable witnesses or evidence." *Id.*

Thus, in the instant matter, [Buckner] suffered no prejudice because he was incarcerated during the entire period of delay. Furthermore, [Buckner] pled guilty to new charges. Similar to the defendant in *Christmas*, [Buckner] was incarcerated on new charges during the entire period of the VOP hearing delay, thus there was no loss of personal liberty. In both cases, the Commonwealth could not establish a reasonable justification for delaying the VOP hearings; nevertheless, the analysis must then turn to the prejudice. Since [Buckner] plead guilty to the new weapons charges, thereby establishing conclusive proof of his [parole] violation, there could be no prejudice to [Buckner]'s need to defend the VOP charges with witnesses and evidence.

Trial Court Opinion, 12/21/2011, at 5-8. As we agree with the court's well-reasoned analysis, we conclude that Buckner's second argument warrants no relief.[7]

Judgment of sentence affirmed.

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[7] We note that Buckner raises several new arguments in his reply brief. ***See*** Buckner's Reply Brief at 3 (unnumbered). It is well-settled that "an appellant is prohibited from raising new issues or remedying an original brief's deficient discussion in a reply brief. ***See*** Pa.R.A.P. 2113(a)[.]" ***Commonwealth v. Brown***, 872 A.2d 1139, 1147 n.5 (Pa. 2005). Even though Buckner is acting *pro se*, he must adhere to the Pennsylvania Rules of Appellate Procedure. Therefore, we need not address these additional claims raised in his reply brief.