

[J-160-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

HOWARD JACKSON,	:	No. 10 Eastern District Appeal Docket
	:	2000
Appellant	:	
	:	Appeal from the Order of the
	:	Commonwealth Court entered January 10,
v.	:	1999, at No. 604 M.D. 1999 denying
	:	Appellant's Petition for Writ of Mandamus
	:	
DONALD VAUGHN, SUPERINTENDENT,	:	
SCI-GRATERFORD, PENNSYLVANIA	:	SUBMITTED: September 29, 2000
BUREAU OF CORRECTIONS, ET AL.,	:	
AND KATHLEEN ZWIERZYNA, BOARD	:	
SECRETARY, PENNSYLVANIA BOARD	:	
OF PROBATION AND PAROLE, ET AL.,	:	
	:	
Appellees	:	

OPINION

MR. JUSTICE NIGRO

DECIDED: July 18, 2001

Appellant Howard Jackson appeals from the Commonwealth Court's order granting Appellees' David Vaughn, Superintendent, SCI-Graterford, Pennsylvania Bureau of Corrections, et al., ("the Department") demurrer to his pro se petition for review in the nature of mandamus. Appellant sought mandamus to compel the Department to credit his pre-sentence incarceration time towards his sentence for third-degree murder. For the reasons that follow, we affirm.

On September 28, 1990, Appellant was arrested and incarcerated on multiple criminal charges, including third-degree murder. Appellant was convicted of the murder charge on October 5, 1991. On November 19, 1991, prior to sentencing for his murder conviction, Appellant was sentenced to a term of two and one-half to five years

incarceration for unrelated parole violations.¹ Appellant was sentenced on February 2, 1993 to seven to twenty years incarceration for the third-degree murder conviction. The trial court granted Appellant credit for time served from September 28, 1990 until February 2, 1993.

The Department, however, only awarded Appellant credit for the time he served from September 28, 1990 to November 19, 1991. Contrary to the trial court's order, the Department did not credit any of Appellant's time in prison from November 20, 1991 to February 2, 1993 towards his murder sentence because that period of incarceration had already been applied to Appellant's sentence for his parole violation. Thus, the Department contended that crediting all of Appellant's pre-sentence incarceration time to his murder sentence would result in an impermissible double credit under Pa.R.Crim.P. 1406(c).² Appellant subsequently filed a mandamus petition with the Commonwealth Court.

The Commonwealth Court, hearing the matter in its original jurisdiction, granted the Department's demurrer to Appellant's mandamus petition. The court agreed with the Department that since Appellant's incarceration from November 20, 1991 to February 2, 1993 had already been credited towards his parole violation sentence, that time could not

¹ Appellant contends that the Commonwealth Court erroneously stated that he was sentenced for a parole violation, when, according to Appellant, it was actually for a probation violation. Whether the sentence was for a parole or a probation violation, however, is of no moment in this matter.

² At the time in question, Rule 1406(c) provided:

When at the time sentence is imposed, the defendant is imprisoned under a sentence imposed for any other offense or offenses, the instant sentence which the judge is imposing shall be deemed to commence from the date of imposition thereof unless the judge states that it shall commence from the date of the expiration of such other sentence or sentences.

Pa.R.Crim.P. 1406(c)(1975). Rule 1406 was amended in 1996.

also be credited towards his murder sentence. The court held that the Department could not be compelled to award Appellant double credit. Appellant subsequently filed this direct appeal.

Mandamus is an extraordinary writ that will only lie to compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy. Pennsylvania Dental Ass'n v. Commonwealth Ins. Dep't, 516 A.2d 647, 652 (Pa. 1986). A decision to deny mandamus is subject to reversal only for abuse of discretion. Renziehausen v. Township of Robinson, 611 A.2d 706, 709 (Pa. 1992). A decision that a plaintiff has failed to state a cause of action in mandamus, however, is subject to plenary review, inasmuch as the lower court has decided that the complaint, as a matter of law, does not make out a claim for relief. Id.

In Fajohn v. Commonwealth, Dep't of Corrections, 692 A.2d 1067 (Pa. 1997), this Court addressed the same argument that Appellant presents in this appeal. There, Fajohn brought a mandamus action seeking to compel the Department to apply a 190-day pre-sentence credit for time served granted by the sentencing court. The Department, however, refused to apply the credit because the 190 days had already been credited to another sentence that Fajohn was serving at the time he was sentenced. We held that mandamus was not available since the Department could not be compelled to perform an illegal act, i.e., award pre-sentence credit for a period of incarceration that was already applied to another sentence. Id. at 1067-68; see also Doxsey v. Commonwealth, Dep't of Corrections, 674 A.2d 1173 (Pa. Commw. 1996)(mandamus cannot be used to compel Department of Corrections to grant double credit).

Here, since Appellant's incarceration from November 19, 1991 to February 2, 1993 had already been applied to his parole violation sentence, it could not have also been legally applied to his murder sentence. See Doxsey, 674 A.2d at 1176. Therefore,

because Appellant was not entitled to double credit, we agree with the Commonwealth Court that as a matter of law mandamus cannot compel the Department to award Appellant credit for time served when that time has already been credited towards his parole violation sentence.

Appellant also contends that his constitutional right to a speedy trial and his constitutional right to appeal were violated by the fact that his sentence for murder was entered nearly two years after conviction. However, these issues are not properly before the Court. Any argument related to an allegedly improper delay in sentencing should first be raised to the trial court that imposed the judgment of sentence, not to this Court or to the Commonwealth Court in a mandamus petition.³ Thus, we will not address the merits of these issues. See Pa.R.A.P. 302(a)(issues not properly raised in the lower courts will not be addressed on appeal).

Appellant's final argument is that he was entitled to a parole hearing on September 28, 1997 - the date that Appellant claims his seven-year minimum sentence expired. Appellant's argument is based upon the erroneous assumption that all of his incarceration from September 28, 1990 to February 2, 1993 should have been applied to his murder sentence. However, since the Department's calculation for time served properly excluded the November 20, 1991 to February 2, 1993 period of incarceration, Appellant's minimum sentence was not reached on September 28, 1997. As even Appellant recognizes in his brief, he was not entitled to a parole hearing prior to the expiration of his minimum sentence. See generally Commonwealth v. Rogers, 724 A.2d 319 (Pa. 1999)(prisoner may not be paroled prior to expiration of minimum sentence).⁴

³ The Commonwealth Court did not address these issues, which were not within its original jurisdiction. See 42 Pa.C.S. § 761.

⁴ Appellant also claims that his equal protection rights were violated because he received "different treatment from that received by other[s] similarly situated." Appellant, however, (continued...)

The order of the Commonwealth Court is affirmed.

Mr. Justice Zappala concurs in the result.

Mr. Justice Saylor files a dissenting opinion in which Mr. Justice Castille joins.

(...continued)

completely fails to expound upon this bald allegation. Thus, his equal protection argument is waived. See Pa.R.A.P. 2119.