[J-69-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JAMES T. MARTIN,	:	No. 189 MAP 2002
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court entered on July 9,
v.	:	2002 at No. 245CD2002 affirming the
	:	order of the Pennsylvania Board of
PENNSYLVANIA BOARD OF	:	Probation and Parole at No. 3106S
PROBATION AND PAROLE,	:	
	:	
Appellee	:	Argued: May 14, 2003

DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: DECEMBER 30, 2003**

I must respectfully dissent as I believe that the Commonwealth Court properly affirmed the decision of the Board of Probation and Parole ("Board") not to credit Appellant James Martin's pre-trial confinement to his parole violation sentence, i.e., his "original sentence."

I would reaffirm the rule set forth by this Court over a decade ago in Gaito v. Pennsylvania Bd. of Probation and Parole, 412 A.2d 568, 571 (Pa. 1980). In that case, this Court held:

> [I]f a [parolee] is being held in custody solely because of a detainer lodged by the Board and has otherwise met the requirements for bail on the new criminal charges, the time which he spent in custody shall be credited against his original sentence. If a [parolee], however, remains incarcerated prior to trial because he has failed to satisfy bail requirements on the new criminal charges, then the time spent in custody shall be credited to his new sentence.

412 A.2d at 571.[1] In my view, this rule is mandated by section 331.21a of the Parole Act, and as a result, may not be changed by the majority to permit a parolee's pre-trial confinement to be credited to his original sentence in circumstances where he did not post bail and the Board filed a detainer against him.

Section 331.21a(a) of the Parole Act provides:

> Any parolee under the jurisdiction of the Pennsylvania Board of Parole released from any penal institution of the Commonwealth who, during the period of parole or while delinquent on parole, commits any crime punishable by imprisonment, from which he is convicted or found guilty by a judge or jury or to which he pleads guilty or nolo contendere at any time thereafter in a court of record, may, at the discretion of the board, be recommitted as a parole violator. If his recommitment is so ordered, he shall be reentered to serve the remainder of the term which said parolee would have been compelled to serve had he not been paroled, and he shall be given no credit for the time at liberty on parole . . . . The period of time for which the parole violator is required to serve shall be computed from and begin on the date that he is taken into custody to be returned to the institution as a parole violator.

61 P.S. § 331.21a(a) (emphasis added). Thus, according to this statute, a parolee may only receive credit towards his original sentence for that time spent in jail after he is taken into custody "as a parole violator." See id.

In the instance where a parolee is arrested on new criminal charges and incarcerated because he cannot post bail, that period of incarceration is due to his new charges, not his parole violation, and therefore the time cannot be credited to his original

---

[1] In a footnote, this Court created a narrow exception to this rule set forth in the body of the opinion so as to permit the allocation of a parolee's pre-trial confinement to his original sentence in cases where the parolee did not satisfy bail, but was acquitted of the new charges, or the parolee did not receive a sentence on the new charges. See Gaito, 412 A.2d at 571 n.6. While such an exception is not entirely consistent with the Parole Act, see infra pp.2-3, I nevertheless believe that it was within this Court's equitable powers to create this limited exception.

sentence under the plain language of section 331.21a. See Gaito, 412 A.2d at 571; Rodriques v. Pennsylvania Bd. of Prob. and Parole, 403 A.2d 184, 185-86 (Pa. Commw. 1979); Davis v. Cuyler, 394 A.2d 647, 649-50 (Pa. Commw. 1978). While, as the majority notes, the Board may file a detainer against the arrested parolee who fails to post bail that "will prevent the parolee from making bail, pending disposition of the new charges or other action of the court," 37 Pa. Code § 65.5(2), that does not change the fact that the parolee must nevertheless remain incarcerated due to his failure to post bail on the new charges. The detainer will only take effect if the parolee manages to meet bail,[2] or when the new charges are resolved. See Davis, 394 A.2d at 650 (detainer simply assures that "the [parolee] will be turned over to the Board when available"). Unless one of these two occurrences takes place, the parolee remains incarcerated due to his failure to post bail on the new charges and thus, pursuant to section 331.21(a) of the Parole Act, that pre-trial incarceration time may not be credited to his original sentence. See 61 P.S. § 331.21a(a); Gaito, 412 A.2d at 571.

Accordingly, as I believe that section 331.21a of the Parole Act requires that this Court maintain the rule established in Gaito, I must disagree with the majority's decision to change that rule to permit a parolee's pre-trial confinement to be credited to his original sentence and/or his new sentence when he did not post bail on the new charges and the Board filed a detainer against him. Moreover, in my view, permitting such a credit option to

[2] Notably, the parolee may always seek a modification of bail under Pennsylvania Rule of Criminal Procedure 524. See Pa. R. Crim. P. 524.

a parolee, who has been convicted of and received a sentence for new charges, would grant such a recidivist criminal an unwarranted windfall.[3] [4]

Thus, as Appellant failed to post bail on his new charges, I believe that the Board properly refused to credit his pre-trial confinement time to his original sentence based on the rule established by this Court in Gaito.

---

[3] The rule created by the majority only grants new relief to those parolees who have been convicted of and received a sentence for the new charges because, as noted supra in footnote 1, this Court already held in Gaito that where a parolee was not convicted on the new charges or did not receive a sentence, his pre-trial confinement may be credited to his original sentence. See 412 A.2d at 571 n.6.

[4] The majority also finds that the exception created in Gaito's footnote six, see supra n.1, should be extended to permit a parolee, who did not meet bail on his new charges, to credit his pre-trial confinement to his original sentence not only when he was not convicted of the new charges or received no new sentence, but also whenever he did not receive a new sentence of incarceration. Here, however, Appellant received a sentence of forty-eight hours of incarceration on his new charges. Thus, to the extent that Gaito did not resolve the issue of whether a parolee may credit his pre-trial confinement to his original sentence when he did not receive a new sentence of incarceration, that issue is not properly before this Court in the instant case.