



Ulisky v. Pennsylvania Board of Probation and Parole

2005 | Cited 0 times | Supreme Court of Pennsylvania | October 18, 2005

Submitted: July 22, 2005

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge, HONORABLE ROBERT SIMPSON, Judge, HONORABLE JESS S. JIULIANTE, Senior Judge.

OPINION NOT REPORTED

MEMORANDUM OPINION

Tracy Ulisky petitions the Court pro se for review of the January 10, 2005 decision of the Pennsylvania Board of Probation and Parole (Board) that denied as untimely Ulisky's November 29 and November 30, 2004 administrative appeals. Ulisky objected to the timeliness of the Board's June 6, 2003 revocation hearing and the forfeiture of his street time; he objected to the Board's October 27, 2004 decision making modifications to prior orders establishing Ulisky's parole maximum dates to reflect a one-day credit for his confinement from April 7 to April 8, 1981; and he objected to the Board's October 28, 2004 decision denying reparole. In its January 2005 decision, the Board stated that Ulisky's challenge to the timeliness of his revocation hearing was in actuality an appeal from the Board's September 23, 2003 recommitment order and that to the extent Ulisky objected to a forfeiture of his street time he sought relief from the July 21, 2004 recalculation decision rather than from the October 27, 2004 modification decision.

Ulisky questions whether the Board unlawfully revoked his parole, whether the Board has falsely contended that he was provided a revocation hearing on June 6, 2003 and whether the Board imposed sanctions that exceeded the presumptive parole backtime ranges and that are unreasonable and/or manifestly excessive. The Board questions, inter alia, the timeliness of the administrative appeals and whether the issues before this Court are waived.

In October 2001, while on reparole from a rape conviction, Ulisky was arrested for driving with a suspended license and for driving under the influence of alcohol (DUI) to which he ultimately pleaded guilty. On May 28, 2003, he was sentenced by the Butler County Court of Common Pleas to twelve to twenty-four months less one day to be served under house arrest. Ulisky testified at the June 6, 2003 revocation hearing that he immediately informed his former parole agent of the DUI arrest and that the parole agent told him that he would "see what he could do about keeping [him] out of jail." C.R. at 70. Ulisky asserts that because of the "negotiated agreement" with his parole agent allegedly resolving any parole violations, he accepted the terms of the agreement and waived



Ulisky v. Pennsylvania Board of Probation and Parole

2005 | Cited 0 times | Supreme Court of Pennsylvania | October 18, 2005

his right to a panel hearing and his right to counsel. Ulisky states that the "negotiated agreement" provided that if he entered a plea to the DUI charge, he would receive ten months of backtime to run concurrently with any sentence imposed by the court of common pleas. Brian D. Helfrich, Ulisky's parole agent at the time of the revocation hearing, entered Ulisky's guilty plea and sentencing order into evidence.

On September 23, 2003, the Board remailed its revocation decision to Ulisky recommitting him to six months backtime as a convicted parole violator due to his DUI guilty plea. In a decision mailed July 21, 2004, the Board provided notice of its July 13, 2003 action recommitting Ulisky to a state correctional institution as a technical and as a convicted parole violator to serve a total of ten months backtime. In its October 27, 2004 decision, the Board made modifications to Ulisky's parole violation maximum dates and recomputed the maximum date set forth in the Board action recorded July 13, 2004 (mailed July 21) to read "June 8, 2012." In its October 28, 2004 decision, the Board denied reparole to Ulisky.

Ulisky filed an administrative appeal with the Board through counsel on November 29, 2004, objecting to the Board's October 27 and October 28, 2004 decisions, and on November 30, 2004 he filed a pro se administrative appeal raising additional objections. In his counseled appeal, Ulisky contended that at the parole review he did not have an opportunity to address the Board, nor did the Board inform him of his right to counsel or allow him to waive this right. Had he been represented by counsel he would have presented evidence of the "negotiated agreement" with his former parole agent, of changes to his health and the health of his family members and of his productive activities in society while on parole since 1997. In Ulisky's pro se appeal he claims that the June 2003 revocation hearing was untimely under 37 Pa. Code §71.4,¹ he objected to the forfeiture of his street time and he objected to the modifications to his parole maximum dates.

In its decision now under review, the Board dismissed Ulisky's administrative appeals as untimely because his objections related to the timeliness of the June 2003 revocation hearing and forfeiture of his street time, which should have been raised within thirty days of the September 2003 recommitment decision pursuant to 37 Pa. Code §73.1(b). The Board explained that its October 27, 2004 modifications to Ulisky's parole maximum dates did not relate to the removal of his street time but were the result of a change in his sentencing structure by the sentencing court whereby he was given a one-day credit for his confinement from April 7 to April 8, 1981. As for the October 28, 2004 decision, the Board emphasized that parole denial is discretionary and that it is not governed by regulations applicable to revocation proceedings.²

Ulisky first argues that the Board violated his due process rights when it unlawfully revoked his parole. He contends that he pleaded guilty to the DUI charge relying on the "negotiated agreement" with his former parole agent and that the Board breached this agreement by taking him into custody on July 1, 2004, after he completed his DUI sentence, and transferring him to SRCF-Mercer. Citing among other cases *United States v. Hall*, 730 F. Supp. 646 (M.D. Pa. 1990), and *Commonwealth v.*



Ulisky v. Pennsylvania Board of Probation and Parole

2005 | Cited 0 times | Supreme Court of Pennsylvania | October 18, 2005

Zakrzewski, 460 Pa. 528, 333 A.2d 898 (1975), Ulisky maintains that he is entitled to the benefit of his "negotiated agreement" based on contract theories that are applicable in the criminal context and that nunc pro tunc review is warranted because he was deceived by the Board into accepting the "negotiated agreement" and he never received a copy of a Board decision that followed the terms of that agreement. Ulisky further states that his due process rights were violated when he waived his right to counsel at the revocation hearing in his reliance upon the "negotiated agreement." He asserts, as well, that the Board erroneously upheld changes to his parole maximum dates and that the six-month recommitment exceeds the presumptive range requiring written justification pursuant to 37 Pa. Code §75.1(c), which the Board failed to provide.

The Board counters that it correctly dismissed Ulisky's administrative appeals because they were filed over one year after mailing of the September 2003 revocation decision. Citing *Newsome v. Pennsylvania Board of Probation and Parole*, 553 A.2d 1050 (Pa. Cmwlth. 1989), the Board submits in the alternative that the three issues raised on appeal to this Court are waived because Ulisky did not raise them at his June 2003 revocation hearing or in his administrative appeals. Ulisky did not contend at the revocation hearing or in the administrative appeals that the terms of a "negotiated agreement" barred the Board from recommitting Ulisky based on his guilty plea, that the Board did not conduct a revocation hearing on June 6, 2003 or that the recommitment period exceeded the maximum presumptive range applicable to DUI under 37 Pa. Code §75.2, which is three to six months. The Board notes, in any event, that Ulisky's issues are frivolous because the terms of the "negotiated agreement" did not preclude the Board from recommitting Ulisky; the record lacks any evidence of such an agreement and his guilty plea did not include any promise by parole authorities; the transcript of the revocation hearing is proof that it occurred; and the recommitment period is within the presumptive range.

The law is well settled that issues not raised before the government unit are waived and cannot be considered for the first time on appellate review, except where the Court is satisfied that a petitioner by the exercise of due diligence could not have raised the issue before the government unit. Section 703(a) of the Administrative Agency Law, 2 Pa. C.S. §703(a); Pa. R.A.P. 1551(a); *Newsome*. In *DeMarco v. Pennsylvania Board of Probation and Parole*, 758 A.2d 746 (Pa. Cmwlth. 2000), this Court reiterated that upon appellate review it may not decide an issue that a petitioner has failed to raise at any time on appeal before the Board.

The issues that Ulisky has raised before this Court essentially pertain to the Board's September 2003 revocation decision, which he did not challenge within the required administrative appeal period, and they also pertain to his claim that the Board did not provide a timely revocation hearing on June 6, 2003 pursuant to its regulations and that the recommitment period exceeded the presumptive range. There is no indication that Ulisky was prevented from timely raising these issues before the Board, and because of his failure to so act the Court must conclude that the Board properly denied the November 2004 administrative appeals as untimely filed. Nevertheless, the Court notes that the decision to parole or to reparole a petitioner is within the Board's discretion, *White v. Pennsylvania*



Ulisky v. Pennsylvania Board of Probation and Parole

2005 | Cited 0 times | Supreme Court of Pennsylvania | October 18, 2005

Board of Probation and Parole, 833 A.2d 819 (Pa. Cmwlth. 2003), and that the decision to recommit a parolee within the presumptive range likewise is within the Board's discretion. Id.; 37 Pa. Code §75.2. For the reasons discussed, the Court affirms the order of the Board.

AND NOW, this 18th day of October, 2005, the order of the Pennsylvania Board of Probation and Parole is affirmed.

DORIS A. SMITH-RIBNER, Judge

1. Section 71.4(l) provides in pertinent part that "[a] revocation hearing shall be held within 120 days from the date the Board received official verification of the plea of guilty . at the highest trial court level.."

2. The Court's review of the Board's order is limited to determining whether the findings of fact are supported by substantial evidence and whether an error of law was committed or constitutional rights of the parolee were violated. See DeMarco v. Pennsylvania Board of Probation and Parole, 758 A.2d 746 (Pa. Cmwlth. 2000); Leese v. Pennsylvania Board of Probation and Parole, 570 A.2d 641 (Pa. Cmwlth. 1990).

