



McCrea v. Pennsylvania Board of Probation and Parole

2009 | Cited 0 times | Supreme Court of Pennsylvania | February 6, 2009

Submitted: December 12, 2008

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge, HONORABLE MARY HANNAH LEAVITT, Judge, HONORABLE JIM FLAHERTY, Senior Judge.

OPINION NOT REPORTED

MEMORANDUM OPINION

Orlando McCrea (Petitioner), an inmate at the state correctional institution at Graterford, petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) denying Petitioner administrative relief from the Board's decision and order mailed April 24, 2008 recommitting him as a convicted parole violator to serve eighteen months of backtime for his new criminal charges. Petitioner questions whether the Board's recommitment violated his constitutional rights, represented an error of law or was not supported by substantial evidence and whether the Board failed to give credit for time served solely under its warrant for the period of March 22 to March 31, 2003.¹

Petitioner was serving three years and six months to fifteen years for robbery and criminal conspiracy when he was paroled on November 17, 1994. The Board declared Petitioner delinquent on November 27, 1995 and recommitted him as a technical parole violator with a maximum expiration date of December 20, 2007. Petitioner was reparaoled July 25, 1999 but was arrested March 20, 2003 for driving under the influence and returned to SCI-Graterford on March 22, 2003. He was released March 31, 2003.

On August 9, 2006, Petitioner was arrested on numerous new criminal charges involving an assault on a minor. The Board was notified the same day and lodged a detainer warrant against Petitioner. On August 22, 2006, he posted bail and was detained solely on the Board's warrant. On February 29, 2008, he pleaded guilty to indecent assault without consent and to corruption of minors and was sentenced, respectively, to five years of probation and to two years of probation, to be served concurrently. All other charges were dismissed.

On April 3, 2008, the Board re-lodged its detainer and took custody of Petitioner and on April 18 recommitted him as a convicted parole violator to serve eighteen months of backtime, with a new maximum expiration date of April 28, 2016. Petitioner requested administrative review alleging that



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he was not credited for time served solely on the Board's warrant from August 9, 2006 to December 3, 2007.² By letter mailed June 17, 2008, the Board denied the petition:

Briefly, when you were released . on July 25, 1999, your maximum sentence date was December 20, 2007, which left 3,070 days remaining to serve on your original sentence. As a convicted parole violator, you automatically forfeited credit for all of the time that you spent on parole. See 61 P.S. §331.21a(a) [Act of August 6, 1941, P.L. 861, added by Section 5 of the Act of August 24, 1951, P.L. 1401, as amended ("Parole Act")].

This also means that you forfeited 375 days . from November 17, 1994 to November 27, 1995. The 375 days, when added to the 3,070 days, results in a total of 3,445 days of back time owed. However, the Board provided you with 498 days of back time served credit . for the period of August 9, 2006 to December 20, 2007. Accordingly, your 3,445 days of back time owed was reduced by 498 days, resulting in 2,947 days of back time that you owed.. You became available to begin serving your back time on April 3, 2008.. Adding 2,947 days (or 8 years, 24 days) to April 3, 2008, yields a new parole violation maximum date of April 28, 2016.

Response to Request for Administrative Review; Certified Record at 94 (citations omitted) (emphasis added).³

Petitioner now argues that the Board erred in recommitting him on April 18, 2008 as his original sentence was completed December 20, 2007. Citing *Massey v. Pennsylvania Board of Probation and Parole*, 509 Pa. 256, 501 A.2d 1114 (1985), Petitioner claims that the Board may not increase the term of the original sentence after it has been fully served. The Board responds that this claim is waived because Petitioner did not raise it at the parole revocation hearing or in his request for administrative relief, citing as support *DeMarco v. Pennsylvania Board of Probation and Parole*, 758 A.2d 746 (Pa. Cmwlth. 2000), and *Dear v. Pennsylvania Board of Probation and Parole*, 686 A.2d 423 (Pa. Cmwlth. 1996).

In the alternative, the Board argues that under the Parole Act it may recommit parolees for crimes committed on parole even if their new conviction occurs after the maximum date of the original sentence. Section 21.1 of the Parole Act, 61 P.S. §331.21a(a), provides in part: "(a) Convicted Violators. Any parolee . who, during the period of parole or while delinquent on parole, commits any crime punishable by imprisonment, for which he is convicted . or to which he pleads guilty . may, at the discretion of the board, be recommitment as a parole violator." The Board asserts that it is undisputed that Petitioner was on parole when he committed crimes punishable by imprisonment and that he was convicted.

The Court has reviewed the record and agrees with the Board that the issue regarding the Board's authority to recommit Petitioner was waived. He failed to raise the issue in his request for administrative review. See *Dear* (holding that issue not appealed to the Board is waived). Assuming



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arguing that the issue was properly preserved for review, the Court again agrees with the Board that because Petitioner committed new crimes while on parole the Board could recommit him as a convicted parole violator even though his conviction came after the maximum date on the original sentence had expired. Also, Massey does not apply because the issue there involved the Board's lack of authority to recommit a parolee as a technical parole violator and as a convicted parole violator for the same crime.

Accordingly, the Court concludes that the Board committed no error in recommitting Petitioner as a convicted parole violator pursuant to its recorded decision on April 18, 2008. The Board concedes, however, that it failed to credit Petitioner with time served from March 22 to March 31, 2003, and as a result the Court must vacate the Board's order in this respect and remand this matter for the Board to award appropriate credit and to recalculate the maximum expiration date.

DORIS A. SMITH-RIBNER, Judge

ORDER

AND NOW, this 6th day of February, 2009, the Court affirms the order of the Pennsylvania Board of Probation and Parole recommitting Petitioner as a convicted parole violator, but it remands this matter for the Board to award appropriate credit and to recalculate Petitioner's maximum expiration date in accordance with the foregoing opinion.

Jurisdiction is relinquished.

DORIS A. SMITH-RIBNER, Judge

1. The Board in its brief concedes that Petitioner is entitled to credit for this period of time served and requests remand by the Court so that it can credit this period. See Board's Brief, p. 9. Therefore, this issue is deemed resolved and will not be discussed.
2. Notwithstanding Petitioner's allegation, Petitioner posted bail on August 22, 2006. Petitioner alleges that he was transferred to county jail on December 3, 2007.
3. The Court's review of a Board decision is limited to determining whether constitutional rights were violated, errors of law were committed or findings of fact were not supported by substantial evidence. *Morgan v. Pennsylvania Board of Probation and Parole*, 814 A.2d 300 (Pa. Cmwlth. 2003).

