

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Andre Dantzler,	:	
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	:	
Petitioner	:	
	:	
v.	:	No. 56 C.D. 2019
	:	Submitted: July 5, 2019
Pennsylvania Board of	:	
Probation and Parole,	:	
	:	
	:	
Respondent	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WOJCIK

FILED: August 21, 2019

Andre Dantzler (Parolee) petitions for review of the decision of the Pennsylvania Board of Probation and Parole (Board) that denied his Petition for Administrative Review challenging the Board’s calculation of his maximum sentence expiry date following the revocation of his reparole as a convicted parole violator. We vacate and remand.

On May 3, 2013, Parolee was sentenced in the Montgomery County Common Pleas Court to a 1½- to 10-year term of imprisonment based on his guilty plea to an aggravated assault charge. Certified Record (C.R.) at 1. With an effective date of January 1, 2012, the minimum expiry date of Parolee’s sentence was calculated to be July 24, 2013, and the maximum expiry date was calculated to be January 24, 2022. *Id.* at 1-2.

On April 2, 2014, Parolee was released on parole to a detainer for pending Philadelphia County charges of possession of a firearm, firearms not to be carried without a license, and carrying firearms in public. C.R. at 3, 6. On October 17, 2014, Parolee pleaded guilty to possession of a firearm, he was sentenced to an 11½- to 23-month term of imprisonment with a consecutive 8-year probationary term, and he was immediately paroled from the new Philadelphia County sentence. *Id.* at 20.

On April 9, 2015, the Board imposed “Special Conditions of Parole,” requiring Parolee to enter the DRC Dual Diagnosis Halfway Back Program (DRC HBP) in Philadelphia for up to 90 days. C.R. at 11. On May 9, 2015, Parolee was transported to the hospital for a drug overdose and remained hospitalized until May 18, 2015. *Id.* at 20. On May 18, 2015, Parolee returned to the DRC HBP and was discharged, the Board issued a warrant to commit and detain him, and the Board imposed a new “Special Condition of Parole” requiring him to enter the Region 1 PVCCC¹ at the Kintock Erie in Philadelphia (Kintock PVCCC) until successfully discharged from that program. *Id.* at 12, 13, 20.

On May 29, 2015, Parolee waived his preliminary/detention hearing and right to counsel and admitted the violations of his parole conditions, namely, the drug overdose and his unsuccessful completion of the DRC HBP. C.R. at 14-15. The Board recommended that Parolee remain in the Kintock PVCCC to detain him pending completion of the program, and held the parole violation hearing in abeyance pending completion of the program. *Id.* at 16, 22. On July 23, 2015, the

¹ Section 6138(f) of the Prisons and Parole Code, 61 Pa. C.S. §6138(f), defines “Community corrections center,” in relevant part, as “[a] residential program that is supervised and operated by the [D]epartment [of Corrections.]”

Board released Parolee from his detention at Kintock PVCCC and cancelled its warrant to commit and detain him. *Id.* at 24.

On July 22, 2016, Parolee was arrested in Philadelphia and charged with aggravated assault, resisting arrest, simple assault, and recklessly endangering another person based on his attempt to avoid detention by parole agents for a positive drug test. C.R. at 31, 33-34, 37-41. On September 22, 2016, the Board ordered that Parolee be detained pending the disposition of the new criminal charges. *Id.* at 42.

On February 3, 2017, following a bench trial, Parolee was convicted of aggravated assault, simple assault, and resisting arrest. C.R. at 43. On May 5, 2017, Parolee was sentenced to an 11½- to 23-month term of imprisonment with a consecutive 3-year probationary term based on his convictions, and he was immediately paroled from the new Philadelphia County sentence. *Id.* at 71, 73.

On April 28, 2017, Parolee waived his right to a parole revocation hearing and to counsel based on his new convictions. C.R. at 44-45. On June 27, 2017, the Board issued a decision revoking Parolee's parole and recommitting him as a convicted parole violator to serve 24 months' backtime. *Id.* at 77-78. The Board recalculated his parole violation maximum expiry date to be December 21, 2024. *Id.* at 78. In recalculating Parolee's maximum expiry sentence, the Board gave him credit for 66 days that he served at Kintock PVCCC, from May 18, 2015, to July 23, 2015, and credit for 1 day that he served prior to the filing of the new Philadelphia charges, from July 21, 2016, to July 22, 2016. *Id.* at 63.

On July 7, 2017, Parolee submitted a *pro se* Petition for Administrative Review in which he sought, *inter alia*, credit on his original sentence for the period of time that he was housed at DRC HBP. C.R. at 81. On

December 18, 2018, the Board denied Parolee's request for credit, *id.* at 91, and Parolee then filed the instant petition for review.

The sole claim that Parolee raises on appeal² is that the Board erred in failing to give him credit on his original sentence for the period that he was housed at DRC HBP, or for even failing to conduct a hearing on whether or not credit should be granted for that period. Brief for Petitioner at 7, 14-16.³ The Board concedes that it erred in failing to hold an evidentiary hearing to determine whether Parolee is entitled to credit for the time that he was housed at DRC HBP. Respondent's Brief at 8.

As this Court has explained:

The law is well-settled that a parolee may be entitled to backtime credit for time spent in a residential facility if the inmate demonstrates that the residential

² Our review is limited to determining whether constitutional rights were violated, whether the adjudication was in accordance with law, and whether necessary findings were supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; *Miskovitch v. Pennsylvania Board of Probation and Parole*, 77 A.3d 66, 70 n.4 (Pa. Cmwlth. 2013), *appeal denied*, 87 A.3d 322 (Pa. 2014).

³ Parolee also contends that the Board erred in failing to grant him credit on his original sentence for "street time" that accrued from his release from the 2014 Philadelphia County detainer to the filing of the Board's Warrant to Commit and Detain. Brief for Petitioner at 7, 16-17. However, Parolee never sought credit for street time in the Petition for Administrative Review that he submitted to the Board, only seeking "Entitlement to Credit for Time Spent in Custody," including "while being in good standing for the period of 4-4-1[5] to 5-18-15 when he was at Drc (halfway house)." C.R. at 82. *See also id.* at 81 ("Petitioner was place[d] on house arrest from 6-3-14 until 12-18-15 during this time period he was place[d] in Drc (halfway house) on 4-4-15 until 5-18-15. Petitioner did not receive time credit for this time period."). Because Parolee did not raise a claim of credit for "street time" before the Board, it has been waived and may not now be raised for the first time in this appeal. Section 703(a) of the Administrative Agency Law, 2 Pa. C.S. §703(a); Pa. R.A.P. 1551(a); *Chesson v. Pennsylvania Board of Probation and Parole*, 47 A.3d 875, 878 (Pa. Cmwlth. 2012); *McCaskill v. Pennsylvania Board of Probation and Parole*, 631 A.2d 1092, 1094-95 (Pa. Cmwlth. 1993).

facility's characteristics are equivalent to incarceration. *Cox v. [Pennsylvania Board of Probation and Parole]*, 493 A.2d 680 (Pa. 1985); *see also Harden v. [Pennsylvania Board of Probation and Parole]*, 980 A.2d 691 (Pa. Cmwlth. 2009)[.] Notwithstanding, the Board failed to address [the parolee's] time spent at the [residential facility]. Further, since the Board did not hold a hearing, there is no record evidence on which the Board could or this Court can consider [the residential facility's] custodial nature. "We are therefore left with the need for a factual determination as to the nature of the [residential facility's] program and whether the restrictions on [the parolee's] liberty there were the equivalent of incarceration entitling him to credit for the time spent in the program." *Cox*, 493 A.2d at 683. Under circumstances in which the Board has not provided a sufficiently-developed record, remand is appropriate. *See Cox; see also McNally v. [Pennsylvania Board of Probation and Parole]*, 940 A.2d 1289 (Pa. Cmwlth. 2008). Thus, we remand this matter to the Board to conduct an evidentiary hearing to determine whether [the residential facility's] restrictions were equivalent to incarceration.

Kemp v. Pennsylvania Board of Probation and Parole (Pa. Cmwlth., No. 206 C.D. 2016, filed January 12, 2017), slip op. at 6-7 (footnote omitted).⁴ *See also id.*, slip op. at 7 n.8 wherein we stated:

In *Cox*, the Pennsylvania Supreme Court emphasized:

It is [the parolee's] burden, on remand, to show the specific characteristics of the . . . program that constituted restrictions on his liberty sufficient to warrant credit on his recomputed backtime, and persuade the Board of that fact. . . .

⁴ *See* Section 414(a) of this Court's Internal Operating Procedures, 210 Pa. Code §69.414(a) ("Parties may . . . cite an unreported panel decision of this court issued after January 15, 2008, for its persuasive value, but not as binding precedent.").

[T]he Board must help in providing a record which makes effective appellate review possible.

Id. at 683.

Accordingly, the Board's decision is vacated, and the matter is remanded to the Board for proceedings to make a factual determination as to the nature of DRC HBP's program, and whether the restrictions on Parolee's liberty there were the equivalent of incarceration thereby entitling him to credit for the period that he spent there in the program.

MICHAEL H. WOJCIK, Judge

