IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joel Gauche,	:	
Appellant	:	
	:	
v.	:	No. 200 C.D. 2015
	:	Submitted: May 29, 2015
Jerome Walsh, Superintendent,	:	
SCI Dallas, Pa. Department of	:	
Corrections, Michael Potteiger,	:	
Chairman, PA. Board of Probation	:	
and Parole	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: June 25, 2015

Joel Gauche (Gauche) appeals *pro se* the order of the Bucks County Court of Common Pleas (trial court) denying his petition for a writ of *habeas corpus*.[1] Gauche's petition sought immediate release from custody, claiming that he had

[1] Section 6503 of the Judicial Code states that "an application for habeas corpus to inquire into the cause of detention may be brought by or on behalf of any person restrained of his liberty within this Commonwealth under any pretense whatsoever;" however, "[w]here a person is restrained by virtue of sentence after conviction for a criminal offense, the writ of habeas corpus shall not be available if a remedy may be had by post-conviction hearing proceedings authorized by law." 42 Pa. C.S. §6503. Section 6502(a) provides that "[a]ny judge of a court of record may issue the writ of habeas corpus to inquire into the cause of detention of any person or for any other lawful purpose." 42 Pa. C.S. §6502.

served his maximum sentence and that Jerome Walsh, Superintendent, SCI Dallas, Pa. Department of Corrections (Department), and Michael Potteiger, Chairman, PA Board of Probation and Parole (Board), (collectively, Respondents) continue to illegally confine him. We affirm.

In July 1981, Gauche was sentenced by the trial court to a 10- to 20-year term of imprisonment based on his guilty pleas to a number of criminal charges including theft by unlawful taking and receiving stolen property. In September 2000, the trial court ultimately granted credit for 222 days for an effective date on this sentence of December 1, 1980.

In November 1981, Gauche was convicted by a jury of a number of charges including two counts each of rape and involuntary deviant sexual intercourse and one count of indecent assault. In July 1982, Gauche was sentenced by the trial court to a 10- to 20-year term of imprisonment to be served consecutive to the above 10- to 20-year sentence for an aggregate 20- to 40-year term of imprisonment.[2] In October 1990, Gauche pleaded guilty in Luzerne County to possession of drug paraphernalia and was sentenced to a consecutive 15-day term of imprisonment.

[2] Section 9757 of the Sentencing Code, 42 Pa. C.S. §9757, enacted by the Act of December 30, 1974, P.L. 1052, effective in 90 days, and renumbered by the Act of October 5, 1980, effective in 60 days, states:

> Whenever the court determines that a sentence should be served consecutively to one being then imposed by the court, or to one previously imposed, the court shall indicate the minimum sentence to be served for the total of all offenses with respect to which sentence is imposed. Such minimum sentence shall not exceed one-half of the maximum sentence imposed.

With an effective date of September 1, 1980, the Department calculated Gauche's controlling minimum date to be December 1, 2000, and his controlling maximum date to be December 16, 2020. (Certified Record (CR) Item 1, Exhibit F).

In July 1991, the Board granted Gauche constructive parole to his "detainer sentence only." (CR Item 1, Exhibit E at 1). The Board rescinded the constructive parole in June 2000. In December 2011, the Board denied Gauche parole from his sentence. (*Id.* at 2).

In August 2012, Gauche filed the instant petition alleging that the Department and the Board have erred in failing to credit the nine years that he was on constructive parole from July 10, 1991, to June 28, 2000, toward his first sentence so that he completed service of all sentences on July 25, 2011. Gauche alleges that as a result, the Department erred in aggregating his sentences and the Board lacks jurisdiction to keep him incarcerated so that his continued detention violates his double jeopardy and due process rights under the United States Constitution.[3] Gauche also argues that the Department's application of *Abraham v. Department of Corrections*, 615 A.2d 814 (Pa. Cmwlth. 1992),[4] to improperly aggregate his

[3] The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Section 1 of the Fourteenth Amendment provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law…." U.S. Const. amend. XIV, §1. The Double Jeopardy Clause was made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Double jeopardy protects an individual from being tried and convicted more than once for the same alleged crime. *Forbes v. Pennsylvania Department of Corrections*, 931 A.2d 88, 94 (Pa. Cmwlth. 2007), *aff'd*, 946 A.2d 103 (Pa. 2008), *cert. denied*, 555 U.S. 1192 (2009).

[4] In August 2009, the Department cited *Abraham* in disposing of Gauche's grievance regarding the correction of his sentence status document and written notification to the Board
(Footnote continued on next page…)

sentences, violates his *ex post facto* rights as well. The Department filed a motion to dismiss the petition without a hearing.

The trial court issued a memorandum and order denying and dismissing Gauche's petition, explaining that Section 9757 "**mandates automatic aggregation of sentences once a trial court imposes a consecutive sentence**," so the Department properly calculated his minimum date as December 1, 2000, and his maximum date as December 1, 2020. (Trial Court 8/20/13 Memorandum and Order at 2) (citations omitted and emphasis in original). The trial court also noted that "[w]here a petitioner is legally detained in prison he is not entitled to the writ of *habeas corpus*." (*Id.*) (citation omitted). Gauche then filed this appeal.[5]

(continued…)

following its refusal to grant him parole from his sentence. (*See* CR Item 1 at Exhibit H). The Department stated that it "presently aggregates all consecutive sentences in accordance with the Commonwealth Court's order in Abraham," and that "[a]ggregation is the adding together of consecutive sentences to form one new sentence with one effective date, one minimum date and one maximum date. Thus, none of your sentences are expired. They are still running as one sentence with one minimum and one maximum date." (*Id.*).

[5] While the trial court directed Gauche to file his appeal in the Superior Court, the Superior Court transferred the instant appeal to this Court because it was without jurisdiction to consider the merits of Gauche's claims. *See Gauche v. Walsh*, (Pa. Super. No. 2671 EDA 2013, filed December 30, 2014), slip op. at 4. The court explained that Gauche is not challenging the validity of his convictions or the legality of his sentences; rather, he argues that the Board failed to properly credit the time that he served on constructive parole and that the Department improperly aggregated his consecutive sentences. *Id.* The court held that "[s]uch challenges are within the original jurisdiction of the Commonwealth Court." *Id.* (citations omitted).

On appeal,[6] Gauche claims that: the trial court erred in denying *habeas corpus* relief and dismissing the petition without a hearing because: the alleged facts show that his sentence has expired when credit is given for the nine years he was on constructive parole; the Department's aggregation of his sentences and the Board's rescission of his constructive parole violates his double jeopardy and due process

[6] "Our standard of review of a trial court's order denying a petition for writ of habeas corpus is limited to abuse of discretion." *Rivera v. Pennsylvania Department of Corrections*, 837 A.2d 525, 528 (Pa. Super. 2003), *appeal denied*, 857 A.2d 680 (Pa. 2004). However, we agree with the Superior Court's determination that Gauche's petition should properly be considered as a mandamus action in this Court's original jurisdiction. A writ of *habeas corpus* "is an extraordinary remedy that is available after other remedies have been exhausted or are ineffectual or nonexistent." *Department of Corrections v. Reese*, 774 A.2d 1255, 1260 (Pa. Super.), *appeals denied*, 790 A.2d 1016, 1018 (Pa. 2001). It may be pursued where one seeks a reduction in sentence or challenges the legality of a sentence. *Wilson v. Pennsylvania Bureau of Corrections*, 480 A.2d 392, 393 (Pa. Cmwlth. 1984). It is not available to challenge the aggregation of two sentences that has the effect of delaying availability for parole. *Id.* A writ of *habeas corpus* proceeding cannot be used "to challenge the Board's recalculation of [an inmate's] maximum release date." *Reese*, 774 A.2d at 1261. As this Court has explained:

> [H]abeas Corpus is not available to challenge an action of the Board as by definition a parolee is subject to a legal sentence imposed by a court of competent jurisdiction of this Commonwealth and remains in the legal custody of the Commonwealth until the expiration of that sentence's maximum term. … [S]ince Gillespie is challenging neither the legality of his initial five to ten year sentence, the legality of his subsequent three to six month sentence, nor the fact that they are consecutive to each other, he has not made out a proper habeas corpus action.

Gillespie v. Department of Corrections, 527 A.2d 1061, 1064 (Pa. Cmwlth. 1987), *appeal denied*, 540 A.2d 535 (Pa. 1988) (citation omitted). The foregoing confirms the Superior Court's holding that this Court has original jurisdiction over Gauche's challenges to the Department's and the Board's actions regarding the aggregation of his sentences and calculation of his maximum sentence date. Nevertheless, as explained *infra*, Gauche is not entitled to any relief regardless of the court in which his claims are considered and resolved.

rights; and the application of *Abraham* to aggregate his sentences violates his *ex post facto* rights.

It is settled that the Board does not determine the minimum and maximum sentence dates; that is the Department's responsibility. *Gillespie*, 527 A.2d at 1065 (citing Section 9757 of the Sentencing Code, 42 Pa. C.S. §9757). The Board is bound by those dates and is prohibited from paroling an inmate prior to the minimum sentence date set by the Department. *Id*. at 1066.

The instant case is very similar to *Forbes*. In that case, Forbes was sentenced to serve 10 to 20 years in February 1981, with a minimum sentence date of February 23, 1990, and a maximum sentence date of February 23, 2000. In February 1982, he was sentenced on another conviction to serve 7 to 15 years consecutive to his first sentence. On February 23, 1991, the Board paroled Forbes from his first sentence to begin service on his second sentence. On February 23, 2000, Forbes completed serving his first sentence, and the Department and the Board informed him that he was only serving his second sentence, which would expire on February 23, 2006. On February 24, 2006, a day after he was to be released from his second sentence, the Department realized that the first sentence and the second sentence should have been aggregated, resulting in a total sentence of 17 to 35 years of confinement. As a result, the Department corrected Forbes' minimum and maximum sentence dates to May 21, 1997, and May 21, 2015, respectively.

Forbes petitioned this Court for a writ of mandamus to order the Department to vacate its decision to aggregate his sentences. We rejected Forbes' arguments that the Department's aggregation of his sentences violated his due

process and double jeopardy rights, explaining that because the sentences had been ordered to be served consecutively, the Department had an automatic and mandatory duty to aggregate the sentences pursuant to Section 9757 of the Sentencing Code, 42 Pa. C.S. §9757. *Forbes*, 931 A.2d at 92. We explained:

> Forbes argues that the Department is barred from performing its mandatory duty because performing it would violate Forbes' right to due process, which protects individuals from government conduct that shocks the conscience and from fundamental unfairness. However, the Department's correction of its error does not shock the conscience. Forbes does not allege that the Department deliberately misled Forbes to torment him. The Department simply made a mistake and did not realize it until the Department prepared for Forbes' release at the expiration of his erroneous maximum date. Moreover, it is not fundamentally unfair to allow the Department to correct its error and to require that Forbes serve the sentence he actually received….
>
> Forbes argues that the Department is barred from performing its mandatory duty because performing it would violate Forbes' double jeopardy rights, which protect individuals with a legitimate expectation of the finality of a sentence. We disagree.
>
> The constitutional prohibition against double jeopardy protects an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. *United States v. DiFrancesco*, 449 U.S. 117 [(1980)]. In this respect, double jeopardy preserves the finality of an original sentence. *Id.* Here, however, no court altered Forbes' original sentence; the Department simply re-calculated his sentence to correct an error….
>
> Moreover, once the Department aggregated Forbes' consecutive sentences and established a minimum sentence date in 1997, the Board's grant of parole in 1991 became a nullity because that grant of parole was beyond the authority of the Board. *See Commonwealth v. Tilghman*,

> [673 A.2d 898, 905 (Pa. 1996)] (stating that an order granting parole is a nullity where it is beyond the authority of the person issuing the order)…. [Forbes argues that the Board could not rescind the 1991 grant of parole without affording him the minimal due process guarantees of prior notice and an opportunity to be heard. *Johnson v. Pennsylvania Board of Probation and Parole*, [532 A.2d 50 (Pa. Cmwlth. 1987)]. However, the Board's order became a nullity, which meant that it never happened. There was nothing about which to give notice and hold a hearing].

Forbes, 931 A.2d at 94-95.

In this case, the Department was required to aggregate Gauche's consecutive sentences at the time that they were imposed because Section 9757 of the Sentencing Code, 42 Pa. C.S. §9757, was in effect at the time. As a result, Gauche's reliance on the predecessor statute to Section 9757 and the case law interpreting that provision are patently inapplicable to this instant matter. Additionally, because the correct minimum date of Gauche's aggregated sentence was December 1, 2000, the Board was without jurisdiction to constructively parole him in July 1991, and such Board action was a nullity and was properly vacated by the Board. *Forbes*.

As a result, Gauche's second sentence did not start to run at that time and he is not entitled to receive double credit on both sentences for the nine years that he purportedly served on constructive parole from the first sentence. Moreover, none of the Department's or the Board's actions in this regard violated Gauche's due process or double jeopardy rights; rather, they were required by the express provisions of statutory law and do not require the grant of any form of relief.

Accordingly, the trial court's order is affirmed.[7]

DAN PELLEGRINI, President Judge

[7] Finally, we adopt the Superior Court's disposition of Gauche's *ex post facto* claim:

> The Pennsylvania Supreme Court has stated:
>
> > A law violates the *ex post facto* clause of the United States Constitution if it (1) makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) aggravates a crime, or makes it greater than it was when committed; (3) changes the punishment, and inflicts greater punishment than the law annexed to the crime when committed; or (4) alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense in order to convict the offender.
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> *Commonwealth v. Allshouse*, 36 A.3d 163, 184 (Pa. 2012)[, *cert. denied*, ___ U.S. ___, 133 S.Ct. 2336 (2013)] (citation omitted).
>
> Here, the sentencing statute was passed on [December 30, 1974, and became effective in 90 days and was renumbered] on October 5, 1980 and became effective 60 days later. *See* 42 Pa. C.S.A. [sic] §9757. Upon review of the record, [Gauche]'s convictions resulted from two separate bills of criminal information as filed by the Commonwealth. In both criminal matters, [Gauche] was arrested, charged, convicted and, most importantly, sentenced *after* Section 9757 became law. As such, there was no *ex post facto* violation.

Gauche, slip op. at 6 (emphasis in original).

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O R D E R

AND NOW, this 25th day of June, 2015, the order of the Court of Common Pleas of Bucks County, dated August 20, 2013, at No. 2012-07811-25, is affirmed.

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DAN PELLEGRINI, President Judge