

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH WISE : CIVIL ACTION
: :
v. : :
: :
PENNSYLVANIA BOARD OF PROBATION :
AND PAROLE, et al. : NO. 97-4812

MEMORANDUM AND ORDER

BECHTLE, J.

APRIL , 1998

Presently before the court in this pro se habeas corpus action is petitioner Joseph Wise's ("Petitioner") objections to the magistrate judge's report and recommendation. Upon consideration of the petition for writ of habeas corpus ("Petition"), the report and recommendation, the objections thereto, the Commonwealth of Pennsylvania's ("Commonwealth") response, and the record, the court will deny the Petition without an evidentiary hearing.¹

1. The court has jurisdiction pursuant to 28 U.S.C. § 2254 which provides, in pertinent part:

[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a). The court reviews the magistrate judge's Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(C) which provides that a

judge shall make a de novo determination of those portions of the report or specific proposed findings or recommendations to which objection is made. . . . [and] may accept, reject, or modify, in whole or in part, the
(continued...)

I. BACKGROUND

Following a jury trial before the Court of Common Pleas of Philadelphia County in December 1979, Petitioner was convicted of robbery, conspiracy and possessing an instrument of crime. He was sentenced to serve seven and one-half to fifteen years imprisonment. Petitioner appealed his conviction. The Pennsylvania Superior Court affirmed the verdict and the Pennsylvania Supreme Court denied allocatur.

On January 21, 1990, Petitioner was paroled and released from the State Correctional Institute at Huntingdon. On September 26, 1992, he was arrested on drug-related charges. He was declared delinquent effective September 29, 1992 for failure to report his arrest. After his arraignment, Petitioner was released pending an October 1, 1992 hearing. Petitioner failed to appear for the hearing, and a bench warrant was issued for his arrest. Petitioner was also instructed to report to the Tioga sub-office on October 6, 1994. He failed to report on that date or contact the office. The drug-related charges were subsequently dismissed.

On January 4, 1993, Petitioner was again arrested on drug-related charges. A nolle prosequi was entered on those charges. After the charges were dismissed, Petitioner was not in criminal violation of his parole. However, because of the other violations, Petitioner remained in technical violation of his parole. On August 16, 1994, Petitioner was arrested in

1. (...continued)
findings or recommendations made by the magistrate.

Pennsylvania on a parole detainer of the Pennsylvania Board of Probation and Parole (the "Board") for violating the terms of his parole. He was placed back into the state correctional system, and housed at SCI-Graterford. On August 25, 1994, a preliminary detention hearing was held to determine whether Petitioner had committed the parole violations of which he was accused. Id. The Board's decision was to detain Petitioner pending the disposition of criminal charges and to recommit him to a state correctional institute as a technical parole violator² to serve ten months back time.³ (Board Dec. dated 12/15/94, Pet. Ex. A.)

Petitioner's original maximum release date was June 26, 1997. On August 16, 1994, when he returned to prison, there were four years, eight months and twenty-seven days remaining to be served on his sentence. However, because of his delinquency (the time spent outside of prison between Petitioner's September 29, 1992 violation of parole and his August 16, 1994 arrest), he also had an additional one year, ten months and sixteen days of his

2. A "technical parole violator" is a parolee who "during the period of parole, violates the terms and conditions of his parole, other than by the commission of a new crime of which he is convicted and found guilty. . . ." 61 Pa. Stat. Ann. § 331.21a.

3. Backtime is defined as that part of an existing judicially imposed sentence that the Board of Probation and Parole directs the parolee to complete after determining in a civil administrative hearing that the parolee has violated the terms of his or her parole. Brown v. Pennsylvania Bd. of Probation and Parole, 668 A.2d 218, 220 (Pa. Commw. 1995). The applicable ranges for violation of special conditions of parole are set forth at 37 Pa. Adm. Code § 75.4.

sentence remaining. Therefore, his maximum confinement date was recomputed to May 12, 1999.

On April 29, 1996, Petitioner was listed for reparole review. On January 2, 1997, Petitioner was denied reparole.⁴ Petitioner applied to the Supreme Court of Pennsylvania for an issuance of a writ of habeas corpus. On May 14, 1997, the Supreme Court of Pennsylvania denied the request.

Petitioner is presently incarcerated at the State Correctional Institute at Huntingdon, Pennsylvania. He filed his Petition pursuant to 28 U.S.C. § 2254, alleging that the Board violated his constitutional rights by failing to parole him. The action was referred to United States Magistrate Judge Smith who recommended that the court deny the Petition without an evidentiary hearing. Petitioner filed objections to the report and recommendation. His objections were that the report only addresses two of the five issues⁵ he raised in his Petition, the

4. The reasons for denial of reparole were: poor prison adjustment, substance abuse, assaultive instant offense, weapon involved in commission of offense (loaded shotgun), need for counseling, failure to participate in and benefit from a substance abuse program, and an unfavorable recommendation from the Department of Corrections. (Bd. Dec. 12/97 Ex. R-13.)

5. The five issues Petitioner raises are:

1. Can a technical parole violator be reviewed where the legislature did not amend Title 61 or 37?

2. Was review invalid and unconstitutional where Petitioner was a technical parole violator?

3. Was it unconstitutional for the Board to consider events that took place 23 years earlier when denying Petitioner's reparole?

(continued...)

magistrate judge improperly relied on case law relating to convicted parole violators and the magistrate judge incorrectly determined that the Board did not violate the Ex Post Facto Clause and Petitioner's right to due process. (Pet'r Obj. at 3.) Petitioner alleges that the Board improperly reviewed his past criminal record in its reparole determination. He argues that because he is a technical parole violator, factors that were not considered in the original parole determination cannot be considered in the decision to grant or deny reparole. Id.⁶

II. DISCUSSION

Under Pennsylvania law, the sentence for a criminal offense is the maximum term imposed by the court. The minimum term merely sets the date prior to which a prisoner cannot be paroled. Brown v. Pennsylvania Bd. of Probation and Parole, 668 A.2d 218, 220 (Pa. Commw. 1995). Therefore, if a prisoner is sentenced to seven and one-half to fifteen years, the actual sentence is

5. (...continued)

4. Did Governor Casey's administration have jurisdiction over Petitioner when he received a green sheet [recommitment order] on October 19, 1994 to serve 10 months back time?

5. Does a technical parole violator have liberty interests and due process?

(Pet'r Obj. at 3.)

6. In his objections to the magistrate judge's report and recommendation, he also raises for the first time an Equal Protection argument. (Pet'r Obj. at 5.) However, he offers no facts to support the argument and the court can see no support therefore. The court will deny and dismiss this claim.

fifteen years. However, after seven and one-half years, that prisoner may petition the Board for parole.

The decision to grant, rescind or revoke parole is one of administrative, not judicial, discretion. This power is vested exclusively in the Board and the Board has broad discretion to determine if and when a prisoner shall be released on parole.⁷ Rivenbark v. Pennsylvania Bd. of Probation and Parole, 501 A.2d 1110 (Pa. 1985). Prisoners have no right to parole or reparole, but only the right to petition for parole at the expiration of the minimum term. Brown v. Pennsylvania Bd. of Probation and Parole, 668 A.2d 218, 220 (Pa. Commw. 1995). Parole is "a favor granted upon a prisoner by the state as a matter of grace and mercy." Weaver v. Pennsylvania Bd. of Probation and Parole, 688 A.2d 766, 769 (Pa. Commw. 1997). This favor is only granted to prisoners who have shown the probable ability to function as a law abiding citizen in society. Id.

Parole is not a release from sentence, but rather, a continuation during which the prisoner serves his sentence as the subject of society's rehabilitation efforts under supervision. Commonwealth v. Homoki, 621 A.2d 136 (Pa. Super. 1993). Once

7. Under Pennsylvania law, the Board may review any relevant factors in determining whether to grant parole. Those factors include, but are not limited to: the extent of risk to the community, the nature of the offense, criminal history, potential for employment, emotional and family stability, adjustment to prison, recommendations of the trial judge, district attorney, and each warden or superintendent, and the written personal statement or testimony of the victim or the victim's family. Johnson v. Pennsylvania Bd. of Probation and Parole, 532 A.2d 50 (Pa. Commw. 1987); 61 Pa. Stat. Ann. § 331.19.

paroled, a prisoner may serve the remainder of his sentence in society, or if he commits a violation of his parole, may be recommitted to prison to serve the remainder of the sentence. A prisoner who is recommitted following a parole violation loses his status as a parolee and has no right to be automatically released on parole after the expiration of his backtime mandated by the Board. Krantz v. Pennsylvania Bd. of Probation and Parole, 698 A.2d 701, 703 (Pa. Commw. 1997)(reparole is not automatic upon completion of backtime, but is subject to Board review); see also Brown v. Pennsylvania Bd. of Probation and Parole, 668 A.2d 218 (Pa. Commw. 1995). Rather, upon recommitment, a reparole eligibility date is established, and once backtime has been served, the violator has the right to petition the Board for reparole. Id. After recommitment, the backtime serves the same purpose as the minimum portion of the original sentence--it is the date before which the prisoner cannot petition for reparole.

A. The Parole Act

The Parole Act, 61 P.S. § 331.21a(b), governs parole violations. That statute provides that technical parole violators must be given credit against the maximum sentence "for time served on parole in good standing but with no credit for delinquent time. . ." It further provides that the prisoner may be reentered to serve the remainder of his original sentence or

sentences.⁸ 61 Pa. Stat. Ann. §331.21a(b). The Board recomputes the remaining sentence from the time of the delinquent conduct until the end of the unexpired period of the maximum sentence imposed. While the technical violator is given credit for time spent on parole before the violation occurred, no credit is given for the period of time the prisoner was delinquent on parole, it must be served. The violator is required to serve that remainder and is given credit for the time spent in prison from the date he is taken into custody on the Board's warrant. After serving the backtime, the prisoner is subject to reparole whenever, in the Board's opinion, the best interest of the prisoner justifies or requires reparole, and the interests of the Commonwealth will not be injured. Id. Petitioner claims that the Board's failure to reparole him after he served the mandated backtime is an ex post facto law and a violation of his right to due process. The court disagrees.

B. Ex Post Facto Laws

Section Ten of Article One to the United States Constitution provides that no State shall pass any ex post facto law. U.S. Const. art. I., § 10, cl. 1. Any law that makes punishment of a crime more burdensome than when it was committed is prohibited as ex post facto. Dobbert v. Florida, 432 U.S. 282 (1977).

8. In contrast, a convicted parole violator cannot receive credit against his or her maximum sentence for time spent while on parole. Houser v. Pennsylvania Bd. of Probation and Parole, 675 A.2d 787, 790 (Pa. Commw. 1996).

In the context of parole, the United States Court of Appeals for the Third Circuit has held that if parole guidelines are applied without substantial flexibility, they constitute laws within the meaning of the ex post facto clause. United States ex rel. Forman v. McCall, 709 F.2d 852, 862 (3d Cir. 1983). It is unclear whether Petitioner is arguing that the law changed or the Board changed its internal policy. Petitioner has cited no law that has changed, and the court is aware of no change in the law. As for the Board's policy, the Board adheres to no formal guidelines in making its parole determinations. It has complete discretion to parole or reparole a prisoner "whenever, in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby." 61 Pa. Con. Stat. Ann. § 331.21. Therefore, Petitioner's claim of newly established criteria is insufficient to state a claim. Jubilee v. Horn, 959 F. Supp. 276, 282 (E.D. Pa. 1997).

Petitioner appears to be under the mistaken belief that a recommitment order and order to serve backtime is akin to a new sentence to be served, after which he should be released. He also seems to believe that the recomputation of his sentence is akin to changing the standards for parole and/or giving him a longer period of incarceration than he was sentenced to serve. Petitioner also appears to argue that the Board's consideration of past criminal history is in violation of the ex post facto clause. Petitioner has not been subject to a longer period of

incarceration. While the maximum release date has changed, the actual number of days Petitioner will serve under his sentence has not been increased. He has stated no valid claim under the ex post facto clause. The court will deny and dismiss this claim.

C. Due Process

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. To establish a violation thereof, Petitioner must allege the deprivation of a protected liberty or property interest. The Constitution does not provide a liberty interest in parole. Further, in Pennsylvania, a prisoner has no liberty interest in parole or reparole. Reider v. Commonwealth, 514 A.2d 967, 971 (Pa. Commw. 1986). See also Rodgers v. Parole Agent SCI-Frackville, 916 F. Supp. 474, 476-77 (E.D. Pa. 1996); Hayes v. Muller, Civ. No. 96-3420, 1996 WL 583180 (E.D. Pa. Oct. 10, 1996)(stating that even if the Board unconditionally recommends a date, there is no constitutionally protected liberty interest in being released on that date.) The court finds that the Board's review and decision was neither arbitrary nor capricious. The Board considered permissible factors and determined that Petitioner was not a good candidate for reparole. The role of judicial review is only to "insure that the Board followed criteria appropriate, rational and consistent with the statute and that its decision is not based on impermissible

considerations."⁹ Block v. Potter, 631 F.2d 233, 236 (3d Cir. 1980).

The Board has the power to reparole or recommit a prisoner "in the same manner and with the same procedure as in the case of an original parole." 61 Pa. Stat. Ann. § 331.21. Contrary to Petitioner's assertion, this does not mandate that the Board must rely on the exact criteria it relied upon in its decision to parole the prisoner. It may rely on any factors that indicate whether release is in the best interests of the prisoner and society. If as Petitioner contends, the Board was required to rely upon the same criteria when considering reparole as it did when considering the prisoner's parole, the Board could never consider the reasons for which the prisoner was recommitted. The reason for recommitment is certainly a factor to be weighed in determining whether to reparole a recommitted prisoner.

The Board did not rely on impermissible considerations, and did not abuse its discretion. It did not act in an arbitrary or capricious manner. Block, 631 F.2d at 233. Therefore, Petitioner's right to substantive due process was not violated and the court will deny and dismiss this claim.

9. Such impermissible considerations include race, political beliefs, religion, and frivolous criteria that bears no relation to the purpose of parole, such as eye color. Bradley v. Dragovich, Civ. No. 97-7660, 1998 WL 150944 at *3 (E.D. Pa. Mar. 27, 1998).

D. Petitioner's Five Issues

Although each of the five issues Petitioner raised were covered in the body of this memorandum, the court will now individually address the issues.

1. Can a technical violator be reviewed where the legislature did not amend Title 61 or 37?

Yes. Upon recommitment, Petitioner was no longer a parolee, he was incarcerated to serve the remainder of his sentence. The ten months of backtime was not a new sentence to be served after which he would be released. Rather, it was the minimum time Petitioner must serve on his remaining sentence before the Board considers reparole.

2. Was review invalid and unconstitutional where Petitioner was a technical parole violator?

No. Petitioner lost his status as a parolee upon recommitment. Petitioner was not entitled to be released after he had completed the backtime. The Board has absolute discretion to parole and reparole prisoners. Review is mandatory before parole and reparole. Petitioner has not shown that the Board acted in any unconstitutional manner in denying his reparole.

3. Was it unconstitutional for the Board to consider events that took place 23 years earlier in denying Petitioner's reparole?

No. The Board has discretion to decide what factors are relevant in determining whether to parole or reparole a prisoner. Generally, it may consider any factor that would help it determine whether "the best interest of the prisoner justifies

parole, and the interests of the Commonwealth will not be injured." 61 Pa. Stat. Ann. § 331.21a. That determination may include a review of Petitioner's entire criminal history, as well as his general character.

4. Did Governor Casey's administration have jurisdiction over Petitioner when he received a green sheet [recommitment order]?

Yes. Petitioner was a parolee in violation of the terms of his parole. The Board may rescind parole for both technical and criminal violations.

5. Does a technical parole violator have liberty interests and due process?

Petitioner does not have a liberty interest in reparole. He is entitled to due process, and received due process. As explained above, neither have been violated in this case.

III. CONCLUSION

For the above reasons, the court will deny the petition for habeas corpus without an evidentiary hearing.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH WISE	:	CIVIL ACTION
	:	
v.	:	
	:	
PENNSYLVANIA BOARD OF	:	
CORRECTIONS, <u>et al.</u>	:	NO. 97-4812

ORDER

AND NOW, TO WIT, this day of April, 1998, upon consideration of petitioner Joseph Wise's petition for a writ of habeas corpus, the magistrate's report and recommendation, the objections thereto, the Commonwealth of Pennsylvania's responses, and the record, IT IS ORDERED that said petition is DENIED without an evidentiary hearing.

LOUIS C. BECHTLE, J.