IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-769-2011; CR-1592-2011**
	:	
vs.	:	
	:	
	:	
KERI S. BAILEY,	:	
Defendant	:	

OPINION AND ORDER

This matter came before the Court on September 24, 2012 for a conference on Defendant's Post Conviction Relief Act (PCRA) petition, in which Defendant seeks an order imposing credit for time served, directing the Department of Corrections to lift detainers, and closing out case CR-1592-2011 as the maximum term expired on May 23, 2012. The relevant facts follow.

On January 11, 2012, Defendant entered a guilty plea to retail theft, a felony of the third degree, at CR-769-2011 and a consolidated count of access device fraud, a misdemeanor of the third degree, at CR-1592-2011. The plea agreement called for a six month minimum sentence for retail theft and a one month minimum sentence for access device fraud to be served concurrently to each other and to Defendant's state parole violation.[1] The Court sentenced Defendant to incarceration in a state correctional institution for six (6) months to three (3) years for retail theft and a concurrent one (1) month to one (1) year for access device fraud. The Court gave Defendant credit for time served from May 23,

[1] At the time of Defendant's guilty plea and sentence, she was serving a nine month parole violation sentence in another case for drinking and not being at her proper address. Transcript, January 11, 2012, at p. 5. The Court does not know when Defendant began serving this nine-month set back for technical violations of parole.

2011 to January 10, 2012.

On or about May 24, 2012, Defendant filed a motion for reconsideration of sentence nunc pro tunc, in which she claimed the Department of Corrections was failing to acknowledge her credit for time served and a detainer was lodged against her; therefore she wanted her state sentence vacated and to be "resentenced to serve county time in a state prison nunc pro tunc."[2] The Court summarily denied her motion because it no longer had jurisdiction to modify or rescind it pursuant to 42 Pa.C.S.A. §5505. The Court noted, however, that it had given Defendant credit for time served; the credit did not apply to her parole "set-back;" and the Court had no authority over Defendant's parole proceedings.

On July 10, 2012, Defendant filed her "Post Conviction Relief Application." In her petition, Defendant asserts that her plea contract was breached because the Department of Corrections removed her credit for time served and lodged detainers against Defendant in the above-captioned cases. She sought the following relief: (a) an order imposing credit for time served; (b) an order for the Department of Corrections to lift detainers on case CR-769-2011; and (c) an order closing out case CR-1592-2011 as the maximum term expired on May 23, 2012. Since this was Defendant's first PCRA petition, the Court appointed counsel, gave counsel time within which to file either an amended PCRA petition or a Turner/Finley letter, and scheduled a conference for September 24, 2012. On September 21, 2012, appointed counsel filed a motion to withdraw as counsel that contained his Turner/Finley letter as an exhibit.

[2] Since Defendant's maximum sentence for retail theft was three years, the court could not simply vacate her state sentence and declare that Defendant was serving a county sentence. See 42 Pa.C.S.A. §9762(b)(2).

In his Turner/Finley letter, counsel explained that Defendant is not entitled to relief because she was told that her sentence would not be concurrent to any sentence she received for her parole violation and she elected to plead guilty anyway.

After an independent review of the record, the Court agrees with defense counsel's assessment that Defendant is not entitled to the relief requested in this PCRA proceeding.

By law, when a convicted parole violator's set back time and the new sentence are to be served at a State correctional institution, the sentences must be served consecutively, with the back time being served first. See 61 Pa.C.S.A. §6138 (a)(5)(i). Prior to accepting the plea and imposing sentence, however, the Court informed Defendant that her guilty plea to these new charges would result in a second parole violation and that the parole violation sentence would not be concurrent to her sentences for retail theft and access device fraud. Transcript, at pp. 4-5. Defendant stated that she understood. Transcript, at p. 6. In fact, during the discussion of this issue Defendant stated, "They gave me nine months for a violation for drinking and not being at my proper address. So with this, it's going to be an additional." Transcript, at p. 5. She also indicated that she had a sufficient amount of time to speak with her attorney about the consequences of pleading guilty; her plea was being giving in a knowing, intelligent and voluntary manner; and she did not have any questions. Transcript, at p. 8. Therefore, based on the record in this case, the Court finds that Defendant entered her guilty plea knowing that her sentence in the above-captioned cases would not run concurrently to the parole set back she would receive as a result of these new convictions.

The Court also questions whether the Department of Corrections removed her

credit for time served on these cases or whether the Department merely removed Defendant's street time on her parole case. When a convicted parole violator is recommitted, he or she is not entitled to credit for the time at liberty on parole. 61 Pa.C.S.A. §6138(a)(2). What that generally means is that Defendant's street time would be removed and her maximum date would be extended for that amount of time.

Even if the Department removed Defendant's credit for time served in this case, Defendant would not be eligible for relief through this PCRA petition. The Court already directed that Defendant receive credit for time served from May 23, 2011 to January 10, 2012 in its guilty plea and sentencing order dated January 11, 2012. If the Department is not following that order, Defendant's remedy would be to file a mandamus action in the Commonwealth Court to force the Department to comply with the Court's order. See Oakman v. Department of Corrections, 903 A.2d 106 (Pa. Cmwlth. 2006).

Based upon statements made at a separate violation hearing in CR-214-2006, the Court believes that Defendant received a one-year set back on her state parole case. See Commonwealth v. Bailey, CR-214-2006, Order dated April 5, 2012 (a copy of which is attached). Pursuant to 61 Pa.C.S.A. §6138(a)(5)(i), Defendant would serve this sentence first, beginning on or about January 12, 2012. Case CR-769-2011 would be a detainer against Defendant at least until that back time is served. After the back time is served and with the credit for time served in the 2011 cases, she should be eligible for parole. Parole, however, "is not a right, but a matter of grace lying solely within the discretion of the Board." Bowman v. Pa. Bd. of Prob. & Parole, 709 A.2d 945, 948 (Pa. Cmwlth. 1998). Since Defendant is still serving her back time, she is not entitled to an order directing the

Department to lift the detainer against her.

Finally, Defendant seeks an order closing out case number CR-1592-2011. Quite frankly, the Court does not understand why such an order would be necessary in this case. While Defendant asks that CR-769-2011 be removed as a detainer, she does not make a similar request with respect to CR-1592-2011; therefore, the inference the Court is drawing from that fact is that the Department is not treating that case as a detainer. CR-1592-2011 is totally concurrent to CR-769-2011 and should not be affecting Defendant's maximum date, as that date should be controlled by the maximum on her parole case and the three year maximum sentence imposed in CR-769-2011. Nevertheless, since the maximum sentence imposed in CR-1532-2011 was one year, parole authority on CR-1592-2011 would be with the Court. 42 Pa.C.S. §9775. At the time Defendant entered her guilty plea and the Court imposed sentence, Defendant had more than enough credit for time served to satisfy her minimum sentence. The Court would be willing to amend its sentencing order to parole Defendant from case CR-1592-2011. The Court, however, is not certain what effect such an order would have on the Department's computation of Defendant's maximum sentences in all her cases.

If Defendant's disagreement is with the Department's calculation of her maximum date in case CR-1592-2011, Defendant's remedy is through a mandamus action in the Commonwealth Court. See McCray v. Dep't. of Corr., 582 Pa. 440, 872 A.2d 1127, 1130-31 (2005)("Where discretionary actions and criteria are not being contested, but rather the actions of the Department in computing an inmate's maximum and minimum dates of confinement are being challenged, an action for mandamus remains viable as a means for

examining whether statutory requirements have been met").

Based on the foregoing discussion, the following order is entered:

O R D E R

AND NOW, this ___ day of November 2012, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of this Court's intention to issue an amended sentencing order paroling Defendant from case 1592-2011, but in all other respects to dismiss Defendant's petition without holding an evidentiary hearing. Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an order amending its sentencing order, but otherwise dismissing the petition.

In light of the Court's intent to amend its sentencing order to parole Defendant from case 1592-2011, the Court is constrained to deny defense counsel's motion to withdraw.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
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Work file