

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :
 :
 vs. : NO. 413 CR 2016
 :
 ZACHARY MICHAEL PENICK, :
 Defendant :

Criminal Law - Imposition of Consecutive Sentences on Separate and Unrelated Criminal Offenses Occurring while Defendant was on State Parole - Automatic Aggregation - Failure to Post Bail on New Criminal Charges - Time Spent in Custody on State Detainer - Allocating Credit for Time Spent in Custody by and between Original State Sentence and New Criminal Charges

1. By statute, a criminal defendant is entitled to credit for all time spent in prison on the offense for which he is sentenced. 42 Pa.C.S.A. § 9760(1).
2. Time credit on a sentence may only be granted when it has not already been credited toward another sentence. The "operative rule" of cases addressing credit for time served is that a defendant should receive credit only once for time served before sentencing.
3. When a sentencing court imposes a consecutive sentence, aggregation with other consecutive sentences is "automatic and mandatory" under Section 9757 of the Sentencing Code. 42 Pa.C.S.A. § 9757.
4. When a criminal defendant is incarcerated on both a state detainer issued by the Pennsylvania Board of Probation and Parole ("Board"), and on new criminal charges, all time spent in confinement must be credited to either the sentence the defendant receives on the new criminal charges or to the original state sentence for which the detainer was issued.
5. All time served by a state parole violator while awaiting disposition on new criminal charges must be credited to the original state sentence if the defendant remains in custody solely on a Board detainer. If the defendant is being held in custody on both a Board detainer and for failing to satisfy for any reason the requirements of bail on his new criminal charges, credit for time served is to be applied

first to the new sentence by the sentencing court and, if the new sentence is shorter than the time served, any unused balance is to be applied to the original state sentence.

6. In the instant proceedings, Defendant was incarcerated in Northampton County on a detainer for a parole violation issued by the Pennsylvania Board of Probation and Parole. Following his incarceration on this state detainer and having failed to post bail on the charges filed in Northampton County, he was given a credit of 60 days for time served on a 30 to 60 day sentence imposed in Northampton County consecutive to his original state sentence. Seven days later he was sentenced in Lehigh County to a sentence of not less than one month nor more than 12 months imprisonment consecutive to his state sentence, which sentence expressly provided that Defendant be given credit "as required by law, for all time spent in custody, as a result of these criminal charges for which sentence is imposed." As of September 19, 2017, the date on which Defendant was sentenced in Carbon County on two separate offenses, which sentences ran consecutive to one another and consecutive to any existing sentence Defendant was then serving, Defendant had been in prison since May 7, 2017 when he was first detained on the Board detainer, a total of 136 days. Because Defendant had been given a time served 60 day credit against the sentence he received in Northampton County, was entitled to have any unused credit applied to the sentence he received in Lehigh County since he had failed to meet the bail conditions on the underlying Lehigh County charges, and had yet to be paroled on the Lehigh County sentence at the time of his sentencing in Carbon County four days after his sentencing in Lehigh County, Defendant was entitled to no additional credit against the sentence he received in Carbon County.

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 Brian B. Gazo, Esquire Counsel for Commonwealth
 Assistant District Attorney

 Eleanor M. Breslin, Esquire Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. - June 5, 2018

The question presented in this case is how credit for Defendant's time spent in prison awaiting disposition on three separate and unrelated criminal offenses, each occurring in a different county on different dates while Defendant was on state parole, should be allocated among the sentences Defendant received on these new charges, where the entire time Defendant was in prison awaiting disposition, he was also incarcerated on a detainer for a parole violation issued by the Pennsylvania Board of Probation and Parole ("Board").

PROCEDURAL AND FACTUAL BACKGROUND

On February 3, 2016, the above-named defendant, Zachary Michael Penick, was charged, *inter alia*, with accidents involving damage to attended vehicle or property,¹ a misdemeanor

¹ 75 Pa.C.S.A. § 3743.

of the third degree, and driving while operating privilege is suspended or revoked,² his sixth or subsequent violation of this offense, for an incident which occurred on December 27, 2015. Bail was set at \$500.00, unsecured. When Defendant failed to appear for a pretrial conference scheduled for March 27, 2017, a bench warrant was issued which resulted in the May 10, 2017, placement of a detainer against Defendant, who was then being held in the Northampton County Prison on a state parole detainer. (N.T., 9/19/17, pp.32-33).

On September 19, 2017, Defendant pled guilty to the two Vehicle Code violations identified in the preceding paragraph and was immediately sentenced at his request. (N.T., 9/19/17, pp.29-30). On the misdemeanor offense, Defendant was sentenced to a period of imprisonment of not less than sixty days nor more than one year, and on the summary offense, to a period of imprisonment of not less than thirty days, the mandatory minimum required as a six-time repeat offender,³ nor more than six months. These sentences ran consecutive to one another and consecutive to any existing sentence Defendant was then serving. (N.T., 9/19/17, p.31).

Before Defendant's sentencing in Carbon County, he was sentenced in Northampton County on September 8, 2017, to a

² 75 Pa.C.S.A. § 1543(a).

³ 75 Pa.C.S.A. §6503(a.1).

mandatory period of imprisonment of not less than thirty nor more than sixty days on another conviction of driving under suspension, for which he was given a credit of sixty days' time served and maxed out.⁴ Additionally, on September 15, 2017, Defendant was sentenced in Lehigh County to a period of imprisonment of not less than one nor more than twelve months for making false reports to law enforcement authorities, 18 Pa.C.S.A. § 4906 (b)(2), a misdemeanor of the third degree, for which Defendant claimed he was given a credit of seventy days. (N.T., 9/19/17, pp.11-12, 36-37; N.T., 1/29/18, Defendant Exhibit Nos.1, 2). The sentences Defendant received in Northampton and Lehigh Counties were each made consecutive to the same state sentence ("original sentence") for which he had earlier been confined in Northampton County on a state parole detainer.

At the time of Defendant's sentencing in Carbon County he had not yet been paroled on the Lehigh County sentence. (N.T., 9/19/17, p.37). Because of the credit Defendant received against the sentences imposed in Northampton and Lehigh Counties and the fact that Defendant had not been paroled on his Lehigh County sentence before being sentenced in Carbon County, and because the sentences in Lehigh and Carbon Counties ran

⁴ On this same date, Defendant was also sentenced in Northampton County to twelve months' probation, again for a violation of 75 Pa.C.S.A. § 3743(a) (Accidents involving damage to attended vehicle or property), a third-degree misdemeanor offense.

consecutive to one another and aggregated, Defendant was given no credit against his Carbon County sentence. (N.T., 9/19/17, pp.37-38).

On October 2, 2017, Defendant filed a Post-Sentence Motion to Reconsider and/or Modify ("Motion") the sentence imposed in Carbon County on the basis that the sentences in Northampton and Lehigh Counties did not grant Defendant immediate parole upon Defendant serving the minimum term of each sentence, which Defendant alleged was the intention of the sentencing court in each instance; that he then had pending in Northampton and Lehigh Counties motions to reconsider and/or modify the sentences imposed by those courts; and that with such modification, Defendant would be entitled to credit against his Carbon County sentence. (Motion, paragraphs 6-9). A hearing on Defendant's Motion was held on January 29, 2018.

At this hearing, Defendant testified he was arrested and taken into custody in Northampton County on May 7, 2017, on a state parole violation, and that a Carbon County detainer was lodged against him on May 10, 2017, and a Lehigh County detainer on June 24, 2017. (N.T., 1/29/18, pp.4-5). Defendant also testified that since his sentencing on September 19, 2017 in Carbon County, a petition to modify his September 8, 2017 sentence in Northampton County was filed on September 21, 2017, that it was allowed to proceed *nunc pro tunc*, and that the

sentence was modified on October 6, 2017 granting Defendant parole after serving the thirty day mandatory minimum sentence. (N.T., 1/29/18, pp.5-6, 20-21; Defense Exhibit No.2). With respect to Defendant's September 15, 2017 sentencing in Lehigh County, Defendant testified that a motion to reconsider that sentence was filed on October 9, 2017 and scheduled for hearing on November 6, 2017, when it was withdrawn. (N.T., 1/29/18, pp.6, 16). Notwithstanding this withdrawal, Defendant contended that somehow his credit against this sentence was reduced from seventy days to thirty days and he was paroled effective July 7, 2017. (N.T., 1/29/18, pp.6, 10). Based on these claimed retroactive revisions of the sentences he received in Northampton and Lehigh Counties, Defendant requested credit against his Carbon County sentence for the period from July 7, 2017 to September 19, 2017. (N.T., 1/29/18, p.7). Defendant's request was denied by this court on the same date. (N.T., 1/29/18, p.36; see also January 29, 2018 Order of Court).

On or about February 28, 2018, Defendant filed electronically through PACFile an appeal from the January 29, 2018 order denying his motion to modify his sentence.⁵

⁵ This appeal was rejected by the Carbon County Clerk of Courts' Office for reasons we have been unable to ascertain and which the Clerk's Office indicates it is unable to access. The electronic filing contains a certificate of service certifying that a true and correct copy of the Notice of Appeal was also being mailed to Court Administration - Criminal Division on the same date by first class mail. Upon receipt, the Notice of Appeal was time stamped as having been filed on March 5, 2018 and appears in the case file for this case. Because the order appealed from was entered on January

Unfortunately, because a copy of this appeal was not served on the court as required by Pa.R.A.P. 906(a)(2), the court did not become aware of the appeal until defense counsel's motion to withdraw her appearance was received by the court on or about April 3, 2018, wherein counsel states that a notice of appeal was filed on February 28, 2018. Upon learning of this appeal, the court immediately issued a Rule 1925(b) order pursuant to Pa.R.A.P. 1925(b) directing Defendant to provide the court with a concise statement of the errors complained of on appeal within twenty-one days from the date of the order's entry on the docket. As of this date, no concise statement has been filed.⁶

Without any clear explanation from Defendant as to what issue he intends to raise on appeal, and accepting for the moment that Defendant has not waived his right to raise issues on appeal, the only viable issue of which we are aware is Defendant's apparent belief that he is entitled to credit

30, 2018, an appeal was required to be filed on or before March 1, 2018. Pa.R.A.P. 903(a). Given the uncertainty as to whether Defendant's appeal was timely filed, for purposes of this opinion we have accepted that it was.

⁶ With reference to defense counsel's motion to withdraw her appearance, a rule to show cause was issued on the Defendant on April 3, 2018 as to why this request should not be granted, with Defendant to provide a response within twenty days. On April 23, 2017, Defendant filed a *pro se* request for the court to allow defense counsel to withdraw provided, as the court understands Defendant's request, that new counsel be appointed for Defendant within sufficient time for a concise statement to be timely filed. Because we do not know whether Defendant qualifies for the appointment of counsel, no IFP verified statement having been filed by Defendant, and because the time constraints resulting from Defendant's filing made it a practical impossibility to appoint new counsel to timely file a concise statement and defense counsel was under a continuing obligation to represent Defendant through direct appeal pending approval of her withdrawal (see Pa.R.Crim.P. 120(A)(4)), no further action was taken on counsel's motion to withdraw, the court anticipating that defense counsel would file the requested concise statement.

against his Carbon County sentence and none was given.⁷ We therefore address this issue below.

DISCUSSION

Fundamental to sentencing is that a defendant be granted credit for all time spent in prison on the offense for which a sentence is imposed. See 42 Pa.C.S.A. § 9760(1);⁸ Commonwealth v. Mann, 957 A.2d 746, 749 (Pa.Super. 2008) (citing 42 Pa.C.S.A.

⁷ Although Defendant states in his April 23, 2018 *pro se* filing that his appeal is premised on "Breach of contract signed on the 27th day of July 2018," an apparent reference to Defendant's guilty plea stipulation filed on July 26, 2017, that stipulation provided only that the Commonwealth had no objection to a probationary sentence, not that this was an agreed-upon sentence that the court had to accept or reject. Moreover, that the court retained its discretion in imposing a sentence and that the sentence necessarily would include jail time given the mandatory minimum Defendant was facing for his sixth or subsequent driving under suspension conviction was made clear to Defendant during his guilty plea colloquy. (N.T., 9/19/17, pp.3-4, 7, 9; see also Written Guilty Plea Colloquy, questions 26, 27, 38).

⁸ Section 9760 of the Sentencing Code provides in relevant part as follows:

§ 9760. Credit for time served

After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:

(1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of conduct on which such a charge is based. Credit shall include credit for the time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

(4) If the defendant is arrested on one charge and later prosecuted on another charge growing out of an act or acts that occurred prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge that has not been credited against another sentence.

42 Pa.C.S.A. § 9760(1), (4).

§ 9760). A secondary principle is that time credit on a sentence may be granted only when it has not already been credited toward another sentence. Bright v. Pa. Bd. of Probation and Parole, 831 A.2d 775, 778 (Pa.Cmwlth. 2003) (citing 42 Pa.C.S.A. § 9760(4)). To this end, the court is to be provided at the time of sentencing a summary of those sentences the defendant is then serving and any credit to which he is entitled. See 42 Pa.C.S.A. §§ 9737, 9760. Additionally, "once a sentencing court imposes a consecutive sentence, aggregation with other consecutive sentences is 'automatic and mandatory' under Section 9757 of the Sentencing Code, [42 Pa.C.S.A. § 9757]." Forbes v. Department of Corrections, 931 A.2d 88, 92 (Pa.Cmwlth. 2007), *affirmed*, 946 A.2d 103 (Pa. 2008).

Where a defendant is incarcerated on both a state detainer issued by the Board and new criminal charges, "all time spent in confinement must be credited to either the new sentence or the original sentence." Martin v. Pa. Bd. of Probation & Parole, 840 A.2d 299, 309 (Pa. 2003). In addressing how to allocate such credit between a defendant's original state sentence for which a parole board detainer has been lodged and the new criminal charges, and by whom the decision is to be made, the Pennsylvania Superior Court in Mann stated:

[A]ll time served by a parole violator while awaiting disposition on new charges must be

credited to the original sentence if the inmate remains in custody solely on a Board detainer. If the inmate is incarcerated prior to disposition and has both a detainer and has failed for any reason to satisfy bail, the credit must be applied to the new sentence by the sentencing court. If the new sentence is shorter than the time served, the balance can be applied to the original sentence, but the sentencing court must specify "time served: in the sentencing order for the new offense, so that the Board will be able to apply the credit.

Commonwealth v. Mann, 957 A.2d at 751 (citations omitted); see also Commonwealth v. Gibbs, 181 A.3d 1165, 1167 (Pa.Super. 2018).

Defendant was arrested and detained in Northampton County on May 7, 2017 on a state parole detainer. Although the record does not reveal for what new offense Defendant was detained by the Board - the date of the offense in Carbon County was December 27, 2015; in Northampton County, April 5, 2017; and in Lehigh County, May 7, 2017 (N.T., 9/19/17, pp.11-13) - after Defendant was arrested in Northampton County, Carbon County lodged a detainer on May 10, 2017 and Lehigh County lodged its detainer on June 24, 2017, thus ensuring Defendant's incarceration until the disposition of his new charges. (N.T., 1/29/18, pp.4-5).⁹ Additionally, although the terms of Defendant's bail in Northampton and Lehigh Counties does not appear in the record, it is clear that Defendant did not meet

⁹ No detainer was placed against Defendant arising from the criminal charges filed against him in Northampton County. (N.T., 9/19/17, p.33).

the conditions of his bail in either of those counties and therefore was technically incarcerated on both of these new criminal charges as well as the parole board detainer. (N.T., 9/19/17, p.34).

Therefore, as of September 19, 2017, the date of Defendant's sentencing in Carbon County, Defendant had been in jail a total of 136 days, from May 7, 2017 through September 19, 2017. The record reflects, however, that Defendant was given full credit for this time: sixty days were applied to his driving under suspension sentence in Northampton County (*i.e.*, May 7, 2017 through July 5, 2017), resulting in a full credit time served sentence, and the Lehigh County September 15, 2017 sentence expressly provided that Defendant be given credit "as required by law, for all time spent in custody, as a result of these criminal charges for which sentence is imposed." (N.T., 9/19/17, pp.36-37; N.T., 1/29/18, Defendant Exhibit Nos.1 and 2). Since the period from July 6, 2017 through September 15, 2017 represents a total of 72 days, Defendant was entitled to receive 72 days credit against his Lehigh County sentence. See also Melhorn v. Pa. Bd. of Probation and Parole, 908 A.2d 266 (Pa. 2006) (holding that where the period of pre-sentence confinement does not exceed the sentence on the new charges, the sentencing court must credit the time served related to the new charges to the new sentence and that defendant's remedy, if the

sentencing court fails to provide such credit, is with the sentencing court and through the direct appeal process, not through the Board).¹⁰ The period after Defendant's sentencing in Lehigh County was then followed by four additional days - from September 15, 2017 through September 19, 2017 - during which time Defendant was not released on parole and continued to serve his sentence in Lehigh County before being sentenced in Carbon County. (N.T., 9/19/17, p.37).

These figures totaling 136 days - 60 days, 72 days, and 4 days - provide Defendant full credit for the time he was incarcerated before being sentenced in Carbon County. Further, under the rules applicable to aggregation of sentences, since the sentence imposed in Carbon County was consecutive and subsequent to that imposed in Lehigh County, any additional pre-sentence credit to which Defendant was entitled - if any existed - would in any event be applied first against the Lehigh County sentence. "The operative rule" of cases addressing credit for time served "is that a defendant should receive credit only once

¹⁰ In Gaito v. Pennsylvania Bd. of Probation and Parole, the Pennsylvania Supreme Court stated:

[I]f a defendant is being held in custody solely because of a detainer lodged by the Board and has otherwise met the requirements for bail on the new criminal charges, the time which he spent in custody shall be credited against his original sentence. If a defendant, however, remains incarcerated prior to trial because he has failed to satisfy bail requirements on the new criminal charges, then the time spent in custody shall be credited to his new sentence.

412 A.2d 568, 571 (Pa. 1980) (footnote omitted) (citations omitted).

for time served before sentencing.” Commonwealth v. Merigris, 681 A.2d 194, 195 (Pa.Super. 1996), *appeal denied*, 693 A.2d 587 (Pa. 1997).

To the extent Defendant sought to retroactively reapportion time-served credit applied to the sentences he received in Northampton and Lehigh Counties after he was sentenced in Carbon County, Defendant has unnecessarily and inappropriately sought to convert what was a legal sentence when imposed into an illegal one after the fact. Commonwealth v. Gibbs, 181 A.3d at 1166 (“A claim asserting that the trial court failed to award credit for time served implicates the legality of the sentence.”). This court, we believe, was not only entitled, but required, by Section 9737 of the Sentencing Code, 42 Pa.C.S.A. § 9737, to determine, before sentencing, the status and disposition of all criminal charges brought against Defendant and what credit, if any, Defendant had been granted for time served on these charges in order to determine if Defendant was entitled to any credit on the sentence we imposed. Defendant’s attempt to reallocate these credits after his sentencing in Carbon County and without having first addressed the issue with the sentencing courts in Northampton and Lehigh Counties can only create havoc.¹¹

¹¹ Parenthetically, we note that Defendant’s Motion to Reconsider and/or Modify the sentences he received in Northampton and Lehigh Counties were both filed beyond the ten day time period permitted to file a post-sentence motion

CONCLUSION

In accordance with the foregoing, because Defendant was entitled to no additional credit at the time of his sentencing in Carbon County on September 19, 2017, our order dated January 29, 2018 denying Defendant's Motion to Reconsider and/or Modify his sentence was properly entered.

BY THE COURT:

P.J.

to modify a sentence. See Pa.R.Crim.P. 720(A)(1), (B)(1)(c). Additionally, even though we understand the court in Northampton County granted Defendant's motion *nunc pro tunc*, because the sentence modified was consecutive to a state sentence, we are uncertain how the trial court was able to grant parole. See Commonwealth v. Ford-Bey, 590 A.2d 782, 784 (Pa.Super. 1991) (holding that consecutive sentences automatically aggregate and where the total aggregated sentence exceeds two years in a state correctional institution, the exclusive power to parole a defendant is vested in the State Board of Probation and Parole; a trial judge's grant of parole under these circumstances is void *ab initio*).

[FN-22-18]