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IN THE
COURT OF APPEALS OF INDIANA

RANDY MCGEE,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 67A01-0901-CV-24
	)	
MICHAEL OSBURN,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE PUTNUM SUPERIOR COURT
The Honorable Robert Lowe, Judge
Cause No. 67D01-0810-MI-23

July 2, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Randy McGee, *pro se*, appeals the denial of his petition for writ of habeas corpus.

We affirm.

ISSUE

Whether McGee is entitled to additional jail time credit for time he spent incarcerated in Illinois after he was served with notice of an Indiana parole violation warrant.

FACTS

On July 8, 2003, McGee was convicted of forgery in Lake County and sentenced to six years in the Department of Correction ("DOC"). On March 10, 2006, he was released to parole. On April 4, 2006, he was declared delinquent for violating the terms of his parole and was again incarcerated. On December 4, 2006, McGee's parole was reinstated and he was again conditionally released.

On February 16, 2007, McGee was again declared delinquent by the Indiana Parole Board ("the Board"). The Board issued a parole violation fugitive warrant on March 7, 2007. After McGee's arrest on March 24, 2007, on an outstanding forgery Illinois warrant, Indiana's parole violation fugitive warrant was forwarded to Illinois on that same day. On April 26, 2007, in Cook County, Illinois, a State's Attorney served McGee with notice of Indiana's parole violation warrant in open court; the warrant was lodged as a detainer or hold against McGee.

On May 10, 2007, McGee was convicted of forgery in Illinois and sentenced to four years. On December 11, 2007, under the mistaken belief that McGee had been returned to Indiana to serve the balance of his sentence there, a judge of the Circuit Court

of Cook County ordered the Illinois DOC to award him jail time credit for the period of time he spent incarcerated in Indiana.

On August 12, 2008, McGee waived extradition to Indiana. He completed his Illinois sentence, and on August 22, 2008, was extradited to Indiana to appear before the Board regarding the violation of his parole. The record reveals that McGee earned jail time credit in Illinois for the period between March 24, 2007, and August 22, 2008. On September 25, 2008, McGee appeared before the Board and pled guilty to violating Rules 2, 10, 7, and 3a. The Board's findings of fact provide, in relevant part, as follows:

> Regarding Rule #2: McGee's approved residence was the Salvation Army Rehabilitation Six month Residential Program in South Bend. McGee left his approved residence on a pass on 2/16/07 and failed to return. McGee did not have permission from his parole agent to change his residence and he was declared delinquent effective 2/16/07.
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> Regarding Rule #10: McGee had a Special Stipulation – Successfully complete the Salvation Army Rehabilitation Six month Residential Program that was ordered by the Parole Board. McGee left the Salvation Army Rehabilitation Six month Residential Program on 2/16/07 and failed to return. McGee failed to comply with his Special Stipulation.
>
> Regarding Rule #7: McGee was arrested on 3/24/07 and sentenced in Cook County, Illinois on Case No. 06CR2008201, for Forgery, to 4 years, and was released on 8/22/08.
>
> Regarding #3a: McGee was arrested in Illinois on 3/24/07, he waived extradition in Illinois on 8/12/08, he completed his Illinois sentence on 8/22/08, and he was returned to Indiana from Illinois. McGee did not have permission from his parole agent to travel outside the State of Indiana.

(App. 76-77). The Board assessed against McGee the balance of his sentence of 1123 days. McGee then requested jail time credit for the period he spent incarcerated in

Illinois after being served with Indiana's parole warrant; the Board denied his request. His projected release date is March 6, 2010.

On October 17, 2008, McGee filed a Verified Petition for State Writ of Habeas Corpus.[1] On December 5, 2008, Osburn moved for summary judgment of McGee's petition, which the court granted on December 22, 2008. McGee now appeals.

DECISION

McGee argues that he is entitled to jail time credit in Indiana for the period he spent incarcerated in Illinois after he was served with Indiana's parole violation warrant. He argues further that the Illinois court ordered that his Indiana and Illinois sentences be served concurrently; and, therefore, that the post-conviction court erred when it did not give full faith and credit to this alleged order. McGee's Br. at 6.

Pursuant to Indiana Code section 34-25.5-1-1, "Every person whose liberty is restrained, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered from the restraint if the restraint is illegal."

> The purpose of a writ of habeas corpus is to determine the lawfulness of custody or detention of the defendant and may not be used to determine collateral matters not affecting the custody process. A defendant is entitled to a writ of habeas corpus if he or she is unlawfully incarcerated and is entitled to immediate release. We review the trial court's habeas decision for an abuse of discretion. Without reweighing the evidence, this court considers only that evidence most favorable to the judgment and reasonable inferences drawn therefrom.

[1] McGee is currently incarcerated in the Putnamville Correctional Facility ("Putnamville"). Michael J. Osburn is the former superintendent of the prison. Osburn has since been named the Deputy Commissioner of Operations for the Department of Correction. His successor at Putnamville is Bruce Lemmon.

Hardley v. State, 893 N.E.2d 740, 742 (Ind. Ct. App. 2008) (internal citations omitted).

We initially note, and McGee acknowledges in his brief, that his petition for habeas corpus was not properly brought. Our Supreme Court has held that a prisoner can only obtain an immediate discharge through a petition for habeas corpus; he cannot obtain a modification of his sentence through such a proceeding. *Dunn v. Jenkins*, 377 N.E.2d 868, 870 (Ind. 1978); *see also* Ind. P-C. R. 1(a)(5) (petition for post-conviction relief is proper vehicle for claims that petitioner's "sentence has expired, his probation, parole or conditional release [has been] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint").

Here, in his habeas corpus petition, McGee alleged that he was being unlawfully held in custody and sought a discharge and/or modification of his commitment to DOC. As McGee neither claimed nor was entitled to immediate discharge, the trial court properly treated his petition as a petition for post-conviction relief.

Indiana Code section 35-50-1-2(d) provides that the imposition of consecutive sentences is mandatory where an offender is convicted of a new criminal offense while on parole. It provides:

> If, after being arrested for one (1) crime, a person commits another crime:
> (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or
> (2) While the person is released:
> (A) Upon the person's own recognizance; or
> (B) on bond;
> the terms of imprisonment for the crimes <u>shall be served consecutively</u> regardless of the order in which the crimes are tried and sentences are imposed.

Ind. Code § 35-50-1-2(d) (emphasis added). Further, the two crimes need not have even been committed within the same jurisdiction. I.C. § 35-50-1-2(a); *see Penick v. State*, 659 N.E.2d 484, 489 (Ind. 1997); and *Morrow v. State*, 690 N.E.2d 183, 184 (Ind. 1997).

The record reveals that McGee was convicted of forgery in Indiana on July 8, 2003, and was sentenced to six years in the DOC. He was conditionally released to parole on March 10, 2006. The term of his parole was twenty-four months. McGee violated the terms of his parole and was again incarcerated. On December 4, 2006, McGee's parole was reinstated and he was released. On February 16, 2007, the Parole Board declared McGee delinquent; it issued a parole violation warrant on March 7, 2007. On March 24, 2007, McGee was arrested in Illinois on a forgery charge. He was subsequently convicted and sentenced to four years of imprisonment in Illinois. After serving his Illinois sentence and being returned to Indiana on or about August 22, 2007, McGee appeared before the Board on September 26, 2007. The Board conducted a parole violation hearing and determined that McGee had violated the terms of his parole and that he should "[b]e assessed the balance of [his] sentence." (App. 78).

When, as here, a parolee commits another crime before being discharged from parole, Indiana Code section 35-50-1-2(d) requires that the sentences for the two crimes be served consecutively. Based upon McGee's procedural history, we find no error from the post-conviction court's finding that McGee was required to serve his Illinois and Indiana sentences consecutively and was not entitled to jail time credit in Indiana for time he spent incarcerated in Illinois.

Next, McGee argues that the DOC's Executive Directive #04-19 and its Policy Administrative Procedures ("Policy Manual") expressly support his claim for jail time credit. We disagree.

The Directive provides, in relevant part, as follows: "Effective April 1, 2004, an offender incarcerated under a parole violation warrant shall earn time served and applicable earned credit time from the date of service of the warrant." (App. 11). Similarly, section 01-04-101 Section 4(c) of the Policy Manual states, "A parolee incarcerated under a parole violation warrant shall earn time served and applicable earned credit time from the date of service of the warrant." (App. 97).

The DOC Directive and Policy Manual do not support McGee's claim. The evidence clearly reveals that when McGee was served with notice of Indiana's parole violation warrant, he was being held on an Illinois charge of forgery and not under the parole violation warrant. The above cited DOC provisions apply in instances where an offender is incarcerated pursuant to a parole violation warrant. Such is not the case here because McGee was being held to answer charges for an Illinois offense. Thus, his reliance upon these provisions is misplaced and his arguments must fail.[2]

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[2] In his brief, McGee also cites to *Nutt v. State*, 451 N.E.2d 342 (Ind. Ct. App. 1983), for the proposition that an offender being held under a parole violation warrant is entitled to jail time credit. His reliance upon *Nutt* is equally misplaced.

In *Nutt*, the defendant failed to appear on an Indiana theft charge and Indiana authorities issued a warrant for his arrest. Nutt absconded to Texas, where he was subsequently arrested on unrelated charges. Indiana authorities learned of Nutt's arrest and filed a hold with Texas authorities. The Texas charges were later dismissed; however, Texas authorities continued to detain Nutt pursuant to the Indiana hold. The trial court denied Nutt jail time credit for time spent incarcerated in Texas. We reversed the trial court's judgment, concluding that Nutt was entitled to jail time credit in Indiana for time spent incarcerated in Texas, because his Texas confinement "resulted solely from" the Indiana charge. Thus, we found that because Texas authorities had held him under the Indiana warrant, Nutt was entitled to additional jail time credit. *Id*. at 345.

McGee argues further that the post-conviction court impermissibly ignored an alleged Illinois court order requiring that his Indiana sentence be served concurrently with his Illinois sentence. He argues that the "judgment of the Illinois [court] should have been given its full credit, meaning that McGee should have been given credit [in Indiana] for the time [he] spent [incarcerated] in Illinois[.]" McGee's Br. at 12. We cannot agree.

McGee mischaracterizes the order of the Illinois court, which states:

> The court having found that Randy McGee (IDOC # A73823) was sentenced to 4 years to the Illinois Department of correction; Court also finds that Randy McGee was returned to the Indiana Department of Correction to serve the remaining portion if [sic] a [sic] unexpired sentence; [t]he court further finds that Randy McGee meets the requirements of 730 ILCS 5/5-8-1(e).
>
> Wherefore, it is the order of this court that the Illinois Department of Corrections credit Randy McGee with time spent in the Indiana Department of Corrections pursuant to 730 ILCS 5/5-8-1(e).

(App. 76-77) (emphasis added).

Section 730 ILCS 5/5-8-1(e) provides:

> (e) A defendant who has a previous and unexpired sentence of imprisonment imposed by another state or by any district court of the United States and who, after sentence for a crime in Illinois, must return to serve the unexpired prior sentence may have his sentence by the Illinois court *ordered to be concurrent* with the prior sentence in the other state. The court may order that any time served on the unexpired portion of the sentence in the other state, prior to his return to Illinois, shall be credited on his Illinois sentence. The other state shall be furnished with a copy of the order imposing sentence which shall provide that, when the offender is

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Here, unlike the defendant in *Nutt*, McGee was being held on an entirely independent Illinois charge, not under the parole violation warrant. Thus, he is not entitled to earn jail time credit in Indiana for time spent incarcerated in Illinois.

> released from confinement of the other state, whether by parole or by termination of sentence, the offender shall be transferred by the Sheriff of the committing county to the Illinois Department of Corrections. The court shall cause the Department of Corrections to be notified of such sentence at the time of commitment and to be provided with copies of all records regarding the sentence.

(App. 17), emphasis added.

McGee directs our attention to the provision above that a defendant with a previous and unexpired sentence in another jurisdiction, and who must return to serve that sentence may have his Illinois sentence ordered to be concurrent with the prior sentence in the other state. He couples this provision with the Illinois court's statement that he "me[t] the requirements of 730 ILCS 5/5-8-1(e)" and interprets the two statements to mean that the Illinois court ordered his Indiana and Illinois sentences to be served concurrently. (App. 76-77). We disagree with this reading of the court's order.

Whereas the first paragraph of the order lists the Illinois court's findings, the second sets out the court's express order based upon the court's findings. This second paragraph neither mentions nor orders a concurrent sentence.

While under the mistaken belief that McGee had been "returned to the Indiana Department of Correction to serve the remaining portion" of his unexpired sentence, the Illinois court concluded that pursuant to Illinois law, McGee might be entitled to earn jail time credit in Illinois for the time he had spent incarcerated in Indiana serving the balance of his sentence. It is clear from the record that McGee was not returned to Indiana to serve his unexpired sentence until after he had served his Illinois sentence.

Notwithstanding this mistaken belief, the Illinois court's order permitting McGee to earn jail time credit in Illinois has no effect upon whether McGee has met his obligation to serve the balance of his Indiana sentence. Nor does it affect the requirement, pursuant to Indiana Code section 35-50-1-2(d), that McGee must serve the remaining balance of his Indiana sentence consecutively to his Illinois sentence. *See Penick*¸ 659 N.E.2d at 489 (defendant is not entitled to credit on Indiana sentence while incarcerated in another state). *See also Carrion v. State*, 619 N.E.2d 972, 974 (Ind. Ct. App. 1993) (citing *Woodson v. State*, 383 N.E.2d 1096, 1101 (Ind. Ct. App. 1978) ("It is well established that there is no right to serve concurrent sentences for different crimes in the absence of a statute so providing, and that concurrent sentences may be ordered only when they are to be served at the same institution. Moreover, a defendant is not even entitled to credit on his Indiana sentence while he is incarcerated in another jurisdiction for a totally different offense.")).

We find no error in the post-conviction court's denial of jail time credit.

Affirmed.

BAILEY, J., and ROBB, J., Concur.