IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Norman Reigle, Petitioner	:	
v.	:	No. 1117 C.D. 2009
Pennsylvania Board of Probation and Parole, Respondent	:	Submitted: February 12, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: March 29, 2010

Norman Reigle petitions for review of a decision of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief from the Board's decision recommitting him to serve 12 months backtime as a technical parole violator. Also before this Court is the Amended Petition of Appointed Counsel to Withdraw filed by James L. Best, Esquire, as the Assistant Public Defender for Northumberland County, Pennsylvania.

By decision mailed February 24, 2009, the Board recommitted Reigle to a state correctional institution as a technical parole violator to serve 12 months backtime for multiple technical parole violations. Specifically, the Board found that Reigle violated condition 2 of his parole, change of residence without permission, and special condition 7, failure to successfully complete the program at

the Minsec-Hazelton Treatment Center. The evidence relied upon by the Board was Reigle's admissions that he had violated the conditions of his parole. The Board stated that its reasons for its February 24, 2009, decision were Reigle's pattern of parole failure in his criminal history record, that he had been declared delinquent by the Board, and that the violations were established.

On March 11, 2009, Reigle filed a request for administrative relief. By decision mailed May 8, 2009, the Board denied Reigle's request and affirmed its February 24, 2009, decision.

On June 9, 2009, Reigle filed a petition for review with this Court. Therein, Reigle contends that the Board's decision should be reversed for the following five reasons:[1]

> 1. Prior record should not be considered when determining whether a technical violation was committed.
>
> 2. Although never charged or even investigated for drug or alcohol offenses, this was used as a factor as proved by the fact that it is made part of the conditions of his sentence.
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> 3. Mitigating circumstances were not considered.
>
> 4. Even though never declared delinquent, this was used as a factor.
>
> 5. Sentence is excessive for act admitted.

On August 27, 2009, Counsel filed his first petition to withdraw along with a no-merit letter based on his belief that Reigle's appeal is without merit. However, due to Counsel's failure to address all five issues raised by Reigle in this

[1] These are the same reasons that Reigle raised in his request for administrative relief.

appeal, this Court denied the application to withdraw but with leave to amend within thirty days or, in the alternative, to file a brief supporting Reigle's position. Thereafter, Counsel filed an amended petition to withdraw again stating his belief that Reigle's appeal is without merit. Counsel also states that he sent a letter to Reigle advising him of the status of these matters along with a copy of the no-merit letter.[2] Counsel notified Reigle that he could make his own argument to this Court or retain other counsel. No brief has been filed on behalf of Reigle.

[2] This Court has reexamined what steps counsel appointed to represent petitioners seeking review of determinations of the Board must take to withdraw from representation. In Hughes v. Pennsylvania Board of Probation and Parole, 977 A.2d 19 (Pa. Cmwlth. 2009), this Court held that in a case where there is a constitutional right to counsel, counsel seeking to withdraw from representation of a petitioner in an appeal of a determination of the Board should file a brief in accordance with Anders v. California, 386 U.S. 738 (1967). Relying upon the United States Supreme Court's decision in Gagnon v. Scarpelli, 411 U.S. 778 (1973), we held that a constitutional right to counsel arises where the petitioner raises a:

> colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Hughes, 977 A.2d at 24 (quoting Gagnon, 411 U.S. at 790). We stated further that such claims would only arise in appeals from determinations revoking parole. Id. Accordingly, we held that "[i]n an appeal from a revocation decision, this Court will apply the test from Gagnon, quoted above, and, unless that test is met, we will only *require* a no-merit letter." Id. at 26 (emphasis in original, footnote omitted). We noted further that "[a]s in the past, we will not deny an application to withdraw simply because an attorney has filed an Anders brief where a no-merit letter would suffice. In cases where there is no constitutional right to counsel, however, we shall still apply the standard of whether the petitioner's claims are without merit, rather than whether they are frivolous." Id. at 26, n.4.

Herein, Counsel has filed a no-merit letter. As the issues raised by Reigle in this appeal are neither complex nor difficult to develop, we conclude that Counsel followed the correct procedure by filing a no-merit letter.

Pursuant to Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988), a no-merit letter must contain: (1) the nature and extent of counsel's review; (2) the issues the petitioner wishes to raise; and (3) counsel's analysis in concluding that the petitioner's appeal is meritless. In Zerby v. Shanon, 964 A.2d 956, 959 (Pa. Cmwlth. 2009), this Court explained that pursuant to Turner, the no-merit letter must detail the nature and extent of counsel's review and list each issue the petitioner has raised, with counsel's explanation of why those issues are meritless. We explained further that the no-merit letter must include "'substantial reasons for concluding that a petitioner's arguments are meritless.'" Zerby, 964 A.2d at 962 (quoting Jefferson v. Pennsylvania Board of Probation and Parole, 705 A.2d 513, 514 (Pa. Cmwlth. 1998)). If the technical requirements set forth in Turner have been satisfied, this Court must conduct its own review of whether the claims are meritless. Turner, 518 Pa. at 494-95, 544 A.2d at 928.

Herein, Counsel's no-merit letter complies with Turner. Counsel notified Reigle of his request to withdraw and advised him of his right to retain new counsel or file a brief on his own behalf. Further, Counsel sent Reigle copies of the petition to withdraw and the no-merit letter. The no-merit letter indicated that Counsel reviewed the proceedings affecting Reigle, Reigle's petition for review, and the record. The no-merit letter also addressed all the issues Reigle raised on appeal. Moreover, it sets forth Counsel's analyses of the issues and why they are meritless. As such, Counsel complied with Turner, and we may conduct an independent review to determine whether Counsel's characterization of the appeal as meritless is correct. Zerby.

Initially, we note that this Court's scope of review of a decision by the Board is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether the

constitutional rights of the parolee was violated. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, Gaito v. Pennsylvania Board of Probation and Parole, 563 A.2d 545 (Pa. Cmwlth. 1989), petition for allowance of appeal denied, 525 Pa. 589, 575 A.2d 118 (1990). Substantial evidence is such evidence that a reasonable mind might accept as adequate to support a conclusion. Chapman v. Pennsylvania Board of Probation and Parole, 484 A.2d 413 (Pa. Cmwlth. 1984).

Reigle first contends in his petition for review that the imposition of 12 months backtime by the Board was excessive.[3] We disagree.

The Parole Board has broad discretion to assess mitigating and aggravating factors in the recommitment of a technical parole violator, and any challenge to the length of a recommitment period falling within the presumptive range is not a valid basis for appeal. Smith v. Pennsylvania Board of Probation and Parole, 524 Pa. 500, 574 A.2d 558 (1990). Where a parolee violates both general and special conditions of parole, the Board may aggregate backtime imposed for violation of the general condition having the highest presumptive range with backtime imposed for violation of any special conditions. 37 Pa. Code §75.3(e)-(f).

Herein, the Board correctly determined that the presumptive range for Reigle's violation of condition 2, change of residence without permission, and special condition 7, failure to successfully complete the program at the Minsec-Hazelton Treatment Center, is 9 to 27 months. Condition 2 carries a backtime range of 6 to 9 months and special condition 7 carries a backtime range of 3 to 18 months. See 37 Pa. Code §75.4. Aggregating the backtime, the presumptive range becomes 9 to 27 months. The amount of backtime imposed by the Board was 12

[3] In the interest of clarity, we have reordered the issues raised by Reigle in this appeal.

months, which is well within the presumptive range. Accordingly, Reigle's challenge to the amount of backtime imposed by the Board is meritless. Smith.

Next, Reigle contends that his prior record should not be considered when determining whether a technical parole violation occurred. However, the record clearly shows that Reigle admitted to violating conditions 2 and 7 of his parole and this is the evidence the Board relied upon in recommitting him as a technical parole violator. See Certified Record (C.R.) at 128-29. The Board did not indicate in the February 24, 2009, decision that its determination was based upon Reigle's prior record. As such, Reigle's contention is without merit.

Next, Reigle contends that the Board, in the February 24, 2009, decision, erroneously requires him to participate in drug and alcohol counseling because he has never been charged or even investigated for drug or alcohol offenses. The record shows that at the time of the parole violation hearing, there were pending criminal charges against Reigle in Northumberland County for driving under the influence, which the Board took notice. See C.R. at 114; 130. Accordingly, it was reasonable for the Board to require that Reigle participate in drug and alcohol counseling while confined to a state correctional institution.

Next, Reigle argues that mitigating factors were not considered when the Board imposed 12 months backtime. The record belies this argument as Reigle was given the opportunity to present evidence with respect to mitigation and to fully explain his actions at the parole violation hearing. See C.R. at 131-140. Therefore, there were mitigating circumstances contained in the record for the Board's consideration. Moreover, the imposition of 12 months backtime was within the lower range of the 9 to 27 month presumptive range of backtime that the Board was permitted to impose pursuant to 37 Pa. Code §75.4. Accordingly, this issue is also without merit.

Finally, Reigle argues that the Board erroneously considered the fact that he was declared delinquent as a reason for its decision. Reigle contends that he was never declared delinquent.

Our review of the record reveals that the Board issued an Order to Detain for Forty-Eight Hours and a Warrant to Commit and Detain Reigle on September 20, 2008, and Reigle was apprehended the next day on September 21, 2008. See C.R. at 52-54. Therefore, Reigle is correct that he was not actually declared delinquent. However, as stated previously herein, the evidence relied upon by the Board for its February 24, 2009, decision recommitting Reigle as a technical parole violator was Reigle's admissions that he did in fact violate conditions 2 and 7 of his parole. As such, there is no dispute that Reigle failed to return to the Minsec-Hazelton Treatment Center on September 19, 2008, after he signed out on a community pass. Id. at 129. Thus, the Board's decision is supported by substantial evidence and we decline to reverse the Board's decision on the basis that the Board did not actually declare Reigle delinquent.

As all five of the issues raised herein by Reigle are clearly meritless, the Board's May 8, 2009, order denying Reigle's request for administrative relief is affirmed and Counsel's amended petition to withdraw is granted.

JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 29th day of March, 2010, the order of the Pennsylvania Board of Probation and Parole, dated May 8, 2009, at Parole No. 4381-V is affirmed. The Amended Petition of Appointed Counsel to Withdraw filed by James L. Best, Esq., as the Assistant Public Defender for Northumberland County, Pennsylvania is granted.

JAMES R. KELLEY, Senior Judge