

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alan J. Novitski, :
Petitioner :
 :
v. : No. 1235 C.D. 2009
 : Submitted: July 9, 2010
Cynthia L. Daub, Secretary :
Pennsylvania Board of Probation and :
Parole, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: October 8, 2010

Before the Court is the second petition for leave to withdraw as counsel filed by Jonathan D. Ursiak, Esquire (Counsel), assistant public defender of Luzerne County. Counsel was appointed to represent Alan J. Novitski (Novitski), who petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) recommitting him to serve a total of twenty-four months backtime as a convicted parole violator.

Counsel previously filed a petition for leave to withdraw as counsel in this matter, which we denied without prejudice in Novitski v. Pennsylvania Board of Probation and Parole (Pa. Cmwlth., No. 1235 CD 2009, filed April 14, 2010) (Novitski I). We granted Counsel leave to file either an amended petition for leave to withdraw or a Petitioner's brief.

On May 14, 2010, Counsel filed an amended brief in support of his petition to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967), in which he concludes that Novitski's appeal is wholly frivolous and without merit.¹ We may not examine the merits of Novitski's appeal until we are satisfied that Counsel discharged his responsibility by complying with the technical requirements of an Anders brief.² Wesley v. Pennsylvania Board of Probation and Parole, 614 A.2d 355 (Pa. Cmwlth. 1992).

Counsel's brief must set forth the following: (1) the nature and extent of counsel's review of the case; (2) the issues the petitioner wishes to raise; and (3) counsel's analysis concluding that the appeal has no merit and is frivolous.³ Encarnacion v. Pennsylvania Board of Probation and Parole, 990 A.2d 123 (Pa. Cmwlth. 2010); Banks v. Pennsylvania Board of Probation and Parole, 827 A.2d 1245 (Pa. Cmwlth. 2003). Counsel's analysis must include a substantive explanation as to why the issues are frivolous. Wesley.

¹ The terms "wholly frivolous" and "without merit" are often used interchangeably in the Anders brief context. Whatever term is used to describe the conclusion an attorney must reach before requesting to withdraw--and the Court must reach to grant such a request--what is required is a determination that the appeal lacks any basis in law or fact. Commonwealth v. Santiago, 602 Pa. 159, 978 A.2d 349 (2009).

² The record establishes that Counsel served Novitski with his petition for leave to withdraw as counsel, Anders brief, and amended Anders brief.

³ We again observe that, pursuant to Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988), Counsel could have filed a no-merit letter in this matter rather than an Anders brief. Hughes v. Pennsylvania Board of Probation and Parole, 977 A.2d 19 (Pa. Cmwlth. 2009); Zerby v. Shanon, 964 A.2d 956 (Pa. Cmwlth. 2009). A no-merit letter must set forth the nature and extent of counsel's review of the appeal, the issues the petitioner wishes to raise, and counsel's explanation of why each of those issues is meritless. Hughes; Zerby. The Court will not deny an application to withdraw merely because an attorney filed an Anders brief, where a no-merit letter would suffice. Hughes.

In this case, Novitski filed a petition for review of the Board's order raising the following issues: (1) whether the Board failed to provide Novitski adequate notice of the revocation hearing; (2) whether the Board denied Novitski the right to submit evidence at his revocation hearing; (3) whether Novitski waived his right to a timely preliminary/revocation hearing within 120-days; (4) whether the Board submitted non-certified and altered documents; and (5) whether the Board coerced Novitski into waiving his right to a hearing. (Petition for Review, ¶ 6, subsections 1 – 5, pg. 2.)

Counsel's Anders brief adequately discusses the first four issues that Novitski raises in his petition for review; however, Counsel did not include any analysis in his brief regard Novitski's fifth issue: whether the Board coerced Novitski into waiving his right to a hearing. Counsel mentioned the fifth issue in the statement of the questions involved and the summary of the argument portions of his brief, but inexplicably failed to discuss it in his argument. Therefore, because Counsel's amended Anders brief does not address all of Novitski's issues, we may not conduct an independent review of the merits of this case. Hughes; Wesley.

Accordingly, we again deny Counsel's petition to withdraw without prejudice. Counsel may file a second amended petition to withdraw as counsel and a second amended Anders brief, or no merit letter, within thirty (30) days of the date of this order. If Counsel chooses not to file a second amended petition, he shall file a Petitioner's brief within thirty (30) days of the date of this order.

PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 8th day of October, 2010, the petition for leave to withdraw as counsel filed by Jonathan D. Ursiak, Esquire, is hereby DENIED without prejudice. Counsel is granted thirty (30) days from the date of this order to either file a second amended petition to withdraw or submit a Petitioner's brief.

PATRICIA A. McCULLOUGH, Judge