

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alan J. Novitski,	:	
Petitioner	:	
	:	
v.	:	No. 1235 C.D. 2009
	:	Submitted: November 19, 2010
Cynthia L. Daub, Secretary	:	
Pennsylvania Board of Probation and	:	
Parole,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

**OPINION NOT REPORTED**

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: February 18, 2011

Before the Court is the third 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 the June 8, 2009, order of the Pennsylvania Board of Probation and Parole (Board), which denied his administrative appeal and affirmed a decision recommitting him to serve a total of twenty-four months backtime as a convicted parole violator.

Counsel previously filed petitions for leave to withdraw as counsel in this matter, which we denied without prejudice and granted Counsel leave to file either an amended petition for leave to withdraw or a petitioner's brief. Novitski v.

Pennsylvania Board of Probation and Parole (No. 1235 C.D. 2009, filed April 14, 2010); Novitski v. Pennsylvania Board of Probation and Parole (No. 1235 C.D. 2009, filed October 8, 2010).

On November 19, 2010, Counsel filed a second 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> 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).

<sup>2</sup> The record establishes that Counsel served Novitski with his petitions for leave to withdraw as counsel, Anders brief, and amended Anders briefs. Counsel also informed Novitski of his right to hire a private attorney or represent himself in this appeal.

<sup>3</sup> 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.

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.

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.)

We have carefully reviewed Counsel’s Anders brief and conclude that it adequately discusses the five issues that Novitski raises in his petition for review. Having determined that Counsel discharged his responsibility, we address the merits of Novitski’s appeal.

Novitski was paroled from a six to twelve year sentence for burglary on January 16, 2007. His maximum expiration date for that sentence was September 16, 2009. (Certified Record (C.R.) at 57.) On August 17, 2007, Novitski absconded from his approved residence at the Conewego-Wernersville CCC. (C.R at 80.) On September 12, 2007, Novitski was arrested in the State of California for the crime of burglary; he pled guilty to that offense on September 26, 2007, and was sentenced to a period of incarceration of two years. (Id.) Novitski signed a waiver of extradition on September 22, 2008, (C.R. at 219), and he was returned to Pennsylvania on October 7, 2008, and incarcerated at SCI-Dallas. (C.R. at 86.)

The Board notified Novitski that he was being charged with the technical parole violation of absconding from his approved residence at the Conewego-Wernersville CCC, and a violation hearing was scheduled for January 14, 2009. (C.R. at 77.) Although Novitski executed a written waiver of the violation hearing and admitted the technical parole violation on January 12, 2009, (C.R. at 79), he subsequently rescinded the waiver and requested a panel hearing on January 23, 2009. (C.R. at 86, 157.)

On January 23, 2009, the Board received official verification of Novitski's California conviction and sentence. (C.R. at 84, 105.) On the same date, the Board issued a notice charging Novitski with the California criminal conviction and the technical parole violation stemming from his absence from the CCC. (C.R. at 80.) The Board scheduled a panel hearing for February 12, 2009, (C.R. at 82), and it took place on that date.

At the hearing, Novitski confirmed that he had notice of the hearing and was prepared to proceed. (C.R. at 101.) Novitski's counsel moved to dismiss the charges on the ground that the hearing was untimely (C.R. at 102); however, after argument, the motion was denied. (C.R. at 117.) The Board then received evidence pertaining to Novitski's technical parole violation and new conviction.

On March 24, 2009, the Board issued a decision recommitting Novitski to serve twenty-four months backtime as a convicted parole violator and nine months backtime as a technical parole violator concurrently. (C.R. at 232.) Novitski filed an administrative appeal, which the Board denied.

On appeal to this Court, Novitski first contends that the Board failed to provide him with adequate notice of the violation hearing. However, the record shows that the Board provided Novitski with written notice of the alleged charges, his

hearing rights, and the date and time of the revocation hearing. (C.R. at 77-78, 80-82.) Furthermore, at the beginning of the hearing, Novitski confirmed that he received notice of the subject of the hearing and that he was prepared to go forward with the case. (C.R. at 101.) Therefore, this issue is meritless.

Next, Novitski contends that he was denied the right to submit evidence at his revocation hearing. However, after a careful review of the hearing transcript, we conclude that the record does not support this assertion. Instead, the record reflects that Novitski was permitted to introduce documents into evidence, and Novitski was represented by an attorney during the proceedings. Therefore, we conclude that this issue is also without merit.

Novitski contends that the revocation hearing was untimely because he did not waive his right to a timely preliminary/revocation hearing. To the contrary, the record establishes that Novitski, in fact, waived his right to panel hearing on January 12, 2009, and then revoked his waiver on January 23, 2009. The Board's regulations provide that the Board is required in this situation to hold a hearing within 120 days of the parolee's last change of decision, 37 Pa. Code §71.5(c)(4), and the Board complied with that regulation by holding a hearing twenty days later on February 12, 2009. Therefore, we conclude that this issue is without merit.

Novitski argues that Board introduced non-certified and altered documents at the hearing. However, the Board's regulations provide that

documentary evidence and reports, including, but not limited to, depositions, written interrogatories, affidavits, laboratory reports, business records, public records, official records and letters rogatory, may be utilized solely, if the panel or examiner is satisfied as to their authenticity, relevancy, accuracy and reliability.

37 Pa. Code §71.5(b). This regulation is consistent with the general rule that parole and probation revocation proceedings need not be conducted with the same formality as a criminal trial and that state parole boards may consider evidence, such as statements, affidavits, and other documentary evidence, not normally admissible in an adversary trial. Anderson v. Pennsylvania Board of Probation and Parole, 497 A.2d 947 (Pa. Cmwlth. 1985).

Here, Novitski objected to certain documents the parole agent offered for admission on the ground that they were uncertified and/or were hearsay.<sup>4</sup> (C.R. at 133-34, 135-36, and 144-45.) The Board heard argument on the objections, found the documents satisfactory, and properly admitted them into evidence. Davis v. Pennsylvania Board of Probation and Parole, 481 A.2d 714 (Pa. Cmwlth. 1984) (Board did not err by basing its decision solely on uncertified photocopies of court records). We also note that Novitski agreed at the time of his parole that, in event he would be charged with a parole violation in a jurisdiction outside of the Commonwealth, revocation of parole could be based solely on documentary evidence; and he specifically waived the right to confront or cross-examine any person who prepared that evidence. (C.R. at 58, 132-33.) Furthermore, nothing in the record supports Novitski's assertion that the documents were altered. Therefore, we conclude that this issue is also meritless.

Finally, Novitski argues that he was coerced into waiving his right to a preliminary hearing and violations hearing. However, the waiver executed by Novistki contains unequivocal language stating that it was not procured by coercion:

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<sup>4</sup> The objected to documents were the California criminal complaint, a copy of Novitski's California conviction for burglary, and a discharge summary from the Conewego-Wernersville CCC.

I have been advised of my constitutional right to a preliminary hearing and a violation hearing. With full knowledge and understanding of my constitutional right to a preliminary hearing and a violation hearing, I hereby waive that right. *I waive that right of my own free will, without promise, threat or coercion.*

(C.R. at 79.) (Emphasis added.) Pennsylvania law supports the use of such waivers in parole matters, McKenzie v. Pennsylvania Board of Probation and Parole, 963 A.2d 616 (Pa. Cmwlth. 2009), and there is nothing in the record supporting Novitski's claim that his waiver was obtained by threat or coercion. Therefore, this contention is without merit.

Therefore, we conclude that Novitski's appeal lacks any basis in law or fact and thus is frivolous and without merit. Accordingly, we grant Counsel's petition for leave to withdraw, and we affirm the Board's order.

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PATRICIA A. McCULLOUGH, Judge

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**ORDER**

AND NOW, this 18th day of February, 2011, the petition of Jonathan D. Ursiak, Esquire, for leave to withdraw as counsel in the above-captioned matter is hereby GRANTED.

The June 8, 2009, order of the Pennsylvania Board of Probation and Parole is hereby AFFIRMED.

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PATRICIA A. McCULLOUGH, Judge