

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alan J. Novitski, :
Petitioner :
 :
v. : No. 1235 C.D. 2009
 : Submitted: February 12, 2010
Cynthia L. Daub, Secretary :
Pennsylvania Board of Probation and :
Parole, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: April 14, 2010

Before the Court is the 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 filed a 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 This Court 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. *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. *Encarnacion v. Pennsylvania Board of Probation and Parole*, ___ A.2d ___ (Pa. Cmwlth., No. 1677 C.D. 2009, filed February 25, 2010); *Banks v. Pennsylvania Board of Probation and Parole*, 827 A.2d 1245 (Pa. Cmwlth. 2003). Counsel's analysis must include some explanation as to why the issues are frivolous. *Wesley*.

We 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 wished to have raised, and counsel's explanation of why those issues are meritless. *Zerby*. The no merit letter also must include Counsel's reasons for concluding that the petitioner's arguments are meritless. *Id.*

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*, ___ Pa. ___, 978 A.2d 349 (2009).

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 either event, counsel is required to provide an explanation in support of his conclusion.

In the instant case, Novitski filed a *pro se* petition for review that raised 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.)

Although Counsel addressed each of the preceding issues in his brief, Counsel did not adequately explain his conclusion that they are meritless and wholly frivolous. Instead, for each of the issues addressed in his brief, Counsel sets forth several facts of record and then states only that he “could not locate” any cases supporting Novitski’s contention. We conclude that Counsel’s inability to locate controlling case law, without more, does not demonstrate that an issue is meritless, has no reasonable basis in law or fact, or that the matter is completely devoid of points that might arguably support an appeal. Moreover, Counsel did not cite or discuss any authority to support his conclusion and, therefore, failed to provide a substantive explanation of why the appeal is meritless or wholly frivolous. *Banks*. Until Counsel satisfies the requirements for an *Anders* brief or no merit letter, this Court may not evaluate the merits of the case to determine whether the appeal is frivolous. *See Banks* (stating that, when counsel’s brief is

insufficient, we are not free to make our own independent evaluation of a case, even when cursory research would reveal that the appeal was frivolous).

Accordingly, we deny Counsel's petition to withdraw without prejudice. Counsel may file an amended petition to withdraw as counsel and an amended *Anders* brief, or no merit letter, within thirty (30) days of the date of this order. If Counsel chooses not to file an 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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Parole,	:	
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ORDER

AND NOW, this 14th day of April, 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 an amended petition to withdraw or submit a Petitioner's brief.

PATRICIA A. McCULLOUGH, Judge