

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George R. Belak,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1267 C.D. 2009
	:	
Pennsylvania Board of Probation	:	Submitted: December 18, 2009
and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: February 24, 2010

George R. Belak petitions for review from an order of the Pennsylvania Board of Probation and Parole (Board) that recommitted him to serve 12 months' backtime as a convicted parole violator. Belak argues that the parole violation charge against him should be dismissed due to the Board's failure to hold a timely revocation hearing. L. Abraham Smith, Esquire (Counsel), Belak's appointed counsel, petitions for leave to withdraw. Because the issues raised in Belak's petition for review is meritless, we affirm the Board's order and grant Counsel's petition.

In 2000, the Westmoreland County Common Pleas Court (sentencing court) sentenced Belak to eight to 20 years, with a concurrent five to 15 year sentence for two counts of burglary. Certified Record (C.R.) at 1. At the time of

his conviction, Belak's minimum expiration date was September 15, 2006, and his maximum expiration date was September 15, 2018. Id.

Shortly after Belak's minimum expiration date, the Board released him on parole. Id. at 4. However, in December, 2007, the Rostraver Township Police Department arrested Belak and charged him with forgery and access device fraud. Id. at 20. In February, 2008, while Belak was in custody at Westmoreland County Prison, he was arrested again and charged with theft by unlawful taking, receiving stolen property, forgery, and access device fraud. C.R. at 41-42.

On September 25, 2008, Belak pleaded guilty to the December, 2007, charges (first conviction) and to the February, 2008, charges (second conviction). The sentencing court imposed its sentence the same day. Id. at 78-80, 83.

On March 3, 2009, the Board held a revocation hearing to determine whether Belak should be recommitted as a convicted parole violator. Id. at 106. The Board divided the hearing to address the first and second convictions separately. Id. at 113, 152. Belak objected to the timeliness of the revocation hearing with regard to both convictions. Id. at 113, 153.

At hearing, Belak testified that the Westmoreland County Clerk of Courts (Clerk of Courts) forwarded a copy of his conviction to the Board on the same day of his sentencing. C.R. at 140-141. Belak further testified that he wrote the Clerk of Courts a letter and received a reply less than a week later. Id. at 163-164. Essentially, Belak contends 1) his parole agent already had a copy of his

convictions prior to the parole agent's alleged date of receipt of official verification, or 2) the parole agent would have received official verification of convictions sooner had the agent acted with due diligence.

For his part, the parole agent testified he received official verification of Belak's first conviction on November 19, 2008. C.R. 114, 122. In addition, the parole agent further testified he received official verification of Belak's second conviction on December 31, 2008. Id. at 156.¹

The Board denied Belak's objection and accepted the parole agent's testimony as credible. It therefore concluded the revocation hearing was timely on both convictions because the hearing occurred within 120 days of November 19, 2008 and December 31, 2008, the dates on which the Board received official verifications of Belak's convictions. Id. at 122-127, 156-157. The Board further concluded the parole agent acted with due diligence in obtaining official verifications of Belak's convictions. Id. at 123-127. Shortly thereafter, the Board recommitted Belak as a convicted parole violator to serve 12 months' backtime. Id. at 181.

Belak sought administrative relief from the recommitment order, again contending the Board failed to hold a timely revocation hearing in

¹ The hearing examiner inquired as to why there are two different dates for receipt of official verification of Belak's September 25, 2008 convictions. Certified Record at 159. However, the parole agent was unable to explain why there were two different dates. Id.

accordance with regulation 37 Pa. Code §71.4(1).² In May, 2009, the Board denied Belak's request for administrative relief. Belak now petitions this court for review.³

On appeal, Belak raises one issue: that the Board's revocation hearing was untimely because it was held more than 120 days after the parole agent's receipt of official verifications of Belak's convictions. After reviewing Belak's petition for review, Counsel filed a petition to withdraw based on his assertion that after a conscientious review of the record and interview with Belak, his appeal is meritless. In support, Counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and Commonwealth v. McClendon, 495 Pa. 467, 434 A.2d 1185 (1981).

For an appointed counsel to withdraw representation pursuant to

Anders:

(1) he must notify parolee of request to withdraw; (2) he must furnish parolee with a copy of an Anders brief or no-merit letter; and (3) he must advise parolee of his right to retain new counsel or raise any new points that he might deem worthy of consideration. The brief or letter must set forth (1) the nature and extent of counsel's

² In Belak's petition for administrative relief, he also asserted the Board erred in: calculating his new maximum expiration date, and calculating whether he would be eligible for review for reparole in or after October, 2009. The Board affirmed the hearing examiner. Belak did not appeal these issues.

³ Our review is limited to determining whether constitutional rights have been violated, whether an error of law has been committed or whether the necessary findings of fact were supported by substantial evidence. Morgan v. Pa. Bd. of Prob. & Parole, 814 A.2d 300 (Pa. Cmwlth. 2003).

review of the case; (2) the issues the [parolee] wishes to raise; and (3) counsel's analysis concluding that the appeal is frivolous.

Banks v. Pa. Bd. of Prob. & Parole, 827 A.2d 1245, 1248 (Pa. Cmwlth. 2003) (footnote and citations omitted).

Furthermore, in Hughes v. Pennsylvania Board of Probation and Parole, 977 A.2d 19 (Pa. Cmwlth. 2009), this Court recently reviewed the steps counsel appointed to represent parolees seeking review of a Board's order must take to withdraw from representation. The Court, speaking through Judge Cohn Jubelirer, explained that in cases where the parolee does not have a constitutional right to counsel, counsel should file a no-merit letter.⁴

Nonetheless, in cases where a parolee does not have a constitutional right to counsel, but counsel submits an Anders brief instead of a no-merit letter, the Court noted:

As 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,

⁴ A parolee has a constitutional right to counsel where he 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 v. Pa. Bd. of Prob. & Parole, 977 A.2d 19, 26 (Pa. Cmwlth. 2009).

however, we shall still apply the standard of whether the [parolee's] claims are without merit, rather than whether they are frivolous.

Id. at 26 n.4 (emphasis added); see also Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988) (counsel presented the issues the parolee wished to raise and explained why those issues were meritless); Hughes, 977 A.2d at 25 (“This Court has drawn little distinction between whether the case must be ‘frivolous’ or ‘meritless’ before counsel may withdraw.”).

Thus, once we are satisfied counsel has met the requirements of Anders, we will then make an independent evaluation of the proceedings before the Board to determine whether the parolee’s appeal is without merit before we allow counsel to withdraw. See Wesley v. Pa. Bd. of Prob. & Parole, 614 A.2d 355 (Pa. Cmwlth. 1992).

Here, Belak does not have a constitutional right to counsel. Thus, a no-merit letter would have sufficed; nevertheless, Counsel submitted an Anders brief.

Upon review, we recognize Counsel notified Belak of his request to withdraw and advised him of his right to retain new counsel or file an appeal on his own behalf. Furthermore, Counsel sent Belak copies of the petition to withdraw and the Anders brief.

In addition, Counsel’s Anders brief indicates the extent of his review of the record, and it also addressed the issues Belak raised on appeal. Moreover, it

sets forth Counsel's analysis as to why Belak's appeal is meritless. As such, Counsel complied with the technical requirements of Anders, and we may conduct an independent review to determine whether Counsel's characterization of the appeal as meritless is correct. Wesley.

Our independent examination reveals Belak's contention is meritless. Belak contends the Board failed to provide a timely revocation hearing. More specifically, relying on Taylor v. Pennsylvania Board of Probation and Parole, 931 A.2d 114 (Pa. Cmwlth. 2007) (Leavitt, J.), Belak asserts the parole agent accessed two docket statements from the sentencing court's website on October 7, 2008, which verified his conviction date. Belak submits the following appears at the bottom of the two docket statements: "Printed: 10/07/2008." Belak avers the parole agent printed these docket statements on October 7, 2008; thus, he had official verification of Belak's conviction prior to November 19, 2008. As a result, Belak contends the revocation hearing was untimely. We disagree.

At the outset, we note that when a parolee alleges that the Board failed to hold a timely revocation hearing, the Board bears the burden of proving that the hearing was timely. Taylor.

In relevant part, Section 71.4(1) provides "[a] revocation hearing shall be held within 120 days from the date the Board received official verification of the" guilty plea or conviction. 37 Pa. Code §71.4(1). In addition, an official verification is defined as "[a]ctual receipt by a parolee's supervising parole agent of a direct written communication from a court in which a parolee was convicted

of a new criminal charge attesting that the parolee was so convicted.” 37 Pa. Code §61.1.⁵

Here, the parole agent received official verification of Belak’s first conviction on November 19, 2008. C.R. 168. In addition, the parole agent received official verification of Belak’s second conviction on December 31, 2008. C.R. at 170. The Board held the revocation hearing on March 3, 2009. C.R. at 106. Thus, the Board held the revocation hearing within 104 days of the parole agent’s receipt of official verification of the first conviction and within 62 days of his receipt of official verification of the second conviction.

Furthermore, despite Belak’s contention, the sentencing court’s docket sheet entered into the record by the parole agent does not establish when the agent received a direct communication from the Clerk of Courts attesting to Belak’s new conviction. C.R. at 73-85; see also Jacobs v. Pa. Bd. of Prob. & Parole, 958 A.2d 1110 (Pa. Cmwlth. 2008) (docket sheet entered into record by parole agent does not establish when the parole agent received a direct written communication from the court).

⁵ Although we recognize whether the parole agent acted with due diligence in obtaining official verification of Belak’s conviction is not on appeal here, we note “[n]either statute nor regulation places a burden on the Board to demonstrate that it exercised due diligence in obtaining official verification of a parolee’s new conviction.” Lawson v. Pa. Bd. of Prob. & Parole, 977 A.2d 85, 88 (Pa. Cmwlth. 2009) (Leavitt, J.). Furthermore, “considering the logistical problems the Board would face in discovering when a parolee was convicted, it is ... reasonable for a parole agent to wait for official verification even if the agent is aware that charges are, or may be, pending.” Lee v. Pa. Bd. of Prob. & Parole, 596 A.2d 264, 265 (Pa. Cmwlth. 1991).

In Taylor, the Court held the Board's receipt of a computer printout of a parolee's conviction constituted official verification because it was authenticated by the court's seal and directly informed the Board of the parolee's convictions on the new criminal charges. However, in Taylor, there was evidence that the court sent the Board the computer printout. Thus, the Board in Taylor, received direct communication from the court of the parolee's conviction in accordance with 37 Pa. Code §61.1 (relating to official verification).

Here, absent from the record is any evidence that the Clerk of Courts sent the parole agent a direct communication regarding Belak's convictions on October 7, 2008. Thus, we conclude Belak received a timely revocation hearing.

Accordingly, the order of the Board is affirmed.

ROBERT SIMPSON, Judge

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Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 24th day of February, 2010, the order of the Pennsylvania Board of Probation and Parole is **AFFIRMED**.

ROBERT SIMPSON, Judge