IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kerry T. Burford, Jr.,	:	
Petitioner	:	
	:	
v.	:	No. 1388 C.D. 2010
	:	Submitted: December 17, 2010
Pennsylvania Board of Probation and Parole,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: January 19, 2011

Kerry T. Burford, Jr. (Petitioner) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) recommitting him to serve nine months backtime as a convicted parole violator with a parole violation maximum date of January 9, 2013. Charles G. Brace, Esquire (Counsel), Petitioner's appointed counsel, petitions for leave to withdraw. Because the issues raised in Petitioner's petition for review are without merit, we affirm the Board's order and grant Counsel's petition.

Petitioner was sentenced to three to six years incarceration in a state prison for aggravated assault on September 15, 2005. He was released on parole

upon expiration of his minimum on May 19, 2008. On June 13, 2009, while on parole, Petitioner was arrested on new charges. He did not post bail. On November 12, 2009, Petitioner was sentenced to 154 days to 24 months incarceration, with 154 days time served on the charge of resisting arrest. The 154 days credit represented the time between his arrest and sentencing. Following a parole revocation hearing, the Board issued an order, dated January 21, 2010, but actually signed on January 10, 2010, ordering him to serve nine months backtime on his original sentence, indicating that he would be eligible for review in October 2010, and recalculating his violation maximum date as January 9, 2013.

Petitioner filed a *pro se* request for administrative relief with the Board, in which he argued that the Board miscalculated his parole eligibility and maximum dates by not granting him appropriate credit for the time between his arrest on June 13, 2009, until January 10, 2010, when the Board signed his parole revocation order. Essentially, he argued that this time should be credited against his backtime rather than against his new sentence. The Board denied Petitioner's administrative appeal, and he appealed *pro se* to this Court.

In his *pro se* appeal, Petitioner raised the same issue as in his administrative appeal and, in addition, contended that the Board erred by not crediting him with time against his maximum date for the period between his arrest on June 13, 2009, until his sentencing on November 12, 2009. Following this appeal, Counsel was appointed by this Court to represent Petitioner in this action, and Counsel filed an amended petition for review containing the same contentions as the *pro se* petition for review. Following consideration of the issues Petitioner raised on

appeal, Counsel filed a petition for withdrawal of appearance and a no-merit letter, which he served upon Petitioner.

When a court-appointed counsel, in the exercise of his professional judgment, believes the issues raised by the parolee in his appeal are without merit, he may be permitted to withdraw as counsel if he satisfies the following procedural requirements: he must notify the parolee of his request to withdraw; he must furnish the parolee with a copy of an *Anders*[1] brief or no-merit letter satisfying the requirements of *Turner*;[2] and he must advise the parolee of his right to retain new counsel or raise any new points he might deem worthy of consideration by submitting a brief on his own behalf. *Reavis v. Pennsylvania Board of Probation and Parole*, 909 A.2d 28 (Pa. Cmwlth. 2006). Counsel's brief or no-merit letter must set forth: (1) the nature and extent of his review of the case; (2) the issues the parolee wishes to raise on appeal; and (3) counsel's analysis concluding that the appeal has no merit. *Hughes v. Pennsylvania Board of Probation and Parole*, 977 A.2d 19 (Pa. Cmwlth. 2009); *Banks v. Pennsylvania Board of Probation and Parole*, 827 A.2d 1245 (Pa. Cmwlth. 2003). Once this Court is satisfied that all of the above requirements have been met, we will then make an independent evaluation of the proceedings before the Board to determine whether the parolee's appeal is indeed without merit before we will allow counsel to withdraw. *Banks*, 827 A.2d at 1248.

[1] See *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

[2] See *Commonwealth of Pennsylvania v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988).

On October 4, 2010, Counsel sent Petitioner copies of his application to withdraw and no-merit letter, in which he made clear his intention to withdraw and that Petitioner had the option of either retaining counsel or filing a *pro se* brief with this Court. His no-merit letter specifies the issues Petitioner wished to raise on appeal – that he was not credited with time against his maximum date for the period between his arrest on June 13, 2009, until his sentencing on November 12, 2009, and that the time spent incarcerated following his arrest was not time spent at liberty on parole because the Board issued a detainer on June 15, 2009.

In the no-merit letter, Counsel stated that Petitioner's contention that the Board erred by not crediting him with time against his maximum date for the time spent in jail following his arrest on the new charge was waived because Petitioner did not raise it before the Board and, even if it had not been waived, that it is frivolous and has no merit. Counsel, setting forth an analysis of existing case law, stated that Petitioner's contention that the period he spent in prison between his arrest and his recommitment as a convicted parole violator should be counted towards his original sentence also has no merit because it is well-settled that no time before the recommitment counts towards backtime. Petitioner did not respond to Counsel's no-merit letter.[3]

[3] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication was in accordance with the law, or whether the necessary findings of fact were supported by substantial evidence. *Reavis v. Pennsylvania Board of Probation and Parole*, 909 A.2d 28 (Pa. Cmwlth. 2006).

Our independent review indicates that Counsel is correct on his analysis of both issues. With regard to whether his maximum release date is correct, because Petitioner failed to raise that issue before the Board, it has no merit because it was waived. *DeMarco v. Pennsylvania Board of Probation and Parole*, 758 A.2d 746 (Pa. Cmwlth. 2000).[4] Similarly, with regard to whether the time served between Petitioner's arrest on the new charge and the date of his recommitment as a convicted parole violator should be credited to the new or old sentence, 61 Pa. C.S. §6138(a), provides, in relevant part:

> (4) The period of time for which the parole violator is required to serve shall be computed from and begin on the date that the parole violator is taken into custody to be returned to the institution as a parole violator.
>
> (5) If a new sentence is imposed on the parolee, the service of the balance of the term originally imposed shall precede the commencement of the new term imposed. . .

We have held that this language only takes effect once the Board recommits the parolee as a convicted parole violator. *Hill v. Pennsylvania Board of Probation and Parole*, 683 A.2d 699 (Pa. Cmwlth. 1996); *Campbell v. Pennsylvania Board of Probation and Parole*, 409 A.2d 980 (Pa. Cmwlth. 1980). Here, Petitioner was not recommitted until January 10, 2010, and Petitioner's claim that the time he

[4] Even if this issue had not been waived, it is clearly meritless. 61 Pa. C.S. §6138(a)(2) provides that convicted parole violators "shall be given no credit for the time at liberty on parole." Our Supreme Court has interpreted the words "at liberty on parole" to mean only liberty from the confinement on the particular sentence for which parole was granted, not liberty from all confinement. *Hines v. Pennsylvania Board of Probation and Parole*, 491 Pa. 142, 148, 420 A.2d 381, 384 (1980); *see also Hernandez v. Pennsylvania Board of Probation and Parole*, 548 A.2d 380 (Pa. Cmwlth. 1988).

spent in custody before January 10, 2010, should be counted towards his backtime served rather than towards his new sentence is meritless.

For the foregoing reasons, the order of the Board is affirmed, and Counsel's petition to withdraw as counsel is granted.

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DAN PELLEGRINI, JUDGE

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O R D E R

AND NOW, this 19th day of January, 2011, the order of the Pennsylvania Board of Probation and Parole, dated June 18, 2010, is affirmed. The petition by Charles G. Brace, Esquire, to withdraw as counsel is granted.

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DAN PELLEGRINI, JUDGE