

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Juan Marcus Searcy,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1396 C.D. 2009
	:	
Pennsylvania Board of Probation	:	Submitted: February 5, 2010
and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: April 21, 2010

Before this Court is the Application to Withdraw Appearance (Application) of Lowell T. Williams (Counsel). Through the Application, Counsel seeks to withdraw from representing Juan Marcus Searcy (Searcy)¹ in Searcy’s Petition for Review (Petition) challenging the order of the Pennsylvania Board of Probation and Parole (Board) revoking Searcy’s parole. For the following reasons, we grant Counsel’s Application and affirm the order of the Board.

¹ We note that Searcy’s first name is not spelled consistently in the record. Searcy signs his first name “Jauan;” however, most of the Board’s records document Searcy’s first name as “Jaun.” Because Searcy’s first name is spelled “Juan” in his Petition for Review, we use this spelling in our caption and opinion.

On November 8, 2002, Searcy was sentenced to five to ten years' imprisonment for the manufacture, sale, delivery or possession with intent to deliver illegal drugs. The Board paroled Searcy on January 8, 2008. Condition 5(a) of Searcy's parole required him to abstain from the use or possession of illegal drugs. Condition 5(b) of Searcy's parole required him to refrain from possessing firearms. On December 9, 2008, New Castle Police Officer Justin Crum (Officer Crum) stopped Searcy for driving with a suspended license. At the time of the stop, Searcy's parole agent, Brian Babusci (Agent Babusci) was riding with Officer Crum. Agent Babusci had heard that approximately two months prior, Searcy had threatened an individual known as "Ochi" with a gun outside a local bar. (Examiner Hr'g Tr. at 13, R. at 45.) In front of Agent Babusci, Officer Crum, and another New Castle Police Officer, Richard Ryhal (Officer Ryhal), Searcy admitted to possessing a firearm.

On December 15, 2008, Searcy attended a parole conference with Agent Babusci and Agent Babusci's supervisor, Dennis Hearn (Agent Hearn). At the conference, Agent Babusci again questioned Searcy regarding the incident with Ochi, and Searcy again admitted to possessing a firearm. Searcy also submitted a urine sample, which tested positive for marijuana, and Searcy admitted to Agent Babusci that he had used marijuana about a week previously. Based on Searcy's admissions, the Board arrested Searcy for violating his parole.

The Board held a violation hearing before a hearing examiner on January 26, 2009, at which Counsel represented Searcy. Searcy admitted violating condition 5(a) of his parole by using marijuana, but he denied possessing a firearm in violation of condition 5(b) of his parole. The Board presented testimony from Agent Babusci,

Agent Hearn, Officer Crum, and Officer Ryhal, each of whom stated that Searcy admitted to possessing a firearm. On March 31, 2009, the Board issued a Notice of Decision revoking Searcy's parole and recommitting him "as a technical parole violator to serve 18 months backtime." (Notice of Decision, March 31, 2009.) On April 8, 2009, Searcy filed an administrative appeal with the Board, which the Board denied. Searcy then filed the Petition with the Superior Court on June 26, 2009. The Superior Court subsequently transferred Searcy's Petition to this Court, and we appointed Counsel to represent Searcy in his appeal. On October 7, 2009, Counsel filed his Application, along with his No-Merit Letter (Letter), which is now before this Court.

As discussed in Hughes v. Pennsylvania Board of Probation and Parole, 977 A.2d 19 (Pa. Cmwlth 2009) (en banc), the standard for reviewing an attorney's withdrawal request depends on whether the parolee has a constitutional or statutory right to appeal. Id. at 25-26. A parolee has a constitutional right to counsel where his petition for review raises a colorable claim that he did not commit the alleged violation of his parole conditions. Id. (citing Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)). In this case, Searcy does argue in his Petition that there was insufficient evidence to establish that he violated condition 5(b) of his parole. However, as we shall discuss below, Searcy's claim is not colorable.² Where a constitutional right to counsel is not at issue, counsel seeking to withdraw should file a no-merit letter that: (1) details the extent and nature of the counsel's review of the record; (2) lists each of the issues the petitioner wishes to raise; and (3) sets out the counsel's substantive explanation of why those issues are without merit. Id. at 24-25 (citing

² Black's Law Dictionary defines "colorable" as "appearing to be true, valid, or right." Black's Law Dictionary 301 (9th Ed. 2009).

Commonwealth v. Turner, 518 Pa. 491, 494-95, 544 A.2d 927, 928 (1988)). Counsel in this case submitted his Letter. The Letter states that Counsel has “exhaustive[ly] examin[ed]” the certified record, satisfying the first element. (Letter at 1.) Next, Counsel discusses in turn each of the issues raised in Searcy’s Petition, which Counsel describes as follows: (1) the Board denied Searcy the right to confront his accusers; (2) the Board erred in admitting verbal and written statements by the witnesses against Searcy without allowing for cross-examination; (3) the Board admitted a report that constituted hearsay; (4) there is only hearsay evidence to support a finding that Searcy violated condition 5(b) of his parole; (5) Searcy was denied the opportunity to cross-examine the police officers who wrote the hearsay report, along with the parole agent; and (6) the Board’s finding that Searcy violated condition 5(b) was based solely on hearsay. (Letter at 2-3.) After reviewing the Petition, we conclude that this is an accurate summary of the issues raised by Searcy.³

³ Specifically, Searcy argues in his Petition that:

6. The objections raised before the Board in the request for administrative review addressed the issue of whether Petitioner was denied his State and Federal Constitutional Due Process right to confrontation and possession of a weapon, (Condition 5b).

7. Petitioners [sic] parole was revoked by the board on his alleged violation of condition 5(b). The sole basis for this violation was verbal, and/or written statements by 2 police officers as well as the parole agent. The report was admitted without showing good cause for denying cross-examination and confrontation, thereby, denying his rights to due process and confrontation.

8. The admission of the report also violated Board regulations under hearsay.

9. At the revocation hearing, the Board only provided hearsay statements (and no evidence of any weapon) from said police officers (as no individual testified).

10. Petitioner was denied confrontation and cross-examination of the police officers, who prepared the report as well as the parole agent.

Essentially, Searcy argues that a hearsay report was offered into evidence, that he did not have an opportunity to cross-examine the witnesses who testified against him, and that the Board based its finding that he violated condition 5(b) based solely on hearsay. In the Letter Counsel explains, with regard to the report, that the Petition does not explain what report Searcy is referencing and that Searcy was unable to elucidate the matter in a conference with Counsel. (Letter at 3.) Counsel also points out that none of the witnesses offered any written statements at the hearing. (Letter at 2.) The Letter further explains that Counsel, who represented Searcy at the hearing, had the opportunity to cross-examine the witnesses who testified against Searcy. (Letter at 2-3.) Finally, Counsel explains that, although the witnesses' statements regarding Searcy's admission that he possessed a firearm are technically hearsay, they fall within an exception to the hearsay rule and are, therefore, admissible evidence which the factfinder may consider. (Letter at 3.) Thus, we conclude that Counsel provided a substantive explanation regarding why the issues Searcy wishes to raise are without merit. Counsel's Letter is, therefore, adequate and this Court will conduct an independent investigation of the record to determine whether the issues raised in the Petition have any merit. Hughes, 977 A.2d at 25.

Regarding Searcy's argument that a hearsay report or record was introduced at his violation hearing, we note, after reviewing the transcript of the hearing, that no documents or exhibits were introduced at the hearing. With regard to Searcy's

11. The Board relied solely on the hearsay evidence of the unsubstantiated police statements in finding a violation of parole conditions. In the absence of good cause – which requires a showing of the regularity and reliability of the evidence. An order revoking parole may not rest solely on hearsay evidence.

(Petition for Review ¶¶ 6-11.)

argument that he did not have the opportunity to confront or cross-examine the witnesses against him, we note that Counsel had the opportunity to cross-examine these witnesses and, in fact, did cross-examine each witness. Finally, we reject Searcy's argument that the Board's determination should be reversed because his violation of condition 5(b) is supported only by hearsay evidence. Each of the witnesses against Searcy testified at the hearing that Searcy admitted in their presence that he possessed a firearm. (Examiner Hr'g Tr. at 13-14, 17-18, 24, 30, R. at 45-46, 49-50, 56, 62.) Rule 803(25)(A) of the Pennsylvania Rules of Evidence provides that a party's own statement is admissible against that party. Pa. R.E. 803(25)(A). Because the witnesses were testifying regarding Searcy's own admissions, such testimony was admissible. Therefore, we conclude that the arguments raised in Searcy's Petition are without merit. For these reasons, we grant Counsel's Application and affirm the order of the Board.⁴

RENÉE COHN JUBELIRER, Judge

⁴ Searcy raises additional issues in his brief to this Court, such as ineffective assistance of counsel and violations of Searcy's Fourth, Fifth, and Sixth Amendment rights under the United States Constitution. Searcy did not raise these issues in his Petition for Review and they are, therefore, waived. Rackley v. Pennsylvania Board of Probation and Parole, 881 A.2d 69, 72 (Pa. Cmwlth. 2005.)

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and Parole,	:	
	:	
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ORDER

NOW, April 21, 2010, the Application to Withdraw Appearance of Lowell T. Williams in the above-captioned matter is hereby **GRANTED**. Additionally, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge