

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael King,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 15 C.D. 2011
	:	
Pennsylvania Board of Probation and Parole,	:	Submitted: July 1, 2011
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: August 23, 2011

Michael King (King) petitions for review of the October 1, 2010 Order of the Pennsylvania Board of Probation and Parole (Board), recommitting King to a state correctional institution to serve concurring terms of 18 months and two years, seven months, and two days of backtime as a Convicted Parole Violator (CPV). Douglas J. Campbell, Esq., Assistant Public Defender for Clearfield County (Counsel), King's court-appointed counsel, has petitioned this Court for leave to withdraw as counsel (Petition) and submitted a no-merit letter pursuant to Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988). Consequently, this

Court must determine whether: (1) the no-merit letter complies with the standards set forth in Turner; and (2) the claims raised in King's Petition for Review are without merit.

On March 7, 2005, King was found guilty of two separate charges by the Court of Common Pleas of Luzerne County (Luzerne County trial court) and was sentenced to one to two years' incarceration on the first charge, and nine months to one year, six months' incarceration on the second charge. (Sentence Status Summary at 1, C.R. at 1.) Subsequently, on July 28, 2005, the Court of Common Pleas of Philadelphia County (Philadelphia County trial court) found King guilty of violating his probation and sentenced him to an additional one to two years of incarceration. (Sentence Status Summary at 1, C.R. at 1.) King's minimum and maximum sentences were respectively, two years and nine months and five years and six months, with a maximum release date of September 7, 2010.¹ (Sentence Status Summary at 1, 2, C.R. at 1, 2.) On September 20, 2007, the Board granted King parole, and he was released on parole on February 4, 2008. (Notice of Board Decision, September 20, 2007 at 1, C.R. at 4; Warrant to Commit and Detain, C.R. at 10.)

While on parole, King was arrested for, *inter alia*, aggravated assault, on July 24, 2009. (Notice of Charges and Hearing, C.R. at 20.) The Board issued a warrant for King's detention on July 25, 2009. (Warrant to Commit and Detain,

¹ The no-merit letter indicates that King's sentence for violating his probation was a "concurrent sentence." (Counsel's No-Merit Letter at 2.) However, the sentencing report does not reflect that statement and sets King's maximum sentence date as the one used by the Board in making its determinations.

C.R. at 10.) The Philadelphia County trial court convicted King on May 4, 2010. (Notice of Charges and Hearing, C.R. at 20.) King was then sentenced on July 13, 2010. (Notice of Charges and Hearing, C.R. at 20.) Thereafter, the Board revoked King's parole, recommitting him "to a State Correctional Institution as a [CPV] to serve 18 [months] when available pending revocation hearing on [his] Philadelphia County Case." (Notice of Board Decision, September 22, 2010, C.R. at 84.) King filed a petition for administrative relief on October 6, 2010, arguing that the Board exceeded "the total aggregated maximum sentence first imposed by the trial court regarding [his] original sentence and extend[ed] it 18-months." (King's Administrative Relief Appeal, October 6, 2010 at 1, C.R. at 106.) In his appeal, King argued that the Board improperly extended his maximum release date. (King's Administrative Relief Appeal at 1, C.R. at 106.)

After noting its prior determination of September 22, 2010, the Board issued a second determination to recommit King "to a state correctional institution as a convicted parole violator to serve [his] unexpired term, concurrently for a total unexpired term of 2 years, 7 months, 2 days." (Notice of Board Decision, October 1, 2010, C.R. at 114.) The Board then recalculated King's new maximum date as February 12, 2013, denying him credit for the time he was at liberty on parole, but crediting him for time periods during which he was incarcerated solely on the Board's warrant. (Board's Response to Administrative Appeal, January 13, 2011, C.R. at 119.) King submitted a second petition for administrative relief restating his allegations that the Board wrongly extended his judicially imposed sentence when it recalculated his maximum date as February 12, 2013. (King's Administrative Relief Appeal, October 27, 2010, at 1, 2, C.R. at 115-16.) On

administrative appeal, the Board’s determination was affirmed. (Board’s Response to Administrative Appeal, January 13, 2011, C.R. at 119.) King petitioned this Court for review, and we appointed Counsel.²

Following his appointment, Counsel filed his Petition and no-merit letter, seeking leave to withdraw under Turner. In order to obtain leave to withdraw, Counsel must establish that he properly discharged his responsibility by complying with the technical requirements of a no-merit letter set forth in Pennsylvania v. Finley, 481 U.S. 551 (1987). Turner, 518 Pa. at 494, 544 A.2d at 928. The Supreme Court of the United States, in Finley, stated that where the criminal conviction has already occurred, the federal constitutional right to counsel no longer exists. Finley, 481 U.S. at 555. In these situations, “[s]tates have no obligation to provide [postconviction] relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.” Id. at 557 (citation omitted). According to Turner, when states create a right to counsel for these instances, as is the case here, a proper no-merit letter must “detail[] [1] the nature and extent of [the counsel’s] review and [2] list[] each issue the petitioner wished to have raised, with [3] counsel’s explanation of why those issues were meritless.” Turner, 518 Pa. at 494, 544 A.2d at 928 (citing Finley, 481 U.S. 551); see also Finley, 481 U.S. at 557 (describing the differences between state-created right to counsel and constitutional due process). “Counsel must also send to the petitioner: (1) a copy of the ‘no-merit’ letter/brief; (2) a copy

² Our Court’s review in parole revocation cases “is limited to a determination of whether necessary findings are supported by substantial evidence, an error of law was committed, or whether constitutional rights of the parolee were violated.” Johnson v. Pennsylvania Board of Probation and Parole, 706 A.2d 903, 904 (Pa. Cmwlth. 1998).

of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed pro se or by new counsel." Zerby v. Shanon, 964 A.2d 956, 960 (Pa. Cmwlth. 2009). If counsel meets the above requirements, "the court . . . must then conduct its own review of the merits of the case." Id. If the court agrees that petitioner's case is without merit, "the court will permit counsel to withdraw and deny relief." Id. If the court finds that petitioner's claim has merit, "the court will deny counsel's request and grant relief, or at least instruct counsel to file an advocate's brief." Id.

Here, Counsel's no-merit letter: (1) stated that he reviewed the certified record, the issue King wishes to raise, and researched applicable law; (2) analyzed the issue raised by King that the Board inappropriately extended his judicially imposed sentence; and (3) after a thorough discussion of King's legal arguments and a comparison to the record, Counsel set forth his reasoning for why King's arguments were without merit. In addition, Counsel sent King a copy of his no-merit letter. (Counsel's No-Merit Letter at 7.)³ In the no-merit letter, Counsel advised King of his right to retain substitute counsel or raise any claims "he may deem worthy of merit in a pro se brief." (Counsel's No-Merit Letter at 7.) Counsel also sent King his Petition. Therefore, we conclude that Counsel complied with the requirements set forth in Turner, and we will now review the merits of King's arguments to determine whether to grant or deny Counsel's Petition, and whether to grant or deny King relief.

³ Counsel's no-merit letter is not paginated and, therefore, all page numbers are taken from counting the pages of the no-merit letter.

Relying on Savage v. Pennsylvania Board of Probation and Parole, 761 A.2d 643 (Pa. Cmwlth. 2000) and Davenport v. Pennsylvania Board of Probation and Parole, 656 A.2d 581 (Pa. Cmwlth 1995), King argues that the Board improperly extended his final maximum release date when it changed his maximum date from September 7, 2010, to February 12, 2013. King asserts that, because the Board does not have the power to alter judicially imposed sentences by law, an extension of his original maximum date is illegal.

A parolee, “may at the discretion of the board be recommitted as a parole violator” if the parolee commits a crime punishable by imprisonment. Section 6138(a)(1) of the Prison and Parole Code (Code), 61 Pa. C.S. § 6138(a)(1).⁴ If recommitted pursuant to this provision, a parolee “shall be reentered *to serve the remainder of the term which the parolee would have been compelled to serve had the parole not been granted and shall be given no credit for the time at liberty on parole.*” 61 Pa. C.S. § 6138(a)(2) (emphasis added). This Court has referred to this recommitted period as “backtime” which is

merely that part of an *existing* judicially-imposed sentence which the Board directs a parolee to complete following a finding after a *civil* administrative hearing that the parolee violated the terms and conditions of parole, which time must be served before the parolee may again be eligible to be considered for a grant of parole. . . . Section 21.1 of the Parole Act[, former 61 P.S. § 331.21a,] gives the Board the power to return parole violators to prison to serve the *entire remaining balance* of their unexpired terms.

⁴ The timeline here spans periods during which both the Code and the former Parole Act, Act of August 6, 1941, P.L. 861, repealed by Section 11(b) of the Act of August 11, 2009, P.L. 147, effective October 13, 2009, were effective. However, the relevant language of Section 6138 of the Code is the same as Section 21.1 of the former Parole Act, 61 P.S. § 331.21a; therefore, for ease we will refer to the current Code.

Davenport, 656 A.2d at 583 n.3 (citations omitted) (emphasis in original) (quoting Krantz v. Board of Probation and Parole, 483 A.2d 1044, 1047-48 (Pa. Cmwlth. 1984)). The “[c]alculation of the amount of backtime is within the Board’s discretion, but that discretion is limited by the remaining balance of the unexpired term.” Davenport, 656 A.2d at 583 n.3.

In Savage, the Board recommitted the parolee to serve 125 months of backtime when he only had twelve months left to serve on his sentence. Savage, 761 A.2d at 644-45. This Court, in Savage, held that, because the Board failed to include language limiting the recommitment sentence to the parolee’s unexpired term, its actions were “clearly in error” as the Board’s order could lead someone to believe that the parolee’s recommitted period would extend past the maximum sentence, i.e., that the parolee would actually have to serve all of the 125 months, rather than just the time remaining on his sentence. Id. at 645. Due to this failure by the Board, we reversed the Board’s determination, stating that “such actions are patently unfair to a parolee because he/she could be misled to believe that the recommitment period extends beyond the maximum sentence.” Id. Similarly, in Davenport, the Board issued a decision to recommit the parolee to serve 624 months of backtime, although the Board admitted that petitioner’s unexpired term was 121 months. Davenport, 656 A.2d at 583. There, our Court held that the Board erred because the term for recommitment was close to 42 years over the petitioner’s unexpired term. Id. at 583-84.

Here, when King was released on parole, he had two years, seven months, and two days remaining on his sentence until his maximum date of September 7,

2010. When King was convicted of the subsequent felony charges while on parole, the Board ordered King recommitted for eighteen months. Thereafter, the Board issued another determination recommitting King for an additional two year, seven month, and two day period to run concurrently with the original eighteen month recommitment. In doing so the Board noted that, because King was recommitted as a CPV, it was required by Section 6138(a) of the Code to recalculate King's maximum release date to reflect that he did not receive credit for the period he was on parole. (Board's Response to Administrative Appeal, January 13, 2011, C.R. at 119.) Contrary to King's argument, the duration of his recommitment does not extend his judicially imposed sentence; it merely declines to credit King for the time he spent on parole as is proper pursuant to Section 6138(a)(2) of the Code. Additionally, unlike in Savage and Davenport, the Board here was clear in its determination that King's backtime sentence was limited to his "unexpired term." Because the Board recommitted King for a period equal to that of his unexpired term, it did not improperly extend a judicially mandated sentence.

For these reasons, we conclude that the Board did not err or abuse its discretion when it recommitted King to serve his remaining term of two years, seven months, and two days, and properly recalculated King's maximum release date using that term. Accordingly, we grant Counsel's Petition and affirm the Board's Order.

RENÉE COHN JUBELIRER, Judge

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and Parole,	:	
	:	
Respondent	:	

ORDER

NOW, August 23, 2011, the Petition for Withdrawal of Appearance filed by Douglas J. Campbell, Esq. is hereby **GRANTED**, and the Order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge