

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Keith M. Silfies,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1967 C.D. 2009
	:	Submitted: May 21, 2010
Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge**

***OPINION NOT REPORTED***

**MEMORANDUM OPINION  
BY JUDGE BROBSON**

**FILED:** August 5, 2010

Petitioner Keith M. Silfies (Silfies) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) that denied his application for administrative review. Additionally, Silfies’ appointed counsel, Kent D. Watkins, Esquire (Counsel), petitions for leave to withdraw as counsel. Counsel asserts, as expressed in his “no-merit” letter, that the issues Silfies raises in his petition for review lack merit. We grant Counsel’s petition for leave to withdraw and affirm the Board’s denial of Silfies’ request for administrative review.

The record reveals the following factual and procedural background. On June 8, 2005, Judge William H. Platt of the Court of Common Pleas of Lehigh County sentenced Silfies to numerous prison sentences for his conviction on charges of burglary and receiving stolen property. (Certified Record (C.R. at 6.))

On August 23, 2007, the Board issued a notice of decision, granting parole to Silfies, and indicating that his maximum sentence expiration date was September 11, 2010. (C.R. at 3-5.) The Board issued an order to release him, dated December 10, 2007. (C.R. at 6-7.)

On May 23, 2008, the Board declared Silfies delinquent, effective May 22, 2008. (C.R. at 10.) The Board issued a notice of decision, recorded on September 26, 2008, recommitting Silfies to a state correctional institution as a technical parole violator based upon the Board's determination that Silfies had violated Conditions 2 (change of residence without permission) and 5A (use of drugs) of his parole. (C.R. at 11.) The notice provided for "reparole upon successful completion of the parole violator therapeutic community to an approved plan upon condition that there are no misconducts and subject to . . . special conditions." (*Id.*) The Board recorded a decision on December 19, 2008, modifying its September 26, 2008 recommitment decision, based upon outstanding criminal charges against Silfies. This order deleted the rep parole language of the earlier decision and recommitted Silfies to serve nine months backtime as a technical parole violator, when available, and pending the outcome of the criminal charges. (C.R. at 13.)

Silfies sent a letter to the Board's Secretary seeking to "formally appeal" the Board's December 2008 modification order. (Supplemental Certified Record (S.C.R.))<sup>1</sup> Silfies cited a chapter of a book he refers to as "the PA Law of PBPP," and quoted from that book a statement suggesting that the Board is not

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<sup>1</sup> The Supplemental Certified Record is not paginated, but contains Silfies pro se administrative appeal and a copy of the Board's decision as recorded on September 26, 2008.

empowered to rescind parole based upon events or conduct that occurred and of which the Board is aware before the Board grants parole. (*Id.*) Silfies suggested in his administrative appeal that the Board lodged a detainer against him following his detention in Lehigh County Prison. (*Id.*) Silfies also asserted that the Board violated his due process rights by failing to provide him with a hearing before rescinding parole. (*Id.*)

An assistant public defender in the Lehigh County Office of the Public Defender sent a letter dated January 27, 2009, to the Board. (C.R. at 14.) The Board's date-stamp on the letter appears to indicate that the Board received the letter on or about February 3, 2009. The letter sought to supplement Silfies' administrative appeal. (*Id.*) In the letter, the public defender clarified the factual background surrounding the new criminal charges that were pending against Silfies between the time of the Board's initial September 2008 action and its December 2008 modification action. The public defender also sought to clarify the legal issues arising from those facts.

As indicated on an administrative appeal vote sheet dated February 12, 2009, three voting Board members agreed to affirm the Board's December, 2008 decision. By letter dated April 14, 2009, the Board notified the public defender that (1) the Board could not accept her letter as an appeal because the Board did not receive it on or before January 28, 2009 (within thirty days of the Board's December 29, 2008 decision), and (2) that the Board affirmed its December 29, 2008 decision. (C.R. at 21.) In support of its position, the Board relied upon its regulation found at 27 Pa. Code § 73.1(a), which the Board characterized as requiring a parolee to submit appeals containing accurate, clear, and specific details necessary to provide the Board with an adequate understanding

of the factual and legal issues the parolee would like the Board to address. The Board's letter stated that Silfies' appeal

does not indicate that the Board made any specific evidentiary, procedural, or calculation errors in recommitting [him] as a parole violator. Furthermore, you cannot use an administrative appeal to challenge a decision to rescind the reparole language because granting or refusing parole is purely a matter of the Board's discretion. Thus, the pro se appeal must be dismissed for failure to present adequate factual and legal points for consideration.

*(Id.)*

On appeal, Silfies asserts in an amended petition for review,<sup>2</sup> that (1) the Board's order rescinding parole constituted an error of law, a violation of Silfies' constitutional rights, and was not supported by substantial evidence; (2) the Board did not have jurisdiction to recommit Silfies through its modification order because the criminal charges against him had been dismissed before the Board's December 2008 modification order; (3) the Board failed to give Silfies credit for all time he served solely on the basis of the Board's detainer; and (4) the Board abused its discretion by holding and recommitting Silfies through its decision, which post-dated his acquittal on the new criminal charges.

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<sup>2</sup> On October 2, 2009, Silfies filed a pro se petition for review with this Court, seeking review of the Board's December 29, 2008 decision. Silfies also filed a petition for leave to file nunc pro tunc, and based upon pleadings indicating that the Board had sent its April 2009 letter denying Silfies' administrative appeal to his counsel in an unrelated matter, this Court issued an order on December 3, 2009, granting Silfies' motion and appointing the Public Defender of Schuykill County to represent Silfies in his petition for review. The Court's order also permitted the newly appointed counsel to file an amended petition for review within thirty days of the Court's order. Counsel then filed an amended petition for review that reiterated and clarified some of the issues Silfies had raised in his initial petition for review.

We begin by addressing Counsel’s request to withdraw from his representation of Silfies. Where no constitutional right to counsel is involved, an attorney seeking to withdraw from representation in a probation and parole case need only file a no-merit letter, as opposed to an Anders<sup>3</sup> brief. *Hughes v. Pennsylvania Bd. of Probation and Parole*, 977 A.2d 19 (Pa. Cmwlth. 2009). A constitutional right to counsel arises when the petitioner presents 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.

*Id.* at 25-26 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)). Because Silfies is only challenging the power of the Board to rescind an order that recommitted him, he does not meet the test described in *Hughes*, and he does not have a constitutional right to counsel in this case. *See Hughes*, 977 A.2d at 25-26. Silfies only has a statutory right to counsel under Section 6(a) of the Public Defender Act, Act of December 2, 1968, P.L. 1144, *as*

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<sup>3</sup> In *Anders v. California*, 386 U.S. 738 (1967), the United States Supreme Court held that, in order for a criminal defendant’s counsel to withdraw from representing his client in an appeal, the counsel must assert that the case is completely frivolous, as compared to presenting an absence of merit. An appeal is completely or “wholly” frivolous when there are no factual or legal justifications that support the appeal. *Craig v. Pennsylvania Bd. of Probation and Parole*, 502 A.2d 758 (Pa. Cmwlth. 1985). However, in *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988), our Supreme Court held that in matters that are *collateral* to an underlying criminal proceeding, such as parole matters, a counsel seeking to withdraw from his representation of a client may file a “no-merit” letter that includes information describing the extent and nature of the counsel’s review, listing the issues the client wants to raise, and informing the court by explaining the reasons why counsel believes the issues have no merit.

*amended*, 16 P.S. § 9960.6(a)(10). As such, Counsel properly filed a no-merit letter in order to withdraw from representation of Silfies.

In filing a no-merit letter, counsel must comply with certain procedural requirements. Counsel must: (1) notify the parolee that he has submitted to the Court a request to withdraw; (2) provide the parolee with a copy of counsel's no-merit letter; and (3) advise the parolee that he has the right to obtain new counsel and to submit to the Court a brief of his own raising any arguments that he may believe are meritorious.<sup>4</sup> *Reavis v. Pennsylvania Bd. of Probation and Parole*, 909 A.2d 28, 33 (Pa. Cmwlth. 2006). In seeking to withdraw, an attorney must include the following descriptive information in the no-merit letter: (1) the nature and extent of counsel's review of the case; (2) the issues the parolee wants to raise; and (3) the analysis counsel used in reaching his conclusion that the issues are meritless. *Zerby v. Shanon*, 964 A.2d 956, 961 (Pa. Cmwlth. 2009).<sup>5</sup>

Counsel's no-merit letter suggests that, even if the Board had concluded that Silfies' administrative appeal sufficiently presented the factual and legal issues of which Silfies sought review, the Board's September 2008 recommitment order did not include an effective date of parole, and Silfies did not accept and sign an agreement acknowledging Board-imposed conditions of parole. Counsel asserts that the Board is empowered to delay the actual release date in granting parole and that the lack of a definitive release date meant that Silfies was not subject to a parole revocation that would have required the Board to conduct a

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<sup>4</sup> Counsel has complied with these requirements.

<sup>5</sup> Counsel's no-merit letter complies with these requirements.

hearing before modifying his “uncompleted” parole application. Aside from referring to the regulatory provisions, Counsel does not offer any citations to case law in support of his conclusion that Silfies’ appeal has no merit.

Nevertheless, we agree with Counsel’s characterization of the September 26, 2008, Board order as one which does not provide Silfies with a right to a pre-modification hearing. In *Lord v. Pennsylvania Board of Probation and Parole*, 580 A.2d 463, 464-65 (Pa. Cmwlth. 1990), this Court held that, generally, the Board has the power to rescind an order granting parole if the parole order has not been executed. Execution of a Board parole order does not occur until (1) a parolee signs an acknowledgment of the conditions the Board has attached to the grant of his parole and (2) the Board issues a release order. *Id.* at 464.<sup>6</sup>

In this case, the Board’s order provided simply for recommitment with the possibility of future parole upon Silfies’ satisfaction of certain conditions. The Board did not and could not have, however, executed the September 26, 2008 order because it was a recommitment order and not a reparole order, and consequently, the Board was not required to provide Silfies with a hearing before it elected to rescind the reparole aspect of the September 2008 order.

Based on the foregoing, we agree with Counsel that Silfies’ petition for review lacks merit, and, therefore, we grant Counsel’s petition for leave to

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<sup>6</sup> As reflected in this Court’s recent decision in *Gruff v. Pennsylvania Board of Probation and Parole*, 986 A.2d 953, 958 (Pa. Cmwlth. 2009), there are situations in which a grant of parole may have been executed, but a parolee remains in confinement. The Court in *Gruff* provided the example contained in *Green v. Pennsylvania Board of Probation and Parole*, 515 A.2d 1006, 1008 (Pa. Cmwlth. 1986), in which a parolee was “constructively paroled” from his original sentence, but remained in custody because of a detainer sentence. Under those circumstances, although the parolee was still in confinement, his parole had been executed and due process rights had attached to the grant of parole such that the Board was required to provide notice and hearing.

withdraw as counsel. Moreover, because we have concluded that Silfies' appeal lacks merit,<sup>7</sup> we dismiss his appeal and affirm the order of the Board denying his administrative appeal.<sup>8</sup>

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P. KEVIN BROBSON, Judge

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<sup>7</sup> In reaching this conclusion, the Court considered the "brief for judicial review" filed by Silfies.

<sup>8</sup> Silfies raised an additional issue in his amended petition for review relating to the question of whether the Board properly credited him for time he spent in incarceration on the Board's detainer following the filing of new criminal charges. Neither Silfies nor the public defender in Lehigh County who sent the untimely supplemental administrative appeal information to the Board raised this question, and, consequently, Silfies has waived this issue.



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

***ORDER***

AND NOW, this 5th day of August, 2010, petition for leave to withdraw as counsel, filed by Kent D. Watkins, Esquire, is GRANTED. The Board's order dated December 19, 2008, is AFFIRMED, and the appeal is DISMISSED.

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P. KEVIN BROBSON, Judge