

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Basir Starkes,	:	
a.k.a. Harvey Clanton,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Board of	:	
Probation and Parole,	:	
	:	No. 222 C.D. 2011
Respondent	:	Submitted: July 29, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: September 7, 2011

Basir Starkes a.k.a. Harvey Clanton (Starkes), an inmate at the State Correctional Institution (SCI) at Graterford, petitions this Court for review of the January 25, 2011 order of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief. Petitioner's counsel, David Crowley, Esquire (Counsel), has filed a petition for leave to withdraw as counsel, and has submitted a brief in support of his petition. For reasons set forth in this opinion, we grant Counsel's petition to withdraw and affirm the order of the Board.

On July 24, 1992, Starkes was sentenced to not less than 2.5 to 5 years. He was released on parole on June 26, 2000 after serving backtime on an earlier sentence. His parole violation maximum date was set at December 21, 2002. He was declared delinquent by the Board on May 7, 2002. Starkes was then arrested by the FBI on June 21, 2002 for robbery. That same day, the Board issued a warrant to

commit and detain him. Starkes pled guilty to two counts of a federal indictment on December 15, 2003, and was sentenced to serve 108 months in prison concurrently with any state sentence that may be imposed on him.

On September 12, 2005, Starkes sent a letter to the Board requesting that it schedule a revocation hearing. The Board informed Starkes that a revocation hearing would not be scheduled until his return to state custody following the completion of his federal sentence. On June 1, 2007, Starkes contacted the Board again with a complaint that the Board's warrant lodged with the Federal Bureau of Prisons precluded him from participating in pre-release and other federal programs. Starkes also complained that he was not provided with a timely preliminary or final revocation hearing, and argued that his federal sentence was supposed to run concurrently with his state parole backtime. There is nothing in the record indicating that the Board responded to Starkes' June 1, 2007 inquiry. On May 10, 2010, Starkes sought clarification from the federal court as to whether his federal sentence ran concurrent with the time remaining on his original state sentence. There is nothing in the record to indicate that the federal court responded to Starkes' inquiry.

Starkes was released by federal authorities to the Board's detainer on May 6, 2010, and a revocation hearing was held on May 26, 2010. The Board issued a decision on August 19, 2010 recommitting Starkes as a convicted parole violator to serve his unexpired term with a parole violation maximum date of October 30, 2012. He timely filed an administrative appeal of the recommitment, which was denied by the Board on January 25, 2011. Starkes filed a petition for review with this Court on February 11, 2011.¹ On June 8, 2011, Counsel filed a petition to withdraw his appearance and an *Anders* brief.²

¹ "Our scope of review of the Board's decision denying administrative relief is limited to determining whether necessary findings of fact are supported by substantial evidence, an error of

This Court must first consider Counsel’s application to withdraw his appearance. “In a case where there is a constitutional right to counsel, counsel seeking to withdraw from representation of a petitioner in an appeal of a determination of the Board should file an *Anders* brief.” *Hughes v. Pennsylvania Bd. of Probation and Parole*, 977 A.2d 19, 25 (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.

Seilhamer v. Pennsylvania Bd. of Probation and Parole, 996 A.2d 40, 42 n.4 (Pa. Cmwlth. 2010). In the present case, no constitutional right to counsel arises because Starkes does not claim that he has not violated his parole conditions and Starkes’ issues do not involve allegations that the revocation of his parole was inappropriate. His issues concern timeliness of the revocation hearing and jurisdiction.³ Accordingly, all that was required of Counsel here was a no-merit letter, not an *Anders* brief.

In *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988), the Pennsylvania Supreme Court adopted a less stringent standard for the withdrawal of appointed counsel

law was committed, or constitutional rights have been violated.” *Hubler v. Pennsylvania Bd. of Probation and Parole*, 971 A.2d 535, 537 n.2 (Pa. Cmwlth. 2009).

² *Anders v. California*, 386 U.S. 738 (1967).

³ Counsel includes another issue in his *Anders* brief concerning the concurrent effect of Starkes’ federal sentence. Since this issue was not raised at the administrative hearing or in the petition for review, it will not be considered by this Court. See *Maher v. Unemployment Comp. Bd. of Review*, 983 A.2d 1264, 1266 (Pa. Cmwlth. 2009) (“We will not consider issues raised in a party’s brief when they are not sufficiently addressed in the petition for review”); and Pa.R.A.P. 1551(a) (“No question shall be heard or considered by the court which was not raised before the government unit . . .”).

from cases in which the right to counsel does not derive from the United States Constitution, such as collateral appeals. The Court held that, rather than an *Anders* brief, counsel may instead provide a “no-merit” letter [] which details “the nature and extent of [the attorney’s] review and list[s] each issue the petitioner wished to have raised, with counsel’s explanation of why those issues are meritless,” at which point the court must conduct its own review of whether the claim is meritless. *Id.* at 494–95, 544 A.2d at 928. . . . [I]n *Frankhouser v. Pennsylvania Bd. of Probation and Parole*,] 143 Pa. Cmwlth. 80, 598 A.2d 607 (1991) . . . this Court clarified that a no-merit letter need only “allege that the parolee’s appeal is without merit,” in accord with the requirements of *Turner. Frankhouser*, 598 A.2d at 608 (emphasis added).

Hughes, 977 A.2d at 24-25 (footnotes omitted).

That stated:

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, however, we shall still apply the standard of whether the petitioner’s claims are without merit, rather than whether they are frivolous.

Id. at 26 n.4.

Here, Counsel served copies of the required materials on Starkes, and advised him of his right to proceed pro se or obtain new counsel. Counsel’s *Anders* brief indicates that he reviewed his notes from a May 21, 2010 interview with Starkes and the record provided by the Board on March 31, 2011, and he re-interviewed Starkes on May 13, 2011. Counsel listed Starkes’ issues as: 1) whether Starkes’ revocation hearing was untimely, and 2) whether the Board lacked jurisdiction to revoke parole. Finally, Counsel provides an in-depth analysis of each issue, including references to the record which could arguably support an appeal, and his

conclusion that there is no factual or legal basis for either of Starkes' arguments. Therefore, Counsel has satisfied the procedural requirements for his withdrawal.

Once counsel has complied with the requirements for withdrawal using a no-merit letter, this Court conducts an independent review of the case to determine if it is without merit. *Wesley v. Pennsylvania Bd. of Probation and Parole*, 614 A.2d 355 (Pa. Cmwlth. 1992). Here, Starkes argues that his due process rights were violated because the Board failed to hold a revocation hearing in a timely manner, waiting until after he served his 108-month federal sentence. We disagree.

“When a parolee alleges that the [B]oard held a revocation hearing beyond the 120–day period . . . the [B]oard bears the burden of proving, by a preponderance of the evidence, that a timely revocation hearing was held.” *Butler v. Pennsylvania Bd. of Probation and Parole*, 989 A.2d 936, 939 (Pa. Cmwlth. 2010) (quotation marks omitted). Section 71.4(1) of the Board's regulations provides, in relevant part:

A revocation hearing shall be held within 120 days from the date the Board received official verification of the plea of guilty or nolo contendere or of the guilty verdict at the highest trial court level except as follows:

(i) If a parolee is confined outside the jurisdiction of the Department of Corrections, such as . . . confinement in a Federal correctional institution . . . where the parolee has not waived the right to a revocation hearing . . . the revocation hearing shall be held within 120 days of the official verification of the return of the parolee to a State correctional facility.

37 Pa. Code § 71.4(1). Starkes was arrested on federal charges on June 21, 2002 and, on the same day, the Board issued a warrant to commit and detain him. On December 15, 2003, he pled guilty to two counts of his federal indictment and was sentenced to serve 108 months of imprisonment. Starkes was released from federal

custody on May 6, 2010, and a revocation hearing was held on May 26, 2010. Clearly, Starkes was under federal custody from June 21, 2002 through May 6, 2010, and was not returned to the state's custody until May 6, 2010. A revocation hearing was held twenty days later. Therefore, there is no merit to Starkes' argument regarding the timeliness of his revocation hearing.

Next, Starkes argues that the Board lacked the jurisdiction to revoke his parole, having lost its jurisdiction when it failed to declare him delinquent or place a detainer on him prior to reaching his parole violation maximum date. We disagree.

The Parole Act (Act)^[4] provides the Board with statutory authority to revoke parole even after the expiration of a maximum sentence date. Under Section 21.1a of the Act, 61 P.S. § 331.21a,^[5] the Board retains jurisdiction to recommit a parolee convicted of a crime committed while on parole even after the expiration of an original maximum sentence. There is no doubt that the Board can recommit and recompute the sentence of a parolee who commits a crime while on parole but is not convicted until after his original sentence expired.

Adams v. Pennsylvania Bd. of Probation and Parole, 885 A.2d 1121, 1124 (Pa. Cmwlth. 2005) (citation and footnotes omitted). Starkes was released on parole on June 26, 2000 with a parole violation maximum date of December 21, 2002. On June 21, 2002, while still on parole, he was arrested by federal authorities on new criminal charges. Clearly, Starkes committed a crime punishable by imprisonment while he was on parole, and therefore, the Board retained jurisdiction over Starkes for

⁴ Act of August 6, 1941, P.L. 861, *as amended*, 61 P.S. §§ 331.1-331.34a. It should be noted that the Parole Act was repealed on August 11, 2009, and replaced by the Prisons and Parole Code, 61 Pa.C.S. §§ 101-6153, on the same date. For purposes of the case at bar, the Parole Act was in effect at the time Starkes was on parole, and thus, applies to the analysis of this case. Further, the statutory language applicable to the present case, i.e., the language in 61 P.S. § 331.21a and 61 Pa.C.S. § 6138, is virtually the same as between the Parole Act and the new Prisons and Parole Code.

⁵ Added by Section 5 of the Act of August 24, 1951, P.L. 1401.

purposes of parole revocation, even though he was not convicted of the federal charges until December 15, 2003. Therefore, there is no merit to Starkes' argument as to the Board's lack of jurisdiction.

For the reasons stated above, Counsel's petition to withdraw is granted and the January 25, 2011 order of the Board is affirmed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 7th day of September, 2011, Counsel's petition for leave to withdraw his appearance is granted, and the January 25, 2011 order of the Pennsylvania Board of Probation and Parole is affirmed.

JOHNNY J. BUTLER, Judge