

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin L. Kessler, :  
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 Petitioner :  
 :  
 v. : No. 2462 C.D. 2009  
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 Pennsylvania Board of : Submitted: September 10, 2010  
 Probation and Parole, :  
 :  
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: October 19, 2010

Kevin L. Kessler (Kessler) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief from the Board's decision recommitting him to serve 12 months backtime as a technical parole violator. In addition to the petition for review, we are presented with an amended application for leave to withdraw appearance as counsel filed by Kessler's court-appointed attorney, Robert Feller Morocco, Esquire, on the grounds that Kessler's appeal is without merit. We grant Attorney Morocco's amended application for leave to withdraw appearance as counsel and affirm the order of the Board.

Kessler was released on parole on July 23, 2007, with conditions. Certified Record (C.R.) at 7. Special condition #7 provides "Outpatient

drug/alcohol and sex offender treatment is a special condition of your parole supervision until the treatment source and/or parole supervision staff determine it is no longer necessary.” C.R. at 9. On January 2, 2009, Kessler acknowledged he is subject to the following condition imposed pursuant to special condition #7:

You must attend and successfully complete Outpatient Sex Offender Treatment with Commonwealth Clinical Group, located at 2444 N. 3<sup>rd</sup> Street Harrisburg, PA (717) 236-3600. You must successfully complete this program as determined by their staff and/or the Parole Supervision Staff. You must abide by all the rules and regulations of the program. Any discharge or termination from this program other than successful completion will constitute a violation of the conditions of your parole. If any additional treatment, attendance, participation or aftercare is recommended, you must comply with these recommendations. You must attend and [(sic)] evaluation scheduled BY YOUR AGENT.

C.R. at 16. On April 30, 2009, Kessler was unsuccessfully discharged from the sex offender treatment program. C.R. at 19. The Board issued a warrant to commit and detain Kessler for violating a condition of his parole. C.R. at 20.

On May 8, 2009, a preliminary hearing was held. C.R. at 29. Kessler was represented by counsel. C.R. at 31. Probable cause was established that Kessler violated special condition #7. C.R. at 29-30.

On May 26, 2009, a parole violation hearing was scheduled. Kessler waived his constitutional right to a violation hearing. C.R. at 49. Kessler also waived his right to counsel. C.R. at 50. Kessler admitted that he violated special condition #7 of his parole. C.R. at 51. As a result, the Board recommitted Kessler to a state correctional institution as a technical parole violator to serve twelve (12) months backtime for violating special condition #7. C.R. at 55.

Thereafter, Kessler timely filed a request for administrative relief, claiming that the Board did not have sufficient evidence to revoke parole, the Board failed to consider the reasons for his discharge from the treatment program, and the Board's decision to recommit Kessler for 12 months is excessive and an abuse of discretion. C.R. at 56-59. By letter dated November 13, 2009, the Board denied Kessler's request. Kessler filed a *pro se* petition for review with this Court, which then appointed Attorney Morocco to represent Kessler.

On March 15, 2010, Attorney Morocco filed his first application to withdraw along with a no-merit letter based on his belief that Kessler's appeal is without merit. However, due to Counsel's failure to address all the issues raised by Kessler in this appeal, this Court denied the application to withdraw but with leave to amend within thirty days or, in the alternative, to file a brief supporting Kessler's position. Thereafter, Counsel filed an amended application to withdraw and no merit letter again stating his belief that Kessler's appeal is without merit.<sup>1</sup>

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<sup>1</sup> This Court has reexamined what steps counsel appointed to represent petitioners seeking review of determinations of the Board must take to withdraw from representation. In Hughes v. Pennsylvania Board of Probation and Parole, 977 A.2d 19 (Pa. Cmwlth. 2009), this Court held that 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 a brief in accordance with Anders v. California, 386 U.S. 738 (1967). Relying upon the United States Supreme Court's decision in Gagnon v. Scarpelli, 411 U.S. 778 (1973), we held that a constitutional right to counsel arises where the petitioner raises 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.

Hughes, 977 A.2d at 24 (quoting Gagnon, 411 U.S. at 790). We stated further that such claims would only arise in appeals from determinations revoking parole. Id. Accordingly, we held that “[i]n an appeal from a revocation decision, this Court will apply the test from Gagnon,

(Continued....)

Counsel seeking to withdraw must conduct a zealous review of the case and submit a “no-merit” letter to this Court detailing the nature and extent of counsel’s diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw. Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988); Zerby v. Shanon, 964 A.2d 956 (Pa. Cmwlth. 2009). The no-merit letter must include “substantial reasons for concluding that a petitioner’s arguments are meritless.” Zerby, 964 A.2d at 962 (quoting Jefferson v. Pennsylvania Board of Probation and Parole, 705 A.2d 513, 514 (Pa. Cmwlth. 1998)). In addition, counsel must send the petitioner: (1) a copy of the “no-merit” letter; (2) a copy of the application for leave to withdraw; and (3) a statement that advises the petitioner of the right to retain substitute counsel or proceed *pro se*. Turner; Zerby. If counsel satisfies these technical requirements, this Court must then conduct an independent review of the merits of the case. Id. If this Court determines that the petitioner’s claims are without merit, counsel will be permitted to withdraw and the petitioner will be denied relief. Id.

Here, Attorney Morocco’s “no-merit” letter satisfies the technical requirements of Turner. Attorney Morocco’s letter lists all the issues Kessler seeks to have reviewed and provides a thorough analysis as to why the issues lack merit.

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quoted above, and, unless that test is met, we will only *require* a no-merit letter.” Id. at 26 (emphasis in original, footnote omitted). We noted further that “[a]s in the past, 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.

Herein, Attorney Morocco has filed a no-merit letter. As the issues raised by Kessler in this appeal are neither complex nor difficult to develop, we conclude that Attorney Morocco has followed the correct procedure by filing a no-merit letter.

Attorney Morocco explains that Kessler's issues lack merit because Kessler knowingly, intelligently and voluntarily admitted he violated the terms and conditions of his parole. Further, Kessler waived his constitutional right to a violation hearing and his right to be represented by counsel on his own free will, without promise, threat or coercion. Kessler's written admission constitutes substantial evidence to recommit Kessler for violating special condition #7. The recommitment period of 12 months is within the presumptive recommitment for a violation of special condition #7. Attorney Morocco states he has conducted a conscientious and exhaustive examination of the record. Based upon his review, he has concluded that Kessler's appeal is without merit and requests permission to withdraw. Attorney Morocco provided Kessler with a copy of the "no-merit" letter and his request to withdraw and advised Kessler of his right to retain new counsel or proceed *pro se*.<sup>2</sup> Accordingly, we must now conduct an independent review to determine whether the Board has erred by recommitting Kessler for violating special condition #7 of his parole.<sup>3</sup>

It is well-established that a parolee "must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or if he did, that circumstances in mitigation suggests that the violation does not warrant revocation." McKenzie v. Pennsylvania Board of Probation and Parole, 963 A.2d 616, 620 (Pa. Cmwlth. 2009) (quoting Morrissey v. Brewer,

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<sup>2</sup> No brief has been filed on behalf of Kessler.

<sup>3</sup> This Court's scope of review of a decision by the Board is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether the constitutional rights of the parolee was violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704, Gaito v. Pennsylvania Board of Probation and Parole, 563 A.2d 545 (Pa. Cmwlth. 1989), petition for allowance of appeal denied, 525 Pa. 589, 575 A.2d 118 (1990).

408 U.S. 471, 488 (1972)). This Court has held that no hearing is required after a parolee admits that he violated the terms and conditions of his parole and waives his right to a hearing because the clear statements in the waiver/admission form are sufficient evidence in and of themselves to justify recommitment. Prebella v. Board of Probation and Parole, 942 A.2d 257 (Pa. Cmwlth. 2008); McKenzie. In order to prove that a parolee made a knowing and voluntary waiver, all that is required is for the Board to show that it followed its own regulations and provided the necessary information to the parolee prior to the parolee signing the written waiver form. McKenzie, 963 A.2d at 620.

Here, Kessler signed the violation hearing waiver after being advised of his constitutional rights to preliminary and violation hearings, and that he did so of his “own free will, without promise, threat or coercion.” C.R. at 49, 51. Kessler also signed the waiver of representation by counsel after being advised of his right to be represented, and that he did so of his “own free will, without promise, threat or coercion.” C.R. at 50. Kessler further admitted the parole violation “knowingly, intelligently, and voluntarily,” and with knowledge his admission could be withdrawn within ten days. C.R. at 51. Kessler did not retract his admission within the ten-day grace period.

In the request for administrative relief, Kessler does not deny that he failed to successfully complete Commonwealth’s treatment program. C.R. at 56. Rather, the basis for Kessler’s request for administrative relief was that the Board did not examine the reasons for his discharge and argues that his failure to complete the program was through no fault of his own. Id. Having waived his right to a violation hearing, Kessler waived his right to testify and present evidence regarding the circumstances leading to his discharge. He also waived his right to argue on appeal issues that could have been argued at the waived hearing. See

McKenzie, 963 A.2d at 621 (“It is well-settled that failure to raise an issue before the Board results in waiver and precludes this Court from review.”). Kessler’s admission that he violated special condition #7 of his parole constitutes substantial evidence to support the Board’s recommitment order.

As for Kessler’s claims that the recommitment period is excessive and an abuse of discretion, the presumptive recommitment range for violating a special condition of parole is 3 to 18 months. 37 Pa. Code §75.4. The Board’s decision to recommit Kessler to serve 12-months backtime for violating special condition #7 falls squarely within this range. Any challenge to the length of a recommitment period falling within the presumptive range is not a valid basis for appeal. Smith v. Pennsylvania Board of Probation and Parole, 524 Pa. 500, 574 A.2d 558 (1990).

For these reasons, we agree with Attorney Morocco that Kessler’s appeal has no merit. Accordingly, we grant Attorney Morocco’s amended application for leave to withdraw appearance as counsel and affirm the order of the Board denying Kessler’s request for administrative relief.

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JAMES R. KELLEY, Senior Judge

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Petitioner	:	
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v.	:	No. 2462 C.D. 2009
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Pennsylvania Board of	:	
Probation and Parole,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 19th day of October, 2010, Robert Feller Morocco's amended Application for Leave to Withdraw Appearance is GRANTED and the order of the Pennsylvania Board of Probation and Parole Board's denying Kevin L. Kessler's request for administrative relief is AFFIRMED.

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JAMES R. KELLEY, Senior Judge