

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin L. Kessler, :
Petitioner :
v. : No. 2462 C.D. 2009
Pennsylvania Board of : Submitted: May 28, 2010
Probation and Parole, :
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: July 29, 2010

Kevin L. Kessler (Kessler) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board), which denied his request for administrative relief. In addition to the petition for review, we are presented with an application for leave to withdraw appearance as counsel filed by Kessler's court-appointed attorney, Robert Feller Morocco, on the grounds that Kessler's appeal is without merit. We deny Attorney Morocco's application for leave to withdraw appearance as counsel.

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 determines 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. 3rd 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 also 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. Attorney Morocco now petitions for leave to withdraw.

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, 494, 544 A.2d 927, 928 (1988); Zerby v. Shanon, 964 A.2d 956, 960 (Pa. Cmwlth. 2009). 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*. Id. 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 submitted a no-merit letter in support of his request to withdraw as counsel. While Attorney Morocco's no-merit letter substantially comports with the technical requirements, Attorney Morocco's letter fails to address all the issues Kessler seeks to have raised. Specifically, Attorney Morocco's letter does not address the issue of whether the Board's decision is excessive and an abuse of discretion. On this basis, we must deny his request for leave to withdraw as counsel. The Court will not undertake an independent

examination of the merits of Kessler's appeal until it is satisfied that counsel has fully discharged his obligations under Turner.

JAMES R. KELLEY, Senior Judge

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ORDER

AND NOW, this 29th day of July, 2010, the application for leave to withdraw appearance as counsel filed by Robert Feller Morocco is DENIED, without prejudice, and counsel is directed to refile the application or file a brief in support of Kessler's petition for review within thirty days (30) of this order.

JAMES R. KELLEY, Senior Judge