

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Holman,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2488 C.D. 2010
	:	Submitted: June 17, 2011
Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: August 11, 2011

Robert Holman (Holman) petitions for review from an order of the Pennsylvania Board of Probation and Parole (Board) that recommitted him to serve six months' backtime as a convicted parole violator. Timothy Peter Wile, Esquire (Counsel), Holman's appointed counsel, petitions for leave to withdraw. Concluding the issues raised by Holman are meritless, we affirm the Board's order and grant Counsel's petition to withdraw.

Holman's entire record of convictions and paroles is too extensive to cover here. It is sufficient for current purposes to start in December 2008. At that time, while on parole from various sentences, including a state sentence with a maximum date in 2013, Holman was arrested by the Philadelphia Police and charged with multiple offenses. The Board voted to continue Holman on state parole pending disposition of his new criminal charges.

In November 2009, Holman pled guilty to the new criminal charges, theft by deception and passing bad checks. Nevertheless, he remained free on bail until February 2010. At that time, the Board detained him, and he came under the jurisdiction of the Department of Corrections.

On March 5, 2010, Philadelphia Common Pleas sentenced Holman to a term of 3 months to 23 months in county prison for theft by deception. The court did not impose a prison term on the bad checks conviction. Holman was immediately paroled on the county sentence. He was returned to the state correctional institution on March 10, 2010. Certified Record (C.R.), Item 8 at 1. Official verification of the new conviction was received on March 23, 2010. Id.

On July 6, 2010, Holman, represented by counsel (Hearing Counsel), appeared before a Board hearing examiner for a parole revocation hearing. Hearing Counsel objected to the timeliness of the hearing on due process grounds and on the basis that it was being held more than 120 days after Holman's conviction in violation of Board regulations. Hearing Counsel also lodged a hearsay objection to the testimony concerning the date of official verification. The hearing examiner overruled both the timeliness and hearsay objections.

Regarding the 120-day challenge, the hearing examiner found the Board received official verification of Holman's convictions on March 23, 2010. See Notes of Testimony (N.T.), 07/06/10, at 51-53. Therefore, the Board's July 6 hearing occurred within 120 days from the date the Board received official verification of Holman's convictions as required by 37 Pa. Code §71.4(1).

Ultimately, the Board issued a decision recommitting Holman to a state correctional institution as a convicted parole violator to serve six months' backtime for the offenses of theft by deception and bad checks. Certified Record (C.R.) at 84a. Holman, representing himself, filed an administrative appeal. Id. at 85. In denying Holman's appeal, the Board reasoned:

Because you were not confined at all when you were found guilty, the general rule of 37 Pa. Code §71.4(1) applied to your guilty verdicts ... the 120 day period for holding a Revocation Hearing began on March 23, 2010, the date of official verification of your guilty verdicts; therefore, your Revocation Hearing 105 days later on July 6, 2010, was held within the 120 day period.

Id. at 89.

Holman then filed a petition for review from the Board's denial of his administrative appeal. This Court granted Holman's petition to proceed *in forma pauperis* and appointed the Montgomery County Public Defender to represent him. Thereafter, Counsel entered his appearance and filed an amended petition for review.

After reviewing Holman's case, Counsel filed a petition for leave to withdraw based on his assertion that Holman's appeal is meritless. In accord with Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988), Counsel provided Holman a "no-merit" letter explaining that his appeal is meritless.¹ Counsel

¹ Although an indigent parolee is entitled to appointed counsel on appeal, this right does not require counsel to prosecute a meritless appeal. Zerby v. Shanon, 964 A.2d 956 (Pa. Cmwlth. 2009). There is no right to counsel to bring a meritless appeal. Id.

advised Holman that pursuant to 37 Pa. Code §71.4(1), it is the Board's receipt of the official verification of a parolee's new conviction that triggers the 120-day period for providing a revocation hearing. Gibson v. Pa. Bd. of Prob. & Parole, 3 A.3d 754 (Pa. Cmwlth.), appeal denied, ___ Pa. ___, 13 A.3d 481 (2010). Counsel further advised Holman that he waived any issue regarding the admissibility of the evidence of the date of the Board's receipt of official verification of his new convictions by failing to raise such a challenge in his administrative appeal. Newsome v. Pa. Bd. of Prob. & Parole, 553 A.2d 1050 (Pa. Cmwlth. 1989).

Counsel also advised Holman that Hearing Counsel raised a Fourteenth Amendment due process issue based on the Board's unreasonable delay in holding his parole revocation hearing. However, Counsel observed that neither Hearing Counsel nor Holman presented any evidence of prejudice, a necessary element of a due process claim. See Sanders v. Pa. Bd. of Prob. & Parole, 651 A.2d 663 (Pa. Cmwlth. 1994) (where no prejudice established by unreasonable delay in issuing parole revocation decision, no due process violation). Counsel also explained that Holman waived a Fourteenth Amendment claim by failing to raise it in his administrative appeal. Newsome.

Before this Court will grant a petition to withdraw, appointed counsel must satisfy the technical requirements set forth in Craig v. Pennsylvania Board of Probation & Parole, 502 A.2d 758 (Pa. Cmwlth. 1985). Appointed counsel must notify the parolee of his request to withdraw, furnish the parolee with a copy of a brief complying with Anders v. State of California, 386 U.S. 738 (1967), or a no-merit letter that, in part, informs the parolee of his right to retain new counsel or

submit a brief on his own behalf. Reavis v. Pa. Bd. of Prob. & Parole, 909 A.2d 28 (Pa. Cmwlth. 2006).

If appointed counsel provides a no-merit letter, the letter must contain the nature and extent of counsel’s review, the issues the parolee wishes to raise and counsel’s analysis in concluding the parolee’s appeal is meritless.² Hughes v. Pa. Bd. of Prob. & Parole, 977 A.2d 19 (Pa. Cmwlth. 2009); Zerby v. Shanon, 964 A.2d 956 (Pa. Cmwlth. 2009). Once appointed counsel satisfies these requirements, it is incumbent upon this Court to make an independent evaluation of the merits of the appeal to determine whether it is meritless. Id.

Where, as here, counsel proceeds under Turner, the no-merit letter must substantively contain: the nature and extent of counsel’s review; the issues the parolee wishes to raise; and, counsel’s analysis in concluding the parolee’s appeal is meritless. Hughes; Zerby. We require counsel to comply with these requirements to ensure an inmate’s claims are considered and counsel has substantial reasons for concluding those claims are meritless. Id.

² Counsel uses the term “frivolous” throughout his “no-merit” letter. “Frivolousness,” a standard applied in Anders briefs, is not the proper standard in a no-merit letter. Zerby. “[F]rivolousness is a slightly higher standard than lack of merit; an argument may be meritless but not frivolous.” Id., 964 A.2d at 960. Where there is a reasonable belief that the Court will be persuaded to change existing law, an appeal may be meritless under that existing law, but not frivolous. Smith v. Pa. Bd. of Prob. & Parole, 524 Pa. 500, 574 A.2d 558 (1990). Here, we find Holman’s appeal, which completely lacks factual or legal reasons that might arguably support it, frivolous and meritless. Nevertheless, in this “no-merit” case, we apply the lesser standard. Hughes; Zerby.

Here, Counsel notified Holman of his request to withdraw and advised him of his right to file a brief on his own behalf or to retain new counsel. Further, Counsel served Holman with a copy of his petition to withdraw and a copy of his no-merit letter. Thus, Counsel complied with the technical requirements set forth in Craig. Additionally, Counsel's no-merit letter complies with Turner. It contains a statement indicating Counsel reviewed the proceedings affecting Holman, Holman's amended petition for review, and the certified record. The no-merit letter also addressed the timeliness issues Holman raised on appeal. Moreover, it set forth Counsel's analysis of the issues and why they are meritless.

We next examine the timeliness issues raised by Holman. Our independent review confirms Holman's appeal is meritless. In his brief here, submitted in response to Counsel's petition to withdraw, Holman asserts the Board arrested and confined him pursuant to a detainer on February 18, 2010. He contends the Board's July 6, 2010 revocation hearing violated the timeliness requirement in 37 Pa. Code §71.4(1) because it occurred more than 120 days after the Board held him on detainer.

Holman cites no authority for his absurd argument that 37 Pa. Code §71.4(1) (conviction for a new criminal offense) requires that the Board provide him with a revocation hearing within 120 days from the date the Board detained him, even if that is *before* conviction of a new criminal offense. To the contrary, where the Board files convicted parole violator charges, a revocation hearing must be held within 120 days from the date the Board receives official verification of a plea of guilty or *nolo contendere*, or a guilty verdict. 37 Pa. Code §71.4(1); Reavis.

When a parolee asserts the Board failed to hold a timely revocation hearing, the Board bears the burden of showing by a preponderance of the evidence that a timely hearing occurred. Reavis. If the Board fails to meet this burden, the appropriate remedy is dismissal of the parole violation charges with prejudice. Taylor v. Pa. Bd. of Prob. & Parole, 931 A.2d 114 (Pa. Cmwlth. 2007).

In its entirety, 37 Pa. Code §71.4(1) provides (with emphasis added):

The following procedures shall be followed before a parolee is recommitted as a convicted parole violator:

(1) 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 out-of-State, confinement in a Federal correctional institution or confinement in a county correctional institution where the parolee has not waived the right to a revocation hearing by a panel in accordance with *Commonwealth ex rel. Rambeau v. Rundle*, 455 Pa. 8, 314 A.2d 842 (1973), the revocation hearing shall be held within 120 days of the official verification of the return of the parolee to a State correctional facility.

(ii) A parolee who is confined in a county correctional institution and who has waived the right to a revocation hearing by a panel in accordance with the *Rambeau* decision shall be deemed to be within the jurisdiction of the Department of Corrections as of the date of the waiver.

Here, Holman remained under the jurisdiction of the Department of Corrections at all relevant times. Consequently, the general rule in 37 Pa. Code

§71.4(1) applies. Montgomery v. Pa. Bd. of Prob. & Parole, 808 A.2d 999 (Pa. Cmwlth. 2002).

At the revocation hearing, the hearing examiner determined the Board received official verification of Holman's new convictions on March 23, 2010. Holman did not challenge this determination in his administrative appeal. Therefore, it is waived. Newsome.

Clearly, the July 6 revocation hearing occurred within 120 days of the March 23 date the Board received official verification of Holman's new convictions. Accordingly, the Board complied with the 120-day requirement in 37 Pa. Code §71.4(1).³ Reavis; Taylor.

Based on the foregoing, we conclude Holman's appeal is meritless. Counsel's petition to withdraw is granted and the Board's order is affirmed.

ROBERT SIMPSON, Judge

³ Upon review of Claimant's administrative appeal, C.R. at 85, we also agree with Counsel that Holman waived any Fourteenth Amendment due process claim. Newsome. In any event, the Board did not violate Holman's due process rights; it held a revocation hearing within 120 days of the Board's receipt of official verification of his new convictions. See Lawson v. Pa. Bd. of Prob. & Parole, 977 A.2d 85 (Pa. Cmwlth. 2009) (it is reasonable for 120-day period mandated in 37 Pa. Code §71.4(1) to begin to run on the date the Board receives official verification of a parolee's conviction; this regulation strikes a balance between a parolee's right to due process and the Board's ability to obtain information).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Holman,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2488 C.D. 2010
	:	
Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 11th day of August, 2011, the order of the Pennsylvania Board of probation and Parole is **AFFIRMED**. The petition of Timothy P. Wile, Esq., to withdraw as counsel is **GRANTED**.

ROBERT SIMPSON, Judge