IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Clinton Smith, Petitioner	:	
v.	:	
Pennsylvania Board of Probation and Parole, Respondent	:	No. 2543 C.D. 2009
	:	Submitted: July 16, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: August 20, 2010

Clinton Smith (Petitioner), an inmate at the State Correctional Institution (SCI) at Albion, petitions this Court for review of the order of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief. Petitioner's counsel, Tina M. Fryling, Esquire (Counsel), has filed a petition for leave to withdraw as counsel, and has submitted a letter in support of her petition. For reasons set forth in this opinion, we grant Counsel's petition to withdraw and affirm the order of the Board.

On November 7, 2001, Petitioner was sentenced to a term of four to eight years for a violation of probation. Petitioner's minimum release date was October 10, 2005, and his maximum release date was October 10, 2009. Petitioner was paroled on October 24, 2005, and rearrested on unrelated criminal charges on July 15, 2007. Petitioner was released on his own recognizance on September 11, 2007. Petitioner was convicted of one of those charges and sentenced to a term of 3

to 23 months. He was paroled on October 8, 2008, and arrested again on December 30, 2008 for unrelated criminal charges. He did not post bail and was not convicted of those charges. On March 24, 2009, Petitioner was transferred to SCI-Graterford and placed in "parole violator pending" status. On June 24, 2009 the Board mailed its decision indicating Petitioner's new maximum sentence date of July 2, 2012.

Petitioner filed an administrative appeal from the Board's decision, and in a decision mailed December 1, 2009, the Board affirmed its previous decision. On January 19, 2010, Petitioner filed a Petition for Review with this Court. The Public Defender's Office was appointed to represent Petitioner on January 21, 2010, and on April 9, 2010, Counsel filed her petition for leave to withdraw and no-merit letter in support thereof. Petitioner filed a pro se informal letter-brief on June 25, 2010.

Under *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) (*Turner/Finley)*, when an attorney wants to withdraw representation, the attorney must review the case zealously, and:

> submit a 'no-merit' letter to the trial court, or brief on appeal 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.

Zerby v. Shanon, 964 A.2d 956, 960 (Pa. Cmwlth. 2009). "A no-merit letter must include substantial reasons for concluding that a petitioner's arguments are meritless." *Id.* at 962 (quotation marks omitted). Here, Counsel's letter detailed the nature and extent of Counsel's review of the case, listed Petitioner's issues, and explained why and how those issues lacked merit.

Petitioner argues that the Board erroneously and unlawfully extended Petitioner's maximum release date by 360 days. Specifically, Petitioner contends that

because he was held on the Board's warrant/detainer, all his time spent in custody from July 15, 2007 onward, should be credited towards his maximum sentence date. Further, Petitioner contends that when his street time is forfeited and added to his original maximum release date of October 10, 2009, the new maximum release date becomes June 25, 2011. Counsel concludes, however, that the Board complied with the applicable guidelines and credited Petitioner for the time he was held solely on the Board's warrant. We agree with Counsel.

> [I]f a defendant is being held in custody *solely* because of a detainer lodged by the Board and has otherwise met the requirements for bail on the new criminal charges, the time spent in custody shall be credited against his original sentence. If a defendant, however, remains incarcerated prior to trial because he has failed to satisfy bail requirements on the new criminal charges, then the time spent in custody shall be credited to his new sentence.

Jones v. Pennsylvania Bd. of Prob. and Parole, 831 A.2d 162, 165 (Pa. Cmwlth. 2003) (quoting *Gaito v. Pennsylvania Bd. of Prob. and Parole*, 488 Pa. 397, 403-04, 412 A.2d 568, 571 (1980)). "'It is clear, of course, that if a parolee is not convicted, or if no new sentence is imposed for that conviction on the new charge, the pre-trial custody time must be applied to the parolee's original sentence.'" *Id.*, 831 A.2d at 165 (quoting *Gaito*, 488 Pa. at 404 n.6, 412 A.2d at 571 n.6). Here, Petitioner was given credit for the time he was held solely on the Board's warrant, which was from September 11, 2007 to February 26, 2008 and December 31, 2008 to February 27, 2009. The first period, where Petitioner was in fact convicted, began running as soon as he was released on his own recognizance (in lieu of bail) and the second, for which Petitioner was not convicted, began immediately. Thus, Petitioner's argument is meritless.

Counsel cites *Johnson v. Pennsylvania Board of Probation and Parole*, 706 A.2d 903 (Pa. Cmwlth. 1998) and *Green v. Pennsylvania Board of Probation and Parole*, 664 A.2d 677 (Pa. Cmwlth. 1995), for the proposition that the Board's findings must be upheld absent an abuse of discretion; but the Board must be reversed if it has erred as a matter of law, abused its discretion, or acted in an arbitrary or capricious manner, and/or violated Petitioner's constitutional rights. Counsel concludes that there is no evidence in the record that the Board acted arbitrarily, capriciously, or unreasonably. We agree.

Petitioner argues that he was held on a warrant for a crime that was eventually dismissed and therefore all time spent detained should be credited to his original sentence. Apparently, Petitioner was under the belief that because the Board's decision stated that he became available to serve his back time on February 27, 2009, Petitioner was not credited for the period December 31, 2008 to February 27, 2009 when he was held on the charges that were eventually dismissed. That was not the case, however, as that time was subtracted from his back time prior to his actually serving his back time. *See* Bd.'s Decision, Certified Record, Item No. 16 at 116. Thus, this argument is meritless.

Having made an independent evaluation of the issues presented, including a thorough review of Petitioner's letter-brief, we hold that Petitioner's position is without merit. Thus, having found that Counsel's no-merit letter satisfied the *Zerby* requirements and adequately addressed the issues raised, this Court grants the application for leave to withdraw appearance. Because we conclude that the petition for review is meritless, we affirm the Board's order at this time.

JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 20th day of August, 2010, Tina M. Fryling, Esquire's Petition for Leave to Withdraw as Counsel is granted, and the order of the Pennsylvania Board of Probation and Parole is affirmed.

JOHNNY J. BUTLER, Judge

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OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: August 20, 2010

I respectfully dissent. Our Supreme Court held in *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988):

> When, in the exercise of his professional judgment, counsel determines that the issues raised under the [Post Conviction Hearing Act[1]] are meritless, and when the PCHA court concurs, counsel will be permitted to withdraw *and the petitioner may proceed pro se*, or by privately retained counsel, or not at all.

Id. at 495, 544 A.2d at 928-29 (emphasis added). Here, the petitioner has chosen to proceed *pro se* and has filed a brief. Therefore, the majority should have treated his

[1] This act is now called the Post Conviction Relief Act, 42 Pa. C.S. §§9541-9546.

brief as an appeal and ordered the Board of Probation and Parole to file a responsive brief followed by a decision on the merits.

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DAN PELLEGRINI, JUDGE