

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony Guido, :
 :
 Petitioner :
 :
 v. : No. 356 C.D. 2010
 : Submitted: July 23, 2010
 Pennsylvania Board of Probation and :
 Parole, :
 Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: September 1, 2010

Anthony Guido (Guido) petitions for review of the March 1, 2010, order of the Pennsylvania Board of Probation and Parole (Board) reversing a decision to recommit Guido as a technical parole violator (TPV) for violating condition #4 of his parole, but affirming the decision to recommit Guido as a TPV for other violations. The Public Defender of Schuylkill County (Public Defender) has filed a “Petition to Withdraw Representation,” alleging that Guido’s petition for review has no merit. We deny the Public Defender’s petition to withdraw without prejudice.

Guido was released on parole in July 2009 to a specialized community corrections center (CCC) offering a program for violence prevention. Guido’s parole was subject to general and special conditions. General condition #1 prohibited Guido from leaving the Philadelphia district without prior written permission from the parole supervision staff. General condition #4 required that Guido comply with all

criminal laws. Special condition #7 stated that Guido “shall not consume or possess alcohol under any condition for any reason (zero tolerance) – mandatory” and that Guido may not be removed or terminated from the CCC for any reason other than successful completion of the CCC’s program. On August 8, 2009, Guido was arrested for violating these conditions of his parole. (C.R. at 6, 10-12, 16.)

A violation hearing was held on October 13, 2009. At the hearing, a parole agent testified that Guido had permission to work from 12:00 p.m. to 9:00 p.m. at Fizzano Brothers at 1776 Chester Pike, which is outside the Philadelphia district. (C.R. at 39-40.) The parole agent stated that Guido is supposed to leave the job site at 9:00 p.m. and return to the CCC by 11:00 p.m., allowing him two hours for travel. (C.R. at 46.)

A police officer testified as follows. On August 7, 2009, Chester police received a call from Guido’s ex-girlfriend for an “unwanted subject who was falling down a flight of steps.” (C.R. at 41.) The police officer found Guido, who was no longer at his girlfriend’s apartment, and returned him to that address. The officer noticed that Guido was not steady on his feet and that Guido smelled of alcohol. At 9:04 p.m., the officer cited Guido for public drunkenness; however, the charge was ultimately dismissed. The ex-girlfriend’s apartment is over five miles from Fizzano Brothers, and Guido could not have left work at 9:00 p.m. and arrived at that location in less than four minutes. (C.R. at 41-42, 44, 61-64.)

Guido testified as follows. He was travelling on his normal route from work at Fizzano Brothers to the CCC when the officer arrested him. Guido said that

he left his job at 8:55 p.m. or 9:00 p.m. and took the bus to the area of his ex-girlfriend's address. He then walked down the street to wait for the train. He was sitting on a bench waiting for the train when his ex-girlfriend confronted him. They had been together a long time and were going through a lot of problems, and, to be vindictive, the ex-girlfriend called the police. Guido was less than 100 feet from the train when he was arrested. Guido denied that he was unsteady on his feet or that he smelled of alcohol. However, Guido admitted that he was taking a prescription pain medication that can make a person seem to be under the influence of alcohol. (C.R. at 47-49, 51-54.)

The police officer corroborated Guido's testimony that a bus line runs from Guido's job site to the location where he was arrested. However, the officer disputed Guido's testimony that Guido was near the train when he was arrested. (C.R. at 55.) The officer offered additional testimony at page 24 of the hearing transcript; however, that page is missing from the certified record.

In a decision recorded on November 9, 2009, the Board recommitted Guido as a TPV to serve twelve months backtime for: (1) leaving the district without permission, a violation of condition #1; (2) failure to comply with the law against public drunkenness, a violation of condition #4; (3) consumption of alcohol, a violation of condition #7; and (4) failure to successfully complete the CCC program, a violation of condition #7. (C.R. at 70.)

Guido filed an administrative appeal, arguing that: (1) he had obtained permission to leave the Philadelphia district to work at Fizzano Brothers and to be

where he was for purposes of travel; (2) the charge of public drunkenness was dismissed, so he did not violate that criminal law; (3) the police officer's testimony about Guido's alleged use of alcohol was hearsay and insufficient to establish that Guido actually consumed alcohol; and (4) although he admitted to failure to complete the CCC program, he did not admit that he consumed alcohol. (C.R. at 73-77.)

In a decision mailed on March 1, 2010, the Board reversed the decision to recommit Guido for a violation of condition #4, failure to comply with the law against public drunkenness. (C.R. at 86.) However, the Board affirmed the decision to recommit Guido as a TPV for leaving the district without permission, consuming alcohol and failing to complete the CCC program. (C.R. at 88.)

On March 11, 2010, Guido filed a petition for review with this court. In the petition for review, Guido argued that: (1) the Board lacked jurisdiction to find that he violated a criminal law in violation of condition #4; (2) the Board was collaterally estopped from finding that Guido violated a criminal law in violation of condition #4; (3) the Board erred in admitting the officer's hearsay testimony over the objection of Guido's counsel without finding good cause for its admission; and (4) the Board's decision is not supported by substantial evidence. On March 22, 2010, Guido filed an amended petition for review, asserting that he wanted to withdraw his admission that he failed to complete the CCC program in violation of condition #7; Guido suggested that his failure to complete the program was related to the dismissed public drunkenness charge.¹

¹ The other issues Guido raises in his amended petition for review mirror those made in his initial filing.

By order dated March 23, 2010, this court appointed the Public Defender to represent Guido and granted the Public Defender leave to file an amended petition for review within thirty days. On June 1, 2010, the Public Defender filed a petition to withdraw as counsel.

In a letter to this court dated June 2, 2010, Guido asserted that the Public Defender's petition to withdraw is unethical and unprofessional. Guido wrote, "At this time, I believe its [sic] in my best interests to withdraw my petition for review." (6/2/2010 letter at 2.)

Could you please withdraw my petition at this time or notify me as to what I need to do to withdraw my appeal. I speak for several inmates here at SCI-Frackville who [sic] [the Public Defender] represented and he claims the same frivolous cases for those also. [The Public Defender] does not want to fight for the inmates or to fight against the Board.... [M]y appeal has merit or I would not have filed it. I plan to take further action against [the Public Defender] and believe his actions should be looked into by the court.

(6/2/2010 letter at 3.) In a form letter, this court's Office of the Prothonotary advised Guido to proceed as follows:

You may argue your issues by filing a pro se brief on the merits of your petition for review, and your brief will be submitted to the court for disposition together with counsel's application to withdraw. Should you still want to withdraw your petition for review, you may request counsel to file a praecipe to withdraw your action.

(6/9/2010 form letter.) Guido filed nothing further with this court, and, in an order dated July 16, 2010, this court stated that the Public Defender's application for leave to withdraw would be decided without oral argument. (7/16/2010 order.)

Counsel seeking leave to withdraw must submit a "no-merit" letter to the 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 (Pa. Cmwlth. 2009). Counsel also must send to the petitioner: (1) a copy of the "no-merit" letter; (2) a copy of counsel's petition to withdraw; and (3) a statement advising the petitioner of the right to proceed *pro se* or by new counsel. *Id.* If counsel fails to satisfy the foregoing technical prerequisites, the court will not reach the merits of the underlying claims but, rather, will merely deny the request to withdraw. *Id.*

Here, the Public Defender provided Guido with a copy of the petition to withdraw and "no-merit" letter, advising Guido that he may retain substitute counsel or raise any points he may deem worthy in a *pro se* brief. In the "no-merit" letter, the Public Defender addresses the issues raised by Guido as follows.

The Public Defender asserts that the jurisdiction, collateral estoppel and hearsay issues pertain to the charge that Guido failed to comply with the law against public drunkenness in violation of condition #4, and that the Board did not recommit Guido as a TPV on that basis. Thus, those issues are moot. We agree with the Public Defender with respect to the jurisdiction and collateral estoppel issues. However, we

cannot agree that Guido's hearsay issue relates solely to condition #4. The hearsay issue also relates to Guido's violation of condition #7, i.e., consumption of alcohol.

Guido argued in his administrative appeal that the police officer's testimony about Guido's alcohol consumption, a violation of condition #7, was hearsay.² In his petition for review, Guido argued that, although the Board could recommit him based on the conduct underlying the dismissed public drunkenness charge, the hearing examiner "failed to make [a] finding of good cause for admitting [the officer's testimony about the underlying conduct, i.e., consumption of alcohol;] introduction of hearsay evidence over counsel's objection constitutes reversible error." (Petition for review, grounds for relief a & b.)

The Public Defender cites page 43 of the certified record as the page showing the hearsay objection. On that page, counsel for Guido objected to documentary evidence showing Guido was charged with public drunkenness. Counsel for Guido stated that he did not "have a problem putting these [documents] in," but he did not think they were "proof of whether the case is open or not." (C.R. at 43.) This is not a hearsay objection, and it does not pertain to the officer's testimony about Guido's consumption of alcohol.

² Guido stated that, "[a]s far as [the officer's] testimony[,] it is only hearsay evidence but not with a preponderance of evidence[,] such as, 'he observed me consuming alcohol' or that 'I had alcohol in my possession' or witnessed or observed me in a[n] establishment which serves alcohol." (Guido's admin. appeal at 3.)

The hearsay objection that this court must review is at pages 41 and 42 of the certified record. At that point in the hearing, the police officer was testifying that Guido was not steady on his feet and that his “ex-girlfriend stated ----.” (C.R. at 41.) Counsel objected, “That’s hearsay.” (C.R. at 42.) The record shows no ruling on the objection and no further testimony by the officer regarding the ex-girlfriend’s statement. The officer proceeded to testify that he smelled alcohol on Guido. (C.R. at 42.) The Public Defender does not address this hearsay objection.

As to whether the record contains substantial evidence to support the Board’s decision that Guido consumed alcohol in violation of condition #7, the Public Defender stated that the Board found credible the officer’s testimony that Guido was unsteady on his feet and smelled of alcohol. However, as indicated above, the Public Defender did not address whether the officer’s testimony in this regard was inadmissible hearsay.

As to whether the record contains substantial evidence to support the Board’s decision that Guido left the Philadelphia district without permission in violation of condition #1, the Public Defender states that the Board did not find credible Guido’s testimony that he had permission to be in the area for purposes of travel to and from work. However, the Board stated that it based its finding that Guido violated condition #1 on the parole agent’s testimony. (C.R. at 88.) Thus, the

real question is whether the parole agent’s testimony constitutes substantial evidence to support the Board’s finding.³ The Public Defender failed to address that question.⁴

As to whether the record contains substantial evidence to support the Board’s finding that Guido violated condition #7 by failing to complete the CCC program, the Public Defender states that Guido “apparently admitted to ... failure to complete the [CCC] program. He was unsuccessfully discharged from the program although the entire dialog is not set forth in the certified record.” (No-merit letter at 5.) The Public Defender is referring to page 39 of the certified record, which reflects the following exchange:

[H.E.]: Prior to going on the record, you made a decision to obtain separate Counsel; is that correct? That you are unsuccessfully discharged from ---?

[GUIDO]: Yes.

(C.R. at 39.) In his amended petition for review, Guido states that he wants to withdraw his admission that he failed to complete the CCC program. The Public Defender does not address whether Guido can properly withdraw his admission at the appellate court stage of the proceedings.

³ We note the parole agent conceded that Guido had permission for travel to and from work, and the police officer corroborated Guido’s testimony that there was a bus line from Guido’s workplace to the location where he was arrested.

⁴ Moreover, page 24 of the hearing transcript is missing from the certified record. That page appears to contain testimony by the officer about Guido’s use of the bus and train to travel between the CCC and work. Because the testimony may be relevant to the “outside the district” issue, this court would not be able to reach a conclusion regarding the issue without first directing the Board to correct this omission pursuant to Pa. R.A.P. 1926 (stating that an appellate court, of its own initiative, may direct an omission in the record to be corrected).

Because the Public Defender failed to address several issues raised by Guido, we deny the Public Defender's petition to withdraw without prejudice.

ROCHELLE S. FRIEDMAN, Senior Judge

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ORDER

AND NOW, this 1st day of September, 2010, it is hereby ordered that:

1. The petition for leave to withdraw as counsel filed by the Public Defender of Schuylkill County (Public Defender) is denied without prejudice.
2. The Pennsylvania Board of Probation and Parole (Board) is directed to file a supplemental certified record containing page 24 of the hearing transcript.
3. The Public Defender shall file a proper “no-merit” letter, or advocate’s brief, within thirty days of the date on which the Board files the supplemental certified record.

ROCHELLE S. FRIEDMAN, Senior Judge