

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dishon R. Henpill,	:	
	:	
v.	:	
	:	
Pennsylvania Board of	:	
Probation and Parole,	:	No. 391 C.D. 2010
	:	
Respondent	:	Submitted: September 17, 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: October 20, 2010

Dishon R. Henpill (Petitioner), an inmate at the State Correctional Institution (SCI) at Pittsburgh, petitions this Court for review of the February 19, 2010 order of the Pennsylvania Board of Probation and Parole (Board) affirming a revocation decision mailed November 10, 2009. The issues before this Court are: (1) whether revocation counsel was ineffective for failing to object to hearsay evidence, and (2) whether the Board's classification of Petitioner as a technical parole violator was supported by substantial evidence. For reasons that follow, we affirm the Board's order.

On December 21, 2006, Petitioner was convicted of the charge of receiving stolen property and sentenced to serve 30-60 months in a state correctional institution. Petitioner was subsequently granted parole, and on September 2, 2008, he was released. On July 13, 2009, the Board issued a warrant to commit and detain Petitioner for parole violations.

On November 4, 2009, Petitioner was recommitted as a technical parole violator to serve 12 months backtime for violating parole conditions 5A (forbidding unlawful possession and use of controlled substances), and 7 (mandating successful completion of DRC Halfway Back program). Petitioner filed a request for administrative relief. On February 19, 2010, the Board mailed its decision denying Petitioner's request for administrative relief, and affirming the Board's decision that was mailed November 10, 2009. On March 17, 2010, Petitioner appealed pro se to this Court.¹ A public defender was subsequently appointed to represent Petitioner in this appeal.

Petitioner argues that his revocation counsel was ineffective for failing to object to hearsay evidence. Specifically, Petitioner contends the testimony offered by Parole Agent Kennett (Agent Kennett) regarding the label on Petitioner's pill bottle and his urinalysis, as well as the testimony offered by Mr. Andrew Davis (Davis)² regarding the search of Petitioner's room at DRC were hearsay. Petitioner argues that revocation counsel should have objected to the statements; and that his failure to do so establishes that his counsel was ineffective. We disagree.

Claims of ineffective assistance of counsel are evaluated under the following standards: Counsel will be found to be ineffective where (1) there is arguable merit to the underlying claim; (2) the course chosen by counsel does not have a reasonable strategic basis designed to advance the defendant's interests; and (3) the error of counsel prejudiced the petitioner, *i.e.*, there is a reasonable probability that, but

¹ Our scope of review of the Board's decision denying administrative relief is limited to determining whether necessary findings of fact are supported by substantial evidence, an error of law was committed, or constitutional rights have been violated. *McNally v. Pennsylvania Bd. of Prob. and Parole*, 940 A.2d 1289 (Pa. Cmwlth. 2008).

² Davis is the security operations manager for DRC, Incorporated.

for the error of counsel, the outcome of the proceeding would have been different.

Commonwealth v. Henke, 851 A.2d 185, 187 (Pa. Super. 2004) (citing *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326 (1999)).

Here, the Board specifically stated that it based its decision on Agent Kennett's testimony that Petitioner admitted to him that he used unauthorized drugs,³ Davis' testimony that Petitioner was discharged from the program for violating program rules, and the documentary evidence introduced at the hearing. Bd. Decision, February 14, 2010. Thus, even if revocation counsel successfully objected to the testimony at issue, the Board would have made the same decision based on the admissible testimony and other evidence referenced herein. Accordingly, since the outcome of the hearing would not have been different had revocation counsel objected, revocation counsel is not deemed ineffective for failing to object to the alleged hearsay evidence.

Petitioner next argues that the Board's classification of Petitioner as a technical parole violator was not supported by substantial evidence. We disagree. "Substantial evidence has been defined as evidence that a reasonable mind would find sufficient to support a conclusion. The Board must prove a technical parole violation by a preponderance of the evidence." *Brown v. Pennsylvania Bd. of Prob. and Parole*, 806 A.2d 984, 986 (Pa. Cmwlth. 2002) (citation omitted).

Here, as stated above, the Board presented Agent Kennett who testified: "After some questioning . . . [Petitioner] did admit that he had been taking Percocet and Xanax and he produced no prescription showing he should have those medications." Notes of Testimony, September 25, 2009 (N.T.) at 8. In addition, the

³ As an admission, this testimony falls under an exception to the hearsay rule. *See* Pa.R.E. 803 (25).

Board presented Davis, who testified: “[Petitioner] was unsuccessfully discharged on parole violations against the Center’s guidelines, and Parole took him and remanded him back into custody.” N.T. at 16. Moreover, the Board presented form PBPP 338, the Special Conditions of Parole signed by Petitioner. Clearly, this evidence is such that a reasonable mind would find sufficient to support the conclusion that Petitioner had violated conditions 5A (forbidding unlawful possession and use of controlled substances), and 7 (mandating successful completion of DRC Halfway Back program), and that the Board had proven said violations by a preponderance of the evidence.

For all of the above reasons, this Court affirms the Board’s order.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 20th day of October, 2010, the February 19, 2010 order of the Pennsylvania Board of Probation and Parole is hereby affirmed.

JOHNNY J. BUTLER, Judge