

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Edward Fisher, :
 :
 Petitioner :
 : No. 415 C.D. 2010
 v. :
 : Submitted: September 17, 2010
 Pennsylvania Board of Probation :
 and Parole, :
 Respondent :

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: December 30, 2010

Presently before this Court is the petition of Nicole Sloane, Esquire (Counsel)¹ for leave to withdraw as appointed counsel for Edward Fisher on the grounds that Fisher's petition for review is without merit. For the reasons that follow, we grant Counsel's petition for leave to withdraw and affirm the order of the Pennsylvania Board of Probation and Parole (Board) recommitting Fisher as a technical parole violator to serve twenty-four months backtime.

In 1987, while on parole from previous charges, Fisher was arrested and charged with third-degree murder and possession of an instrument of crime. (Certified Record (C.R.) at 1.) Fisher pled guilty to these charges and was sentenced on April 20, 1989, to a term of incarceration of twelve years, six months to twenty-

¹ Counsel is an assistant public defender in Erie County.

five years. Id. Additionally, by order dated February 23, 1990, the Board recommitted Fisher as a convicted parole violator to serve the remainder of his original sentence, two years, eight months, and twenty-seven days. (C.R. at 11.)

Fisher was again released on parole on July 30, 2007. (C.R. at 23.) Fisher was subject to numerous conditions while on parole, including refraining from ownership or possession of any firearm or other weapon, refraining from entering establishments that sell or dispense alcohol, and abiding by a curfew requiring his presence in his approved residence between the hours of 8:00 p.m. and 6:00 a.m. (C.R. at 24-25.)

Around 11:30 p.m. on March 29, 2008, police responded to a report of a man, later identified as Fisher, armed with a knife inside a bar in Philadelphia. (C.R. at 33.) Officers approached Fisher inside the bar, and Fisher assaulted the officers before they were able to restrain him. Id. Fisher was thereafter charged with aggravated assault, simple assault, harassment, resisting arrest, and disorderly conduct. (C.R. at 27.) On March 31, 2008, the Board issued a warrant to commit and detain Fisher for a violation of his parole.

On April 2, 2008, while incarcerated at the State Correctional Institution-Albion, Fisher was provided with a notice of charges and hearing detailing his new criminal charges as well as his multiple technical parole violations, including possessing a weapon, being present in an establishment that sells or dispenses alcohol, and violating his curfew. (C.R. at 32-33.) This notice provided that a preliminary hearing would be held on April 8, 2008. Id. However, Fisher waived his right to a preliminary hearing and requested a parole violation hearing before a panel. (C.R. at 40.) At the same time, Fisher filed a request for a continuance of this hearing pending final disposition of his outstanding criminal charges. (C.R. at 42.) By order

dated April 22, 2008, the Board granted Fisher's request for a continuance and directed him to advise in writing when he is prepared to proceed. (C.R. at 43.)

Fisher was found guilty of the new criminal charges and sentenced on September 10, 2008, to five years probation. (C.R. at 57.) On May 13, 2009, Fisher voluntarily signed a waiver of his right to a parole violation hearing and admitted to the technical parole violations described above.² (C.R. at 47.) By order dated August 27, 2009, the Board recommitted Fisher as technical parole violator to serve twenty-four months backtime. (C.R. at 61.) Fisher subsequently filed an administrative appeal with the Board alleging that the Board failed to provide him with a timely violation hearing and that the imposition of twenty-four months backtime was excessive. (C.R. at 64.)

By letter mailed February 19, 2010, the Board denied Fisher's appeal concluding that his waiver of the parole violation hearing precluded him from challenging the timeliness of any hearing with respect to his parole violations. (C.R. at 70.) The Board also indicated that the twenty-four months backtime fell within the presumptive range for Fisher's multiple parole violations and, therefore, was not subject to challenge. *Id.* Fisher then filed a pro se petition for review with this Court reiterating the allegations of his administrative appeal to the Board.

By order of this Court dated March 29, 2010, Counsel was appointed to represent Fisher. Upon review of Fisher's petition and the certified record of the Board, Counsel determined that no grounds for appeal existed. Counsel filed a

² The Board received verification of Fisher's convictions on the new criminal charges on September 22, 2008, but did not hold a revocation hearing with respect to these convictions until March 10, 2009. (C.R. at 63.) At this hearing, the hearing examiner concluded that the same was untimely and dismissed the matter. *Id.* Hence, Fisher was not recommitted as a convicted parole violator.

petition for leave to withdraw with this Court. Accompanying this petition was a “Turner” letter from Counsel detailing the reasons why she found the appeal lacked merit.³ Copies of this letter were forwarded to Fisher and the Board.

Fisher filed a response requesting that Counsel’s petition be granted, noting that he never requested representation. Alternatively, Fisher alleged that Counsel’s letter failed to address the relevant issues. Fisher proceeded in this response to set forth the reasons why this Court should reverse the Board’s decision.

In order to withdraw, counsel must satisfy the procedural requirements set forth by this Court in Craig v. Pennsylvania Board of Probation and Parole, 502 A.2d 758 (Pa. Cmwlth. 1985). Under Craig, counsel must notify the parolee of his request to withdraw, furnish the parolee with either a copy of a brief complying with Anders v. State of California, 386 U.S. 738 (1967), or a no-merit letter satisfying the requirements of Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988), and inform the parolee of his right to retain new counsel or submit a brief on his own behalf.

If counsel proceeds under Turner, the letter must substantively contain: 1) the nature and extent of counsel’s review; 2) the issues the parolee wishes to raise; and, 3) counsel’s analysis in concluding the parolee’s appeal is without merit. Hughes v. Pennsylvania Board of Probation and Parole, 977 A.2d 19 (Pa. Cmwlth. 2009); Zerby v. Shannon, 964 A.2d 956 (Pa. Cmwlth. 2009). We require counsel to comply with these requirements to ensure a parolee’s claims are considered and that counsel has substantial reasons for concluding the claims are without merit. Id.

³ Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988).

In the present case, by letter dated June 10, 2010, Counsel notified Fisher of her petition for leave to withdraw and provided him with a copy of the same, advised him of his right to obtain substitute counsel or file a brief on his own behalf, and provided him with a copy of her Turner letter setting forth the reasons why she found his petition for review to lack merit. Hence, Counsel has complied with the procedural requirements of Craig.

Likewise, Counsel's no-merit letter complies with the requirements of Turner. The letter contains a statement that Counsel has reviewed the record in this matter, including all pro se filings, as well as applicable decisional, statutory, and regulatory law. The letter addresses each of the claims raised by Fisher in his petition for review. Furthermore, the letter sets forth Counsel's analysis of these claims and why she concluded that each was meritless. Thus, Counsel has complied with Turner.

Having determined that Counsel has satisfied the necessary procedural and technical requirements to withdraw, we will now conduct our own independent review to determine whether Fisher's appeal is, in fact, without merit. An appeal is without merit when it lacks any basis in law or fact. Commonwealth v. Santiago, 602 Pa. 159, 978 A.2d 349 (2009).

The Board's regulations set forth the procedures and timelines applicable to preliminary and violation hearings. These regulations direct that a preliminary hearing be held within fourteen days of the detention of a parolee on a Board warrant. 37 Pa. Code §71.2(3). If a violation hearing is scheduled, the hearing must be held within 120 days of the preliminary hearing. 37 Pa. Code §71.2(10). However, the Board's regulations do not specify a time limitation for a violation hearing if no preliminary hearing is required or held. We have recently held that, in

such cases, the Board is required to hold a violation hearing within a reasonable time after the parolee is taken into custody. Butler v. Pennsylvania Board of Probation and Parole, 989 A.2d 936 (Pa. Cmwlth.), appeal denied, ___ Pa. ___, 997 A.2d 1180 (2010).

In the present case, Fisher waived his right to a preliminary hearing and simultaneously filed a request for a continuance of his violation hearing pending final disposition of his outstanding criminal charges. As Counsel points out in her Turner letter, this Court has previously held that when a parolee requests a continuance, the 120-day period does not begin to run again until the parolee requests in writing that the parole hearing be rescheduled.⁴ Stevens v. Pennsylvania Board of Probation and Parole, 538 A.2d 108 (Pa. Cmwlth. 1988). This holding applies equally to an analysis under the reasonable time standard.

Subsequent to his continuance request, Fisher never requested in writing that the Board schedule a violation hearing. Instead, on May 13, 2009, Fisher voluntarily waived his right to a violation hearing and admitted to all three of the alleged technical parole violations. Thus, we agree with Counsel that Fisher's claim regarding an untimely parole violation hearing is without merit.

Fisher also alleges that the Board's imposition of twenty-four months backtime was excessive. Fisher admitted to violating condition 5B of his parole, as well as violating two provisions of condition 7. The Board's regulations provide for

⁴ In his response to Counsel's petition for leave to withdraw, Fisher notes his reliance on this Court's previous decision in Tarrant v. Pennsylvania Board of Probation and Parole, 521 A.2d 997 (Pa. Cmwlth.), appeal denied, 517 Pa. 596, 535 A.2d 84 (1987), wherein we indicated that, in the case of new charges and technical parole violations, the 120 day period for a violation hearing with respect to both begins to run with the Board's receipt of the official verification of a parolee's conviction. However, we further noted in Tarrant that any delay attributable to a parolee's continuance request cannot be included in the calculation of this 120 day period.

a presumptive range of six to twelve months backtime for a single violation of condition 5B and three to eighteen months for each violation of condition 7. 37 Pa. Code §75.4. The Board's regulations further provide that backtime for a violation of condition 7 shall be aggregated with other backtime. 37 Pa. Code §75.3(f). Because Fisher was subject to a total presumptive range of twelve to forty-eight months backtime, the backtime imposed by the Board fell within the presumptive range and Fisher's claim that the same was excessive is without merit.

Accordingly, having made an independent evaluation of the issues presented and having found Counsel has satisfied the criteria set forth in Turner, we grant Counsel's petition for leave to withdraw and affirm the Board's denial of administrative relief.

PATRICIA A. McCULLOUGH, Judge

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and Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 30th day of December, 2010, the petition filed by Nicole Sloane, Esquire, for leave to withdraw as counsel for Edward Fisher is hereby granted. The order of the Board, mailed February 19, 2010, denying Fisher's request for administrative relief, is affirmed.

PATRICIA A. McCULLOUGH, Judge