

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin Green,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 432 C.D. 2011
	:	SUBMITTED: October 7, 2011
Pennsylvania Board of Probation and Parole,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: December 1, 2011

Kevin Green petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) denying his administrative appeal from an order recommitting him for multiple technical parole violations. In addition, Steven E. Burlein, Esquire, of the Wayne County Public Defender’s Office, petitions this Court for leave to withdraw as court-appointed counsel for Green on the ground that the appeal is wholly frivolous. After review, we grant counsel’s petition and affirm the order of the Board.

After a November 2010 parole violation hearing held at SCI-Graterford, the Board, in a decision mailed December 21, 2010, ordered that Green be recommitted as a technical parole violator to serve twelve-month’s backtime,

with a maximum parole expiration date of November 7, 2013. After unsuccessful attempts to obtain the assistance of a public defender to file an administrative appeal from the Board's decision, Green filed a *pro se* appeal. On February 18, 2011, the Board dismissed Green's appeal as untimely, reasoning:

[B]ecause it was not received at the Board's Central Office within 30 days of the mailing date of the Board's order (in other words, on or before January 20, 2011), and, as it was dated January 21, 2011, it could not have been given to prison officials on or before January 20, 2011.

Board's February 18, 2011 Order.

On March 10, 2011, Green filed a *pro se* petition for review with this Court averring that he repeatedly had requested assistance from several public defenders, but that he was frustrated in his attempts. He attached numerous exhibits to his petition to that effect, noting that he was transferred to SCI-Waymart on December 22, 2010. Pursuant to this Court's March 29, 2011 order, Burlein entered his appearance on behalf of Green on April 11, 2011. On April 12, 2011, the Board filed a motion to limit the issue on appeal to the timeliness of Green's appeal, which this Court granted on April 27th.

In May 2011, Burlein filed a motion for remand to allow Green to file for *nunc pro tunc* relief with the Board. Therein, Burlein alleged that Green had made various attempts to procure counsel, but was finally forced to file a *pro se* appeal past the thirty-day deadline. Further, Burlein averred that "no administrative appeal was ever filed by the Montgomery County Public Defender's office" and that Green "was improperly advised to seek counsel from the Pike

County Public Defender's office when he was housed in Wayne County.”¹ May 16, 2011 Motion for Remand at 3.

In its answer to Green's motion for remand, the Board pointed out that it was only *after* Burlein entered his appearance for Green that this Court granted the Board's unopposed motion to limit the issue on appeal to timeliness. Further, the Board stated that “the record shows that, once a revocation decision existed from which an administrative appeal could be filed, Petitioner did not [make] request[s] [of] any Office of the Public Defender that had a duty to file an administrative appeal of the revocation decision on his behalf.” Board's June 2, 2011 Answer at 3. Finally, the Board asserted that no purpose would be served by a remand on the *nunc pro tunc* issue in light of the fact that it already had dismissed Green's request for such relief as set forth in his administrative appeal. Accordingly, this Court denied Green's motion for remand.

In August 2011, Burlein filed a petition to withdraw as counsel and a brief in support thereof, explaining his reasons for concluding that a careful review of the record indicated that the instant appeal was frivolous. Counsel served both documents on Green. Upon receipt, this Court issued an order advising Green of his right to retain substitute counsel or to file a brief on his own behalf. Based on the foregoing, we are satisfied that counsel complied with the requisite procedural

¹ In two separate letters to a Montgomery County public defender, one sent before issuance of the Board's December 21, 2010 decision (December 19th) and one sent after Green's move to SCI-Waymart (December 28th), Green requested that counsel file an appeal. In counsel's January 3, 2011 response, counsel advised Green that his office had not received a decision and that Green should contact a Pike County public defender in light of Green's move to SCI-Waymart. Certified Record (“C.R.”) at 46-47. When Green in a letter dated January 6, 2011 contacted a Pike County public defender for assistance, counsel advised him in a January 20th response that he had no information on Green's case and that perhaps a Wayne County public defender could help him. *Id.* at 45.

requirements. In reviewing the petition to withdraw, we must independently evaluate the merits of Green's appeal. *Encarnacion v. Pa. Bd. of Prob. & Parole*, 990 A.2d 123 (Pa. Cmwlth. 2010).

Because this Court has already limited this appeal to the timeliness issue, that is the only question we can address. We reiterate the "prisoner mailbox rule:" a prisoner's *pro se* appeal is deemed filed at the time it is given to prison officials or put in the prison mailbox. *Sweesy v. Pa. Bd. of Prob. & Parole*, 955 A.2d 501 (Pa. Cmwlth. 2008). Here, the mailing date of the Board's decision was December 21, 2010. In accordance with the Board's regulations, an appeal of that decision had to "be received at the Board's Central Office within 30 days of the mailing date of the Board's order." 37 Pa. Code § 73.1(a)(1). Green's appeal, therefore, was due January 20, 2011. Because it was dated January 21, 2011, the Board concluded that it was untimely in that Green could not have given it to prison officials on or before January 20, 2011. We agree with the Board's conclusion and, accordingly, grant Burlein's petition for leave to withdraw as counsel and affirm the Board's order denying Green's administrative appeal as untimely filed.

BONNIE BRIGANCE LEADBETTER,
President Judge

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and Parole,	:	
	:	
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ORDER

AND NOW, this 1st day of December, 2011, the petition of Steven E. Burlein, Esquire, for leave to withdraw as counsel for Kevin Green in the above-captioned matter is hereby GRANTED, and the order of the Pennsylvania Board of Probation and Parole is AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge