

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Larry W. Martin,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 612 C.D. 2010
	:	
Pennsylvania Board of	:	Submitted: October 1, 2010
Probation and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: May 9, 2011

Larry W. Martin (Martin) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief from the Board's decision recommitting him to serve twelve months back time as a technical parole violator. In addition to the petition for review, we are presented with a petition for leave to withdraw appearance as counsel filed by Martin's court-appointed attorney, Kent D. Watkins, Esquire (Attorney Watkins), on the grounds that Martin's appeal is without merit. We deny Attorney Watkins' petition for leave to withdraw appearance as counsel.

Martin is serving a series of sentences resulting from multiple guilty pleas in Lehigh County to charges of rape, involuntary deviate sexual intercourse,

burglary, theft, and receiving stolen property.¹ The cumulative sentences therefrom range from 10 to 40 years, with a minimum date of September 4, 2002, and a maximum date of September 4, 2032. By Board order dated August 1, 2008, Martin was paroled to a community corrections residency for a minimum of six months, with an actual release date of August 4, 2008.

On January 29, 2009, Martin was charged with a technical parole violation of Condition 7 of his parole conditions, namely for an unsuccessful discharge from a sex offender treatment program. On June 11, 2009, the Board held a panel parole violation hearing at which Martin chose to represent himself. Before the Board, Martin argued at length, *inter alia*, regarding the inaccuracy of his conviction and sentencing reports, and about the treatment he received as a result of those inaccuracies while on parole at the community corrections residency, Forensic Treatment Services. Martin further testified that while on parole, he went to a Pennsylvania Senator's office seeking assistance with what he perceived as his unfair treatment. Martin further argued that he had received retaliation for his visit to the Senator's office, as well as retaliation for his permitted relationship with a fiancée, from his parole agent, from Forensic Treatment Services, and from the staff at Allentown Community Corrections Center. This alleged retaliation resulted in his discharge from Forensic Treatment Services and arrest for technical parole violation later that same day. Following its receipt of testimony and evidence in the hearing, the Board, by Decision dated July

¹ Martin's sentences were entered on September 11, 1995, and September 28, 1995.

10, 2009, recommitted Martin as a technical parole violator to serve 12 months back time for his violation of parole Condition 7.² Martin's parole violation maximum date was set as September 4, 2032.

Martin thereafter filed a timely *pro se* request for administrative relief with the Board, in which Martin raised 28 stated issues. Martin requested a reversal of the Board's July 10, 2009, Decision, and a reinstatement of his parole with release to an out-of-state parole plan. By notice dated March 22, 2010, the Board denied Martin's administrative appeal.

Martin subsequently filed a timely Petition for Review of the Board's Decision with this Court,³ and Attorney Watkins was appointed to represent him. On July 8, 2010, Attorney Watkins filed herewith a petition for leave to withdraw appearance as counsel, accompanied by a no-merit letter⁴ based on Attorney Watkins' belief that Martin's appeal is without grounds, and/or is frivolous.

² Martin was returned to a state correctional institution, after his arrest for technical parole violation and pending his hearing thereon, on January 29, 2009.

³ This Court's review of a Board order is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether constitutional rights were violated. Walker v. Pennsylvania Board of Probation and Parole, 729 A.2d 634 (Pa. Cmwlth. 1999).

⁴ This Court has reexamined what steps counsel appointed to represent petitioners seeking review of determinations of the Board must take to withdraw from representation. In Hughes v. Pennsylvania Board of Probation and Parole, 977 A.2d 19 (Pa. Cmwlth. 2009), this Court held that in a case where there is a constitutional right to counsel, counsel seeking to withdraw from representation of a petitioner in an appeal of a determination of the Board should file a brief in accordance with Anders v. California, 386 U.S. 738 (1967). Relying upon the United States Supreme Court's decision in Gagnon v. Scarpelli, 411 U.S. 778 (1973), we held that a constitutional right to counsel arises where the petitioner raises a:

(Continued....)

Pursuant to Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988), a no-merit letter must contain: (1) the nature and extent of counsel's review; (2) the issues the petitioner wishes to raise; and (3) counsel's analysis in concluding that the petitioner's appeal is meritless. In Zerby v. Shanon, 964 A.2d 956, 959 (Pa. Cmwlth. 2009), this Court explained that pursuant to Turner, the no-merit letter must detail the nature and extent of counsel's review and list each issue the petitioner has raised, with counsel's explanation of why those issues are meritless. We explained further that the no-merit letter must include "substantial reasons for concluding that a petitioner's arguments are meritless." Zerby, 964 A.2d at 962 (quoting Jefferson v. Pennsylvania Board of Probation and Parole, 705 A.2d 513, 514 (Pa. Cmwlth. 1998)). If the technical requirements set forth in

colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Hughes, 977 A.2d at 24 (quoting Gagnon, 411 U.S. at 790). We stated further that such claims would only arise in appeals from determinations revoking parole. Id. Accordingly, we held that "[i]n an appeal from a revocation decision, this Court will apply the test from Gagnon, quoted above, and, unless that test is met, we will only *require* a no-merit letter." Id. at 26 (emphasis in original, footnote omitted). We noted further that "[a]s in the past, we will not deny an application to withdraw simply because an attorney has filed an Anders brief where a no-merit letter would suffice. In cases where there is no constitutional right to counsel, however, we shall still apply the standard of whether the petitioner's claims are without merit, rather than whether they are frivolous." Id. at 26, n.4.

Herein, Attorney Watkins has filed a no-merit letter. As the issues raised by Martin in this appeal are neither complex nor difficult to develop, we conclude that Attorney Watkins followed the correct procedure by filing a no-merit letter.

Turner have been satisfied, this Court must conduct its own review of whether the claims are meritless. Turner, 518 Pa. at 494-95, 544 A.2d at 928.

In the matter *sub judice*, Attorney Watkins' no-merit letter does not fully comply with Turner. Attorney Watkins properly notified Martin of his request to withdraw, and advised him of his right to retain new counsel or file a brief on his own behalf.⁵ Further, Attorney Watkins properly sent Martin copies of the petition to withdraw and the no-merit letter. The no-merit letter indicates that Attorney Watkins reviewed the proceedings affecting Martin, his petition for review, and the record. However, the no-merit letter does not address all of the issues that Martin raised on appeal, and Attorney Watkins' analyses of the issues raised by Martin do not fully include substantial reasons for concluding that Martin's arguments are meritless.

In his analyses of seven of Martin's stated issues, Attorney Watkins presents an identical mere two-sentence statement of precedent, which general statement is applicable, at most, to only one of those seven issues. Additionally, in his analyses of no fewer than twenty of Martin's issues, Attorney Watkins presents plain assertions of a lack of merit without citation to legal authority or the certified record. Additionally, Attorney Watkins repeatedly asserts that Martin has failed "to describe what his defense would have been," despite the provision of such descriptions by Martin. Further, Attorney Watkins alludes to numerous harmless errors by the Board without further analysis, and without citation to authority or to

⁵ Martin has chosen not to secure substitute counsel, and has filed a *pro se* brief in support of his Petition for Review.

the record. Finally, Attorney Watkins asserts that one of Martin's issues was not set forth, when in fact that issue was set forth in both Martin's administrative appeal, and in his Petition for Review.

As such, Attorney Watkins has failed to address all of Martin's stated issues. Further, Attorney Watkins has failed to include substantial reasons for concluding that Martin's arguments are meritless in regards to numerous, if not all, of Martin's presented issues. We must therefore deny Attorney Watkins' petition to withdraw.⁶ Turner; Zerby.

Accordingly, we deny, without prejudice, Attorney Watkins' petition for leave to withdraw appearance as counsel, and grant Attorney Watkins leave to file an amended petition to withdraw with this Court within thirty days of the date of this order; in the alternative, Attorney Watkins is ordered to file a brief with this Court supporting Martin's Petition for Review.

JAMES R. KELLEY, Senior Judge

⁶ Since Attorney Watkins has failed to comply with Turner's requirements, we will not conduct an independent review to determine whether Attorney Watkins' characterization of the instant appeal as meritless is correct. Accord Zerby.

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Pennsylvania Board of	:	
Probation and Parole,	:	
	:	
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ORDER

AND NOW, this 9th day of May, 2011, the Petition for Leave to Withdraw as Counsel filed by Kent D. Watkins, Esquire is DENIED, without prejudice, and counsel is directed to refile the petition in accordance with the requirements of Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988) and Zerby v. Shanon, 964 A.2d 956, 959 (Pa. Cmwlth. 2009), OR file a brief in support of Larry W. Martin's petition for review within thirty (30) days of this order.

JAMES R. KELLEY, Senior Judge