

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

|                       |   |                               |
|-----------------------|---|-------------------------------|
| Angel L. Viera Lopez, | : |                               |
|                       | : |                               |
| Petitioner            | : |                               |
|                       | : |                               |
| v.                    | : |                               |
|                       | : |                               |
| Pennsylvania Board of | : |                               |
| Probation and Parole, | : | No. 810 C.D. 2010             |
| Respondent            | : | Submitted: September 24, 2010 |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: November 8, 2010

Before us is Kent D. Watkins’s (Attorney Watkins) petition to withdraw as counsel for Angel Viera Lopez (Lopez) on Lopez’s petition for review from an order of the Pennsylvania Board of Probation and Parole (Board) which recommitted Lopez to serve his unexpired term as a convicted parole violator and established Lopez’s maximum date of August 5, 2010.

Lopez was effectively sentenced on November 19, 2001, to a term of two to five years for the manufacture/sale/delivery of drugs or possession with intent to manufacture, sell, or deliver drugs. He was consecutively sentenced to a term of one to three years for conspiracy for a total term of three to eight years. On March 27, 2006, Lopez was paroled to Conewago-Wernersville, a community corrections center. On June 2, 2006, the Board declared Lopez delinquent effective May 10, 2006. In a decision recorded December 11, 2006, and mailed December 19, 2006, the Board recommitted Lopez to serve six months as a

technical parole violator for changing his residence without permission and for his failure to report as instructed. In a decision recorded and mailed July 9, 2007, the Board modified the December 11, 2006, action by deleting the six month recommitment period and recommitted Lopez as a convicted parole violator for possession of a controlled substance.

On August 13, 2007, Lopez was reparaoled to Conewago-Wernersville. On September 25, 2007, the Board declared Lopez delinquent effective September 24, 2007. In a decision recorded on December 28, 2007, and mailed January 7, 2008, the Board recommitted Lopez as a technical parole violator to serve nine months backtime when available for changing his residence without permission and for failure to successfully complete the Back on Track (B.O.T.) program at Conewago-Wernersville. The Board also detained Lopez pending the disposition of criminal charges. In a decision recorded February 27, 2008, the Board recommitted Lopez to serve nine months backtime as a convicted parole violator concurrent with the earlier technical recommitment for the offenses of possession of marijuana and presenting a false ID to law enforcement officials.

The Board reparaoled Lopez on February 9, 2009, to Wernersville Community Corrections Center. On March 5, 2009, the Reading Police Department arrested Lopez. On May 15, 2009, the Board detained Lopez pending the disposition of criminal charges. In a decision recorded June 19, 2009, and mailed June 22, 2009, the Board recommitted Lopez as a technical parole violator to serve six months backtime for failure to complete the program at Wernersville.

In a decision recorded December 30, 2009, and recorded January 7, 2010, the Board recommitted Lopez as a convicted parole violator to serve his unexpired term of ten months and twenty-four days for attempted possession of heroin concurrent with the June 19, 2009, technical violation. The Board established Lopez's maximum date as August 5, 2010.

On April 15, 2010, Lopez requested administrative relief and asserted that he was entitled to a total of sixty-nine days credit with forty-five days credit for serving in the "B.O.T. program" from August 13, 2007, to September 28, 2007, and twenty-four days credit at Wernersville from his February 19, 2009, parole date until his arrest by the Reading Police Department on March 5, 2009.

The Board dismissed Lopez's request as untimely because it was not filed within thirty days of the mailing date of the Board's determination. 37 Pa.Code §73.1(b).

On May 5, 2010, Lopez petitioned for review with this Court and asserted that he was entitled to forty-seven days credit.

Attorney Watkins was assigned to represent Lopez. After review of Lopez's petition for review and the certified record, Attorney Watkins now desires to withdraw and asserts that Lopez's appeal is without merit.

Appointed counsel may withdraw from assisting an indigent parolee in appealing a parole revocation order, "[w]hen, in the exercise of his professional

opinion, counsel determines that the issues raised . . . are meritless, and when the . . . court concurs. . . .” Commonwealth v. Turner, 518 Pa. 491, 495, 544 A.2d 927, 928-929 (1988).

In reviewing a motion to withdraw, this Court must make an independent evaluation of proceedings before the Board to determine whether a parolee’s appeal is meritless. Dear v. Pennsylvania Board of Probation and Parole, 686 A.2d 423 (Pa. Cmwlth. 1996). When this Court agrees with counsel’s assertion that the appeal is frivolous, this Court will permit counsel to withdraw when counsel has fulfilled the technical requirements set forth in Craig v. Pennsylvania Board of Probation and Parole, 502 A.2d 758 (Pa. Cmwlth. 1985). Under Craig, counsel must (1) notify the parolee of the request to withdraw, (2) furnish the parolee with a copy of the brief, (3) advise the parolee of his right to retain new counsel to raise any new points that he might deem worthy of consideration. In the no merit letter or brief counsel must indicate the nature and extent of his review, the issues the parolee wishes to raise, and counsel’s analysis in concluding that the appeal is frivolous. Wesley v. Pennsylvania Board of Probation and Parole, 614 A.2d 355 (Pa. Cmwlth. 1992).

By order dated June 15, 2010, this Court granted the motion of the Board and limited the issue in this matter to the timeliness of the appeal.

Attorney Watkins concluded in his letter to this Court that Lopez’s appeal was untimely:

Title 37 Pa. Code § 73.1(b) requires that the petition for administrative relief be received by the Pennsylvania

Board of Probation and Parole within 30 days of the mailing date. There is no evidence there was an inability of Mr. Viera Lopez to file the appeal or that the appeal was thwarted by the administrative agency. Therefore, the appeal was properly dismissed.

Letter from Kent D. Watkins, July 22, 2010, at 4.

This Court agrees with Attorney Watkins. The Board's regulation, 37 Pa Code §73.1(b)(1), provides in pertinent part:

*(b) Petitions for administrative review.*

(1) A parolee, by counsel unless unrepresented, may petition for administrative review under this subsection of determinations relating to revocation decisions which are not otherwise appealable under subsection (a). Petitions for administrative review shall be received at the Board's Central Office within 30 days of the mailing date of the Board's determination. When a timely petition has been filed, the determination will not be deemed final for purposes of appeal to a court until the Board has mailed its response to the petition for administrative review.

Lopez did not submit his request for administrative relief within thirty days of January 7, 2010, the mailing date of the Board's determination. This Court is satisfied with Attorney Watkins's determination that this issue is without merit.<sup>1</sup>

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<sup>1</sup> This Court notes that Attorney Watkins has complied with the notification requirements to Lopez under Craig.

Accordingly, this Court grants Attorney Watkins's request and affirms the order of the Board in the above-captioned matter.

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BERNARD L. McGINLEY, Judge

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|                       | : |                   |
| Respondent            | : |                   |

**ORDER**

AND NOW, this 8th day of November, 2010, the request of Kent D. Watkins to withdraw as counsel in the above-captioned matter is granted. The order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge