

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Conwell Curry,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 931 C.D. 2010
	:	Submitted: January 7, 2011
Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: May 4, 2011

Petitioner Conwell Curry (Curry) petitions for review of an order (final determination) of the Pennsylvania Board of Probation and Parole (Board), which denied his request for administrative relief. Curry’s appointed counsel, Kent D. Watkins, Esq. (Counsel), however, filed a petition for leave to withdraw as counsel. Counsel asserts, as expressed in his “no-merit” letter, that the issues Curry raises in his petition for review are without merit. For the reasons expressed below, we deny Counsel’s petition for leave to withdraw, but will permit Counsel the opportunity to file an amended no-merit letter in support of his petition to withdraw.

In October 2002, Curry was sentenced in the Court of Common Pleas of Philadelphia County to a prison term of twenty-seven (27) to fifty-four (54) months for his conviction on drug-related charges. (Certified Record (C.R.) at 1.)

In November 2005, the Board granted Curry parole, with a release date of January 9, 2006. (C.R. at 18, 24.) Curry was arrested on July 14, 2006, on new criminal charges. (C.R. at 24.) The Board lodged a detainer for Curry on July 15, 2006.¹ (*Id.*) Those new charges were dismissed on September 11, 2006, and Curry was released from prison on September 21, 2006. (C.R. at 24.) The Board issued a forty-eight (48) hour detainer for Curry on October 30, 2006, (C.R. at 28), and followed that detainer with a warrant to commit and detain on October 31, 2006,² when Curry was charged with new crimes. (C.R. at 30.) On November 28, 2006, the Board issued a notice of its decision to detain Curry pending the resolution of the new criminal charges and to recommit Curry, when available, to serve nine months backtime as a technical parole violator. (C.R. at 30.)

The Board received official verification on March 27, 2008, that Curry had been convicted of one of the new criminal charges, and the Board conducted a revocation hearing on June 18, 2008. (C.R. at 41, 46.) On July 3, 2008, the Board issued an order to recommit Curry to serve nine months backtime, when available, as a technical parole violator, and to serve the unexpired term of his initial prison term, when available. (C.R. at 85.) According to the Board's May 6, 2010 order, which is the subject of this appeal, counsel for Curry filed an administrative appeal of the Board's July 3, 2008 order in August 2008, asserting that the Board had failed to provide Curry with a timely revocation hearing. (C.R.

¹ A document captioned "Supervision History," which Curry's parole supervisor apparently prepared indicates that "[a] permanent warrant was issued [the day after Curry's arrest]." We believe that this is a reference to a Board warrant; however, we note that a "Notice of Board Decision," with a recording date of August 21, 2006, provides as follows: "Detain pending disposition of criminal charges." (C.R. at 26.)

² These events apparently followed an "incident" involving Curry that occurred on October 6, 2006. (C.R. at 130.)

at 129.) The Board's May 6, 2010 order indicates that the Board issued a decision on that initial administrative appeal on October 8, 2008. (*Id.*) The record in this case contains no copy of that initial administrative appeal or the Board's October 8, 2008 order.

On December 4, 2009, the Board issued an order to recommit Curry, in which it identified August 24, 2010, as Curry's new maximum sentence release date. (C.R. at 105.) Curry filed an administrative appeal on December 31, 2009, identifying the Board's December 4, 2009 order as the subject of the appeal, but also referring to the Board's July 3, 2008 order. (C.R. at 106.) The administrative appeal identified two grounds: (1) that the Board's June 2008 revocation hearing was untimely; and (2) that the Board had erred in its calculation of credit Curry believed he was due. (C.R. at 107.) The Board denied Curry's administrative appeal, concluding that Curry had already filed an administrative appeal challenging the timeliness of the Board's revocation hearing and that the Board had correctly calculated the credit to which Curry was entitled. (C.R. at 129-130.) With regard to the timeliness issue, the Board opined that its procedural rules precluded serial challenges to issues the Board has already resolved. Curry then filed a petition for review with this Court raising the same two issues. Thereafter, Counsel filed his petition for leave to withdraw as counsel for Curry.

We begin by addressing Counsel's request to withdraw from his representation of Curry. Where no constitutional right to counsel is involved, an attorney seeking to withdraw from representation in a probation and parole case need only file a no-merit letter, as opposed to an Anders³ brief. *Hughes v.*

³ In *Anders v. California*, 386 U.S. 738 (1967), the United States Supreme Court held that, in order for a criminal defendant's counsel to withdraw from representing his client in an appeal, the counsel must assert that the case is completely frivolous, as compared to presenting

Pennsylvania Bd. of Prob. and Parole, 977 A.2d 19 (Pa. Cmwlth. 2009). A constitutional right to counsel arises when the petitioner presents a:

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.

Id. at 25-26 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)). Because Curry's petition for review only raises challenges to the Board's calculation of his maximum sentence date and the timeliness of its revocation hearing, he does not meet the test described in *Hughes*, and he does not have a constitutional right to counsel in this case. *See Hughes*, 977 A.2d at 25-26. Curry only has a statutory right to counsel under Section 6(a) of the Public Defender Act, Act of December 2, 1968, P.L. 1144, *as amended*, 16 P.S. § 9960.6(a)(10). As such, Counsel properly filed a no-merit letter in order to withdraw from representation of Curry.

In filing a no-merit letter, counsel must comply with certain procedural requirements. Counsel must: (1) notify the parolee that he has submitted to the Court a request to withdraw; (2) provide the parolee with a copy of counsel's no-merit letter; and (3) advise the parolee that he has the right to obtain new counsel and to submit to the Court a brief of his own raising any

an absence of merit. An appeal is completely or "wholly" frivolous when there are no factual or legal justifications that support the appeal. *Craig v. Pennsylvania Bd. of Prob. and Parole*, 502 A.2d 758 (Pa. Cmwlth. 1985). However, in *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988), our Supreme Court held that in matters that are *collateral* to an underlying criminal proceeding, such as parole matters, a counsel seeking to withdraw from his representation of a client may file a "no-merit" letter that includes information describing the extent and nature of the counsel's review, listing the issues the client wants to raise, and informing the court by explaining the reasons why counsel believes the issues have no merit.

arguments that he may believe are meritorious.⁴ *Reavis v. Pennsylvania Bd. of Prob. and Parole*, 909 A.2d 28, 33 (Pa. Cmwlth. 2006). In seeking to withdraw, an attorney must include the following descriptive information in the no-merit letter: (1) the nature and extent of counsel’s review of the case; (2) the issues the parolee wants to raise; and (3) the analysis counsel used in reaching his conclusion that the issues are meritless. *Zerby v. Shanon*, 964 A.2d 956, 961 (Pa. Cmwlth. 2009).

Consequently, before considering whether Curry’s appeal has no merit and proceeding to make an independent review of the merits of the case, we must first evaluate Counsel’s no-merit letter to determine whether it complies with the requirements for withdrawal applications. Counsel’s no-merit letter includes a fair summary of Curry’s conviction and parole history, thus reflecting an adequate review of the record. Counsel has also sufficiently summarized the issues Curry has raised in his petition for review. We must now consider whether Counsel’s no-merit letter satisfies the requirement that he describe the analysis he used in reaching his conclusion that Curry’s appeal lacks any merit.

In considering this question, we begin by noting that the amended petition for review in this case states that the Board’s December 4, 2009 decision “revoked” Curry’s parole. Counsel has mischaracterized this order. The December 4, 2009, did not revoke Curry’s parole, but rather recommitted Curry (based on his status as a technical and convicted parole violator) to serve the

⁴ Counsel has complied with these requirements. In response, Curry filed a brief with this Court, in which he addresses the merits of his argument that the Board failed to conduct his revocation hearing in a timely manner.

remainder of his sentence (when he became available) in accordance with the Board's July 3, 2008 decision.

With regard to the timeliness issue, as noted above, the Board rejected that aspect of Curry's administrative appeal based upon its conclusion that Curry had already sought administrative review of the Board's July 3, 2008 recommitment decision. The Certified Record does not include Curry's administrative appeal of that decision, and Counsel here does not address the grounds for the Board's rejection of this issue, but rather refers apparently to the underlying merits of the issue, by reference to the fact that the Board did not receive notification that Curry pleaded guilty to one of the then-pending new criminal charges until March 27, 2008. Counsel, then, misses the mark in his no-merit letter, because the basis of the Board's December 4, 2009 decision with regard to the timeliness of the Board's revocation/recommitment hearing was that Curry's administrative appeal of the December 2009 decision was an inappropriate attempt to re-assert a challenge to an issue that the Board had already decided in July 2008. That July 2008 decision may have addressed the merits of the timeliness issue; however, in this case, because the Board based its rejection of Curry's timeliness claim on the fact that the Board had already addressed this claim, the critical aspect of the timeliness issue that Counsel should have addressed in his no-merit letter is whether the Board erred in concluding that Curry's previous challenge precludes the present challenge. Consequently, we conclude that Counsel's no-merit letter is insufficient with regard to the issue of the timeliness of the Board's revocation hearing. *Zerby*, 964 A.2d at 961-62. We will, therefore, deny Counsel's request to withdraw and grant Counsel leave to file an amended petition for leave to withdraw as counsel, specifically addressing the

questions identified above regarding the Board's previous action on the timing of the revocation hearing and on the merits of whether the Board provided a hearing within the required 120-day period.⁵

The next question is whether Counsel's no-merit letter is sufficient as it pertains to the question of whether the Board provided Curry with the proper amount of credit for time served on his original sentence.⁶ Counsel's no-merit letter does reflect the periods of time during which Curry was incarcerated solely on the basis of the Board's detainer. These dates correlate to the dates reflected in the Board's decision, illustrating that Curry was incarcerated for a period of sixty-eight (68) days following his arrest on July 14, 2006, on new criminal charges for which the Philadelphia County prison authorities ultimately released Curry on September 21, 2006. The Board credited Curry's original sentence for this period and, therefore, this period of time is not at issue in this case.

The Board issued a detainer for Curry on October 30, 2006, and Curry was arrested on new charges on October 31, 2006. Because the Board provided Curry with credit for the one-day period (October 30) during which he was detained before he was arrested on new criminal charges, that single day is not at issue. Thus, the period of time at issue is the period from October 31, 2006 through August 8, 2008, the latter of which is the date upon which Curry received his sentence for his conviction on one of the new criminal charges.

⁵ If Counsel believes that the Certified Record in this matter is inadequate for appellate review because it does not include Curry's August 7, 2008 administrative appeal of the revocation order and/or the Board's October 8, 2008 administrative appeal, Counsel may seek an order of this Court under Pa. R.A.P. 1926 directing the Board to supplement the Certified Record.

⁶ We note that Curry has not raised or addressed the calculation issue in his brief to the Court, and, therefore, we rely upon Counsel's discussion of the issue in his no-merit letter.

Counsel, in addressing the legal propriety of the Board's credit decision, simply refers this Court to the seminal case of *Gaito v. Pennsylvania Board of Probation and Parole*, 488 Pa. 397, 412 A.2d 568 (1980). Counsel, however, provides no discussion of how *Gaito* applies. Despite this shortcoming, by referencing *Gaito* counsel is indicating that he analyzed the facts in this case in accordance with the Supreme Court's holding *Gaito*. Based upon this reasoning, we conclude that Counsel has satisfied the *Zerby* requirements, at least with regard to the credit issue.

In summary, because Counsel's no-merit letter does not satisfy the requirements of *Zerby* with regard to the issue Curry raises as to the timeliness of the Board's revocation hearing, we will refrain from addressing the merits of Curry's appeal and deny without prejudice Counsel's petition for leave to withdraw. Counsel may file an amended petition for leave to withdraw as counsel and accompanying no-merit letter, addressing the timeliness issue in light of the following: (1) Curry's August 7, 2008 administrative appeal and the Board's decision responding to that appeal; and (2) the precise basis of the Board's May 6, 2010 decision indicating that the Board had already addressed the untimeliness issue. As indicated above, Counsel may also seek an order of this Court directing the Board to supplement the Certified Record, if he deems supplementation necessary in order for this Court to exercise appellate review and in order to consider Counsel's amended no-merit letter. Alternatively, Counsel may elect not to file an amended no-merit letter and proceed to file a brief on the merits of this appeal.

Accordingly, we deny Counsel's petition for leave to withdraw as counsel.

P. KEVIN BROBSON, Judge

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	:	
Respondent	:	

ORDER

AND NOW, this 4th day of May, 2011, the petition of Kent D. Watkins, Esq., (Counsel) for leave to withdraw as counsel for Petitioner Conwell Curry is DENIED without prejudice. Counsel is granted thirty (30) days to file an amended petition for leave to withdraw as counsel, along with a no-merit letter, or file a brief on the merits of this appeal.

P. KEVIN BROBSON, Judge