

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Conwell Curry,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 931 C.D. 2010
	:	Submitted: June 17, 2011
Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: September 12, 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, Esquire (Counsel), however, filed a petition for leave to withdraw as counsel. Counsel asserted in an initial “no-merit” letter, that the issues Curry raises in his petition for review are without merit. Following our review of Counsel’s initial no-merit letter, we concluded that the no-merit letter was not adequate and denied Counsel’s petition for leave to withdraw. We permitted Counsel to submit a revised no-merit letter in response to our order, and Counsel has submitted an amended no-merit letter. We will grant Counsel’s petition for leave to withdraw and affirm the Board’s final determination.

In our earlier decision, we summarized the pertinent facts as follows:

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. (*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, 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. 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.

(*Curry v. Pennsylvania Board of Probation and Parole* (Pa. Cmwlth., No. 931 C.D. 2010, filed May 4, 2011, pp.1-3; footnotes omitted) (*Curry I*). Thereafter, Counsel filed his petition for leave to withdraw as counsel for Curry, which, by order dated May 4, 2011, we denied without prejudice to Counsel to file the subject amended no-merit letter.

We need not repeat our entire discussion from *Curry I*, describing the law relating to an attorney's motion for leave to withdraw. (*See Curry I*, pp.3-4.)

We will repeat, however, the following:

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 arguments that

he may believe are meritorious. *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).

Id. at 4-5 (footnotes omitted).

In reviewing Counsel's previous no-merit letter, we concluded that Counsel had satisfied the requirement of *Zerby* with regard to Curry's claim that the Board had erred in calculating the amount of credit for time served while awaiting trial on the new criminal charges against him, but that the record failed to reflect the nature and propriety of the Board's review of Curry's revocation hearing. Counsel's amended no-merit letter and the supplemental certified record (S.C.R.) that the Board filed in response to Counsel's request for supplementation now require the Court to consider whether Counsel's amended no-merit letter satisfies *Zerby* as to Curry's timeliness challenge.

In his amended no-merit letter, Counsel restates the pertinent factual and procedural history in this matter and also indicates that at the time of the revocation hearing on June 18, 2008, Curry objected to the timeliness of the hearing. Counsel states that the Board did not receive official verification of Curry's conviction until March 27, 2008. These facts are supported by the supplemental certified record the Board transmitted to the Court. The Board's October 8, 2008 letter, responding to Curry's administrative appeal raising the question of whether the Board conducted a timely revocation hearing, specifically refers to 37 Pa. Code § 71.4 and this Court's decision in *Morgan v. Pennsylvania Board of Probation and Parole*, 814 A.2d 300 (Pa. Cmwlth. 2003).

This additional information provides a sufficient factual and legal background for the Court to proceed to consider whether Counsel is correct in contending that Curry's appeal lacks any merit for the purpose of considering Counsel's motion for leave to withdraw. For the reasons that follow, we will grant Counsel's motion for leave to withdraw and affirm the Board's final determination.

We first address the question of whether the Board erred in dismissing Curry's challenge to the Board's refusal to consider Curry's contention that the Board's revocation hearing held in 2008 was untimely. As the Board noted in its 2008 revocation decision, the Board's October 8, 2008 response to Curry's administrative appeal of the Board's revocation order indicates that the Board did not receive official verification of Curry's new criminal conviction until March 27, 2008. The Board held the revocation hearing within 120 days of receiving verification, on June 16, 2008. (S.C.R. at 4.)¹ Curry did not appeal that determination of the Board, and it became binding on Curry. Because the Board previously addressed this issue, we conclude that the Board did not err in refusing to address this issue again. As the Board notes in its decision, 37 Pa. Code § 73.1 provides that the Board will not entertain repetitive requests for relief. Based upon these facts, we agree with Counsel that there is no merit to Curry's challenge to the Board's determination that it need not address Curry's claim that the Board's 2008 revocation hearing was untimely.

The final question is whether Counsel is correct in asserting that there is no merit to Curry's claim that the Board did not provide proper credit for periods of time during which Curry was incarcerated following his arrest on new criminal

¹ In *Morgan*, this Court reiterated that the Board satisfies the requirement contained in 37 Pa. Code § 71.4(1) to hold a revocation hearing when it conducts the hearing within 120 days of receiving official verification of a guilty plea.

charges. As the record reveals, on July 14, 2006, while Curry was on parole, the Philadelphia Police arrested Curry on new criminal charges and placed him in the Philadelphia County Prison. The Board lodged a detainer to commit and detain Curry on July 15, 2006. Those criminal charges were dismissed on September 11, 2006. Curry was released from prison on September 21, 2006. The Board lodged another warrant to commit and detain Curry on October 30, 2006, based upon an incident that occurred on October 6, 2006. Curry was arrested on October 31, 2006, and placed in Philadelphia County Prison. Bail was set on the new criminal charges on November 1, 2006, but Curry did not post bail. Curry was ultimately convicted on November 8, 2007, and the bail that had been set for the new criminal charges was revoked. On August 8, 2008, Curry was sentenced to a term of five-to-ten years on the new conviction.

As the Board noted in its final determination, Curry had 819 days remaining on his original sentence when the Board initially released him on parole. The Board's recalculation order provided Curry with credit for the sixty-eight (68) day period Curry spent in the Philadelphia County Prison between July 15, 2006, and September 21, 2006, because the charges that gave rise to that period of imprisonment were dismissed. The Board subtracted that period from the number of days Curry had remaining on his original sentence (819 days remaining minus sixty-eight days equals 751 days remaining on his original sentence). The Board also provided Curry with a one-day credit for the period of October 30, 2006 through October 31, 2006, because he was imprisoned solely on the basis of the Board's detainer. The Board, however, did not credit Curry for the period from October 31, 2006, through the date of his conviction on the new criminal charges. The Board did not err in refusing to credit Curry for that period of time. In *Gaito*

v. Pennsylvania Board of Probation and Parole, 488 Pa. 397, 412 A.2d 568 (1980), our Supreme Court held that a parolee is entitled to credit for time served on an original sentence while awaiting the resolution of new criminal charges *only* when the parolee has posted bail on the new charges. In this case, because Curry did not post bail while he was awaiting the resolution of the new criminal charges, he was not being held during that period solely on the basis of the Board's detainer. Consequently, he was not entitled to credit for that period of time.

Based upon the foregoing, we conclude that Counsel has established that Curry's appeal has no merit. Accordingly, we will grant Counsel's motion for leave to withdraw as counsel and affirm the Board's order.

P. KEVIN BROBSON, Judge

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ORDER

AND NOW, this 12th day of September, 2011, the motion for leave to withdraw as counsel filed by Kent D. Watkins, Esquire, is GRANTED. The order of the Pennsylvania Board of Probation and Parole is AFFIRMED.

P. KEVIN BROBSON, Judge