

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Shaw, :
 :
 Petitioner :
 :
 v. : No. 976 C.D. 2010
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 :
 Pennsylvania Board of : Submitted: October 29, 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: January 5, 2011

James Shaw (Shaw) 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 nine months backtime 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 Shaw's court-appointed attorney, Timothy Peter Wile, Esquire, on the grounds that Shaw's appeal is without merit. We grant Attorney Wile's petition for leave to withdraw appearance as counsel and affirm the order of the Board.

On March 23, 2009, Shaw was last released on parole to a community corrections residency for a minimum of three months until successfully discharged. Certified Record (C.R.) at 46. On September 2, 2009, the Board declared Shaw

delinquent as he left his approved residence without permission and his whereabouts were unknown. C.R. at 55, 61. On January 3, 2010, Shaw was arrested on drug charges and the Board issued a warrant to commit and detain Shaw for violating the conditions of his parole. C.R. at 56, 69. The Board charged Shaw with violating condition #2 (changing approved residence without permission) and special condition #7 (failure to successfully complete community corrections residency).

On January 7, 2010, Shaw waived his rights to a detention hearing, a preliminary parole hearing, panel hearing, and a violation hearing. C.R. at 73 - 75. Shaw also waived his right to counsel. C.R. at 73. Shaw admitted that he violated condition #2 and special condition #7 of his parole. C.R. at 63, 75. Shaw did not revoke or withdraw his admission within ten days. Consequently, the Board recommitted Shaw to a state correctional institution as a technical parole violator to serve nine (9) months backtime for technical parole violations. C.R. at 65, 82.

Thereafter, Shaw filed a “Petition for Writ of Mandamus,” which the Board treated as a request for administrative relief. C.R. 84-86, 89. Therein, Shaw argued that he was not afforded a timely preliminary hearing. C.R. at 85. Shaw claimed that he never waived his right to a preliminary hearing or admitted to parole violations. C.R. at 85. Shaw sought dismissal of all technical parole violations with prejudice and release from confinement C.R. at 86. By letter dated May 4, 2010, the Board denied Shaw’s request. Shaw filed a *pro se* petition for review with this Court, which appointed Attorney Wile to represent Shaw. On August 24, 2010, Attorney Wile filed his petition to withdraw along with a no-merit letter based on his belief that Shaw’s appeal is without merit.¹

¹ This Court has reexamined what steps counsel appointed to represent petitioners
(Continued....)

Counsel seeking to withdraw must conduct a zealous review of the case and submit a “no-merit” letter to this Court detailing the nature and extent of counsel’s diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw. Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988); Zerby v. Shanon, 964 A.2d 956 (Pa. Cmwlth. 2009). 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)). In addition,

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:

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

counsel must send the petitioner: (1) a copy of the “no-merit” letter; (2) a copy of the application for leave to withdraw; and (3) a statement that advises the petitioner of the right to retain substitute counsel or proceed *pro se*. Turner; Zerby. If counsel satisfies these technical requirements, this Court must then conduct an independent review of the merits of the case. Id. If this Court determines that the petitioner’s claims are without merit, counsel will be permitted to withdraw and the petitioner will be denied relief. Id.

Here, Attorney Wile’s “no-merit” letter satisfies the technical requirements of Turner. Attorney Wile’s letter lists the issues Shaw seeks to have reviewed and provides a thorough analysis as to why the issues lack merit. Attorney Wile explains that Shaw’s issues lack merit because Shaw knowingly, intelligently and voluntarily admitted he violated the terms and conditions of his parole. Further, Shaw waived his rights to a preliminary hearing and a violation hearing as well as his right to be represented by counsel on his own free will, without promise, threat or coercion. Shaw’s written admission constitutes substantial evidence to recommit Shaw for violating condition #2 and special condition #7. Attorney Wile states he has conducted a conscientious and exhaustive examination of the record. Based upon his review, he has concluded that Shaw’s appeal is without merit and requests permission to withdraw. Attorney Wile provided Shaw with a copy of the “no-merit” letter² and his request to withdraw and advised Shaw of his right to retain new counsel or proceed *pro se*.³ Accordingly, we must now conduct an independent review to determine whether

² Attorney Wile attached a copy of Shaw’s signed Waiver of Violation Hearing and Admission Form to the no merit letter.

³ No brief has been filed on behalf of Shaw.

the Board failed to hold a preliminary hearing within 14 days of the Board's detainer and whether the Board has erred by recommitting Shaw for violating condition #2 and special condition #7 of his parole.⁴

The Board is required to hold a preliminary hearing within 14 days of a parolee's detention on a Board warrant. 37 Pa. Code §71.2(3). The Board's regulations specifically envision waivers by parolees accused of violations, including waiver of a violation hearing. See 37 Pa. Code §71.2(5) (right to preliminary hearing and right to counsel may be waived; parolee may waive right to have violation hearing before Board panel); 37 Pa. Code §71.2(7) (violations may be admitted, agreed to or stipulated).

It is well-established that a parolee "must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or if he did, that circumstances in mitigation suggests that the violation does not warrant revocation." McKenzie v. Pennsylvania Board of Probation and Parole, 963 A.2d 616, 620 (Pa. Cmwlth. 2009) (quoting Morrissey v. Brewer, 408 U.S. 471, 488 (1972)). This Court has held that no hearing is required after a parolee admits that he violated the terms and conditions of his parole and waives his right to a hearing because the clear statements in the waiver/admission form are sufficient evidence in and of themselves to justify recommitment. Prebella v. Pennsylvania Board of Probation and Parole, 942 A.2d 257 (Pa. Cmwlth. 2008); McKenzie. In order to prove that a parolee made a knowing and voluntary waiver,

⁴ This Court's scope of review of a decision by the Board is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether the constitutional rights of the parolee was violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704, Gaito v. Pennsylvania Board of Probation and Parole, 563 A.2d 545 (Pa. Cmwlth. 1989), petition for allowance of appeal denied, 525 Pa. 589, 575 A.2d 118 (1990).

all that is required is for the Board to show that it followed its own regulations and provided the necessary information to the parolee prior to the parolee signing the written waiver form. McKenzie, 963 A.2d at 620.

Here, on January 7, 2010, Shaw signed the hearing waivers after being advised of his constitutional rights to a preliminary hearing and violation hearing, and that he did so of his “own free will, without promise, threat or coercion.” C.R. at 73-75. Shaw also signed the waiver of representation by counsel after being advised of his right to be represented, and that he did so of his “own free will, without promise, threat or coercion.” C.R. at 73. By signing the admission form, Shaw “knowingly, intelligently, and voluntarily” admitted he violated conditions #2 and #7 of his parole, with knowledge his admission could be withdrawn within ten calendar days. C.R. at 75. Shaw did not retract his admission within the ten-day grace period. Shaw’s signature in each instance was witnessed by his parole agent, Thomas Breeding. C.R. at 73-75. The waiver and admission form was reviewed and signed by a parole officer the following day, January 8, 2010. Shaw’s admission that he violated condition #2 and special condition #7 of his parole constitutes substantial evidence to support the Board’s recommitment order. While Shaw denies waiving his right to the preliminary and violation hearings and denies admitting to the parole violations, Shaw does not challenge the record evidence.⁵

Having waived his right to both the preliminary and violation hearings and having admitted to the parole violations, Shaw’s argument that the Board failed to hold a timely preliminary hearing and erred by recommitting him for

⁵ The Court observes that the signatures appearing on the waiver and admission forms unmistakably match Shaw’s signature agreeing to the conditions of parole, which he signed on

(Continued....)

technical parole violations is completely without merit. Accordingly, we grant Attorney Wile's petition for leave to withdraw as counsel and affirm the order of the Board denying Shaw's request for administrative relief.

JAMES R. KELLEY, Senior Judge

March 21, 2009 before his release. C.R. at 54.

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Pennsylvania Board of		:
Probation and Parole,		:
	Respondent	:

No. 976 C.D. 2010

ORDER

AND NOW, this 5th day of January, 2011, Timothy Peter Wile's Petition for Leave to Withdraw Appearance as Counsel is GRANTED and the order of the Pennsylvania Board of Probation and Parole Board's denying James Shaw's request for administrative relief is AFFIRMED.

JAMES R. KELLEY, Senior Judge