IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kenyon Williams, Petitioner	:	
v.	:	No. 1142 C.D. 2009 Submitted: August 20, 2010
Pennsylvania Board of Probation and Parole, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: December 15, 2010

Kenyon Williams petitions for review of an adjudication of the Pennsylvania Board of Probation and Parole (Board) denying his administrative appeal. Williams' appointed counsel, Luzerne County Assistant Public Defender Jonathan D. Ursiak (Counsel), has filed an amended application for leave to withdraw as counsel. Finding no error in the Board's decision, we affirm and also grant Counsel's application for leave to withdraw.

Williams is serving a five to ten year sentence for his 1997 conviction for robbery with threat of serious injury. When his sentence was imposed, Williams' maximum sentence date was February 13, 2007. On March 15, 2004, Williams was paroled from the State Correctional Institution at Retreat (SCI-Retreat).

On March 22, 2005, the Philadelphia Police Department arrested and charged Williams with involuntary deviate sexual intercourse and two counts of

corrupting of minors, which occurred on February 12, 2005. He was detained in the Philadelphia County Prison on these criminal charges and under a Board warrant pending disposition of the criminal charges. Sometime in 2005 or 2006 - the record is not clear - Williams was convicted of these crimes. On May 30, 2006, the Board recommitted Williams as a convicted parole violator to serve, when available, the lesser of his unexpired term on his robbery sentence or 44 months. Williams did not appeal.

On February 29, 2008, Williams was charged with committing statutory sexual assault on September 15, 2004, also while he was on parole. On May 22, 2008, Williams pleaded guilty to the sexual assault and was sentenced to three and a half to seven years. He was also sentenced for the February 12, 2005, crime at that time. Both sentences were to be served concurrently. The Board received certification of the new conviction on August 5, 2008, and held a revocation hearing at SCI-Retreat on September 18, 2008.

Williams attended the hearing and objected to the hearing as untimely. Williams denied pleading guilty on May 22, 2008; rather, he stated that he signed a guilty plea on March 1, 2006, which the court accepted the same day. After a revocation hearing, where Williams acknowledged the conviction, the Board issued its May 30, 2006, recommitment order. The Board's order did not include a new maximum sentence date, and Williams asserted that it was too late for the Board to do so in 2008. Williams believed that the Board was required to leave his original maximum date of February 13, 2007, unchanged.

In an order of December 24, 2008, the Board recommitted Williams for his May 22, 2008, conviction and recalculated his new maximum sentence date on the initial robbery conviction to be June 27, 2008. Williams then filed a request for

administrative relief, asserting that the revocation hearing was untimely and accordingly, his maximum sentence date of February 13, 2007, should have been left unchanged. Williams also took issue with the minimum and maximum dates of his new sentence for assault. On May 15, 2009, the Board affirmed its order and denied Williams' petition for administrative review. Williams then petitioned for this Court's review.[1]

Williams again argues that the 2008 revocation hearing was untimely; that the Board was not permitted to change his maximum sentence date in 2008 because it failed to do so in 2006; and that the dates of his new sexual assault sentence have been miscalculated. This Court appointed Counsel to represent Williams, and Counsel filed an application for leave to withdraw as counsel, supported by an *Anders* brief.[2] This Court issued an order striking the application to withdraw and the brief without prejudice because Counsel had failed to address the issues raised by Williams in his petition for review. Counsel then filed a second application to withdraw accompanied by an *Anders* brief. In an opinion and order filed on June 30, 2010, this Court denied the second application to withdraw without prejudice because Counsel's brief did not adequately address Williams' issues. We instructed Counsel either to file an amended application, to withdraw with a no-merit letter or to file a petitioner's brief. Counsel has again requested permission to withdraw. His request is supported by what Counsel has labeled an *Anders* brief, but it is actually a no-merit letter.

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[1] Our review is limited to determining whether substantial evidence supports the Board's decision, and whether the Board erred as a matter of law or violated the parolee's constitutional rights. *Harden v. Pennsylvania Board of Probation and Parole*, 980 A.2d 691, 695 n.3 (Pa. Cmwlth. 2009).

[2] *Anders v. State of California*, 386 U.S. 738 (1967).

When Counsel believes that a parolee's appeal of his parole revocation lacks merit, he may file a petition to withdraw pursuant to *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988). This Court has summarized the requirements established by *Turner* as follows:

> [C]ounsel seeking to withdraw from representation of a petitioner seeking review of a determination of the Board must provide a "no-merit" letter which details "the nature and extent of [the attorney's] review and list[s] each issue the petitioner wished to have raised, with counsel's explanation of why those issues are meritless." *Turner*, 518 Pa. at 494-95, 544 A.2d at 928….

Zerby v. Shanon, 964 A.2d 956, 961 (Pa. Cmwlth. 2009). This Court reviews the contents of the no-merit letter to determine whether it meets the requirements of *Turner*. *Zerby*, 964 A.2d at 960 (quoting *Commonwealth v. Wrecks*, 931 A.2d 717, 721 (Pa. Super. 2007)). If it does, then this Court conducts its own review of the merits of the parolee's appeal. If we agree with Counsel that the issues are without merit, then we will permit counsel to withdraw and deny relief. *Id*.

Counsel's latest no-merit letter is only marginally more detailed than his last one, but it does explain Counsel's review of Williams' criminal records. Counsel also addresses the issues raised by Williams; analyzes them; and explains why each lacks merit. As such, Counsel's no-merit letter satisfies the technical requirements of *Turner*.

Having determined that Counsel has fulfilled the requirements for withdrawal of representation, we now consider the merits of Williams' appeal. For the following reasons, we concur in Counsel's judgment that Williams' appeal is baseless.

Williams argues that his September 15, 2008, revocation hearing was not timely because it was held over two years after the Board received verification that he

pleaded guilty to a crime committed while on parole. As such, he argues that the Board was not permitted to recalculate his maximum sentence date in 2008 when it should have done so in 2006. He does not challenge the Board's calculation; rather, he contends the recalculation was done too late.

Where a parolee is convicted of more than one crime committed while on parole, the Board may recommit the parolee for each separate criminal conviction. *Corley v. Pennsylvania Board of Probation and Parole*, 478 A.2d 146, 149 (Pa. Cmwlth. 1984). In accordance with the Board's regulations, the Board must hold a revocation hearing

> within 120 days from the date the Board receive[s] official verification of the plea of guilty or nolo contendere or of the guilty verdict at the highest trial court level…

37 Pa. Code §71.4(1). If a convicted parole violator alleges that his revocation hearing was untimely, the Board bears the burden of proving that the hearing was, in fact, timely. *Williams v. Pennsylvania Board of Probation and Parole*, 561 A.2d 866, 868 (Pa. Cmwlth. 1989).

The gravamen of Williams' appeal is that his guilty plea occurred in 2006, not 2008. The guilty plea in 2006 involved the offenses of involuntary deviate sexual intercourse and corrupting of minors. However, the record shows also that Williams pleaded guilty and was sentenced for a different crime, namely statutory sexual assault, on May 22, 2008. Certified Record at 24, 64 (C.R. ___). The record does not confirm Williams' argument that he pleaded guilty only in 2006. Indeed, Williams did not even face charges for statutory sexual assault until February 29, 2008. C.R. 22. The record also shows that the Board received official verification of the statutory sexual assault conviction on August 5, 2008. C.R. 33. Therefore, the Board proved that the revocation hearing held on September 18, 2008, was timely.

Further, Williams' recommitment as a convicted parole violator meant that, by law, Williams' maximum date on the robbery conviction could not remain February 13, 2007. *Palmer v. Pennsylvania Board of Probation and Parole*, 704 A.2d 195, 197 (Pa. Cmwlth. 1997). Under Section 21.1(a) of the Act commonly referred to as the Parole Act,[3] a convicted parole violator must

> serve the remainder of the term which said parolee would have been compelled to serve had he not been paroled, and he *shall be given no credit for the time at liberty on parole*.

61 P.S. §331.21a(a) (emphasis added).[4] Therefore, the Board was required to recalculate the parole violation maximum date, forfeiting the time that Williams had spent at liberty on parole. Williams acknowledges that the time he spent on parole from March 15, 2004, through March 21, 2005, is subject to forfeiture, but he contends that the Board waited too long to impose the punishment of forfeiture of his street time.[5] Williams believes that the Board was required to do the recalculation in 2006 when it issued its first recommitment order. Williams is mistaken.

The Parole Act does not contain a time limitation for recalculating a parolee's maximum sentence date. In 2006, the Board recommitted Williams as a

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[3] Act of August 6, 1941, P.L. 861, *as amended*, 61 P.S. §331.21a(a), added by the Act of August 24, 1951, P.L. 1401, *as amended.*

[4] The Parole Act was repealed by the Act of August 11, 2009, P.L. 147, No. 33. Section 6138 of the Prisons and Parole Code, 61 Pa.C.S. §6138, now contains the provisions previously found in Section 21.1 of the Parole Act. The Prisons and Parole Code did not become effective until October 13, 2009, after the Board rendered its determination in this case; thus, we continue to cite to the Parole Act.

[5] Time spent at liberty on parole is known as "street time." *Dorsey v. Pennsylvania Board of Probation and Parole*, 854 A.2d 994, 996 n.3 (Pa. Cmwlth. 2004).

convicted parole violator "when available" to serve his backtime.[6] C.R. 19. The Board cannot recalculate a maximum date until the parolee becomes available to serve his backtime. *Snyder v. Pennsylvania Board of Probation and Parole*, 701 A.2d 635, 637 (Pa. Cmwlth. 1997); *Kuykendall v. Pennsylvania Board of Probation and Parole*, 363 A.2d 866, 868 n.1 (Pa. Cmwlth. 1976). Here, Williams was not available to the Board until he was sentenced on May 22, 2008. *Snyder*, 701 A.2d at 637. The Board recommitted Williams in 2006, but it could not recalculate his new maximum sentence date on the robbery conviction because he had not yet been sentenced on the February 12, 2005, crime. When the Board recommitted Williams in the 2008 revocation hearing, he had received a sentence for the 2004 and 2005 crimes. Therefore, the Board was able to recalculate his robbery sentence. The recalculation was not, as Williams suggests, some type of delayed punishment. It merely represents the forfeiture of his street time, and it is mandatory because he is a convicted parole violator.

Finally, Williams argues that the minimum and maximum dates for his new three and a half to seven year sentence for statutory sexual assault are incorrect. The Department of Corrections, not the Board, is responsible for calculating the minimum and maximum terms of prisoners. *Gillespie v. Pennsylvania Department of Corrections and Board of Probation and Parole*, 527 A.2d 1061, 1065 (Pa. Cmwlth. 1987). Williams must pursue a remedy in the trial court and through the direct appeal process, not through the Board. *Koehler v. Pennsylvania Board of Probation and Parole*, 935 A.2d 44, 54-55 (Pa. Cmwlth. 2007).

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[6] "Backtime" is the portion of his judicially imposed sentence that a parole violator must serve as a consequence of violating parole before he is eligible to be re-paroled. *Krantz v. Pennsylvania Board of Probation and Parole*, 483 A.2d 1044, 1047 (Pa. Cmwlth. 1984).

In sum, Counsel has fulfilled the technical requirements for withdrawing his representation, and our independent review of the record before the Board reveals that Williams' appeal is without merit. Accordingly, we grant Counsel's application for leave to withdraw and affirm the Board's decision.

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MARY HANNAH LEAVITT, Judge

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Petitioner	:	
	:	
v.	:	No. 1142 C.D. 2009
	:	
Pennsylvania Board of Probation	:	
and Parole,	:	
Respondent	:	

ORDER

AND NOW, this 15th day of December, 2010, the order of the Pennsylvania Board of Probation and Parole in the above-captioned matter, dated May 15, 2009, is AFFIRMED, and the application for leave to withdraw as counsel filed by Jonathan D. Ursiak is GRANTED.

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MARY HANNAH LEAVITT, Judge