IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nathaniel Brown,	:	
Petitioner	:	
	:	No. 1407 C.D. 2010
v.	:	
	:	Submitted: December 23, 2010
Pennsylvania Board of 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 JUDGE McCULLOUGH FILED: May 23, 2011

Presently before this Court is the petition of Jason G. Pudleiner, Esquire (Counsel)[1] for leave to withdraw as appointed counsel for Nathaniel Brown (Brown) on Brown's appeal from the order of the Board of Probation and Parole (Board) recommitting Brown as a technical parole violator and as a convicted parole violator to serve a total of one year, five months, and twenty-five days backtime. For the reasons that follow, we grant Counsel's petition for leave to withdraw and affirm the Board's order.

On September 24, 1982, Brown was found guilty of burglary, and he was sentenced to a term of incarceration of five to twenty years. (C.R. at 1.) The

[1] Counsel is an assistant public defender in Clearfield County.

effective date of his sentence was listed as August 12, 1983, which resulted in a minimum sentence expiration date of August 12, 1988, and a maximum sentence expiration date of August 12, 2003. (C.R. at 2.) Brown was released on parole on August 12, 1988, after serving his minimum sentence. (C.R. at 6.) Brown thereafter underwent two successive periods of recommitment and re-parole, which resulted in a recalculated maximum sentence expiration date of November 30, 2007. (C.R. at 21.) Brown's most recent re-parole occurred on April 1, 2001. (C.R. at 31.)

In May of 2006, Brown's parole agent was advised by Allegheny County Police that Brown was under investigation for a series of car break-ins, thefts, and misuse of credit cards. (C.R. at 40.) On June 2, 2006, Brown's parole agent accompanied Allegheny County Police during the execution of a search warrant at Brown's approved residence. Id. Brown was not at home at the time of the search, but several pieces of stolen property were recovered at the residence and arrest warrants were subsequently issued for Brown. Id. The parole agent could not locate Brown and the Board thereafter declared Brown delinquent as of June 5, 2006. (C.R. at 38, 40.)

On September 3, 2007, Brown was arrested in Ohio following a traffic stop. (C.R. at 40.) On September 5, 2007, a municipal court in Ohio dismissed all charges against Brown and remanded him to the custody of authorities in Pennsylvania. (C.R. at 39.) By order dated November 2, 2007, the Board recommitted Brown as a technical parole violator to serve his unexpired term of one year, five months, and twenty five days for multiple technical parole violations.[2]

[2] These technical violations included leaving the district without permission, changing residence without permission, failing to report, and failing to submit to urinalysis testing. (C.R. at 43.)

(C.R. at 43.) Brown was later convicted of numerous counts of access device fraud, forgery, theft, and receiving stolen property and was sentenced to multiple terms of incarceration.[3] (C.R. at 49, 69, 98, 129, 154.)

On January 22, 2010, Brown was provided with a notice of charges and a parole revocation hearing relating to these new criminal convictions. (C.R. at 154-55.) Brown refused to sign this notice. (C.R. at 155.) The Board held a revocation hearing on February 2, 2010. (C.R. at 166.) By order dated March 1, 2010, the Board recommitted Brown as a convicted parole violator to serve twelve months backtime concurrent with his previous recommitment as technical parole violator of one year, five months and twenty-five days backtime. (C.R. at 210.) The Board also recalculated Brown's maximum sentence expiration date to April 15, 2019. Id.

Brown filed a *pro se* request for administrative relief, alleging the following: (1) his original maximum sentence expiration date of August 12, 2003, as well as all recalculated maximum sentence dates, were in error; (2) this error subjected him to cruel and unusual punishment, double jeopardy, and a violation of his due process rights; (3) the Board lacked jurisdiction over him because any violations occurred after expiration of his correct maximum sentence expiration date; (4) he never received a notice or hearing relating to the new charges; and (5) the Board erred in revoking all of his "street time" following his recommitment, first, as a technical parole violator, and later, as a convicted parole violator. (C.R. at 212.)

By letter mailed June 30, 2010, the Board denied Brown's appeal. (C.R. at 225-26.) The Board indicated that any issue concerning the calculation of Brown's original maximum sentence expiration date rested with the Department of Corrections and/or the sentencing court, not the Board. (C.R. at 225.) The Board held that any

[3] These convictions occurred on March 25, 2009, and October 26, 2009. (C.R. at 154.)

issue regarding Brown's previously recalculated maximum sentence expiration dates was untimely. Id. With regard to Brown's jurisdiction argument, the Board noted that the new offenses occurred while Brown was on parole and, hence, he was still under the Board's jurisdiction and subject to recommitment as a convicted parole violator. (C.R. at 226.) Additionally, the Board stated that Brown, a convicted parole violator, forfeited all of his street time pursuant to section 6138(a)(2) of the Prisons and Parole Code, 61 Pa. C.S. §6138(a)(2).[4] Id. Finally, the Board concluded that Brown had been afforded due process and that double jeopardy did not apply to a parole revocation decision. Id.

Brown then filed a *pro se* "appeal" with this Court,[5] alleging that the Board erred in: (1) previously calculating his maximum sentence expiration date to be November 30, 2007; (2) failing to credit him for time served from September 5, 2007, through March 1, 2009, resulting in a violation of his due process rights and placing him in a situation of double jeopardy; (3) failing to conclude that it lacked jurisdiction over him as of March 1, 2009; (4) denying him the right to present evidence at his parole revocation hearing; and (5) subjecting him to double jeopardy by recommitting him as a criminal parole violator following a recommitment as a technical parole violator. By order of this Court dated July 22, 2010, Counsel was appointed to

[4] This section provides that a convicted parole violator "shall…serve the remainder of the term which the parolee would have been compelled to serve had the parole not been granted and shall be given no credit for the time at liberty on parole." Similar language was previously found in former Section 21.1(a) of the act commonly referred to as the Parole Act, Act of August 6, 1941, P.L. 861, formerly added by Section 5 of the Act of August 24, 1951, P.L. 1401, as amended, 61 P.S. § 331.21a(a). The Parole Act was repealed by the Act of August 11, 2009, P.L. 147, No. 33 and replaced by the Prisons and Parole Code, 61 Pa.C.S. §§101-6309.

[5] This Court, by order dated July 22, 2010, directed that Brown's "appeal" be treated as a petition for review addressed to our appellate jurisdiction.

represent Brown. Upon review of Brown's petition for review and the certified record of the Board, Counsel determined that Brown's petition for review had no merit and lacked any basis in law or fact, and Counsel filed a petition for withdrawal of appearance with this Court. Accompanying this petition was a "Turner" letter from Counsel stating the reasons why he found that the petition for review lacked merit.[6] Copies of this letter were forwarded to Brown and the Board.

In Craig v. Pennsylvania Board of Probation and Parole, 502 A.2d 758 (Pa. Cmwlth. 1985), this Court set forth the procedural requirements that counsel must satisfy in order to withdraw. Under the Craig requirements, counsel is required to notify the parolee of counsel's request to withdraw; provide the parolee with either (1) a copy of a brief adhering to the requirements of Anders v. State of California, 386 U.S. 738 (1967), or (2) a no-merit letter complying with requirements of Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988); and advise the parolee that he has the right to submit a brief on his own behalf or retain new counsel.

If counsel chooses to send the parolee a no-merit letter under Turner, the letter must satisfy several requirements. Substantively, the letter must contain: (1) "the nature and extent of [counsel's] review"; (2) a list of each issue that the parolee wishes to raise; and (3) counsel's explanation of why the issues that the parolee raised are meritless. Turner, 518 Pa. at 494, 544 A.2d at 928. This Court requires that counsel comply with the requirements set forth above to guarantee that a parolee's claims are thoroughly considered and to ensure that counsel has substantial reasons for reaching that conclusion that the parolee's claims are without merit. Hughes v. Pennsylvania Board of Probation and Parole, 977 A.2d 19 (Pa. Cmwlth. 2009); Zerby v. Shannon, 964 A.2d 956 (Pa. Cmwlth. 2009).

[6] Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988).

In the present matter, Counsel provided Brown with a Turner letter on October 12, 2010, as well as a copy of his petition for withdrawal of appearance. In this letter, Counsel notified Brown that he may retain other counsel to pursue his appeal or that he may file a brief on his own behalf and set forth the reasons why he found Brown's petition for review to lack merit. Thus, Counsel satisfied the procedural requirements of Craig.

In addition, Counsel's no-merit letter contains a statement indicating that Counsel has examined and reviewed the record pertaining to this case, including all relevant *pro se* filings. Furthermore, the no-merit letter addresses all of the issues raised by Brown in his appeal. Finally, the no-merit letter provides Counsel's analysis for each issue and states the reasons why Counsel concluded that each issue was without merit. Thus, Counsel has complied with Turner.

Having determined that Counsel has satisfied the necessary procedural and technical requirements to withdraw, we will now conduct our own independent review to determine whether Brown's appeal is, in fact, without merit. An appeal is without merit when it lacks any basis in law or fact. Commonwealth v. Santiago, 602 Pa. 159, 978 A.2d 349 (2009).

We begin with Brown's first contention that his maximum sentence date was incorrectly calculated. Brown's primary argument in this regard stems from the effective date of his original sentence, which was calculated nearly thirty years ago. Brown argues that since he was sentenced on September 24, 1982, and received a credit of eleven months and three days, the original effective date of his sentence

should have been August 27, 1981.[7] However, this Court has repeatedly held that the Department of Corrections, not the Board, is responsible for calculating the minimum and maximum terms of prisoners committed to its jurisdiction. Nickson v. Pennsylvania Board of Probation and Parole, 880 A.2d 21 (Pa. Cmwlth. 2005); Gillespie v. Department of Corrections, 527 A.2d 1061 (Pa. Cmwlth. 1987), appeal denied, 518 Pa. 614, 540 A.2d 535 (1988). Thus, we agree with Counsel that Brown's claim regarding his maximum sentence date is without merit.

With respect to Brown's contention that he was not under Board's supervision when he committed his subsequent offense, we note that the record reveals that Brown committed his latest offenses in 2006, during the time he was on parole and under the Board's supervision. The fact that Brown may not have been taken into physical custody until 2008 is of no relevance. Thus, we agree with Counsel that this claim is also without merit.

Next, Brown argues that the Board failed to properly credit his period of incarceration from September 5, 2007, through March 1, 2009, which incarceration he alleges was solely on the Board's warrant. Brown did receive 183 days of credit for the period from September 5, 2007, through March 6, 2008, as a result of the Board's detainer. However, the record reveals that, on March 6, 2008, Brown was arraigned on his new criminal charges, for which he did not post bail and/or bail was denied. (C.R. at 64, 88, 127, 145.) The law is well settled that time spent in custody pursuant to a detainer warrant shall be credited to a convicted parole violator's original term only when the parolee was eligible for and had satisfied bail

[7] In his no-merit letter, Counsel noted that Brown was serving another sentence at that time and was not available to begin serving his original sentence until July 18, 1984. Counsel further noted that Brown's credit of eleven months and three days was properly applied to this date.

requirements for the new offense, and, thus, remained incarcerated only by reason of the Board's detainer warrant. Gaito v. Pennsylvania Board of Probation and Parole , 488 Pa. 397, 412 A.2d 568 (1980); Armbruster v. Pennsylvania Board of Probation and Parole, 919 A.2d 348 (Pa. Cmwlth. 2007). Thus, we agree with Counsel that this issue is without merit.

Next, Brown contends that he did not receive adequate notice of the charges against him in preparation for his revocation hearing. However, the record reveals that Brown refused to sign the notice of charges and hearing on January 22, 2010, a fact which Brown admitted at his subsequent parole revocation hearing. Thus, we agree with Counsel that this issue is similarly without merit.

Finally, Brown contends that he was denied the right to present evidence at his parole revocation hearing and that double jeopardy prevents his recommitment as a criminal parole violator following a recommitment as a technical parole violator. However, Counsel correctly notes in his Turner letter that Brown's failure to raise these issues during his parole revocation hearing and/or in his request for administrative relief results in a waiver. Dear v. Pennsylvania Board of Probation and Parole, 686 A.2d 423 (Pa. Cmwlth. 1996) (holding that issues not raised before the Board in either the revocation hearing or in the administrative appeal are waived and will not be considered for the first time on appeal to this Court).

Accordingly, having made an independent evaluation of the issues presented and having found Counsel has satisfied the criteria set forth in Turner, we grant Counsel's petition for leave to withdraw and affirm the Board's denial of administrative relief.

PATRICIA A. McCULLOUGH, Judge

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Nathaniel Brown, Petitioner	:	No. 1407 C.D. 2010
v.	:	
Pennsylvania Board of Probation and Parole, Respondent	:	

ORDER

AND NOW, this 23rd day of May, 2011, the petition filed by Jason G. Pudleiner, Esquire for leave to withdraw as appointed counsel for Nathaniel Brown is hereby granted. The order of the Board, mailed June 30, 2010, denying Brown's request for administrative relief, is affirmed.

PATRICIA A. McCULLOUGH, Judge