

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Samuel Sithisong, :  
 :  
 : Petitioner :  
 :  
 : v. : No. 163 C.D. 2009  
 : Submitted: August 21, 2009  
 :  
 : Pennsylvania Board of :  
 : Probation and Parole, :  
 :  
 : Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FLAHERTY

FILED: October 6, 2009

This case is before us on the petition for leave to withdraw as counsel filed by Kent D. Watkins (Counsel), from his representation of Samuel Sithisong (Sithisong). Sithisong petitions for review from an order of the Pennsylvania Board of Probation and Parole (Board) which denied his request for administrative relief from the Board's recommitment order. We grant Counsel's request to withdraw and affirm the order of the Board.

Sithisong, who was serving a three to seven year sentence for drug charges, was ordered paroled on June 25, 2007. His minimum sentence expiration date was October 9, 2007 and his maximum date was October 9, 2011. Sithisong's actual release date was October 16, 2007.

On December 18, 2007, Sithisong was arrested for criminal conspiracy, two counts of possession with intent to deliver, possession of

drug paraphernalia and use of a communication facility. Thereafter, Sithisong entered a guilty plea for the manufacture, delivery or possession with intent to deliver a controlled substance and was sentenced to two to five years in a state correctional institution. Sithisong also pled guilty to criminal conspiracy and received a concurrent sentence of two to five years. All other charges were withdrawn.

The Board, thereafter, conducted a violation hearing on August 1, 2008. As a result of the hearing, the Board issued an order recommitting Sithisong as a convicted parole violator to serve twenty-four months of backtime. The Board recomputed Sithisong's parole violation maximum date to August 11, 2012. Sithisong filed a request for administrative relief arguing that the backtime imposed was beyond the maximum presumptive range, that there were no aggravating factors and that the Board failed to consider mitigating factors. In an action mailed January 8, 2009, the Board denied the administrative appeal, concluding that the recommitment period fell within the presumptive range and that any challenge to that length of time was not a valid basis for administrative relief.

In his petition for review to this court, Sithisong claims that his recommitment of twenty-four months is outside of the presumptive range, that there were no aggravating circumstances warranting recommitment beyond the presumptive range and that the Board failed to consider mitigating factors.<sup>1</sup>

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<sup>1</sup> Our review is limited to determining whether necessary findings are supported by substantial evidence, an error of law was committed, or a constitutional right of the parolee was violated. Pometti v. Pennsylvania Board of Probation and Parole, 705 A.2d 953 (Pa. Cmwlth. 1998).

Before addressing the merits of the case, we first address Counsel's application to withdraw his appearance. As stated in Zerby v. Shanon, 964 A.2d 956 (Pa. Cmwlth. 2009), in accordance with Commonwealth v. Turner, 518 Pa. 491, 494, 544 A.2d 927, 928 (1988), Epps v. Pennsylvania Board of Probation and Parole, 565 A.2d 214, 216 (Pa. Cmwlth. 1989) and Frankhouser v. Pennsylvania Board of Probation and Parole, 598 A.2d 607 (Pa. Cmwlth. 1991), counsel seeking to withdraw from representation of a parolee seeking review of a determination of the Board must provide a "no-merit" letter. The "no-merit" letter must contain the nature and extent of counsel's review, and list each issue the parolee wishes to raise with an explanation as to why those issues are meritless.

In performance of his duties, Counsel has reviewed the record certified by the Board to this court and has set forth in his "no-merit" letter the issues raised in Sithisong's petition for review from the Board's determination. Counsel has addressed each issue and explained why each is without merit.

As to whether the twenty-four months of backtime imposed by the Board exceeds the presumptive range, we first examine, as does Counsel in his letter, those charges that Sithisong pled guilty to and for which he was sentenced. Sithisong pled guilty to manufacture, delivery or possession with intent to deliver a controlled substance, cocaine, a violation of Section 13(a)(30) of The Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, P.L. 233, as amended, 35 P.S. § 780-113(a)(30) and received a two to five year sentence. In accordance with 35 P.S. § 780-113(f)(1.1), a person who violates 35 P.S. § 780-113(a)(30), as it relates to

any amount of substance containing cocaine “is guilty of a felony and upon conviction thereof shall be sentenced to imprisonment not exceeding ten years ....” 35 P.S. § 780-113(f)(1.1).

Title 37 Pa. Code § 75.2 sets forth the presumptive ranges for convicted parole violators based on their offense. As to drug law violations, the presumptive range for a felony with a statutory maximum of ten years, is eighteen to twenty-four months.

Sithisong also pled guilty to criminal conspiracy, engaging in the manufacture, delivery or possession with intent to manufacture or deliver cocaine. The grading for the crime of criminal conspiracy is set forth in 18 Pa. C.S. § 905a, which provides:

Except as otherwise provided in this title, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy.

Thus, the conspiracy is the same grade as the controlled substance conviction, each having a presumptive range of eighteen to twenty-four months.

As stated in Corely v. Pennsylvania Board of Probation and Parole, 478 A.2d 146 (Pa. Cmwlth. 1984), the Board has discretion to recommit for each separate criminal conviction. Because Sithisong plead guilty to both the manufacture, delivery or possession with intent to deliver a controlled substance and conspiracy engaging in manufacture, delivery or possession with intent to manufacture or deliver a controlled substance, the presumptive range for each offense was eighteen to twenty-four months.

Sithisong received a recommitment of twenty-four months for both convictions. Such recommitment was within the presumptive range.

Next, Sithisong claims that there were no aggravating factors such that the Board should not have exceeded the presumptive range. As Counsel correctly states, however, the Board did not exceed the presumptive range and consideration of aggravating circumstances was not necessary. Aggravating evidence need only be set forth in the order where the recommitment time actually imposed exceeds the presumptive range. Davis v. Pennsylvania Board of Probation and Parole, 579 A.2d 1372 (Pa. Cmwlth. 1990).

Sithisong also claims that the Board did not consider mitigating factors. Counsel has addressed this issue in his letter, and we agree that it is without merit. As stated in Ferguson v. Pennsylvania Board of Probation and Parole, 534 A.2d 579, 582 (Pa. Cmwlth. 1987) wherein the parolee raised the same argument this court stated that “the Board is not required to discuss and evaluate every contention of the parties and that it has wide discretion on credibility matters. We, therefore, find no error in the Board’s having rejected Petitioner’s mitigating circumstances without having specifically discussed them in its order.”

We conclude that Counsel has thoroughly examined the certified record, set forth the issues, researched the applicable law and correctly analyzed the merits of Sithisong's appeal. We have also reviewed the issues independently and agree with Counsel’s assessment that Sithisong’s appeal is without merit.

In light of our conclusion that the “no-merit” letter was submitted in compliance with the requirements of Turner, the application of Counsel filed with this court for leave to withdraw as Sithisong's counsel is granted and the order of the Board is affirmed.

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JIM FLAHERTY, Senior Judge

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|                       | : |                   |
| Respondent            | : |                   |

**ORDER**

Now, October 6, 2009, the Application for Leave to Withdraw as Counsel filed by Kent D. Watkins is granted. The order of the Pennsylvania Board of Probation and Parole is affirmed.

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JIM FLAHERTY, Senior Judge