

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Antonio Hennis, :  
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 Petitioner :  
 :  
 v. : No. 1654 C.D. 2007  
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 Pennsylvania Board of Probation : Submitted: February 29, 2008  
 and Parole, :  
 :  
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: May 14, 2008

Antonio Hennis petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board), which denied his request for administrative relief. In addition to the petition for review, we are presented with a petition for leave to withdraw as appointed counsel filed by Hennis' court-appointed attorney, L. Abraham Smith, on the grounds that Hennis' appeal is frivolous. We grant Attorney Smith's petition for leave to withdraw as appointed counsel and affirm the Board's decision.

The facts of this case are as follows. Hennis was paroled on September 20, 2004 from a two- to four-year sentence and a six-month to two-year sentence. Hennis' minimum expiration date was August 17, 2004 and his maximum expiration date was August 17, 2006. While on parole, Hennis was

charged with a new criminal offense in Lehigh County and was ultimately convicted on September 7, 2006. Certified Record (C.R.) at 40. The conviction was verified to the Board on September 26, 2006. Id. Hennis was returned to a state correctional institution on November 17, 2006. C.R. at 43.

Hennis did not waive his right to a panel violation hearing. A panel revocation hearing was originally scheduled for November 14, 2006. At Hennis' request, the hearing was continued twice. C.R. at 28, 30. Hennis requested that the hearing scheduled for November 14, 2006 be continued to November 28, 2006, and then requested that the hearing scheduled for December 13, 2006 be continued to January 3, 2007.<sup>1</sup> Id. The hearing was eventually held on April 16, 2007. C.R. at 35. Based upon the testimony and evidence presented, the Board, by decision mailed May 17, 2007, recommitted Hennis as a convicted parole violator to serve his unexpired term of one year, 10 months and 28 days of backtime. C.R. at 68.

Attorney Smith filed a request for administrative review, which was received by the Board on June 13, 2007.<sup>2</sup> C.R. 71. By letter mailed August 10, 2007, the Board denied Hennis's counseled request for relief. From this decision, Hennis filed a petition for review with this Court requesting review of the Board's decision. On November 30, 2007, Hennis' court-appointed counsel, Attorney Smith, filed a petition for leave to withdraw as counsel and an Anders brief, alleging therein that, in his professional judgment, the issues raised in Hennis' petition for review are without merit.

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<sup>1</sup> Other requests for continuances were made by the Board. C.R. at 29, 31.

<sup>2</sup> Hennis filed an untimely *pro se* request for administrative review, which was received by the Board on June 19, 2007 (C.R. at 69-70). See 37 Pa. Code §73 (Appeals shall be received at the Board's Central Office within 30 days of the mailing date of the Board's order.).

When counsel believes that an appeal is wholly frivolous, he or she may file a petition to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967), and Craig v. Pennsylvania Board of Probation and Parole, 502 A.2d 758 (Pa. Cmwlth. 1985), or Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988) and Epps v. Pennsylvania Board of Probation and Parole, 565 A.2d 214 (Pa. Cmwlth. 1989). Jester v. Pennsylvania Board of Probation and Parole, 595 A.2d 748, 750 (Pa. Cmwlth. 1991). Pursuant to Anders and Craig, counsel, after conducting an independent review of the record and determining the appeal is wholly frivolous, must: (1) notify the parolee of the request to withdraw; (2) furnish the parolee with a copy of the brief (Anders brief); (3) advise the parolee of his right to retain new counsel or raise any new points that he might deem worthy of consideration in a *pro se* brief; and (4) allow the parolee a reasonable opportunity to respond to counsel's motion to withdraw by either securing substitute counsel or filing a brief on his own behalf. Id.

When presented with an Anders brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw. Commonwealth v. Smith, 700 A.2d 1301, 1303 (Pa. Super. 1997). If the antecedent requirements to withdraw as counsel have been met, this Court must then make an independent evaluation of the record to determine whether the appeal is, in fact, wholly frivolous. Epps v. Board of Probation and Parole, 565 A.2d 214, 216 (Pa. Cmwlth. 1989). An appeal is wholly frivolous when it completely lacks any point that would arguably support an appeal. Id. The fact that a court may ultimately find the appeal to be without merit does not render the appeal as legally frivolous. Id.

Here, Attorney Smith's brief satisfies the technical requirements of Anders and Craig. Upon conducting a thorough, independent review of the record,

Attorney Smith determined that the appeal is frivolous. Attorney Smith's brief sets forth and addresses the issues Hennis wishes to raise of (1) whether the panel revocation hearing was untimely, as not being held within the 120-day time limit set forth in 37 Pa. Code §71.4(1); and (2) whether the Board erred in recomputing Hennis' maximum expiration date because the Board overlooked time spent while incarcerated under their detainer lodged October 13, 2006. Citing Board regulations, Attorney Smith's brief explains that when a parolee is confined outside of the jurisdiction of the Department of Corrections, the revocation hearing must be held within 120 days from the date the Board receives official verification of the return of the parolee to a state correctional facility. Hennis was returned to the state correctional facility on November 17, 2006. Computing the 120-day time period from this date and excluding the continuances requested by Hennis from November 17, 2006 to November 28, 2006 and from December 13, 2006 to January 3, 2007, the revocation hearing held on April 16, 2007 occurred on the 118<sup>th</sup> day. With regard to the second issue raised, Attorney Smith's brief states that this issue was not raised before the Board and is being raised for the first time on appeal.

Attorney Smith has notified Hennis of his request to withdraw. Counsel furnished Hennis with a copy of the petition to withdraw, the Anders brief, and the reproduced record. Counsel also sent a letter to Hennis explaining his right to retain new counsel or raise any new points that he might deem worthy of consideration in a *pro se* brief. Pursuant to this Court's order of December 11, 2007, Hennis was advised that he may, within thirty (30) days, either obtain substitute counsel at his own expense or file a brief on his own behalf.<sup>3</sup> Since the

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<sup>3</sup> Hennis has not filed a brief in support of his petition for review.

technical requirements set forth in Anders and Craig have been satisfied, we must examine the issues raised by Hennis in his petition for review to determine if they are meritless or frivolous.

First, Hennis contends that the Board failed to hold a revocation hearing within the 120-day time period. We disagree.

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 were violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Holland v. Pennsylvania Board of Probation and Parole, 640 A.2d 1386 (Pa. Cmwlth. 1994). Substantial evidence is such evidence that a reasonable mind might accept as adequate to support a conclusion. Chapman v. Pennsylvania Board of Probation and Parole, 484 A.2d 413 (Pa. Cmwlth. 1984).

Section 71.4 of the Board's regulations provide

that a revocation hearing:

shall be held within 120 days from the date the board received official verification of the plea of guilty or nolo contendere or of the guilty verdict ... except as follows:

\* \* \*

(i) If a parolee is confined outside the jurisdiction of the Department of Corrections, such as ... confinement in a county correctional institution where the parolee has not waived the right to a revocation hearing by a panel in accordance with *Commonwealth ex rel. Rambeau v. Rundle*, [455 Pa. 8] 314 A.2d 842 (1973), the revocation hearing shall be held within 120 days of the official verification of the return of the parolee to a State correctional facility.

37 Pa. Code § 71.4(1). The Board is not responsible for delays in a timely scheduled hearing continued at the request of the parolee. 37 Pa. Code § 71.5(c);

Mangone v. Pennsylvania Board of Probation and Parole, 553 A.2d 91 (Pa. Cmwlth.), petition for allowance of appeal denied, 522 Pa. 591, 561 A.2d 743 (1989).

Here, Hennis was confined in a county correctional institution and did not waive his right to a panel hearing. C.R. at 42. Hennis was returned to a state correctional institution on November 17, 2006. C.R. at 42-43. His return triggered the 120-day time period for holding a revocation hearing under 37 Pa. Code §71.4(1)(i). Any time spent in county prison prior to his return to the state correctional facility is excluded from the 120-day calculation. Also excluded from this calculation are any requests for continuances made by Hennis. Hennis requested that the first hearing, which was scheduled November 14, 2006,<sup>4</sup> be continued to November 28, 2006, and then requested that the hearing scheduled for December 13, 2006 be continued to January 3, 2007.<sup>5</sup> C.R. at 28, 30. Excluding these time periods from the calculation, we conclude that the hearing conducted on April 16, 2007 was timely.

Next, Hennis contends that the Board erred in recomputing his maximum date because the Board overlooked time spent while incarcerated under their detainer, which was lodged October 13, 2006. Review of the record reveals that this issue was not raised before the Board. As a result, this issue is waived and cannot be considered for the first time in a judicial appeal. Section 703(a) of the Administrative Agency Law, 2 Pa.C.S. §703(a); Pa. R.A.P. 1551(a); Newsome v. Pennsylvania Board of Probation and Parole, 553 A.2d 1050 (Pa. Cmwlth. 1989).

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<sup>4</sup> The date used for purposes of calculation is the date of return, November 17, 2007, not November 14, 2007.

<sup>5</sup> The continuances made by the Board are not excluded from the 120-day calculation.

As Hennis has failed to allege any points that would arguably support his appeal, we hold that this appeal is without merit and wholly frivolous. Accordingly, we grant Attorney Smith's petition for leave to withdraw as appointed counsel and affirm the Board's decision.

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JAMES R. KELLEY, Senior Judge

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v.	:	No. 1654 C.D. 2007
	:	
Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 14th day of May, 2008, the decision of the Pennsylvania Board of Probation and Parole, at Parole No. 985-AB, is AFFIRMED, and the petition for leave to withdraw as appointed counsel filed by L. Abraham Smith is GRANTED.

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JAMES R. KELLEY, Senior Judge