

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William S. Stallworth, :
Petitioner :
 :
v. : No. 1665 C.D. 2007
 : Submitted: June 13, 2008
 :
Pennsylvania Board of Probation :
and Parole, :
Respondent :
 :

BEFORE: HONORABLE BERNARD MCGINLEY, Judge
HONORABLE ROCHELLE FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY

FILED: July 29, 2008

This case is before us on Jonathan D. Ursiak's (Counsel) petition to withdraw from his representation of William Stallworth (Petitioner), who petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) that denied his request for administrative relief and recommitted him as a convicted parole violator to serve eighteen months backtime, establishing his parole violation maximum date at December 20, 2013. We deny Counsel's petition to withdraw.

On February 15, 1995, Petitioner was sentenced to serve five to fifteen years after a conviction for third-degree murder, robbery, and criminal conspiracy. His maximum release date was set at August 4, 2008. On January 25, 1999, Petitioner was released on parole. On July 31, 2001, Petitioner was recommitted as a technical parole violator for leaving the district without

permission, when available to serve six months backtime. Petitioner was re-paroled on October 27, 2003. Petitioner signed a waiver of extradition as a condition of his parole.

On March 6, 2006, Petitioner was arrested and on July 31, 2006, was convicted in Gloucester County Superior Court, New Jersey, of conspiracy to commit forgery.¹ Petitioner was sentenced to 364 days with 191 days credit. This sentence was to run “concurrent to his Pennsylvania parole violation.” Certified Record (C.R.) at 59. Petitioner was also convicted in Camden County Superior Court, New Jersey, for making terroristic threats on September 18, 2006. On September 29, 2006, Gloucester County jail was contacted by the Board regarding the parole violator’s availability for retake. The Board was advised that Petitioner was still awaiting sentencing on the charge of terroristic threats. *Id.* at 35. Petitioner was subsequently sentenced on November 17, 2006 to five years probation and 125 hours of community service.

The Gloucester County Prosecutor’s Office Fugitive Investigation Unit notified the Board that Petitioner was available for retake on January 26, 2007. Petitioner signed a waiver of extradition on that date. Petitioner was returned to Pennsylvania on February 3, 2007. A revocation hearing was held on April 12, 2007.² He was subsequently recommitted as a technical parole violator

¹ Petitioner signed a waiver of extradition on May 24, 2006.

² Before a parolee is recommitted as a convicted violator, 37 Pa. Code §71.4 provides that:

(1) 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 at the highest trial court level except as follows:

(i) If a parolee is confined outside the jurisdiction of the

and ordered to serve six months backtime. Petitioner was further found to be a convicted parole violator and ordered to concurrently serve eighteen months backtime. Petitioner's maximum release date was set at December 20, 2013.

On June 7, 2007, Petitioner requested administrative relief before the Board, contending that his revocation hearing was untimely and that he was entitled to a credit for all time spent in custody in New Jersey. By letter dated August 1, 2007, the Board denied Petitioner's request for administrative relief. Petitioner timely petitioned our Court for review.

We note that previously, in an order dated September 6, 2007, this Court appointed the Public Defender of Luzerne County to represent Petitioner in this matter. Counsel subsequently filed a petition to withdraw and an accompanying Anders brief.³ In a per curiam order, dated February 12, 2008, this Court denied Counsel's petition to withdraw, without prejudice, stating that Counsel failed to address all of the issues raised in the petition for review or to explain why the issues raised were meritless. In finding that Counsel failed to address all issues, we specifically noted there was "no mention of Petitioner's claim that [the] New Jersey sentence was to run concurrent to [the] parole violation." Counsel was directed to file an amended Anders brief or a brief on the merits. Counsel filed an amended petition to withdraw and Anders brief with this Court on April 1, 2008.

Department of Corrections, such as confinement out-of-State... the revocation hearing shall be held within 120 days of the official verification of the return of the parolee to a State correctional facility.

³ See Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed. 2d 493 (1967).

In his petition for review to this Court, Petitioner argues that the Board failed to hold a timely revocation hearing and failed to “credit Petitioner’s original sentence (backtime) with all the time to which Petitioner is entitled to in accordance with law.” (Petition for Review, at 9). Presently before us is an application to withdraw appearance filed by Counsel. A court-appointed counsel who seeks to withdraw representation because issues raised by the petitioner are frivolous must fulfill the following technical requirements: (1) he must notify parolee of the request to withdraw; (2) he must furnish parolee with a copy of an Anders brief or no-merit letter; and (3) he must advise parolee of his right to retain new counsel or raise any new points that he might deem worthy of consideration. Banks v. Pennsylvania Board of Probation and Parole, 827 A.2d 1245 (Pa. Cmwlth. 2003). The brief or letter must set forth (1) the nature and extent of counsel’s review of the case; (2) the issues the petitioner wishes to raise; and (3) counsel’s analysis concluding that the appeal is frivolous. Id. at 1248. Counsel must satisfy these requirements before we may consider any request to withdraw an appearance. Jefferson v. Pennsylvania Board of Probation and Parole, 705 A.2d 513 (Pa. Cmwlth. 1998).

A wholly frivolous appeal is one that is completely devoid of points that might *arguably* support an appeal. Congo v. Pennsylvania Board of Probation and Parole, 522 A.2d 676 (Pa. Cmwlth. 1987). This court does not reach an examination on the merits of the appeal until it is satisfied that counsel has discharged its responsibility in complying with the technical requirements of an Anders brief or a no-merit letter. Pierce v. Pennsylvania Board of Probation and Parole, 688 A.2d 754 (Pa. Cmwlth. 1997). Indeed, in denying a request to withdraw as counsel in light of a counsel’s failure to support his contention that the

Board properly disposed of an issue, we have stated “we are not free to make our own independent evaluation, no matter that even with cursory research, we could find that the appeal was frivolous.” Banks, 827 A.2d 1249.

Petitioner raised several issues in his request for administrative relief before the Board, as well as in his petition for review with this Court. The first set of issues deals with whether his revocation hearing was timely. Specifically, he queries why the Board was correct when it found he was first available for retake on January 26, 2007, as opposed to September 18, 2006, when he pled guilty to the charge of terroristic threats in the case against him in Camden County Superior Court, New Jersey. According to Petitioner, he was released on his own recognizance pending sentencing on the terroristic threats charge in Camden County and, although he was sentenced to 364 days on the charge of conspiracy to commit forgery, that sentence was, based on the Gloucester County Superior Court’s sentencing order, to run “concurrent to his Pennsylvania parole violation.”⁴ As he had already signed two waivers of extradition by this time, Petitioner questions why he was not considered available for retake as of September 18, 2006. Assuming he was considered available as of September 18, 2006, and was not returned to Pennsylvania until February 3, 2007, Petitioner contends that his revocation hearing that took place on April 12, 2007, was untimely. Petitioner relies, in part, on Williams v. Pennsylvania Board of Probation and Parole, 579 A.2d 1369 (Pa. Cmwlth. 1990), which held that when there is an unreasonable and unexplained delay between the parolee’s date of availability and his date of return

⁴ Although it is unclear from the record whether Claimant was indeed “released on his own recognizance” pending sentencing on the charge of making terroristic threats in Camden County New Jersey, it does appear that he was nonetheless returned to Gloucester County jail where he served time on his conviction for conspiracy to commit forgery until made available for retake in January of 2007.

to Pennsylvania, the 120-day period to hold a revocation hearing runs from the date of *availability*.

Petitioner also challenges that the Board failed to give him a credit for the time he spent incarcerated in New Jersey. Specifically, he references the fact that the Gloucester County Superior Court's sentencing order stated that his sentence for the crime of conspiracy to commit forgery was to run "concurrent to his Pennsylvania parole violation." He further mentions that he received probation and was not sentenced to any jail time for his crime of making terroristic threats.

The argument section of Counsel's Anders brief is divided into two sections and reads as follows:

WHETHER THE BOARD ERRED IN CONCLUDING THAT THE APRIL 12, 2007 PAROLE REVOCATION HEARING WAS TIMELY.

Under 37 Pa. Code § 71.4(1) a revocation hearing must be held within 120 days from the date the Board, receives official verification of a guilty plea, nolo contendere plea, or a guilty verdict.

The record indicates that Petitioner was arrested in Gloucester County, New Jersey for numerous charges and Pennsylvania issued a warrant on this date. Petitioner plead guilty on July 31, 2006 and was sentenced on September 13, 2006 to 364 days in Gloucester County Jail. On September 29, 2006, the jail was contacted regarding Petitioner's ability to be taken to Pennsylvania. The record reflects that his case was still pending. Then on January 26, 2007, Pennsylvania was notified that Petitioner had waived extradition and was available for retake. On February 3, 2007 Petitioner was taken into custody and lodged that day. A revocation hearing was held on April 12, 2007.

Based on a review of the regulations and accompanying case law, Counsel could not locate any case supporting an untimely hearing. Thus, Counsel believes any appeal is frivolous and without merit.

WHETHER THE BOARD ERRED IN RE-CALCULATING PETITIONER'S MAX DATE

Under 61 P.S. §331.21 a, [sic] convicted parole violator automatically forfeits credit for time spent on parole.

The record indicates that Petitioner was paroled on October 27, 2003 with a max date of August 4, 2008 with 1,743 days remaining on that sentence. Further the record indicates that Petitioner was paroled from January 25, 2000 to March 21, 2001, totaling 777 days. These figures added together result in a total of 2,520 days remaining on his sentence. Petitioner became available to the Board on January 26, 2007 due to the signed Waiver of Extradition and this date was the beginning of his sentence. Thus, Petitioner's max date is December 20, 2013.

Upon review of the regulations and accompanying case law, Counsel could not locate anything to the contrary of the Board's conclusion, including the Board's denial of providing credit for incarceration at the Camden County Correctional Facility.

Therefore, Counsel believes any appeal is frivolous and without merit.

Petitioner raises specific concerns in his appeal. He acknowledges that the Board found that he was available as of January 26, 2007. He questions, however, why he was not considered available for retake as of September 18, 2006, for the reasons previously stated. This date is not discussed by Counsel in his Anders brief, nor is mention made regarding Petitioner's arguments in support of his "availability" as of this date. Moreover, despite Petitioner's argument that

he became available months prior to January 26, 2007, there is no reference to cases such as Williams, which hold that when there is an unreasonable and unexplained delay between the parolee's date of availability and his date of return to Pennsylvania, that the 120-day period in which to hold a revocation hearing, runs from the date of availability, not the date of return. Rather, Counsel simply notes that Petitioner became available as of January 26, 2007, as found by the Board, was returned to Pennsylvania on February 3, 2007, and that the revocation hearing was held on April 12, 2007.

Counsel did point out that because Petitioner was confined out of state, 37 Pa. Code §71.4(1)(i) instructs that his revocation hearing should take place within 120 days of his return to Pennsylvania. Despite "a review of the regulations and accompanying caselaw," the only legal authority Counsel cites on the timeliness of Petitioner's revocation hearing concerns individuals within the jurisdiction of the Department of Corrections, whereupon the 120 day period to hold a revocation hearing would commence following receipt of official verification of a plea of guilty or nolo contendere or of a guilty verdict. While we presume Counsel proceeded to review this case under 37 Pa. Code §71.4(1)(i) and calculated the 120-day period from February 3, 2007, the date of Petitioner's return to Pennsylvania, Counsel's brief fails to make this fact clear.

As to the issue of the Board's calculation of Petitioner's max date, we note that at a minimum, Petitioner raised an argument that he was inappropriately denied credit for his time spent incarcerated in New Jersey, as his sentence on the charge of conspiracy to commit forgery was to run concurrent with his sentence on the Pennsylvania parole violation. Moreover, in this Court's prior per curiam order, we denied Counsel's original petition to withdraw for failure to address all

issues, specifically referencing the absence of any discussion of the fact that the Gloucester County New Jersey sentence was to run concurrently to the Pennsylvania parole violation. Yet, our review of Counsel’s newly submitted Anders brief reveals that it fails to even mention the word “concurrent,” let alone address with any sufficiency the issue of whether Petitioner is entitled to a credit based on the language espoused in the sentencing order on the crime of conspiracy to commit forgery.

We cannot agree that court-appointed Counsel has made a thorough review of Petitioner’s claims or that he has sufficiently addressed all of the issues raised by Petitioner. Therefore, Counsel’s petition to withdraw must be denied. Jefferson. Under such circumstances, this court will not reach the merits of the appeal until we are satisfied that Counsel has discharged his duty.⁵ Pierce; Banks.

JIM FLAHERTY, Senior Judge

⁵ Notwithstanding the fact that we need not examine the merits of Petitioner’s claims until court-appointed counsel has sufficiently assessed the claims on his own accord, we note that pursuant to Congo, a wholly frivolous appeal is one that is completely devoid of points that might *arguably* support an appeal. This Court in Santiago v. Pennsylvania Board of Probation and Parole, 937 A.2d 610 (Pa. Cmwlth. 2007), dealt with the issue of whether a parolee is entitled to a credit for time spent incarcerated on an out of state sentence where the sentencing court instructed that the sentence was to run “concurrent with any other outstanding or unserved sentence.” In holding that Santiago was entitled to a credit, we noted that to hold the opposite would result in an increased cost to Pennsylvania taxpayers as Pennsylvania would have to pay for incarceration of another state’s sentence. Id. at 615. We further referenced the “surprise” of criminal defendants who entered a plea conditioned upon the fact that the sentence was to run concurrently but was changed by the Board to run consecutive to other time. Id. While Santiago may ultimately not be applicable in this instance, it would appear that, at minimum, it might arguably support Petitioner’s appeal at least to the extent that he contends that the Board erred in calculating his max time.

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	:	
Respondent	:	
	:	

ORDER

AND NOW, this 29th day of July, 2008, the application of Counsel for leave to withdraw appearance is hereby denied, without prejudice to file a new petition within thirty days of the date of this order. If Counsel concludes, upon reconsideration, that the above-captioned appeal is not frivolous, Counsel shall submit a brief on the merits of the appeal within the said time period. Consideration of the merits of the petition for review is deferred until Counsel files a new petition to withdraw or a brief on the merits of the appeal.

JIM FLAHERTY, Senior Judge