

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Antoine McDaniel, :
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 Petitioner :
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 v. :
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 :
 Pennsylvania Board of :
 Probation and Parole, : No. 1667 C.D. 2007
 Respondent : Submitted: March 28, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: May 30, 2008

Before this Court is Harry J. Cancelmi, Jr.'s (Attorney Cancelmi) petition to withdraw as counsel for Antoine McDaniel (McDaniel) on McDaniel's petition for review from an order of the Pennsylvania Board of Probation and Parole (Board) which recommitted McDaniel to serve twenty-four months backtime with a new maximum date of October 28, 2008.

McDaniel was effectively sentenced on July 2, 2003, to a term of two to four years for the manufacture, sale, delivery or possession of drugs with intent to distribute. McDaniel was placed at Quehanna Motivational Boot Camp. His minimum release date was July 2, 2005, with a maximum release date of July 2, 2007. On October 5, 2004, McDaniel was paroled after graduating from Quehanna Motivational Boot Camp.

On December 28, 2005, the Brackenridge Police Department arrested McDaniel and charged him with theft by unlawful taking. On January 22, 2006, the Ross Township Police Department arrested McDaniel and charged him with robbery. On the same date, the Bellevue Police Department arrested McDaniel and charged him with theft from a motor vehicle, receiving stolen property and access device fraud. On January 25, 2006, Indiana Township Police Department arrested McDaniel and charged him with access device fraud. By notice dated March 7, 2006, the Board ordered that McDaniel be detained pending disposition of the criminal charges. On July 14, 2006, McDaniel pled guilty in the Allegheny County Court of Common Pleas to theft by unlawful taking, robbery, theft from a motor vehicle, receiving stolen property and two counts of access device fraud. McDaniel was sentenced to one year less one day to two years less two days imprisonment with five years of probation.

A revocation hearing was held on August 31, 2006. McDaniel argued *pro se* that he relapsed, began using cocaine and “started going downhill slowly until everything happened.” Revocation Hearing, August 31, 2006, at 8; Certified Record (C.R.) at 31.

After the revocation hearing, the Board, in a decision recorded on October 11, 2006, and mailed October 23, 2006, recommitted McDaniel to serve twenty-four months backtime as a convicted parole violator (revocation decision). Subsequently, the Board in a decision recorded on May 14, 2007, and mailed May 23, 2007, recalculated McDaniel’s maximum release date to be October 28, 2008, with review for parole in February 2008 (recalculation decision).

McDaniel, through Attorney Cancelmi, filed a timely request with the Board on June 22, 2007, for administrative relief from this decision. McDaniel's administrative appeal principally alleged that he did not have a timely revocation hearing and that his parole violation maximum date was incorrect.¹ Antoine McDaniel, Request for Administrative Relief, June 22, 2007, at 1-2; C.R. 84-85.

On July 31, 2007, the Board denied McDaniel's request for administrative relief (denial letter) from the revocation decision recorded on October 11, 2006, and the recalculation decision recorded on May 14, 2007.² As to the October 23, 2006, revocation decision, the Board dismissed the appeal as untimely and indicated that McDaniel's allegations were otherwise inadequate to justify an appeal *nunc pro tunc*. The Board concluded:

Board regulations provide that administrative appeals must be received at the Board's Central Office within 30 days of the mailing date of the Board's order [October 23, 2006]. 37 Pa. Code §73.1(a). Because the Board did not receive [McDaniel's] appeal within the prescribed period, [his] appeal cannot be accepted. *Maldonado v. Pennsylvania Board of Probation and Parole*, 492 A.2d 1202 (Pa. Commw. 1985).

Board Administrative Appeal Denial Letter, July 31, 2007, at 1; C.R. at 89.

¹ To the extent McDaniel raised additional objections they were repetitious.

² In the petition for review, Attorney Cancelmi indicated that the October 23, 2006, revocation decision, addressed in the Board's denial letter was unknown to Attorney Cancelmi.

As to the May 23, 2007, recalculation decision, the Board reviewed it on the merits and affirmed the parole maximum release date of October 28, 2008.

The Board concluded:

When [McDaniel] was paroled on October 5, 2004 his max date was July 2, 2007, which left 1000 days remaining on his sentence. [McDaniel] received 244 days of credit on his original sentence for the period he was incarcerated from February 1, 2006 to October 3, 2006. Subtracting that credit from the 1000 days he had remaining on his sentence, based on his recommitment as a convicted parole violator, results in a total of 756 days remaining on his sentence. [McDaniel] became available to begin serving his original sentence again on October 3, 2006, when he was paroled from his new sentences. Adding 756 days to that date yields a new max date of October 28, 2008.

Board Administrative Appeal Denial Letter, July 31, 2007, at 1; C.R. at 89.

After review of McDaniel's petition for review and the certified record, Attorney Cancelmi desires to withdraw and asserts that McDaniel's appeal is without merit.³

Appointed counsel may withdraw from assisting an indigent parolee in appealing a parole revocation order, "[w]hen, in the exercise of his professional

³ This Court's scope of review of Orders and Determinations of the Pennsylvania Board of Probation and Parole is limited to whether: (1) a necessary finding is unsupported by substantial evidence; (2) the Board committed an error of law; or (3) the parolee's constitutional rights were violated. Kirkland v. Pennsylvania Board of Probation and Parole, 528 A.2d 711 (Pa. Cmwlth. 1987).

opinion, counsel determines the issues raised . . . are meritless, and when the . . . court concurs” Commonwealth v. Turner, 518 Pa. 491, 495, 544 A.2d 927, 928-929 (1988). It is well established that an indigent parolee’s rights to assistance of counsel does not entitle the parolee to representation by appointed counsel to prosecute frivolous appeals. Craig v. Pennsylvania Board of Probation and Parole, 502 A.2d 758 (Pa. Cmwlth. 1985). 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).

In reviewing a motion to withdraw, this Court must make an independent evaluation of the proceedings before the Board to determine whether a parolee’s appeal is meritless. Dear v. Pennsylvania Board of Probation and Parole, 686 A.2d 423 (Pa. Cmwlth. 1996). A court-appointed counsel who seeks to withdraw from representation because issues raised by petitioner are frivolous must fulfill the following technical requirements under Craig: (1) notify the parolee of the request to withdraw, (2) furnish the parolee with a copy of the brief, (3) advise the parolee of his right to retain new counsel to raise any new points that he might deem worthy of consideration. In either a “no-merit letter” or brief, counsel is required to detail the nature and extent of his review, list the issues the parolee wishes to raise, and explain why the appeal is frivolous. Turner, 518 Pa. at 494, 544 A.2d at 928; Wesley v. Pennsylvania Board of Probation and Parole, 614 A.2d 355 (Pa. Cmwlth. 1992). Counsel must satisfy these requirements before this Court may

consider a request to withdraw an appearance.⁴ Vandermark v. Pennsylvania Board of Probation and Parole, 685 A.2d 628 (Pa. Cmwlth. 1996).

McDaniel, through Attorney Cancelmi, filed a petition for review with this Court. In the no-merit letter Attorney Cancelmi appropriately condensed the objections set forth in the petition for review⁵ into three overarching issues: (1)

⁴ It is apparent from Attorney Cancelmi's brief that he has complied with the requirements of Craig.

⁵ McDaniel's petition for review included the following objections:

B. The offender [McDaniel] believes the Board erred because:

1. Offender [McDaniel] did not have a revocation hearing.
2. Offender [McDaniel] was not apprised of the Notice of Decision of Board Action 10/11/2006.
3. Any revocation hearing that offender [McDaniel had] was untimely and a violation of procedural due process.
4. The Parole Violation Maximum Date is incorrect.
5. Any prior action prior to the May 23, 2007 [recalculation decision] is void since the parolee [McDaniel] never had a revocation hearing.
6. Parolee [McDaniel] has not been served with the Pennsylvania Board of Probation and Parole recalculation order and does not have access to the sentence records, parole decisions, and status sheets, upon which the Board relied, and therefore, is unable to determine whether the calculation of the parole violation maximum state on the "green sheet" Notice of Decision is correct.
7. The recalculated parole violation date in the May 23, 2007 [recalculation decision] to be October 28, 2008 but there were no findings or explanation of how the recalculation date was arrived at sufficient for parolee [McDaniel] to understand the decision of the Board.
8. Parolee [McDaniel] believes that the recalculation date is otherwise incorrect.

C. The Board failed to meet its burden of proof to establish the verification date of the parolee's [McDaniel's] alleged new

(Footnote continued on next page...)

McDaniel did not have a revocation hearing and, in any event, his revocation hearing was untimely, (2) his parole violation maximum date was incorrect, and that (3) Attorney Cancelmi could not determine whether McDaniel's parole violation maximum date was correct because McDaniel was not served with the Order to Recommit which contained the findings upon which the parole violation maximum date was determined. This Court will review each of these issues separately.

With respect to whether McDaniel had a timely revocation hearing, Attorney Cancelmi concluded that “[s]ince a revocation hearing was held and . . . [it] was held on August 31, 2006 within 120 days of the plea of guilty on July 14, 2006, the revocation hearing was timely pursuant to 73 Pa. Code 71.4(1).” Harry J. Cancelmi, Jr., No-Merit Letter, December 31, 2007, at 2. A review of the record confirms Attorney Cancelmi's assertion.

(continued...)

convictions and that the revocation hearing was timely under the regulations, the law, and the due process rights afforded him by the Pennsylvania and United States Constitution.

- D. The Board erroneously found that parolee [McDaniel] did not file a timely appeal, or not deem his appeal to be appropriately received *nunc pro tunc* due to the lack of notice of the revocation hearing.
- E. Offender [McDaniel] was sentenced on October 3, 2006 and the Board action of October 11, 2006 took place prior to a revocation hearing. The Board cannot hold a revocation action until the offender [McDaniel] is finally convicted in the Court of Common Pleas.

Petition for Review, September 4, 2007, at 2-3.

The record reflects that a revocation hearing was held at the Allegheny County Jail 48 days after McDaniel was convicted. Revocation Hearing, August 31, 2006, at 1; C.R. at 24. Attorney Cancelmi correctly explained in the no-merit letter that it is not necessary that a parole offender actually be sentenced in a court of common pleas before the revocation hearing takes place. The Board may recommit a convicted parole violator upon proof of a new conviction in a court of record, which includes a guilty verdict by a judge or jury or a plea of guilty or nolo contendere made by an offender. Section 21.1 of the Parole Act, Act of August 6, 1941, P.L. 861, as amended, added by Section 5 of the Act of August 24, 1951, P.L. 1401, as amended, 61 P.S. §331.21(a). Here, McDaniel pled guilty to all charges in the Allegheny County Court of Common Pleas on July 14, 2006, and thereafter the revocation was timely held on August 31, 2006.

With respect to whether McDaniel's parole violation maximum date was incorrect, Attorney Cancelmi concluded the parole violation maximum date was computed correctly. A review of the record confirms Attorney Cancelmi's conclusion was accurate.

McDaniel was paroled on October 5, 2004. At that time, McDaniel's maximum release date was July 2, 2007. McDaniel had 1,000 days remaining on his sentence. The Board awarded McDaniel 244 days of credited backtime for the period he was incarcerated from February 1, 2006, to October 3, 2006. After subtracting the 244 days, a total of 756 days remained on McDaniel's sentence. McDaniel was eligible to begin serving his original sentence on October 3, 2006, when he was paroled from his new sentences. Adding 756 days to that date yields

a maximum release date of October 28, 2008. Attorney Cancelmi is correct that the Board did not err in its calculation.

With respect to whether Attorney Cancelmi's inability to confirm that McDaniel's parole violation maximum date was correct because McDaniel was not served with the Order to Recommit, Attorney Cancelmi concluded that the issue of is either moot or inconsequential because the sentence was calculated correctly.⁶ Again, review of the record confirms Attorney Cancelmi's conclusion. In reviewing both the Order to Recommit and the recalculation decision recorded on May 14, 2007, it is apparent that it was supported by the record and the calculations are correct, as Attorney Cancelmi explained. Order to Recommit, May 14, 2007, at 1-2; C.R. at 77.

Accordingly, this Court grants Attorney Cancelmi's request and affirms the order of the Board in the above-captioned matter.

BERNARD L. MCGINLEY, Judge

⁶ Attorney Cancelmi added that if McDaniel did not receive a copy of the revocation decision mailed on October 23, 2006, then there might be a basis for a *nunc pro tunc* administrative appeal, however, as set forth in the no-merit letter there was no basis for an appeal.

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	: No. 1667 C.D. 2007
Respondent	:

ORDER

AND NOW, this 30th day of May, 2008, the Orders of the Pennsylvania Probation and Parole Board recorded on October 11, 2006, and May 24, 2007, are affirmed.

BERNARD L. MCGINLEY, Judge