

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert M. Miller, :
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 Petitioner :
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 v. : No. 1681 C.D. 2007
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 Pennsylvania Board of : Submitted: July 3, 2008
 Probation and Parole, :
 :
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: October 27, 2008

Robert Miller (Miller) 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 an amended application for leave to withdraw as appointed counsel filed by Miller's court-appointed attorney, Kent D. Watkins, on the grounds that Miller's appeal is frivolous. We grant Attorney Watkins' amended application for leave to withdraw as appointed counsel and affirm the Board's decision.

The history of this case is as follows. On March 22, 1995, Miller was sentenced to serve a term of five to ten years on the charge of aggravated assault. Certified Record (C.R.) at 7. Miller's minimum expiration date was May 19, 1997 and his maximum expiration date was May 19, 2012. Id. By Board order dated

October 30, 1997, Miller was paroled to a Community Corrections Center (CCC) for a minimum of six months with conditions and released on January 26, 1998. C.R. at 5-10.

Miller left the CCC without permission and was declared delinquent. Miller was arrested on April 14, 1998 on new criminal charges. C.R. at 11. Miller was detained pending disposition of the new criminal charges and technical parole violations. By Board order dated May 14, 1998, Miller was recommitted to a state correctional institution as a technical parole violator when available to serve twelve months backtime for multiple technical parole violations. Id. Miller was subsequently convicted on the new criminal charges and recommitted as a convicted parole violator to serve thirty months backtime. C.R. at 13. Miller's parole violation maximum date was extended to June 25, 2013. Id.

By order dated October 5, 2001, Miller was paroled to a state detainer sentence and released on November 29, 2001. C.R. at 17. Miller was then reparaoled and released on February 16, 2004. C.R. at 29. Miller's maximum sentence date remained June 25, 2013. C.R. 29. Miller was also released on August 17, 2004 from a Washington, Maryland five-year probationary sentence with a maximum date of April 12, 2009, for assault with intent to murder.

On January 29, 2007, Miller's girlfriend, Darla Sturms, reported to Miller's parole agent that Miller had assaulted her. Miller was declared delinquent and arrested on January 31, 2007 for technical parole violations. A panel violation hearing was held on April 13, 2007. C.R. at 56. At the hearing, the state presented the testimony of Board Parole Agents Matt Johns and Robert Wertz, and Ms. Sturms, as well as documentary evidence in support of the technical violations. Miller, who was represented by court-appointed counsel at the hearing, testified in his own defense and presented the testimony of Dawn Strickland.

Based upon the testimony and evidence presented, the Board, by decision mailed May 17, 2007, recommitted Miller to state correctional institution as a technical parole violator to serve thirty-six months backtime for multiple technical parole violations. C.R. at 153-154. Specifically, the Board found that Miller violated condition #1 – leaving the district without permission; condition #4 – failure to comply with all laws; condition #5C – (two counts) failure to refrain from assaultive behavior; and condition #7 – consuming or possessing alcohol. Id.

By letter dated June 14, 2007, received by the Board on June 15, 2007, Attorney Watkins filed a request for administrative relief on Miller’s behalf.¹ C.R. at 168-170. Miller also filed *pro se* requests for administrative relief, which were received by the Board on June 15, 2007 and June 21, 2007. C.R. at 173-195.

By decision mailed August 23, 2007, the Board denied Miller’s request for administrative relief. C.R. at 171. The Board concluded that Miller violated all of the conditions indicated by a preponderance of the evidence and that the recommitment period of thirty-six months is within the presumptive range. Id.

Attorney Watkins on Miller’s behalf filed a petition for review with this Court requesting review of the Board’s decision. On June 12, 2008, Attorney Watkins, filed an amended petition for leave to withdraw as counsel² and a “no

¹ By letter dated June 7, 2007, received June 8, 2007, court-appointed counsel, Attorney Stephen O. Fugett, filed a request for administrative relief with the Board on Miller’s behalf. C.R. at 158. Miller then secured the services of Attorney Watkins. C.R. at 165-166. As a result, Attorney Fugett withdrew his request for administrative relief. C.R. at 165-166.

² The instant petition is Attorney’s Watkins’ third attempt to withdraw as counsel. Attorney Watkins’ initial application to withdraw as counsel was denied, without prejudice, by order of this Court dated November 20, 2007 because counsel failed to address all issues raised in the petition for review. Attorney Watkins then filed an amended application to withdraw as counsel, which was likewise denied, without prejudice, by order of this Court dated May 14, 2008, for the same reasons.

merit” letter alleging therein that, in his professional judgment, the issues raised in Miller’s petition for review are frivolous and without merit.

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.

Pursuant to Turner and Epps, if counsel so desires, he or she may file a “no-merit” letter instead of an Anders brief. The “no-merit” letter must contain: (1) the nature and extent of counsel’s review; (2) the issues the petitioner wishes to raise; and (3) counsel’s analysis in concluding that the petitioner’s appeal is without merit or frivolous. Id. Turner has been interpreted as requiring that the “no-merit” letter list the issues the petitioner wishes to raise and must include an explanation as to why those issues lack merit. Hont v. Pennsylvania Board of Probation and Parole, 680 A.2d 47 (Pa. Cmwlth. 1996).

Herein, Attorney Watkins’ “no-merit” letter satisfies the technical requirements of Turner and Epps. Attorney Watkins’ no-merit letter sets forth and

addresses the issues Miller wishes to raise of (1) whether the denial of relief from the Board's order revoking parole constitutes an error of law, a violation of Miller's constitutional rights and is not supported by substantial evidence; (2) whether the Board failed to give Miller credit for all time served solely under its warrant; and (3) whether the Board failed to hold a revocation hearing within 120 days from Miller's return to a state correctional facility or official verification of Miller's conviction.

Upon conducting a thorough review of the record and researching the issues raised, Attorney Watkins concluded that Miller's appeal is without merit. Attorney Watkins' letter summarizes the substantial evidence relied upon by the Board in support of its decision and cites to statutory and case law. With regard to the first issue, Attorney Watkins' letter explains that Miller was recommitted for multiple technical parole violations and that these violations are amply supported by the record. The letter identifies where support for the violations can be located in the record. Citing Board regulations, Attorney Watkins explains that the imposition of thirty-six months backtime is within the presumptive range for the violations and therefore not an abuse of the Board's discretion, an error of law or a violation of Miller's constitutional rights.

With regard to the second and third issues raised by Miller, Attorney Watkins explains that Miller did not raise these issues before the Board at the parole violation hearing, or in the requests for administrative relief and cites case law in support of the proposition that these issues are waived. Attorney Watkins also provided his analysis as to why these issues are frivolous and lack merit even if they had been properly raised. On the issue of whether the Board failed to give Miller credit for all time served solely under its warrant, Attorney Watkins cites to the record indicating that Miller's maximum sentence date at the time of his release

on parole was June 25, 2013 and that his maximum sentence has remained the same. Therefore, there can be no dispute that Miller received all the time credit to which he was entitled. With regard to the issue of whether the Board failed to hold a revocation hearing within 120 days from Miller's return to a state correctional facility or official verification of Miller's conviction, Attorney Watkins cites to record indicating that Miller was arrested on January 31, 2007 and his panel violation hearing was held on April 13, 2007; this period is less than the 120 days required by law.

Attorney Watkins has notified Miller of his request to withdraw, furnished a copy of the "no-merit" letter to Miller, and has advised Miller of his right to retain new counsel or proceed *pro se* and raise any issues he believes have merit. Pursuant to this Court's order of December 10, 2007, Miller was advised that he may, within thirty days, either obtain substitute counsel or file a brief on his own behalf.³ Since the technical requirements set forth in Turner and Epps have been satisfied, we must examine the issues raised by Miller in his petition for review to determine if they are meritless or frivolous.⁴

First, Miller contends that the denial of relief from the Board's order revoking his parole constitutes an error of law, a violation of his constitutional rights and is not supported by substantial evidence. We disagree.

³ Miller has not filed a brief in support of his petition for review.

⁴ In accordance with Epps, "[i]n reviewing counsel's application for leave to withdraw, we must make an independent evaluation of the proceedings before the board to determine whether [Miller's] appeal is wholly frivolous." Epps, 565 A.2d at 216. An appeal is wholly frivolous when it completely lacks any point that would arguably support an appeal. Epps. The fact that a court may ultimately find the appeal to be without merit does not render the appeal as legally frivolous. Id.

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).

In this case, the Board found that Miller violated multiple conditions of his parole. In reaching this decision, the Board relied upon the testimony of two parole agents as well as admissions made by Miller himself. With regard to violation of condition #1 - leaving the district without permission, Miller admitted at the hearing that he had gone to Indiana, Pennsylvania, which is outside the district, without permission of parole staff and in fact had left the district many times without permission. C.R. at 64-65, 110. With regard to violation of condition #4 – failure to comply with all laws, the evidence presented shows that on February 28, 2007, Miller pled guilty to harassment in front of a district justice. C.R. at 66, 132.

In support of a violation of condition #5C – failure to refrain from assaultive behavior, Miller was accused of assaulting Ms. Sturms. State Exhibit #3 is a letter from Miller to Agent Johns, which Miller admitted writing. C.R. at 119. In the letter, Miller stated, in pertinent part:

But when you picked me up and you asked me if I got into a fight with Darla [Sturms] that Saturday, I said that she slapped me and I grabbed her and that we shoved and pushed each other. But I did not know that Darla said all that she said. I didn't find out until later what she actually claimed I did. And I want to explain it to you.

But it's between us. I will lie and deny it if it's brought up.

* * *

Because I was not near her that Saturday afternoon or evening. I wasn't Matt. We argued that Saturday morning like I told you. I had no idea that she said I choked her at 4 pm that Saturday. Because I was not at her house then or anywhere near her at that time.

C.R. at 138, 141 (emphasis in original). At the hearing, Miller did not dispute that he had a physical altercation with Ms. Sturms, but the degree and time of the altercation. C.R. at 110-113. Ms. Sturms also testified that Miller had physically assaulted her. C.R. at 77-79.

The second count of assaultive behavior was based upon Agent Wertz's testimony. Agent Wertz testified that during the transport of Miller, Miller became angry when he was told about the allegations Ms. Sturms made against him and his incarceration pending his appearance before the Board. Agent Wertz testified that Miller said, in a threatening manner, "he would just simply do his ten years and take care of her when he got out." C.R. at 71, 72.

In support of a violation of condition #7 – consuming or possessing alcohol, Agent Johns testified that they searched Miller's residence and found nine bottles of beer in the downstairs refrigerator. C.R. at 69. Agent Johns and Agent Wertz testified that Miller was aware there was beer in the house, but denied the beer was his. C.R. at 70-71. The agents further testified that Miller admitted to the agents that he had consumed vodka and was intoxicated in September 2006. C.R. at 69, 71. We, therefore, conclude that the Board's findings that Miller had violated conditions #1, #4, #5C and #7 of his parole are supported by substantial evidence.

The Board's regulations provide presumptive ranges for recommitment for technical parole violations. The regulations state that the use of presumptive ranges is "intended to structure the discretion of the Board while allowing for individual circumstances to be considered in the final decision." 37 Pa. Code §75.3(b). When multiple violations occur, the presumptive range will be used that has the highest backtime range of those conditions violated. 37 Pa. Code §75.3(e). Additionally, backtime for a violation of a special condition shall be aggregated with other backtime, unless the revocation decision states otherwise. 37 Pa. Code §75.3(f). Where substantial evidence in the record supports the Board's finding that a parolee violated parole and the backtime imposed is within the presumptive range for the parole violation, this Court will not interfere with the Board's exercise of discretion in setting the amount of backtime to be served. Smith v. Pennsylvania Board of Probation and Parole, 543 A.2d 221 (Pa. Cmwlth. 1988), aff'd, 524 Pa. 500, 574 A.2d 558 (1990).

The presumptive range for a violation of condition #1 is six to twelve months. 37 Pa. Code §75.4. The presumptive range for a violation of condition #4 is three to nine months. Id. The presumptive range for single and multiple violations of condition #5C is six to eighteen months. Id. The presumptive range for a violation of condition #7, which is a special condition of parole, is three to eighteen months. Id.

Here, the Board recommitted Miller to serve thirty-six months of backtime for multiple technical parole violations. The general condition which Miller was found to have violated, having the highest backtime range, is Condition #5C (assaultive behavior), with a presumptive range of six to eighteen months. Aggregating that backtime with the backtime for the violation of special condition #7 (consumption of alcohol), the presumptive range becomes nine to thirty-six

months. The thirty-six months backtime imposed by the Board falls within this presumptive range. We, therefore, conclude that the Board has not erred, abused its discretion, or violated Miller's constitutional rights by recommitting Miller to serve thirty-six months backtime for multiple technical parole violations.

Miller also contends that the Board failed to give Miller credit for all time served solely under its warrant and failed to hold a revocation hearing within 120 days from Miller's return to a state correctional facility or official verification of Miller's conviction. Review of the record in this matter reveals that these issues were not raised during the Board's hearing or in Miller's requests for administrative relief⁵ and as a result are waived. Nicastro v. Pennsylvania Board of Probation and Parole, 455 A.2d 295 (Pa. Cmwlth. 1983) (The failure to make such objections constitutes a waiver by the parolee of the issues on appeal).

As Miller 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 Watkins' amended application for leave to withdraw as appointed counsel and affirm the Board's decision.

JAMES R. KELLEY, Senior Judge

⁵ The issues were not raised in either of the counseled requests for relief or in Miller's *pro se* requests.

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Robert M. Miller,	:	
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Petitioner	:	
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v.	:	No. 1681 C.D. 2007
	:	
	:	
Pennsylvania Board of	:	
Probation and Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 27th day of October, 2008, the decision of the Pennsylvania Board of Probation and Parole, at Parole No. 0026-U, dated August 23, 2007, is AFFIRMED, and the amended application for leave to withdraw as appointed counsel filed by Kent D. Watkins is GRANTED.

JAMES R. KELLEY, Senior Judge