

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael A. Brown, :  
Petitioner :  
 :  
v. :  
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 :  
Pennsylvania Board of :  
Probation and Parole, : No. 1824 C.D. 2007  
Respondent : Submitted: April 4, 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 David Crowley’s (Attorney Crowley) petition to withdraw as counsel for Michael A. Brown (Brown) on Brown’s petition for review from an order of the Pennsylvania Board of Probation and Parole (Board) which recommitted Brown to serve nine months backtime for technical parole violations with a maximum date of April 17, 2009, with review for parole beginning in December 2007.

On January 9, 1991, Brown was sentenced to a term of 10 to 20 years after pleading guilty to third degree murder.<sup>1</sup> Brown was released on parole on February 4, 2002, with a violation maximum date of April 17, 2009. On June 7, 2005, Brown was recommitted to serve six months backtime as a technical parole

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<sup>1</sup> Brown received a commitment credit for his time served from April 17, 1989, until January 9, 1991, which resulted in a controlling minimum date of April 17, 1999, and a controlling maximum date of April 17, 2009.

violator for failing to refrain from cocaine use. Brown was reparaoled on February 5, 2007, to a residential treatment program, Renewal, Incorporated (Renewal, Inc.).

On March 19, 2007, Brown left Renewal, Inc., without permission<sup>2</sup> and returned via Greyhound bus to his hometown of Philadelphia. On March 19, 2007, Brown was “unsuccessfully discharged from Renewal, Inc. for leaving the program without permission and not returning.” Supervision History, March 28, 2007, at 1; C.R. at 34. On March 20, 2007, Brown was detained by the Board for technical parole violations because he was arrested outside of his approved parole district, changed his approved residence without permission and unsuccessfully completed the program at Renewal, Inc.

On March 21, 2007, Brown waived his right to a Panel Violation Hearing. On March 30, 2007, Brown waived his right to a Preliminary Hearing and proceeded through a Violation Hearing represented by John Hekking, Esquire (Attorney Hekking), from the Montgomery County Office of Public Defender.

At the March 30, 2007, Violation Hearing Parole Agent Howell submitted the violation report into evidence that supported the technical parole violations which were recited by the Hearing Examiner.<sup>3</sup> Brown then admitted that

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<sup>2</sup> The record reflects that Brown’s parole conditions required him to enter into and actively participate in a residential treatment program at Renewal, Inc., “until successfully discharged.” Notice of Board Decision, November 14, 2006, at 1; Certified Record (C.R.) at 19. No time parameters were established by the Board for successful completion of the treatment program and no end date was set. The certified record reflects that neither Renewal, Inc., nor the Board expressly permitted Brown to leave the treatment program on March 19, 2007.

<sup>3</sup> Brown was charged with the following technical parole violations:  
**(Footnote continued on next page...)**

he violated each of the parole conditions. Violation Hearing, March 30, 2007, at 4-6; C.R. at 44-46.

By order recorded on April 16, 2007, and mailed May 15, 2007, the Board recommitted Brown to serve nine months backtime as a technical parole violator. On May 23, 2007, the Board received a timely *pro se* request for administrative relief. On July 12, 2007, the Board denied Brown's administrative request and affirmed the decision mailed May 15, 2007. The Board concluded:

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**(continued...)**

Violation of Condition #1: 'Report in person or in writing within 48 hours to the district office or sub-office listed, and do not leave that district without prior written permission of the parole supervision staff.' On 3/20/07, you [Brown] were arrested in . . . [Delaware] County, which is outside the Pittsburgh District. You [Brown] did not have written permission from supervision staff to be outside of the Pittsburgh District.

Violation of Condition #2: 'Your [Brown's] approved residence is listed and may not be changed without the written permission of the parole supervision staff.' Approved residence is: Renewal Inc., . . . . On 3/19/07, you [Brown] left your approved residence at Renewal, Inc. You [Brown] did not have written permission from supervision staff to change your approved residence.

Violation of Condition #7: 'You [Brown] shall comply with the special condition listed imposed by the Board and with special conditions imposed by the parole supervision staff. (BOARD IMPOSED) Removal or termination from the Residential Program for any reasons other than successful completion may result in sanction or a violation of [his] parole.' On 3/19/07, you [Brown] were unsuccessfully discharged from Renewal Inc.

Notice of Charges and Hearings Dates, March 20, 2007; C.R. at 29 (emphasis added).

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The record reflects that . . . your [Brown's] constitutional rights were not violated, and that the decision is supported by substantial evidence and not based on an error of law. Specifically, the record in this matter indicates that you [Brown] admitted to violating the conditions of your [his] parole. Further, the backtime imposed was within the presumptive range for the multiple parole violations.

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Board Administrative Appeal Denial Letter, July 12, 2007; C.R. at 62.

On September 27, 2007, Brown filed a timely *pro se* petition for review with this Court. On October 2, 2007, this Court appointed Attorney Crowley to represent Brown. On October 31, 2007, Attorney Crowley submitted an amended petition for review.

Subsequent to filing an amended petition to review, Attorney Crowley met with Brown, reviewed his parole records, the court docket and the relevant case law. Attorney Crowley now desires to withdraw from further representation of Brown and asserts that Brown's appeal is without merit.<sup>4</sup>

Appointed counsel may withdraw from assisting an indigent parolee in appealing a parole revocation order, "[w]hen, in the exercise of his professional opinion, counsel determines the issues raised . . . are meritless, and when the . . .

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<sup>4</sup> This Court's scope of review of Orders and Determinations of the Board 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).

court concurs . . . .” Commonwealth v. Turner, 518 Pa. 491, 495, 544 A.2d 927, 928-929 (1988).

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). Court-appointed counsel who seek to withdraw from representation because issues raised by petitioner are frivolous must fulfill the following technical requirements of Craig v. Pennsylvania Board of Probation and Parole, 502 A.2d 758 (Pa. Cmwlth. 1985): (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 any request to withdraw an appearance.<sup>5</sup> Vandermark v. Pennsylvania Board of Probation and Parole, 685 A.2d 628 (Pa. Cmwlth. 1996).

Before this Court Brown raises the following issues: whether the Board lacked substantial evidence to conclude that he violated the terms of parole; whether his court-appointed counsel for the Violation Hearing was ineffective; and

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<sup>5</sup> It is apparent from Attorney Crowley’s brief that he has complied with the requirements of Craig.

whether the Board erred in refusing to consider mitigating evidence. See also Amended Petition for Review, October 30, 2007, Paragraphs 5-6 at 1-2.

With respect to Brown's first argument this Court agrees with Attorney Crowley that Brown committed the technical parole violations. Brown, who was represented by counsel, understood the violation charges and admitted to each violation. There was nothing of record to indicate that Brown's admissions were coerced or uninformed. Consequently, there was substantial evidence to support Brown's technical parole violations.

Brown next argues that Attorney Hekking was ineffective because he failed to speak on Brown's behalf at the Violation Hearing and he advised Brown to admit to each of the technical parole violations. Here, there was no need for Attorney Hekking to speak on behalf of Brown because the Hearing Examiner allowed Brown the opportunity to explain why he left Renewal, Inc. Further, Attorney Crowley upon review of the record indicated that it was reasonable for Attorney Hekking to counsel Brown to admit to the three technical parole violations so that the Board would take this into consideration and sentence Brown within the presumptive range.

A parolee has a right to competent and effective counsel. Commonwealth v. Fowler, 412 A.2d 614 (Pa. Super. 1979). Absent a showing of *per se* ineffectiveness of counsel a parolee has the burden of proving counsel's ineffectiveness to a degree which entitles the parolee to relief. Commonwealth v. Shore, 487 Pa. 534, 410 A.2d 740 (1980). A parolee is only entitled to relief upon

a showing that counsel “made errors so serious that counsel was not functioning as ‘counsel’ guaranteed under the law” and that parolee was prejudiced by counsel’s performance. LaCourt v. Pennsylvania Board of Probation and Parole, 488 A.2d 70, 75 (Pa. Cmwlth. 1985).

Brown failed to establish that he had ineffective counsel at the Violation Hearing.

Last Brown contends that the Board erred when it refused to consider Brown’s mitigating evidence produced at the Violation Hearing. Again, this Court agrees with Attorney Crowley that this argument is without merit. Specifically, the Hearing Examiner questioned Brown as to the events that lead to his departure from Renewal, Inc., and in fact commended his actions for turning himself into authorities when he arrived in Philadelphia.<sup>6</sup> This is evident in that the Board

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<sup>6</sup> As to any mitigating circumstances, the Hearing Examiner queried:

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Mr. Barone [Hearing Examiner]: Do you [Brown] want to say anything to the Board at this time?

Mr. Brown: Yes. I just want to state why I left the halfway house.

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Mr. Brown: Because I was in a drug program in Pittsburgh. I’m not from Pittsburgh. I was scared to death. I was being threatened up there. I elaborated this to the parole lady. She didn’t believe me. I stayed there for 43 days.

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Mr. Barone: Okay. Why were they threatening you?

Mr. Brown: Because I was simply from . . . Philadelphia . . . and this is Pittsburgh . . .

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**(Footnote continued on next page...)**

sentenced Brown to only nine months of backtime well within the aggregate range of nine to thirty-six months. Hearing Report at 2-3; C.R. at 36-36; Violation Hearing at 7-10; C.R. at 47-50.

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

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BERNARD L. MCGINLEY, Judge

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(continued...)

Mr. Brown: . . . They [Renewal, Inc.] had a graduation the Friday [March 16, 2007] before I left, so I was just waiting to go . . . to another program . . . [because of continued physical threats] I felt no other choice but to leave. I got on the bus overnight . . . from Pittsburgh to Philadelphia . . . I was at the . . . Delaware County Parole Office first thing in the morning [March 20, 2007], turned myself in. I didn't deviate, I didn't go get high. I knew I was wrong, and I admit I was wrong, but I just felt that my life was at risk. I just didn't want to stay up there.

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Mr. Barone: So you decided to leave and took a bus back to, where did it . . .

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Mr. Brown: Philadelphia. The Greyhound station. And I checked into Delaware County Parole Office at seven, eight o'clock in the morning.

Mr. Barone: What time did you get to Philly?

Mr. Brown: About four o'clock in the morning.

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Violation Hearing at 7-10; C.R. at 47-50.



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Michael A. Brown,     | :                    |
|                       | :                    |
| Petitioner            | :                    |
|                       | :                    |
| v.                    | :                    |
|                       | :                    |
| Pennsylvania Board of | :                    |
| Probation and Parole, | :                    |
|                       | : No. 1824 C.D. 2007 |
| Respondent            | :                    |

**ORDER**

AND NOW, this 30th day of May, 2008, Counsel's application for leave to withdraw is granted and the Order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is affirmed.

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BERNARD L. MCGINLEY, Judge