

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Fred Wilson,	:		
	:		
Petitioner	:		
	:		
v.	:	No. 2299 C.D. 2009	
	:	SUBMITTED: April 16, 2010	
Pennsylvania Board of Probation	:		
and Parole,	:		
	:		
Respondent	:		

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: June 10, 2010

Fred Wilson petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board), denying his administrative appeal from an order recommitting him as a convicted parole violator. In addition, Jason G. Pudleiner, Esquire, of the Clearfield County Public Defender’s Office, filed an application for leave to withdraw as counsel for Wilson on the ground that the appeal is frivolous. For the reasons that follow, we affirm the Board’s order and grant Pudleiner’s application for leave to withdraw as counsel for Wilson.

In a decision mailed June 15, 2009, the Board ordered that Wilson be recommitted as a convicted parole violator to serve twenty-four months in a state correctional institution when available, pending completion of a federal sentence.

On October 28, 2009, the Board denied Wilson’s application for administrative relief. On November 25, 2009, Pudleiner filed a petition for review with this Court seeking review of the Board’s decision and raising the following issues: 1) whether the Board failed to conduct the revocation hearing in compliance with the 120-day requirement set forth in 37 Pa. Code § 71.4(1), given the nearly five-month delay between the time of Wilson’s conviction in federal court and the time of the Board’s “official verification” of that conviction;¹ and 2) whether Wilson’s due process rights were violated.

On February 23, 2010, Pudleiner filed an application to withdraw as counsel and a *Turner*² letter with this Court, both of which were served on Wilson. In his application and *Turner* letter, Pudleiner outlines the issues raised by Wilson in his *pro se* petition³ and explains his reasons for concluding that a careful review of the record indicates that the instant appeal is frivolous.⁴ Subsequently, this Court advised Wilson of his right to retain substitute counsel or to file a brief on his own behalf.⁵ Based on the foregoing, we are satisfied that counsel complied with the procedural requirements outlined in *Epps v. Pennsylvania Board of Probation. and Parole*, 565 A.2d 214 (Pa. Cmwlth. 1989), and *Honts v.*

¹ It is well-established that, where a parolee alleges that the Board held a revocation hearing beyond the 120-day period, the Board bears the burden of proving that the hearing was timely. *Taylor v. Pa. Bd. of Prob. and Parole*, 931 A.2d 114 (Pa. Cmwlth. 2007), *appeal denied*, 596 Pa. 750, 946 A.2d 690 (2008).

² *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988).

³ Pudleiner attached Wilson’s November 12, 2009 *pro se* petition for review to the November 25, 2009 petition for review filed with this Court, but Wilson never filed his *pro se* petition independently.

⁴ Counsel seeking to withdraw by means of a *Turner* letter must demonstrate that the appeal is without merit. *Frankhouser v. Pa. Bd. of Prob. and Parole*, 598 A.2d 607, 608 (Pa. Cmwlth. 1991). *See also Wesley v. Pa. Bd. of Prob. and Parole*, 614 A.2d 355, 356 (Pa. Cmwlth. 1992).

⁵ No brief was filed on behalf of Wilson.

Pennsylvania Board of Probation and Parole, 680 A.2d 47 (Pa. Cmwlth. 1996).⁶ Additionally, we note that in reviewing the petition to withdraw, this Court must independently evaluate the merits of Wilson's appeal. *Presley v. Pa. Bd. of Prob. and Parole*, 737 A.2d 858 (Pa. Cmwlth. 1999).

The pertinent facts are as follows. In March 2001, the Court of Common Pleas of Philadelphia County sentenced Wilson to three to eight years in state prison for convictions of manufacturing or delivery of a controlled substance. In February 2005, Wilson was released on state parole. In December 2005, Wilson was arrested for robbery and firearms offenses. In February 2006, the Board issued a detainer holding Wilson pending disposition of criminal charges. In December 2006, those criminal charges were *nolle prossed*.

In December 2006, the Federal Bureau of Investigation issued a detainer against Wilson as an unsentenced prisoner for violations of 18 U.S.C. §§ 1951(a) (interference with interstate commerce by robbery), 924(c)(1) (using and carrying a firearm during and in relation to a crime of violence) and 922(g)(1) (convicted felon in possession of a firearm). On March 1, 2007, Wilson was transferred into federal custody. On April 11, 2007, the Board recommitted Wilson to a state correctional institution to serve twelve months backtime for technical parole violations of condition #5b (possession of a weapon) and condition #5c (failure to refrain from assaultive behavior). The twelve-month sentence was subject to change if Wilson was convicted of the outstanding charges.

⁶ The merits of the appeal may now be reached because counsel adequately discharged his responsibilities under *Turner*. See *Jefferson v. Pa. Bd. of Prob. and Parole*, 705 A.2d 513, 514 (Pa. Cmwlth. 1998).

In July 2007, Wilson pled guilty to the aforementioned federal offenses in the United States District Court, Eastern District of Pennsylvania. On August 27, 2008, Wilson was sentenced to twelve years of incarceration. On September 3, 2008, Wilson was returned to SCI Graterford. The Board lists the official verification of Wilson's sentence as January 26, 2009.

On April 24, 2009, a hearing examiner conducted a panel revocation hearing at SCI Houtzdale, which Wilson attended with counsel.⁷ At that hearing, Agent Clinton Canada testified, *inter alia*, as to his attempts to obtain Wilson's federal conviction. In addition, Canada provided that judgment to the hearing examiner, who accepted it into evidence. The Board rendered a decision on June 15, 2009, wherein it rescinded its action of April 11, 2007 and recommitted Wilson to twenty-four months in a state institution.

In July 2009, the public defender filed a petition for administrative review and relief on Wilson's behalf, alleging that "the delay from the date of entry of his Federal Sentence to official verification and then revocation hearing is unreasonable and unjustifiable as the Board was aware of his conviction but did not verify it until January 26, 2009." Certified Record ("C.R."), Tab 16 at p. 116. In October 2009, the Board affirmed its June 15, 2009 decision and order, determining that the revocation hearing was timely. In pertinent part, the Board set forth the following rationale:

[T]he panel determined that the Board was required to hold the hearing within 120 days of the official verification date because Mr. Wilson was returned to the

⁷ Initially, Wilson's revocation hearing was scheduled for March 26, 2009. When Wilson's counsel indicated that he had a scheduling conflict, the hearing was continued until April 24, 2009.

jurisdiction of the Department of Corrections prior to his conviction. 37 Pa. Code § 71.4; *See also Morgan v. [Pa. Bd. of Prob. and Parole]*, 814 A.2d 300 (Pa. Cmwlth. 2003).] In this case, official verification of the conviction was received on January 26, 2009 and the hearing was held 93 days later on April 24, 2009. Moreover, the record reflects that the Board exercised due diligence in obtaining official verification of Mr. Wilson's conviction despite the fact that there was no duty on the Board to do so. *Lawson v. [Pa. Bd. of Prob. and Parole]*, 977 A.2d 85 (Pa. Cmwlth. 2009), *appeal denied*, ___ Pa. ___, ___ A.2d ___, 2010 Pa. Lexis 750 (No. 492 MAL 2009, April 7, 2010).] Therefore, the hearing was timely.

C.R., Tab 16 at p. 129.

In a November 2009 letter, Wilson requested that the public defender continue to pursue his appeal to this Court. Accordingly, Pudleiner filed a petition for review on Wilson's behalf. Before us now for disposition is the petition for review and the application to withdraw as counsel.⁸

⁸ In his application, Pudleiner represents that he and co-counsel represented Wilson at both the revocation hearing and in the preparation of the petition for review to this Court. Pudleiner did not specify why it took him approximately three months from the time he filed the petition in support of Wilson's position to file the application to withdraw as counsel. Nevertheless, Pudleiner in the application represented that, in reaching his opinion that the case had no merit, he reviewed the certified record, researched applicable case law and reviewed and analyzed Wilson's issues. Specifically, Pudleiner analyzed and distinguished the case Wilson relied upon, *Fitzhugh v. Pennsylvania Board of Probation and Parole*, 623 A.2d 376 (Pa. Cmwlth. 1993). Further, from the evidence adduced at the April 24, 2009 hearing, Pudleiner outlined the efforts made by Agent Canada to procure Wilson's record of conviction and why Pudleiner believed that those efforts were sufficient to explain the delay between the time of Wilson's federal conviction and the time of "official verification." Finally, Pudleiner addressed why he believed that Wilson's due process rights were not violated by the Board making its final decision without his being present. In that regard, Pudleiner pointed out that Wilson received his first green sheet in June 2009, indicating that the Board had rendered a decision recommitting him to a state correctional institution as a convicted parole violator to serve twenty-four months when available, pending completion of his federal sentence. C.R., Tab 15 at p. 114. In addition, Pudleiner noted that Wilson received a second green sheet in December 2009, which seemed **(Footnote continued on next page...)**

As an initial matter, we note that Section 71.4(1) mandates 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 at the highest trial court level. . . .” 37 Pa. Code § 71.4(1). The definition of “official verification” is “[a]ctual receipt by a parolee’s supervising parole agent of a direct written communication from a court in which a parolee was convicted of a new criminal charge attesting that the parolee was so convicted.” 37 Pa. Code § 61.1. Where, as here, there is an alleged delay between the time the Board has notice of the conviction and the time when the Board receives official verification of that conviction, the Board has the burden of establishing that the delay was not unreasonable and unjustifiable. *Ramos v. Pa. Bd. of Prob. and Parole*, 954 A.2d 107 (Pa. Cmwlth. 2008). Significantly, “a parole agent’s actual knowledge of an offender’s new conviction does not commence the 120-day period prior to the Parole Board’s receipt of official verification of that conviction from the court in which the offender was convicted.” *Koehler v. Pa. Bd. of Prob. and Parole*, 935 A.2d 44, 52 (Pa. Cmwlth. 2007), *appeal denied*, 599 Pa. 699, 961 A.2d 858 (2008).

Wilson argues that the Board failed to conduct the revocation hearing in compliance with the 120-day requirement due to the nearly five-month delay between the time of his federal conviction and the time of the Board’s “official verification” of that conviction. Specifically, he alleges that Agent Canada had prior knowledge of his conviction, but delayed in obtaining official proof of the

(continued...)

only to indicate that he was now available for re-parole review and that his back-time had been served. C.R., Tab 17 at pp. 130-31. Pudleiner rejected, therefore, Wilson’s argument that his due process rights were violated due to the Board’s failure to hold a hearing, maintaining that none was required under the circumstances.

same. In support of his position, Wilson cites *Fitzhugh v. Pennsylvania Board of Probation and Parole*, 623 A.2d 376 (Pa. Cmwlth. 1993).

In *Fitzhugh*, this Court addressed an extended delay of 234 days between the time of a petitioner's conviction and the time of the Board's "official verification." The issue was "whether the parole hearing was timely under Section 71.4(1) where the supervising parole agent actually was notified that [p]etitioner was convicted on July 3, 1991, but the Board used the date that its agent went to the courthouse and retrieved the certified conviction records, November 26, 1991, as the date triggering the 120-day period, resulting in a hearing conducted 234 days after the conviction." *Id.* at 377. We vacated the Board's order and remanded for a hearing to determine, since petitioner's parole agent or other Board officials had notice of petitioner's conviction near the time of its occurrence, whether there was any reason for the delay. We noted that, if "the Board was aware of the conviction and the availability of the conviction records but did not retrieve them—there is a possibility there was an unreasonable and unjustifiable delay" in holding a timely hearing. *Id.* at 379.

The public defender maintains that *Fitzhugh* is distinguishable, noting that there was no evidence in that case that anyone made any effort to retrieve the record because the hearing examiner did not allow questioning on the topic. In the present case, the public defender emphasizes that Agent Canada testified that he made six attempts to acquire the necessary record. It was only during the sixth phone call that the Clerk of Courts advised him that the judgment of conviction was now available and that the clerk would mail it to him. Accordingly, when Canada received the judgment of conviction on January 26, 2009, he promptly set

the verification date. The public defender concedes, therefore, that Wilson's argument that the delay was unreasonable is without merit. We agree.

In the present case, the Board via Agent Canada offered an explanation for the delay between the time of the federal conviction and the time of "official verification." Canada represented that, unlike the state court system, it is difficult to obtain documents in the federal court system if someone from another agency, for example, is holding onto a particular file folder in order to look into the case. He concluded that "[w]hen it's unavailable it's unavailable – it's out of our hands, it's out of our control." April 24, 2009 Panel Revocation Hearing, N.T. at 23; C.R., Tab 13 at p. 64. The present case was not one, therefore, where the conviction record was available but the parole agent did not make reasonable efforts to retrieve it. Additionally, once the Board received "official verification" of the federal judgment of conviction on January 26, 2009, a hearing examiner conducted a panel revocation hearing on April 24, 2009. Clearly, the 120-day timeliness mandate of 37 Pa. Code § 71.4(1) was satisfied.

Wilson next argues that the Board violated his due process rights by making its decision without a second hearing, without notice and without affording him an opportunity to provide an argument. Specifically, he contends that "his due process rights were violated when the Board reach [sic] second decision in this matter without notifying the petitioner." Public Defender's "No Merit Letter and Petition for Withdrawal of Appearance," Appendix D. However, Wilson was present, with counsel, at the April 24, 2009 panel revocation hearing. We agree with the Public Defender that Wilson's due process rights were not violated by the Board's rendering its final decision based on the evidence adduced at the April

24th hearing. There was no need for and Wilson had no right to a second hearing before the Board.

For the foregoing reasons, we conclude that Wilson's appeal is without merit. Accordingly, we grant the application of Jason G. Pudleiner, Esquire, for leave to withdraw as counsel for Fred Wilson and affirm the Board's order denying Wilson's administrative appeal from a recommitment order.

BONNIE BRIGANCE LEADBETTER,
President Judge

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	:	
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ORDER

AND NOW, this 10th day of June, 2010, the application of Jason G. Pudleiner, Esquire, for leave to withdraw as counsel for Fred Wilson in the above-captioned matter is hereby GRANTED and the order of the Pennsylvania Board of Probation and Parole is AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge