

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Harden,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 268 C.D. 2009
	:	
Pennsylvania Board of Probation	:	Submitted: July 31, 2009
and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: August 27, 2009

George Harden (Harden) petitions for review from an order of the Pennsylvania Board of Probation and Parole (Board) that recommitted him to serve 12 months' backtime as a convicted parole violator. Kent Watkins, Esquire (Counsel), Harden's appointed counsel, petitions for leave to withdraw. Because the issues raised in Harden's petition for review are meritless, we affirm the Board's order and grant Counsel's petition.

In 2004, the Philadelphia County Common Pleas Court sentenced Harden to three-years-and-six-months to ten years' imprisonment for robbery. The Board subsequently released Harden on parole; Harden's actual release date was June 18, 2007. At that time, Harden's minimum expiration date was January 25, 2007 and his maximum expiration date was July 25, 2013.

On October 23, 2007, Philadelphia Police arrested Harden for receiving stolen property, criminal mischief, unauthorized use of a motor vehicle and fleeing or attempting to elude police. The Board issued a warrant to commit and detain Harden.

On January 22, 2008, Harden satisfied bail requirements on the new charges; however, on January 28, Harden was transferred to a state correctional institution where he remained incarcerated pursuant to the Board's warrant pending disposition of the new charges.

On April 24, 2008, Harden was temporarily transferred to Philadelphia County where he was convicted on the new criminal charges. He received a sentence of one to two years on the receipt of stolen property conviction; the remaining convictions merged with the receipt of stolen property conviction for purposes of sentencing. After his conviction and sentencing, Harden was returned to state custody on April 24. On July 14, 2008, the Board received official verification of Harden's conviction on the new criminal charges.

In August 2008, a Board hearing examiner conducted a revocation hearing. At the hearing, a Board institutional parole supervisor submitted a three-page document that included official verification of Harden's convictions on the new criminal charges. For his part, Harden acknowledged his new convictions arose from conduct while he was on parole.

After hearing, the Board issued a decision recommitting Harden to serve 12 months' backtime as a convicted parole violator. Harden filed a request for administrative relief, asserting the Board failed to hold a timely revocation hearing, and the Board failed to afford him credit for all time served solely on the Board's warrant. The Board denied Harden's request for administrative relief.

Harden filed a petition for review to this Court,¹ raising the same issues he raised in his petition for administrative relief. After reviewing Harden's petition for review, Counsel filed an application to withdraw based on his assertion that after an exhaustive review of the record, Harden's appeal is meritless. In support, Counsel filed a no-merit letter consistent with Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988).

We recently reviewed the steps counsel appointed to represent parolees seeking review of Board determinations must take to withdraw from representation. See Hughes v. Bd. of Prob. & Parole, ___ A.2d ___ (Pa. Cmwlth. No. 1075 C.D. 2008, filed June 9, 2009) (en banc). In Hughes, we held, where there is a constitutional right to counsel, counsel seeking to withdraw from representation of a parolee in an appeal of a Board determination should file an Anders² brief. Relying on Gagnon v. Scarpelli, 411 U.S. 778 (1973), we held a constitutional right to counsel arises where a parolee raises a "colorable claim":

¹ Our review is limited to determining whether the Board's decision was supported by substantial evidence and whether the Board erred as a matter of law or violated the parolee's constitutional rights. Prebella v. Pa. Bd. of Prob. & Parole, 942 A.2d 257 (Pa. Cmwlth. 2008).

² See Anders v. State of California, 386 U.S. 738 (1967).

(i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Hughes, ___ A.2d at ___ (quoting Gagnon, 411 U.S. at 790), Slip op. at 11. We further stated such claims would only arise in appeals from determinations revoking parole. Id. Thus, we held “[i]n an appeal from a revocation decision, this Court will apply the test from Gagnon, quoted above, and, unless that test is met, we will only *require* a no-merit letter.” Id., Slip op. at 11-12 (emphasis in original, footnote omitted). We also noted:

As in the past, we will not deny an application to withdraw simply because an attorney has filed an Anders brief where a no-merit letter would suffice. In cases where there is no constitutional right to counsel, however, we shall still apply the standard of whether the [parolee’s] claims are without merit, rather than whether they are frivolous.

Id., Slip op. at 12 n.4.

Here, Counsel filed a no-merit letter. As stated above, the issues raised in Harden’s petition for review are whether the Board held a timely revocation hearing, and whether the Board afforded Harden credit for all time served solely on the Board’s warrant. These issues are not complex or difficult to develop and do not otherwise implicate the constitutional right to counsel as outlined in Hughes; thus, Counsel employed the correct procedure here by filing a no-merit letter.

In order to withdraw, counsel must satisfy certain procedural requirements, which include: notifying the parolee of his request to withdraw; furnishing the parolee with a Turner letter; and, informing the parolee of his right to retain new counsel or submit a brief on his own behalf. See Zerby v. Shanon, 964 A.2d 956 (Pa. Cmwlth. 2009).

Substantively, counsel's Turner letter must contain: the nature and extent of counsel's review; the issues the parolee wishes to raise; and, counsel's analysis in concluding the parolee's appeal is meritless. Zerby. If these requirements are satisfied, we must conduct our own review of whether the issues are meritless.

Here, Counsel's no-merit letter satisfies the applicable technical requirements. Counsel notified Harden of his request to withdraw and advised him of his right to retain new counsel or file an appeal on his own behalf. Further, Counsel sent Harden copies of the petition to withdraw and the no-merit letter. Counsel also provided analyses of the two issues raised in Harden's petition for review.

In addition, Counsel's no-merit letter complies with Turner. It contains a statement indicating Counsel reviewed the proceedings affecting Harden, Harden's petition for review, and the record. The no-merit letter also addressed the issues Harden raised on appeal. Moreover, it sets forth Counsel's analyses of the issues and why they are meritless. As such, Counsel complied with

Turner, and we may conduct an independent review to determine whether Counsel's characterization of the appeal as meritless is correct. Zerby.

Our independent examination reveals Harden's contentions are meritless. Harden first argues the Board failed to provide a timely revocation hearing. Counsel advised Harden he received a timely revocation hearing because the hearing occurred within 120 days from the date the Board received official verification of Harden's conviction on the new criminal charge. We agree with Counsel.

Pursuant to Board regulations, a revocation hearing shall be held within 120 days from the date the Board receives official verification of a guilty plea or conviction. 37 Pa. Code §71.4(1). The Board bears the burden of showing, by a preponderance of the evidence, a timely revocation hearing occurred. Reavis v. Bd. of Prob. & Parole, 909 A.2d 28 (Pa. Cmwlth. 2006).

Here, the Board received official verification of Harden's new conviction on July 14, 2008. Certified Record (C.R.) at 27, 43, 52-53. The Board held the revocation hearing on August 28, 2008, 45 days after it received official verification. C.R. 39, 41. Thus, Harden received a timely revocation hearing.³

³ The 120-day period starts to run when the Board receives official verification of the guilty verdict unless the convicted parolee is "confined outside the jurisdiction of the Department of Corrections [(DOC)], such as confinement out-of-State, confinement in a Federal correctional institution or confinement in a county correctional institution where the parolee has not waived the right to a revocation hearing by a panel" 37 Pa. Code §71.4(1)(i). When a parolee is confined outside the jurisdiction of DOC, the official verification of the parolee's return to DOC **(Footnote continued on next page...)**

Harden next asserts the Board failed to afford him credit for all time he served solely under the Board's warrant. Counsel addressed this issue and advised Harden the Board afforded him credit for time served solely on the Board's warrant, and the Board properly calculated his new maximum sentence date. Upon review, we agree with Counsel.

It is well-settled that if a defendant is held in custody solely because of a Board detainer and has otherwise met the requirements for bail on the new criminal charges, the time he spent in custody shall be credited against his original

(continued...)

triggers the 120-day period, even if DOC has not received official verification of the conviction. Montgomery v. Pa. Bd. of Prob. & Parole, 808 A.2d 999 (Pa. Cmwlth. 2002).

While not entirely clear, Harden's petition for review alludes to the fact that the exception in 37 Pa. Code §71.4(1)(i) could apply here because, when he was convicted of the new criminal charges in Philadelphia County, he was outside the jurisdiction of DOC. Thus, the Board was required to hold his revocation hearing within 120 days of official verification of his return to state custody, not within 120 days of official verification of his conviction. Contrary to this assertion, the exception in 37 Pa. Code §71.4(1)(i) is inapplicable here.

Specifically, after his release on bail on the new criminal charges, Harden was returned to DOC jurisdiction on January 28, 2008, pursuant to a Board warrant, pending disposition of the new charges. On April 24, 2008, Harden was temporarily transferred to Philadelphia County for trial on the new criminal charges. This temporary transfer does not constitute "confinement outside the jurisdiction of [DOC]" so as to render the exception set forth in 37 Pa. Code §71.4(1)(i) operative. See Morgan v. Pa. Bd. of Prob. & Parole, 814 A.2d 300 (Pa. Cmwlth. 2003) (parolee who is transferred temporarily via judicial writ to federal facility to enter plea to new criminal charges is not outside confinement of DOC's jurisdiction for purposes of 37 Pa. Code §71.4(1)(i)); Montgomery (parolee who is transferred to county facility for the purpose of standing trial on new charges is not outside confinement of DOC's jurisdiction under 37 Pa. Code §71.4(1)(i)).

Thus, the general rule set forth in 37 Pa. Code §71.4(1) applies. Applying that general rule, the 120-day period did not begin to run until July 14, 2008, when the Board received official verification of Harden's conviction. Because Harden's August 28, 2008 revocation hearing was held well within 120 days of July 14, it was timely.

sentence. Gaito v. Bd. of Prob. & Parole, 488 Pa. 397, 412 A.2d 568 (1980). If, however, a defendant remains confined prior to trial because he fails to satisfy bail requirements on the new criminal charges, the time spent in custody shall be credited to his new sentence. Id.

In addition, Section 21.1(a) of the statute known as the Parole Act⁴ states, where a parolee is recommitted as a convicted parole violator “he shall be reentered to serve the remainder of the term, which said parolee would have been compelled to serve had he not been paroled, and he shall be given no credit for the time at liberty on parole. ...” In other words, a parolee who is recommitted as a convicted parole violator automatically forfeits time spent on parole. Palmer v. Bd. of Prob. & Parole, 704 A.2d 195 (Pa. Cmwlth. 1997).

Section 21.1(a) of the Parole Act also requires a convicted parole violator to serve the balance of his original sentence before beginning service of a newly-imposed sentence. 61 P.S. §331.21a(a). This rule is only operative when “parole has been revoked and the remainder of the original sentence becomes due and owing.” Campbell v. Pa. Bd. of Prob. & Parole, 409 A.2d 980, 982 (Pa. Cmwlth. 1980) (citation omitted).

The remainder of an original sentence becomes due and owing upon authorized Board action. Section 4 of the Parole Act, 61 P.S. §331.4, authorizes the Board to act on revocation decisions in panels consisting of two persons.

⁴ Act of August 6, 1941, P.L. 861, as amended, added by Section 5 of the Act of August 24, 1951, P.L. 1401, 61 P.S. §331.21a(a).

Here, Harden was paroled on June 18, 2007; at that time, the Board calculated his maximum date as July 25, 2013, leaving 2,229 days remaining on his original sentence. C.R. at 1-2.

Harden was arrested on new charges on October 23, 2007. C.R. at 15. He satisfied bail requirements on these charges on January 22, 2008; however, he remained in custody pursuant to a Board warrant. C.R. at 57. From January 22, 2008, the date Harden satisfied bail requirements on the new charges, until April 24, 2008, the date of conviction and sentencing on the new criminal charges, a period of 93 days, Harden remained incarcerated solely on the Board's warrant. The Board properly afforded Harden credit for this 93-day period on his original sentence, leaving 2,136 days remaining on his original sentence. C.R. at 69; Gaito.

In August 2008, a hearing examiner conducted Harden's revocation hearing and determined his parole should be revoked. A week later, a Board member agreed with the hearing examiner's determination, as evidenced by the member's signature on the revocation hearing report, dated September 5, 2008. C.R. at 38. Once the Board obtained the second required signature, it was authorized to revoke Harden's parole. Thus, the remainder of Harden's original state sentence became due and owing on September 5. Campbell.

Adding the time remaining on Harden's original sentence (2,136 days) to September 5, 2008, yields a new original state sentence maximum of July 12, 2014. C.R. at 69. Thus, the Board properly calculated Harden's maximum sentence date.

Based on the foregoing, we conclude Harden's appeal is meritless. Counsel's petition to withdraw is granted, and the Board's order is affirmed.

ROBERT SIMPSON, Judge

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and Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 27th day of August, 2009, the order of the Pennsylvania Board of Probation and Parole is **AFFIRMED**, and the petition of Kent Watkins, Esq. to withdraw as counsel is **GRANTED**.

ROBERT SIMPSON, Judge