

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Diaz, :
 :
 Petitioner :
 :
 v. : No. 346 C.D. 2010
 : Submitted: August 13, 2010
 Pennsylvania Board of Probation and :
 Parole, :
 Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: October 12, 2010

William Diaz (Diaz) petitions for review of the February 19, 2010, order of the Pennsylvania Board of Probation and Parole (Board), which affirmed a Board decision to recommit Diaz as a convicted parole violator (CPV) to serve twenty-four months backtime and to set his new maximum date at August 13, 2012. Appointed counsel has filed a petition for leave to withdraw. We grant appointed counsel leave to withdraw and affirm the Board.

On June 2, 2008, Diaz was released on parole from a sentence with a maximum date of August 15, 2011. However, Diaz was arrested on April 13, 2009, and charged with: (1) one count of the use of, or possession with intent to use, drug paraphernalia, a violation of section 13(a)(32) of The Controlled Substance, Drug,

Device and Cosmetic Act (Drug Act);¹ and (2) three counts of the manufacture, delivery or possession of a controlled substance, i.e., cocaine and heroin, with intent to manufacture or deliver, a violation of section 13(a)(30) of the Drug Act.² Diaz posted bail on April 14, 2009, but he remained in custody under a Board detainer warrant. (C.R. at 7, 11-12, 23, 27, 33, 39, 41, 62.)

On August 4, 2009, Diaz was convicted of the charges. Diaz waived a parole revocation hearing, and, on September 21, 2009, the Board obtained enough Board member signatures to recommit Diaz as a CPV to serve twenty-four months backtime. On October 1, 2009, the Board issued an order to that effect. The Board gave Diaz backtime credit for the time he served under the Board warrant from April 14, 2009, to August 4, 2009. The Board used September 21, 2009, as the date Diaz was to begin serving his backtime and set his maximum date at August 13, 2012. (C.R. at 39, 45, 48, 51, 72, 74.)

Diaz filed a petition for administrative review, arguing that the Board's imposition of twenty-four months backtime exceeded the presumptive range for his offenses. Diaz contended that the applicable presumptive range was that for a felony with a statutory maximum of five years, which has a presumptive range of nine to fifteen months. Diaz also argued that the Board erred by calculating his new maximum date based on a start date of September 21, 2009. Diaz asserted that he was available to begin serving his backtime on August 4, 2009.

¹ Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. §780-113(a)(32).

² 35 P.S. §780-113(a)(30).

The Board affirmed the twenty-four months backtime, explaining that the statutory maximum for his felony offense is fifteen years and that the presumptive range for such an offense is twenty-four to thirty-six months. The Board also stated that, under *Campbell v. Pennsylvania Board of Probation and Parole*, 409 A.2d 980, 981-82 (Pa. Cmwlth. 1980), Diaz did not become available to serve his backtime until the Board obtained the necessary signatures to recommit him as a CPV.

Diaz petitioned this court for review of the Board's decision, and this court appointed a public defender to represent Diaz. The public defender, however, has filed a petition for leave to withdraw and an *Anders*³ brief, alleging that Diaz's petition is frivolous and has no merit. Diaz has filed a brief in response to counsel's *Anders* brief.

Although counsel filed an *Anders* brief with his petition to withdraw, all that was required was a no-merit letter. *Seilhamer v. Pennsylvania Board of Probation and Parole*, 996 A.2d 40, 42 (Pa. Cmwlth. 2010). "Where an *Anders* brief is filed when a no-merit letter would suffice, the *Anders* brief must at least contain the same information that is required to be included in a no-merit letter." *Id.* at 42-43. A no-merit letter must include an explanation of the nature and extent of counsel's review and list each issue the petitioner wished to have raised, with an explanation of why those issues are meritless. *Id.* at 43. If counsel satisfies these requirements, the court will conduct its own review of the merits of the case, and, if the court agrees

³ *Anders v. California*, 386 U.S. 738 (1967).

with counsel, the court will permit counsel to withdraw and deny relief. *Zerby v. Shanon*, 964 A.2d 956, 960 (Pa. Cmwlth. 2009).

With respect to Diaz’s argument that his offenses were felonies with a statutory maximum of five years, not fifteen years, the public defender points out that Diaz’s violations of section 13(a)(30) of the Drug Act were felonies involving heroin, a Schedule I drug,⁴ and cocaine, a Schedule II drug.⁵ The public defender notes that a person who violates section 13(a)(30) of the Drug Act with respect to a controlled substance classified in Schedule I or II “which is a narcotic drug” shall be sentenced to imprisonment not exceeding **fifteen** years. Section 13(f)(1) of the Drug Act, 35 P.S. §780-113(f)(1). The public defender indicates that the presumptive range for felony drug law violations with statutory maximums of fifteen years is twenty-four to thirty-six months. 37 Pa. Code §75.2. Having reviewed the matter, we agree with the public defender’s analysis of this issue.⁶

⁴ See section 4(1)(ii)(10) of the Drug Act, 35 P.S. §780-104(1)(ii)(10).

⁵ See section 4(2)(i)(4) of the Drug Act, 35 P.S. §780-104(2)(i)(4).

⁶ In his brief, Diaz asserts that a violation of section 13(a)(30) of the Drug Act involving a “Schedule[] I and II Narcotic carries a[n] Offense Gravity Score of 8, with prior records of 3, carrying a minimum of 18-24 months, with a maximum sentence of 5 years.” (Diaz’s brief at 14.) However, this assertion is contrary to section 13(f)(1) of the Drug Act.

We note that, whereas section 13(f)(1) of the Drug Act establishes a fifteen-year maximum sentence for a violation of section 13(a)(30) of the Drug Act involving a Schedule I or II narcotic drug, section 13(f)(2) of the Drug Act establishes a five-year maximum for a violation of section 13(a)(30) of the Drug Act involving any other, i.e., any non-narcotic, Schedule I or II controlled substance. 35 P.S. §780-113(f)(2). Diaz does not argue that heroin and cocaine are non-narcotic drugs.

With respect to Diaz's argument that the Board should have calculated his new maximum date as of August 4, 2009, the public defender pointed out that, in *Campbell*, this court held that an inmate cannot begin serving backtime until the Board actually revokes parole. The public defender indicated that the Board did not obtain a second Board member signature, which was necessary for approval of the decision to revoke parole, until September 21, 2009.⁷ Because the Board did not revoke parole until September 21, 2009, Diaz could not begin serving backtime until that date. Having reviewed the matter, we agree with the public defender's analysis of this issue.

Accordingly, we grant the petition for leave to withdraw as counsel and affirm the Board.

ROCHELLE S. FRIEDMAN, Senior Judge

⁷ The Board makes decisions regarding parole revocation in panels of two persons. Section 4(b) of the Act known as the Parole Act, Act of August 6, 1941, P.L. 861, formerly 61 P.S. §331.4(b), repealed by section 11(b) of the Act of August 11, 2009, P.L. 147. A similar provision is now found at 61 Pa. C.S. §6113(b). We note that the Board's decision in this case was issued on October 1, 2009, and the new provision did not become effective until October 13, 2009.

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Pennsylvania Board of Probation and	:	
Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 12th day of October, 2010, the order of the Pennsylvania Board of Probation and Parole, dated February 19, 2010, is hereby affirmed. The petition for leave to withdraw as counsel is granted.

ROCHELLE S. FRIEDMAN, Senior Judge

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OPINION NOT REPORTED

**CONCURRING OPINION
BY JUDGE COHN JUBELIRER**

FILED: October 12, 2010

Although I agree with the majority opinion’s holding that grants Richard C. Shiptoski’s (Counsel) Petition to Withdraw and affirms the Pennsylvania Board of Probation and Parole’s order, I write separately to explain that Counsel has satisfied the technical requirements of a no-merit letter and, therefore, this Court’s consideration of the merits of William Diaz’s (Petitioner) appeal is proper. Here, although Counsel filed an Anders⁸ brief, a no-merit letter would have sufficed because Petitioner is not asserting a constitutional right to counsel. Seilhamer v. Pennsylvania Board of Probation and Parole, 996 A.2d 40, 42 n. 4 (Pa. Cmwlth. 2010). “Where an Anders brief is filed when a no-merit letter would suffice, the

⁸ Anders v. California, 386 U.S. 738 (1967).

Anders brief must at least contain the same information that is required to be included in a no-merit letter.” Id. at 42-43. A no-merit letter must set forth, at a minimum, the nature and extent of counsel’s review, a list of the issues raised by the petitioner, and an explanation as to why those issues are without merit. Id. at 43. If counsel’s no-merit letter satisfies these technical requirements, this Court will perform an independent review of the issues raised to determine whether they are without merit, and, if the Court agrees with counsel, it will grant the petition to withdraw and deny relief. Zerby v. Shanon, 964 A.2d 956, 960 (Pa. Cmwlth. 2009).

Counsel’s brief here complies with the requirements because it: indicates that he made a conscientious and thorough review of the record, the statutes, and the case law; sets forth Petitioner’s two issues; and explains why those issues are without merit. Accordingly, Counsel’s brief satisfies the technical requirements of a no-merit letter, and this Court properly considered the merits of Petitioner’s appeal.

RENÉE COHN JUBELIRER, Judge