

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Darnell Jones, :
 :
 Petitioner :
 :
 v. : No. 353 C.D. 2008
 : Submitted: September 12, 2008
 :
 Pennsylvania Board of :
 Probation and Parole, :
 :
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY

FILED: November 25, 2008

This case is before us on James M. McClure's (Counsel) petition to withdraw from his representation of Darnell Jones (Petitioner), who petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) that denied his request for administrative relief from the Board's order of January 17, 2007, which recommitted Petitioner as a technical parole violator, ordered him to serve nine months backtime, and set his parole violation maximum date at June 20, 2008. We grant Counsel leave to withdraw and affirm the Board's determination.

On January 17, 2007, the Board recommitted Petitioner to a state correctional institution as a technical parole violator to serve nine months backtime for violating condition numbers 1, 2 and 7 of his parole. Petitioner's parole violation maximum date was set at June 20, 2008. Petitioner was notified that he

had thirty days in which to file a request for administrative relief before the Board. Petitioner did not request relief within the thirty day period.

The Board, after interviewing Petitioner, issued an order on October 2, 2007, denying Petitioner's parole/reparole request and ordered that he serve out his unexpired maximum sentence. Petitioner's parole violation maximum date was set forth in that order as June 20, 2008.

On October 9, 2007, Petitioner sent the Board a letter indicating that he objected to the June 20, 2008 parole violation maximum date that was set forth in the Board's decision of January 17, 2007.

On January 7, 2008, the Board responded, indicating that they considered Petitioner's letter to be a petition for administrative review. The Board stated in pertinent part as follows:

Board regulations provide that petitions for administrative review must be received at the Board's Central Office within 30 days of the mailing date of the Board's determination. *See* 37 Pa. Code §73.1(b). Because the Board did not receive your petition within the applicable period, and there is no indication that it was given to prison officials within that period, your petition for administrative review cannot be accepted....

Board Decision, January 7, 2008, at 1. The Board dismissed Petitioner's request for administrative review as untimely. Petitioner timely petitioned our court for review.

In his petition for review to this court, Petitioner argues the following:

6. Petitioner believes the Board's denial of administrative relief was erroneous because:

(a) The Board failed to conduct a timely revocation hearing in the above matter.

(b) The Board committed error in its calculation of the parolee's recalculated maximum date by setting a maximum date substantially beyond any time period which parolee can be required to serve on the underlying sentence. Specifically, the Board failed to properly credit time served by the Petitioner due solely to the Board's detainer, and does not accurately reflect the periods of time during which Petitioner was incarcerated and under the Board's jurisdiction.

(c) The Board committed error in its calculation of the parolee's recalculated maximum date by setting a maximum date substantially beyond the time period for which the parolee could be required to serve on the underlying sentence. Specifically, the Board failed to comply with the laws of Pennsylvania and their own procedures relating to the order in which Petitioner served his sentences, and improperly causing Petitioner to serve consecutive time.

(d) To the extent that Petitioner's request is viewed as untimely, Petitioner requests that this Petition for Review be considered an Amended Petition for Review *nunc pro tunc*.¹

Amended Petition for Review, March 31, 2008, at 1-2. The Board filed a motion to limit the issue and an application for stay on April 7, 2008. On that same date, our court entered an order limiting the issue to the timeliness of the petition for administrative relief.

Counsel now seeks this Court's leave to withdraw as counsel by submitting a no-merit letter. "The 'no-merit' letter must contain (1) the nature and

¹ An appeal **nunc pro tunc** may be permitted when a delay in filing the appeal is caused by extraordinary circumstances involving fraud, administrative breakdown, or non-negligent conduct, either by a third party or by the appellant. Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 383-85, 671 A.2d 1130, 1131 (1996). Petitioner does not allege any extraordinary circumstances involving fraud, administrative breakdown or non-negligent conduct by himself or a third party. As such, there is no evidence of fraud, administrative breakdown or non-negligent conduct which would permit the appeal to be filed **nunc pro tunc**.

extent of the counsel's review, (2) the issues petitioner wishes to raise, and (3) counsel's analysis in concluding petitioner's appeal to be frivolous." Epps v. Pennsylvania Board of Probation and Parole, 565 A.2d 214, 216 (Pa. Cmwlth. 1989)(citing Commonwealth v. Turner, 518 Pa. 491, 494, 544 A.2d 927, 928 (1988)). An appeal will be considered frivolous if it is determined to lack any basis in law or fact. Smith v. Pennsylvania Board of Probation and Parole, 524 Pa. 500, 574 A.2d 558 (1990). Frivolous is not synonymous with lack of merit. Commonwealth v. Greer, 455 Pa. 106, 314 A.2d 513 (1974). Review of the merits of the petition is necessary to determine whether it is frivolous. Id.

In performance of his duties, Counsel has reviewed the record certified by the Board to this court and set forth in his letter the issues raised in Petitioner's petition for review from the Board's determination. After conducting an exhaustive examination of the record, as hereinafter set forth, Counsel concludes that Petitioner's petition is without merit and lacks support in either law or fact.

Petitioner's administrative appeal has been limited by our court to the issue of timeliness. Counsel asserts that Petitioner's appeal is untimely. A party seeking administrative review with the Board must file a request within thirty (30) days of the mailing date of the parole revocation order. Merriwether v. Pennsylvania Board of Probation and Parole, 693 A.2d 1000 (Pa. Cmwlth. 1997). The thirty (30) day period begins to run on the date the parole decision is mailed to the parties, not the date it is received. Lewis v. Pennsylvania Board of Probation and Parole, 562 A.2d 957 (Pa. Cmwlth. 1989). Failure to file an administrative appeal with the Board within the thirty (30) day period will result in a dismissal of the appeal. Merriwether. The fact that the Board refers to a previous revocation

decision in a latter decision does not resurrect the appeal period. Id. Our court has held that the Board lacks jurisdiction to entertain an untimely appeal. Christjohn v. Pennsylvania Board of Probation and Parole, 755 A.2d 92 (Pa. Cmwlth. 2000).

In Merriwether, our court clearly set forth that any request for administrative relief must be filed within thirty (30) days of the Board's decision and that any request for administrative relief filed after the thirty (30) day time period should be dismissed as untimely. We further stated that when an appeal is untimely the court must, without deciding the merits, affirm the decision of the Board.

Petitioner requested administrative relief from the Board's decision of January 17, 2007 on October 9, 2007, well over the thirty (30) day time period in which he could appeal. The Board was correct when it denied Petitioner's request for administrative relief from the Board's order of January 17, 2007, as untimely.

We conclude that Counsel has thoroughly examined the certified record, set forth the issues, researched the applicable law and analyzed the merits in Petitioner's appeal. We have also reviewed the issues independently and agree with Counsel's assessment that Petitioner's appeal from the Board's decision of January 17, 2007, was untimely. In view of our conclusion that Counsel's letter is submitted in compliance with the requirements of Turner, the application of Counsel, filed with this court for leave to withdraw his appearance as Petitioner's counsel, is granted and the order of the Board is affirmed.

JIM FLAHERTY, Senior Judge

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

ORDER

AND NOW, this 25th day of November, 2008 the application of James M. McClure for leave to withdraw his representation is granted, and the order of the Pennsylvania Board of Probation and Parole is hereby affirmed.

JIM FLAHERTY, Senior Judge