

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Andre Brown, :
 :
 Petitioner :
 :
 :
 v. : No. 358 C.D. 2010
 : Submitted: October 1, 2010
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 Pennsylvania Board of Probation and :
 Parole, :
 :
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: November 9, 2010

Andre Brown (Brown) petitions for review of the February 19, 2010, order of the Pennsylvania Board of Probation and Parole (Board), which held that Brown's parole revocation hearing was timely and, thus, affirmed the Board's prior decision to revoke Brown's parole. Appointed counsel has filed a petition for leave to withdraw as counsel. We deny counsel's petition to withdraw without prejudice.

On July 10, 2006, Brown was released on parole from a five-to-ten-year sentence for robbery. (C.R. at 8.) On January 30, 2008, Brown was arrested and charged with drug-related offenses. (C.R. at 13.) Brown was convicted of the charges on June 4, 2009, and was sentenced on July 23, 2009. The Board received official verification of the conviction on August 25, 2009, and scheduled a parole revocation hearing for November 9, 2009. (C.R. at 27, 31-32.)

At the hearing, Brown objected that the hearing was untimely because it was not held within 120 days of his June 4, 2009, conviction. (C.R. at 49.) Doug Lowry, a parole supervisor, then testified that the hearing was within 120 days of August 25, 2009, the date the Board received verification of the conviction from the court. (C.R. at 44, 49-50.) Lowry testified:

[T]he notice I was originally given was a conviction date of July 23rd, which was, in fact, the sentencing date. The [form] indicates a guilty finding on 6/4/2009 [and] a verification [date] of 8/25/2009, which I don't believe is excessive. The Board can take note of that. It's clear that [the hearing is] 120 days from the date of verification of the actual conviction when they . . . received the paperwork. And in Philadelphia sometimes, you see, the paperwork is a little bit difficult.

. . . .

[The date of verification is the] date when they received verification from the court that there was an actual conviction. Not word of mouth, they have to receive this actual paperwork.

(C.R. at 49-50.) Based on Lowry's testimony, Brown's objection to the timeliness of the hearing was overruled. (C.R. at 50.)

The Board recommitted Brown as a convicted parole violator, (C.R. at 73), and Brown filed an administrative appeal. Brown argued that Lowry's testimony blaming the Philadelphia court for the Board's delay in obtaining official verification of his conviction "was misleading and inaccurate." (C.R. at 75.) Relying on *Fitzhugh v. Pennsylvania Board of Probation and Parole*, 623 A.2d 376 (Pa. Cmwlth. 1993), where this court suggested that the Board retrieves verifications from the court in Philadelphia, Brown argued that the Board may not force Brown to wait

an unreasonable period before choosing to retrieve the record of his conviction. (C.R. at 75.)

In its November 19, 2010, decision affirming the revocation of Brown's parole, the Board stated:

[T]he record reflects that the Board exercised due diligence in obtaining official verification of the conviction despite the fact that it was not obligated to do so. *Lawson v. Pennsylvania Board of Probation and Parole*, 977 A.2d 85 (Pa. [Cmwlth.] 2009) [*appeal denied*, ___ Pa. ___, 992 A.2d 890 (2010)]. Therefore, the appellate panel finds no grounds to grant administrative relief.

(C.R. at 79.)

Brown filed a petition for review with this court, arguing that: (1) the Board erred in concluding that his revocation hearing was timely; (2) Lowry's testimony regarding the state of affairs in the Philadelphia court system was hearsay, and, in admitting the hearsay evidence without good cause, the Board denied Brown his right to confront witnesses regarding the Philadelphia court system; and (3) the Board failed to present sufficient evidence to support the revocation of parole. This court appointed counsel to represent Brown, and appointed counsel subsequently filed a petition for leave to withdraw and a no-merit letter.¹

¹ Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Counsel may seek leave to withdraw by submitting a no-merit letter that details the nature and extent of counsel's diligent review of the case, listing the issues that the petitioner wants to have reviewed, explaining why and how those issues lack merit and requesting permission to withdraw. *Zerby v. Shanon*, 964 A.2d 956, 960 (Pa. Cmwlth. 2009). Counsel must also send to the petitioner: (1) a copy of the no-merit letter; (2) a copy of counsel's petition to withdraw; and (3) a statement advising the petitioner of the right to proceed *pro se* or by new counsel. *Id.*

Where counsel satisfies these technical requirements, this court will conduct its own review of the merits of the case, and, if this court agrees that the issues are without merit, this court will permit counsel to withdraw and deny the petitioner relief. *Id.* If counsel fails to satisfy the foregoing technical prerequisites, the court will not reach the merits of the underlying claims but, rather, will merely deny the request to withdraw. *Id.*

Here, appointed counsel provided Brown with a copy of the no-merit letter and petition to withdraw and advised Brown of his right to proceed *pro se* or with new counsel. (See 8/3/2010 Letter.) However, in addressing the timeliness issue, appointed counsel does not discuss at all Brown's reliance upon *Fitzhugh* (expressing concern for the possibility of an unreasonable or unjustifiable delay in the retrieval of conviction records from the Philadelphia courthouse) or the Board's reliance upon *Lawson* (stating that *Fitzhugh* is limited to its facts). Indeed, although Brown's argument focuses upon the Board's delay in obtaining official verification of his conviction, counsel nowhere mentions that delay.

In addition, appointed counsel fails to address Brown’s argument that Lowry’s testimony about the Philadelphia court system was inadmissible hearsay. Finally, in setting forth the facts of this case, appointed counsel states: (1) “[o]n July 28, 2009, [Brown] was convicted of the new criminal charges,” when Brown was actually convicted on June 4, 2009; and (2) “[o]n August 28, 2009, a [parole revocation] hearing was held,” when the hearing was actually held on August 25, 2009. (No-merit letter at 3.) These errors attest to counsel’s lack of diligence in preparing the no-merit letter.

Accordingly, we deny appointed counsel’s petition to withdraw without prejudice to file a proper no-merit letter, or brief on the merits, within thirty days.

ROCHELLE S. FRIEDMAN, Senior Judge

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Petitioner	:	
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v.	:	No. 358 C.D. 2010
	:	
Pennsylvania Board of Probation and	:	
Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 9th day of November, 2010, it is hereby ordered that the petition for leave to withdraw as counsel, filed by the Assistant Public Defender of Erie County, is denied without prejudice to file a proper no-merit letter, or a brief on the merits, within thirty days of the date of this order.

ROCHELLE S. FRIEDMAN, Senior Judge