

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Gerarde,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 410 C.D. 2010
	:	
Pennsylvania Board of Probation and Parole,	:	Submitted: August 13, 2010
	:	
	:	
Respondent	:	

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

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: September 20, 2010

Joseph Gerarde (Gerarde) petitions for review of a final adjudication of the Pennsylvania Board of Probation and Parole (Board) that affirmed the decision recommitting Gerarde to serve six months backtime as a technical parole violator. Gerarde is represented in this matter by Nicole Sloan, Esq., Assistant Public Defender of Erie County (Counsel). Counsel has filed a Petition for Leave to Withdraw as

Counsel (Petition to Withdraw), along with an Anders¹ brief, in which she asserts that Gerarde's appeal is frivolous.

On February 7, 2005, the Crawford County Court of Common Pleas sentenced Gerarde to serve concurrent state sentences for the offenses of aggravated indecent assault, criminal attempt, and corruption of minors, and Gerarde's maximum sentence date was set at May 19, 2012. (Sentence Status Summary at 1, R. at 1.) On March 27, 2007, the Board issued a decision granting Gerarde parole, subject to numerous conditions and special conditions. (Notice of Board Decision, mailed March 27, 2007, R. at 4-7.) One of the special conditions of parole imposed by the Board provided as follows: "You shall not directly or indirectly have contact or associate with . . . mi[n]or females for any reason--mandatory." (Notice of Board Decision, mailed March 27, 2007, R. at 5; Special Conditions of Parole/Reparole, R. at 10.) On September 17, 2007, the Board released Gerarde on parole in accordance with its March 27, 2007 decision. (Order to Release on Parole/Reparole, March 27, 2007, R. at 8.)

On July 8, 2009, Parole Agent David Bucheit (Agent Bucheit) prepared a Notice of Charges and Hearings, charging Gerarde with technically violating the above-mentioned special condition of his parole because he allegedly had contact with a minor female while visiting with his friend, Edward Michalczyk, on or about June 22, 2009. (Notice of Charges and Hearings, July 8, 2009, R. at 16.) That same day, the Board lodged a warrant to commit and detain Gerarde. (Warrant to Commit

¹ Anders v. California, 386 U.S. 738 (1967).

and Detain, July 8, 2009, R. at 15.) Thereafter, acting pursuant to the warrant to commit and detain, the Board arrested Gerarde for the alleged technical violation of his parole. (Technical Violation Arrest Report, July 9, 2009, R. at 21.) A preliminary detention hearing was held before a Board hearing examiner on July 20, 2009 at the State Correctional Institution at Albion. (Preliminary/Detention Hearing Report at 1, July 20, 2009 R. at 24.) Following the hearing, the hearing examiner determined that Agent Bucheit had successfully established probable cause with regard to the alleged violation of the special condition of parole requiring Gerarde to refrain from contact with minor females.² (Preliminary/Detention Hearing Report at 2, July 20, 2009, R. at 25.) The hearing examiner, thus, recommended that the matter be scheduled for a parole violation hearing. (Preliminary/Detention Hearing Report at 2, July 20, 2009, R. at 25.) Gerarde subsequently waived his right to a panel hearing. (Waiver of Panel Hearing, July 20, 2009, R. at 91.)

² We note that the Notice of Charges and Hearings issued by Agent Bucheit also charged Gerarde with violating a second special condition of his parole, imposed by parole supervision staff on March 21, 2008, which provided that:

You must not enter or loiter within 1,000 feet of areas where the primary activity at such locations involve persons under the age of 18, including playgrounds, youth recreation centers, youth clubs, arcades, amusement parks, child daycare centers, elementary schools, high schools, elementary/high school bus stops, Special Olympics, Boy Scout/Girl Scout meetings/events or any similar areas where persons under the age of 18 commonly congregate.

(Notice of Charges and Hearings, July 8, 2009, R. at 16.) However, the hearing examiner determined that Agent Bucheit failed to establish probable cause with regard to the alleged violation of this special condition. (Preliminary/Detention Hearing Report at 2, July 20, 2009, R. at 25.) Therefore, because Gerarde's alleged violation of this special condition is not at issue in this case, we will not discuss it any further.

On August 24, 2009, the hearing examiner conducted a parole violation hearing, at which Mr. Michalczyk, Parole Agent Aaron Lopez (Agent Lopez), and Agent Bucheit appeared and testified. Gerarde appeared at the hearing and was represented by Matt Porsch, Esq., of the Erie County Public Defender's Office; however, Gerarde did not provide any testimony. (Parole Violation Hr'g Tr. at 1-4. August 24, 2009, R. at 37-40.)

By decision mailed October 26, 2009, the Board recommitted Gerarde as a technical parole violator to serve six months backtime for failing to refrain from contact with minor females in violation of the special condition of his parole. (Notice of Board Decision, mailed October 26, 2009, R. at 96.) Thereafter, Counsel, acting on behalf of Gerarde, filed an administrative appeal of the Board's October 26, 2009 decision, alleging that it was not supported by substantial evidence of record. On February 17, 2010, the Board issued its final adjudication affirming the October 26, 2009 decision. Gerarde now petitions this Court for review of the Board's final adjudication, asserting that the record does not contain substantial evidence to support the finding that he failed to refrain from contact with minor females in violation of the special condition of his parole.³

Before we reach the merits of Gerarde's Petition for Review, we must first consider Counsel's Petition to Withdraw. Where, as here, a parolee is asserting that he did not violate the condition or conditions which served as the basis for the

³ This Court's review "is limited to determining whether the Board's adjudication is supported by substantial evidence, whether an error of law has been committed or whether the parolee's constitutional rights have been violated." Moroz v. Pennsylvania Board of Probation and Parole, 660 A.2d 131, 132 (Pa. Cmwlth. 1995).

revocation of his parole, a constitutional right to counsel exists. Hughes v. Pennsylvania Board of Probation and Parole, 977 A.2d 19, 25-26 (Pa. Cmwlth. 2009). Under such circumstances, an Anders brief should accompany a petition to withdraw as counsel. Id. at 25. “[C]ounsel must also provide a copy of the [petition to withdraw and Anders] brief to the appellant, advising the appellant of the right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention.” Zerby v. Shanon, 964 A.2d 956, 959 (Pa. Cmwlth. 2009) (quoting Commonwealth v. Wrecks, 931 A.2d 717, 721 (Pa. Super. 2007)).

As the Pennsylvania Supreme Court has recently explained, a proper Anders brief must:

- (1) provide a summary of the procedural history and facts, with citations to the record;
- (2) refer to anything in the record that counsel believes arguably supports the appeal;
- (3) set forth counsel’s conclusion that the appeal is frivolous;
- and (4) state counsel’s reasons for concluding that the appeal is frivolous.

Commonwealth v. Santiago, 602 Pa. 159, 178-79, 978 A.2d 349, 361 (2009). Additionally, in explaining the reasons for concluding that the appeal is frivolous, “[c]ounsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.” Id. at 179, 978 A.2d at 361.

If counsel seeking to withdraw fails to satisfy the technical requirements of Anders, then this Court will deny counsel’s petition to withdraw and direct counsel to either comply with the requirements of Anders or file an advocate’s brief on the merits. Zerby, 964 A.2d at 960. On the other hand, if counsel does satisfy the

requirements of Anders, then this Court will conduct its own review to determine whether the appeal is, in fact, wholly frivolous. Id. Furthermore, if after conducting its own review, this Court determines that the appeal is frivolous, it will grant counsel's petition to withdraw and affirm the order of the Board. Id. However, if this Court concludes that any non-frivolous issues have been raised, it will deny counsel's petition to withdraw and direct counsel to file an advocate's brief on the merits. Id.

Here, Counsel appropriately filed an Anders brief with her Petition to Withdraw, served Gerarde with a copy of both the Anders brief and the Petition to Withdraw, and advised Gerarde of his rights. Moreover, in her Anders brief, Counsel provided a summary of the facts and procedural posture of this matter with appropriate citations and references to the record, set forth her conclusion that the appeal is frivolous, and stated her reasoning for reaching that conclusion. Also, in explaining her reasoning, Counsel appropriately articulated the facts of record and controlling case law that led her to conclude that Gerarde's appeal is frivolous. Therefore, Counsel has satisfied the technical requirements necessary to withdraw from representation of Gerarde in this matter.

Having determined that Counsel has satisfied the necessary technical requirements to withdraw, we will now conduct our own independent review to determine whether Gerarde's appeal is, in fact, frivolous. An appeal is frivolous when it lacks any basis in law or fact. Smith v. Commonwealth, 524 Pa. 500, 506, 574 A.2d 558, 562 (1990). In this case, the sole issue raised by Gerarde is that the Board's determination that he violated the special condition of his parole requiring

him to refrain from having direct or indirect contact with minor females is not supported by substantial evidence in the record. Substantial evidence has been defined as “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” McCauley v. Pennsylvania Board of Probation and Parole, 510 A.2d 877, 879 (Pa. Cmwlth. 1986).

During the parole revocation hearing held on August 24, 2009, Mr. Michalczyk testified that Gerarde visited with him for two-to-three hours at his townhouse on June 22, 2009, while Mr. Michalczyk’s nine-year-old son and one-year-old daughter were present. (Revocation Hr’g Tr. at 12, 34, R. at 48, 70.) Although Mr. Michalczyk could not recall whether Gerarde had any physical contact with his minor daughter on June 22, 2009, (Revocation Hr’g Tr. at 14-16, R. at 50-52),⁴ Mr. Michalczyk did testify that Gerarde was in the same room as his minor daughter that day.⁵ (Revocation Hr’g Tr. at 18-19, R. at 54-55.) Mr. Michalczyk also testified that

⁴ Agent Lopez and Agent Bucheit both testified that, when they had questioned Mr. Michalczyk about Gerarde’s visit to the Michalczyk residence on June 22, 2009, Mr. Michalczyk indicated that Gerarde had interacted with his minor daughter inside of the townhouse on June 22, 2009. (Revocation Hr’g Tr. at 38-39, 41-42, R. at 74-75, 77-78.)

⁵ Specifically Mr. Michalczyk testified as follows regarding June 22, 2009:

[Gerarde] was there before my wife got there. He was there. We were there with my kids during the day a little bit. I don’t know what time [Gerarde] got to the house, maybe one o’clock or something. You know, my kids were there, my daughter might have been taking a nap and then she’ll get up from her nap and, you know, my boy might play X-box with [Gerarde] or something, you know. And we’re all in the same room. You know what I mean? I can’t tell you exactly who walks what way when or whatever, you know, but I mean, you know, he was there in the room with us. We all conversed and obviously, like I said, my daughter you can’t obviously communicate with her as a one year old but other than that I don’t know as far as playing, I guess, you know giggling with her maybe, yeah, you know,

(Continued...)

Gerarde spent approximately 15-20 minutes with Mr. Michalczik's family at the swimming pool located at the townhouse complex on June 22, 2009. (Revocation Hr'g Tr. at 16-17, 34, R. at 52-53, 70.) Additionally, Mr. Michalczik acknowledged that Gerarde had picked his minor daughter up and given her a hug when Gerarde visited his residence on prior occasions during his parole. (Revocation Hr. Tr. at 20-21, 29-30, 33, R. at 56-57, 65-66, 69.) Mr. Michalczik's testimony, which was undisputed and obviously credited by the Board, constitutes substantial evidence to support that Gerarde violated the special condition of his parole requiring him to refrain from having direct or indirect contact with minor females. As the ultimate fact-finder, the Board had the sole authority to assess the credibility of Mr. Michalczik's testimony and determine what weight it should be given, and this Court may not reevaluate such determinations. Figueroa v. Pennsylvania Board of Probation and Parole, 900 A.2d 949, 953 (Pa. Cmwlth. 2006); Sigafoos v. Pennsylvania Board of Probation and Parole, 503 A.2d 1076, 1080 (Pa. Cmwlth. 1986). Although Gerarde may not have intended to do any harm by having contact with Mr. Michalczik's minor daughter, such a consideration is not dispositive; all that matters here is that Gerarde had contact with a minor female, which was a violation of the special condition of his parole. See Heckman v. Pennsylvania Board of Probation and Parole, 744 A.2d 371, 372 (Pa. Cmwlth. 2000) (holding that the fact that a parolee violated a special condition of his parole by having contact with a minor, rather than his intent to do wrong, was dispositive of the issue of whether the Board erred in revoking parole).

as far as, you know, I just don't know how far – as far as playing, you know what I mean?

(Revocation Hr'g Tr. at 18-19, R. at 54-55.)

Therefore, based on our independent review, we agree with Counsel that Gerarde's appeal is frivolous, as it does not have any basis in law or fact. Accordingly, Counsel's Petition to Withdraw is granted, and the Board's final adjudication is affirmed.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Gerarde,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 410 C.D. 2010
	:	
Pennsylvania Board of Probation and	:	
Parole,	:	
	:	
Respondent	:	

ORDER

NOW, September 20, 2010, the Petition for Leave to Withdraw as Counsel filed by Nicole Sloan, Esq., Assistant Public Defender of Erie County, is hereby **GRANTED**, and the final adjudication of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge