

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Zane J. Seilhamer, Jr.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 551 C.D. 2009
	:	
Pennsylvania Board of Probation and Parole,	:	Submitted: July 9, 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 15, 2010

Zane J. Seilhamer, Jr. (Seilhamer) petitions for review of a final adjudication of the Pennsylvania Board of Probation and Parole (Board) that affirmed the decision recommitting him as a convicted parole violator to serve his unexpired term of two months and twenty-five days and recalculating his maximum date as February 11, 2009. Seilhamer's court-appointed counsel, Jonathan D. Ursiak, Esq., Assistant Public Defender of Luzerne County (Counsel), filed a Petition for Leave to Withdraw

(Petition to Withdraw), along with an Anders¹ brief, with this Court on July 24, 2009. However, because Counsel's Anders brief was deficient, we denied Counsel's Petition to Withdraw without prejudice and directed Counsel to "either file a renewed petition for leave to withdraw as counsel, along with a no-merit letter, or submit a brief on the merits of Seilhamer's Petition for Review" within 30 days in Seilhamer v. Pennsylvania Board of Probation and Parole, 996 A.2d 40 (Pa. Cmwlth. 2010) (Seilhamer I). Counsel filed an "Anders Brief in Support of Petition for Leave to Withdraw as Counsel" (Second Anders brief) on June 18, 2010, in which he renews his request for leave to withdraw from representation of Seilhamer.²

The facts of this case, as previously set forth in Seilhamer I, are as follows:

On December 2, 2005, Seilhamer was sentenced to serve one to two years in a state correctional institution after pleading guilty to the offenses of robbery and theft by deception. (Sentence Status Summary at 1-2, July 30, 2007, R. at 7-8.) Seilhamer's maximum date for this sentence was calculated as October 10, 2007. (Sentence Status Summary at 2, R. at 8.) On January 8, 2007, Seilhamer was released on parole. (Order to Release on Parole/Reparole, October 16, 2006, R. at 16.)

Thereafter, the Board declared Seilhamer delinquent effective January 24, 2007. (Administrative Action, February 5, 2007, R. at 19.) On May 8, 2007, the Board recommitted Seilhamer to serve six months backtime as a technical parole violator (Notice of Board Decision at 1,

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

² We note that instead of filing either a renewed petition for leave to withdraw as counsel, along with a no-merit letter, or a brief on the merits in compliance with this Court's opinion and order in Seilhamer I, Counsel simply filed his Second Anders brief. However, based on Counsel's filing of his Second Anders brief and the request for relief set forth in the Conclusion section thereof, we are able to discern that Counsel is once again requesting permission to withdraw from his representation of Seilhamer.

mailed May 24, 2007, R. at 21), and the Board subsequently recalculated Seilhamer's maximum date as November 26, 2007. (Notice of Board Decision, mailed August 6, 2007, R. at 27.) The Board reparaoled Seilhamer on September 17, 2007. (Order to Release on Parole/Reparole, September 5, 2007, R. at 29.)

On November 8, 2007, the Altoona Police Department arrested Seilhamer on new criminal charges. (Criminal Arrest and Disposition Report at 1, November 14, 2007, R. at 35.) On August 18, 2008, Seilhamer pleaded guilty to criminal attempt (Court of Common Pleas of Blair County Criminal Docket at 4, December 31, 2008, R. at 45), and he was sentenced to serve twenty-one to forty-two months in a state correctional institution for this new conviction on September 19, 2008. (Sentence Status Summary at 1, R. at 109.)

On November 3, 2008, the Board held a parole revocation hearing regarding Seilhamer's new conviction. (Hearing Report, November 3, 2008, R. at 67-72.) On December 31, 2008, the Board: (1) recommitted Seilhamer as a convicted parole violator to serve the remainder of his unexpired term of two months and twenty-five days; and (2) recalculated Seilhamer's maximum date as February 11, 2009. (Notice of Board Decision, mailed January 8, 2009, R. at 95.)

Seilhamer filed a counseled request for administrative relief, seeking to have his maximum date changed to December 31, 2008, claiming that he had been returned to SCI-Camp Hill on October 7, 2008 and that his unexpired term of two months and twenty-five days should have been calculated from that date. (Request for Administrative Relief, January 29, 2009, R. at 102.) On February 11, 2009, Seilhamer completed serving his original state sentence. (Sentence Status Summary at 1, February 23, 2009, R. at 109, R. at 109; Moves Report, R. at 112.) At that point, Seilhamer immediately began serving the remainder of his new state sentence for his criminal attempt conviction, and the maximum date for that conviction was calculated as August 2, 2011. (Sentence Status Summary at 1, R. at 109; Moves Report, R. at 112.) On March 3, 2009, the Board issued a final adjudication concluding that the recalculation of Seilhamer's maximum date was correct and denying Seilhamer's request for administrative relief. (Final Adjudication at 1-2, R. at 113-14.)

On April 2, 2009, Seilhamer filed his Petition for Review with this Court. In his Petition for Review, Seilhamer challenges the Board's recalculation of the maximum date on his original sentence.

Specifically, Seilhamer asserts that his maximum date should have been recalculated as December 31, 2008, not February 11, 2009.

Seilhamer I, 996 A.2d at 41-42.

Prior to addressing the merits of Seilhamer's Petition for Review,³ we must first determine whether Counsel's Second Anders brief meets the technical requirements for a "no-merit" letter. As we previously explained in Seilhamer I:

[A]ll that was required here was a no-merit letter. 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. See Adams v. Pennsylvania Board of Probation and Parole, 885 A.2d 1121, 1123 (Pa. Cmwlth. 2005) (stating that "[i]f counsel provides an Anders brief to his client, the brief must contain, at a minimum, the list of issues raised by the parolee and an explanation of why those issues are without merit"); Wesley v. Pennsylvania Board of Probation and Parole, 614 A.2d 355, 356 (Pa. Cmwlth. 1992) (explaining that because, under Turner, a no-merit letter requires less than an Anders brief, "an Anders brief must contain at a minimum, the list of issues raised by petitioner and explanation of why *those* issues are meritless that is required of a no-merit letter"). 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 counsel's explanation of why those issues [are] meritless." Commonwealth v. Turner, 518 Pa. 491, 494-95, 544 A.2d 927, 928 (1988).

³ As we initially noted in Seilhamer I:

[I]f Seilhamer had been released from confinement upon the completion of his original sentence on February 11, 2009, any challenge regarding the Board's recalculation of his maximum date would have been rendered moot. However, because any error in the recalculation of the maximum date on Seilhamer's original sentence could impact the timing of Seilhamer's new state sentence, and because the Commonwealth continues to exercise custody and control over Seilhamer such that this Court could award him relief, the present matter is not moot.

Seilhamer I, 996 A.2d at 42 n.2 (citations omitted).

If counsel has not satisfied the technical requirements of a no-merit letter, then this Court will deny counsel's request to withdraw and direct counsel to either file a renewed request with supporting documentation that complies with the technical requirements of a no-merit letter or an advocate's brief. Zerby v. Shanon, 964 A.2d 956, 960 (Pa. Cmwlth. 2009). However, if counsel has satisfied the technical requirements of a no-merit letter, then this Court will conduct its own independent review to determine whether the petition for review is, in fact, without merit. Id.

Seilhamer I, 996 A.2d at 42-44.

Here, in his Second Anders brief, Counsel identifies the recalculation issue raised in Seilhamer's Petition for Review, indicates the nature and extent of his review, and provides the following analysis:

Undersigned counsel, after having made a conscientious and thorough review of both the record and applicable law, believes that the appeal is frivolous. [Commonwealth v. Santiago, 602 Pa. 159, 978 A.2d 349 (2009)]. Under [Section 6138 of the Prisons and Parole Code (Code), 61 Pa. C.S. § 6138,] a parolee who is granted parole and is found guilty of committing a crime and recommitted . . . shall be given no credit for time spent while at liberty on parole. See also Houser v. [Pennsylvania Board of Probation and Parole], 682 A.2d 1365 (Pa. Cmwlth. 1996). Further, the court in Gaito v. [Pennsylvania Board of Probation and Parole], 488 Pa. 397, 412 A.2d 568 (1980)], held that if a parolee remains incarcerated prior to trial because he has not posted bail, the time spent in custody is credited to his new sentence. Id. at 571.

The record indicates that Seilhamer was released on parole on September 17, 2007. (R. 29). His maximum sentence date was November 26, 2007 (R. 27). On November 8, 2007[,] he was arrested and charged with attempted burglary, loitering and prowling, public drunkenness, and criminal mischief. (R. 35, R. 41). On August 27, 2008[,⁴] Seilhamer pled guilty to attempted burglary. (R. 45.) On

⁴ While Counsel asserts that Seilhamer's guilty plea occurred on August 27, 2008, the page in the record to which counsel cites indicates that Seilhamer entered his guilty plea on August 18, 2008.

September 19, 2008, Seilhamer was sentenced to 21 to 42 months and given credit for time served as of[] November 8, 2007 (R. 85-87). Seilhamer did not post bail at any time during these proceedings and was not solely held on the Board's warrant. (R. 35). On October 7, 2008[,] Seilhamer was placed, by the Board, on parole violator pending status at SCI-Camp Hill. (R. 112). On November 17, 2008, Seilhamer became available to serve his [backtime] on the violation. (R. 93). The Board pulled the 16 days he served on parole and added those days to the 70 days he had remaining on his sentence. (R. 16).

(Counsel's Second Anders brief at 5-6.) Although Counsel's analysis is brief and not thoroughly articulated, it does include citations to statutory authority, case law authority, and the record in support of Counsel's position that the recalculation issue raised by Seilhamer is without merit. Therefore, we are now satisfied that Counsel has satisfied the minimum technical requirements of a no-merit letter.

Because Counsel has satisfied the technical requirements of a no-merit letter, we must next independently review the issue of whether the Board properly recalculated the maximum date on Seilhamer's original sentence following his recommitment as a convicted parole violator. Section 6138(a) of the Code gives the Board the authority to recommit a parolee as a convicted parole violator and prescribes penalties, including the imposition of backtime and loss of credit for time spent at liberty on parole. 61 Pa. C.S. § 6138(a). Specifically, Section 6138(a) provides that:

(1) A parolee under the jurisdiction of the board released from a correctional facility who, during the period of parole . . . commits a crime punishable by imprisonment, for which the parolee is convicted or found guilty . . . may at the discretion of the board be recommitted as a [convicted] parole violator.

(2) If the parolee's recommitment is so ordered, the parolee shall be reentered to serve the remainder of the term which the parolee would

have been compelled to serve had the parole not been granted *and shall be given no credit for the time at liberty on parole.*

61 Pa. C.S. § 6138(a)(1)-(2) (emphasis added). Thus, under Section 6138(a)(2), a convicted parole violator is not entitled to receive any credit for the time spent at liberty on parole during the most recent parole period. We have also held that this section requires a parolee to “forfeit all credit received for time spent in good standing while on parole prior to his previous recommitment as a technical parole violator.” Melendez v. Pennsylvania Board of Probation and Parole, 944 A.2d 824, 825-26 (Pa. Cmwlth. 2008) (emphasis omitted) (quoting Armbruster v. Pennsylvania Board of Probation and Parole, 919 A.2d 348, 351 (Pa. Cmwlth. 2007)).

Section 6138(a) also governs how a convicted parole violator’s backtime on an original sentence is to be calculated and the order in which sentences are to be served, providing that:

(4) The period of time for which the parole violator is required to serve shall be computed from and begin on the date that the parole violator is taken into custody to be returned to the institution as a parole violator.

(5) If a new sentence is imposed on the parolee, the service of the balance of the term originally imposed shall precede the commencement of the new term imposed in the following cases:

(i) If a person is paroled from a State correctional institution and the new sentence imposed on the person is to be served in the State correctional institution.

61 Pa. C.S. § 6138(a)(4)-(5)(i). Additionally, in Gaito v. Pennsylvania Board of Probation and Parole, 488 Pa. 397, 412 A.2d 568 (1980), the Pennsylvania Supreme Court explained that:

if a defendant is being held in custody solely because of a detainer lodged by the Board and has otherwise met the requirements for bail on the new criminal charges, the time which he spent in custody shall be credited against his original sentence. If a defendant, however, remains incarcerated prior to trial because he has failed to satisfy bail requirements on the new criminal charges, then the time spent in custody shall be credited to his new sentence.

Id. at 403-04, 412 A.2d at 571. Furthermore, this Court has held that “where the Board . . . recommit[s] a convicted parole violator to serve the balance of an original sentence before beginning service of a new term, the prisoner's service of backtime on the original sentence must be computed from the date the Board revokes the prisoner's parole,” and “the time served by the prisoner prior to the date parole is revoked must be applied to the new sentence.” Hill v. Pennsylvania Board of Probation and Parole, 683 A.2d 699, 701 (Pa. Cmwlth. 1996) (citing Campbell v. Pennsylvania Board of Probation and Parole, 409 A.2d 980, 982 (Pa. Cmwlth. 1980)).

Here, when the Board reparaoled Seilhamer on September 17, 2007, the maximum date on his original sentence was November 26, 2007. (Order to Release on Parole/Reparole, September 5, 2007, R. at 29.) Thus, at that time, Seilhamer had seventy days remaining on his original sentence. After being reparaoled, Seilhamer: was arrested on new criminal charges on November 8, 2007, (Criminal Arrest and Disposition Report at 1, November 14, 2007, R. at 35); pleaded guilty to criminal attempt, (Court of Common Pleas of Blair County Criminal Docket at 4, December 31, 2008, R. at 45); was sentenced to serve twenty-one to forty-two months in a state correctional institution, (Sentence Status Summary at 1, R. at 109); and was recommitted by the Board as a convicted parole violator, (Notice of Board Decision, mailed January 8, 2009, R. at 95). Because the Board recommitted Seilhamer as a

convicted parole violator, Seilhamer was not entitled to receive any credit for the time he spent at liberty on parole between September 17, 2007 and November 8, 2007. See 61 Pa. C.S. § 6138(a)(2). Additionally, Seilhamer was required to forfeit the sixteen days worth of credit that he had received for the time spent at liberty on parole, prior to his earlier recommitment as a technical parole violator, between January 8, 2007 and January 24, 2007. See Melendez, 944 A.2d at 825-26. Consequently, following his recommitment as a convicted parole violator, Seilhamer was required to serve the seventy days remaining on his original sentence, plus the sixteen days of previously-credited time that he was required to forfeit, which totaled eighty-six days of backtime.

Moreover, because Seilhamer was paroled from a state correctional institution and was to serve his new sentence in a state correctional institution, he was required to serve the backtime on his original sentence prior to serving the new sentence. See 61 Pa. C.S. § 6138(a)(5)(i). Further, since Seilhamer did not post bail following his arrest on his new criminal charges, he was not being held solely on the Board's warrant, and he was not entitled to receive credit towards his original sentence for the time that he spent in custody awaiting disposition of the new criminal charges. See Gaito, 488 Pa. at 403-04, 412 A.2d at 571. Although Seilhamer may have been returned to SCI-Camp Hill on October 7, 2008, Seilhamer did not become available to begin serving his backtime on his original sentence until the Board revoked his parole. See Hill, 683 A.2d at 701. The Board issued its revocation decision recommitting Seilhamer as a convicted parole violator on December 31, 2008; however, the Board used the earlier date of November 17, 2008, the date the necessary signatures were obtained to recommit Seilhamer as parole violator, for

purposes of determining Seilhamer's new parole violation maximum date. (Final Adjudication at 1-2, R. at 113-14; Hearing Report at 6, November 3, 2008, R. at 72.) Adding the eighty-six days discussed above to November 17, 2008 yields a new parole violation maximum date of February 11, 2009. Therefore, the Board properly recalculated Seilhamer's new parole violation maximum date as February 11, 2009, following his recommitment as a convicted parole violator.⁵

Based on our independent review, we conclude that the sole issue raised in Seilhamer's Petition for Review is without merit. Accordingly, Counsel's renewed request to withdraw from his representation of Seilhamer is granted, and the Board's final adjudication is affirmed.

RENÉE COHN JUBELIRER, Judge

⁵ Pursuant to Gaito, any time that Seilhamer spent in custody awaiting the disposition of his new criminal charges is properly credited towards his new sentence. Id. at 403-04, 412 A.2d at 571. Also, pursuant to Hill, the time that Seilhamer spent in custody following the disposition of his new criminal charges, but prior to the revocation of his parole, is properly credited towards his new sentence. Id. at 701. Based on the Sentence Status Summary contained in the record, which indicates that the maximum date on Seilhamer's twenty-one to forty-two month sentence is August 2, 2011, it appears that Seilhamer has received credit towards his new sentence for the twelve months and twenty-two days that he spent in custody from November 8, 2007 (the date when he was arrested on new criminal charges) to November 16, 2008 (the date prior to when the Board considered his parole to have been revoked). (Sentence Status Summary at 1, February 23, 2009, R. at 109.)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Petitioner	:	
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v.	:	No. 551 C.D. 2009
	:	
Pennsylvania Board of Probation and Parole,	:	
	:	
Respondent	:	

ORDER

NOW, September 15, 2010, the request to withdraw from representation of Zane J. Seilhamer, Jr., filed on June 18, 2010 by the Assistant Public Defender of Luzerne County, Jonathan D. Ursiak, Esq., is hereby **GRANTED**. The final adjudication of the Pennsylvania Board of Probation and Parole in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge