

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Trayvon Joseph,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Board of	:	
Probation and Parole,	:	No. 744 C.D. 2011
Respondent	:	Submitted: September 16, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: December 21, 2011

Before us¹ is Jason G. Pudleiner’s (Attorney Pudleiner) petition to withdraw as counsel for Trayvon Joseph (Joseph) on Joseph’s petition for review from an order of the Pennsylvania Board of Probation and Parole (Board) which recommitted Joseph to serve eighteen months backtime as a convicted parole violator and established Joseph’s maximum date of June 8, 2014.

Joseph was effectively sentenced on February 7, 2003, to a term of four to eight years for the manufacture/sale/delivery of drugs or possession with intent to manufacture, sell, or deliver drugs. He was concurrently sentenced to a term of four to eight years for conspiracy for a total term of four to eight years. On July 23, 2007, Joseph was paroled to Capitol Pavilion, a community corrections center, and later moved to a residence in Harrisburg. On January 27, 2010, the

¹ This case was reassigned to the author on October 13, 2011.

Pennsylvania State Police (Police) pulled over the vehicle Joseph was driving for speeding. Joseph declined a request to have his vehicle searched and fled when the State Trooper told him he would be detained. The Police found a handgun and a small amount of marijuana in the vehicle. A warrant was issued for Joseph's arrest. On February 1, 2010, the Board declared Joseph delinquent effective January 27, 2010. On March 15, 2010, the Board issued a warrant to commit and detain Joseph. On March 24, 2010, Joseph was arrested in Baltimore, Maryland by the Fugitive Task Force. Joseph was charged with person not to possess firearms, firearms not to be carried without a license, possession of drug paraphernalia, possession of a small amount of marijuana, and abandonment of a vehicle. On September 28, 2010, Joseph was convicted in the Court of Common Pleas of Cumberland County of firearms charges.²

On October 26, 2010, the Board held a revocation hearing. Joseph acknowledged that he signed a waiver of representation by counsel. Notes of Testimony, October 26, 2010, (N.T.) at 5; Certified Record (C.R.) at 34. Joseph also acknowledged the convictions. N.T. at 11; C.R. at 40.

In a decision recorded December 17, 2010, and mailed December 29, 2010, the Board recommitted Joseph as a convicted parole violator to serve eighteen months backtime to be served concurrently with the earlier backtime as a

² In a decision recorded May 17, 2010, and mailed May 18, 2010, the Board recommitted Joseph to serve nine months backtime as a technical parole violator when available for leaving the district without permission and failing to report as instructed.

result of his technical violations. The Board established Joseph's maximum date as June 8, 2014.

On February 2, 2011, Joseph requested administrative relief and asserted that the Board lacked the authority to impose backtime which exceeded the entire remaining balance of his original term which expired on February 7, 2011. Joseph also requested appointment of counsel for the request for administrative relief and any subsequent appeal.

On April 4, 2011, the Board denied Joseph's request for administrative relief, "[i]t is well established that a recommitted direct violator is not entitled to credit for his time at liberty on parole. . . . The 18-month recommittal period does not exceed the unserved remainder of your 8-year sentence, which, on December 29, 2010, was 1257 days." (Citation omitted). Board Decision, April 4, 2011, at 1; C.R. at 66.

Attorney Pudleiner was assigned to represent Joseph. After review of Joseph's petition and the certified record Attorney Pudleiner desires to withdraw and asserts that Joseph's appeal is without merit.

Appointed counsel may withdraw from assisting an indigent parolee in appealing a parole revocation order, "[w]hen, in the exercise of his professional opinion, counsel determines that the issues raised . . . are meritless, and when the . . . court concurs. . . ." Commonwealth v. Turner, 518 Pa. 491, 495, 544 A.2d 927, 928-929 (1988).

In reviewing a motion to withdraw, this Court must make an independent evaluation of proceedings before the Board to determine whether a parolee's appeal is meritless. Dear v. Pennsylvania Board of Probation and Parole, 686 A.2d 423 (Pa. Cmwlth. 1996). When this Court agrees with counsel's assertion that the appeal is without merit, this Court will permit counsel to withdraw when counsel has fulfilled the technical requirements set forth in Craig v. Pennsylvania Board of Probation and Parole, 502 A.2d 758 (Pa. Cmwlth. 1985). Under Craig, counsel must (1) notify the parolee of the request to withdraw, (2) furnish the parolee with a copy of the brief, (3) advise the parolee of his right to retain new counsel to raise any new points that he might deem worthy of consideration. In the no merit letter or brief counsel must indicate the nature and extent of his review, the issues the parolee wishes to raise, and counsel's analysis in concluding that the appeal is without merit. Wesley v. Pennsylvania Board of Probation and Parole, 614 A.2d 355 (Pa. Cmwlth. 1992).

In the petition for review from the Board's revocation of his parole, Joseph alleged: 1) that the Board lacked authority to impose backtime which extended past the date of his original maximum date, and (2) that Joseph requested that counsel be appointed to assist him with his request for administrative relief, but none was appointed.

With respect to the first issue, Attorney Pudleiner asserts that the Board did not err when it recommitted Joseph to serve eighteen months as a convicted parole violator because it is well settled law that a parolee receives no credit for the time at liberty on parole if he is a convicted parole violator. See

Section 6138(a)(2) of the Prisons and Parole Code, 61 Pa.C.S. §6138(a)(2). This Court agrees with Attorney Pudleiner. Joseph lost all credit for his time spent at liberty on parole when he was recommitted as a convicted parole violator. Once the Board added Joseph's street time to the date he was available to begin serving his backtime, Joseph's maximum date was June 8, 2014. The imposition of eighteen months of backtime did not require Joseph to serve beyond his maximum date.

With respect to the appointment of counsel issue, Attorney Pudleiner believes the issue lacks merit because Joseph waived his right to counsel at the revocation hearing and did not request representation until after he actually filed the document for which he purportedly wished to have representation. Further, because Attorney Pudleiner was appointed counsel for the appeal to this Court and Joseph does not claim that any issues were not properly preserved in his administrative appeal, Attorney Pudleiner argues that Joseph has not suffered any harm.

This Court agrees. Besides the representation issue, the only issue Joseph raises before this Court is whether the Board had authority to assess the eighteen months backtime allegedly beyond his original maximum date. Since this Court has herein determined that the Board did not err in that calculation, a denial of the petition to withdraw where the appointment of counsel would have no

bearing on the underlying merits of the only issue on appeal would serve no useful purpose.³

Accordingly, this Court grants Attorney Pudleiner's request and affirms the order of the Board.

BERNARD L. McGINLEY, Judge

³ This Court also notes that Attorney Pudleiner asserts in his no-merit letter that he has complied with the notification requirements to Joseph under Craig.

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Pennsylvania Board of	:
Probation and Parole,	:
	: No. 744 C.D. 2011
Respondent	:

ORDER

AND NOW, this 21st day of December, 2011, the request of Jason G. Pudleiner to withdraw as counsel in the above-captioned matter is granted. The order of the Pennsylvania Board of Probation and Parole in the above-captioned matter is affirmed.

BERNARD L. McGINLEY, Judge

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 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
 BY SENIOR JUDGE FRIEDMAN

FILED: December 21, 2011

I respectfully dissent. The majority grants the petition to withdraw as counsel filed by Jason G. Pudleiner, Esquire, (Attorney Pudleiner) despite the fact that Attorney Pudleiner failed to conduct a thorough review of both issues raised by Trayvon Joseph. Although Attorney Pudleiner properly examined whether the Pennsylvania Board of Probation and Parole (Board) erred in imposing backtime that required Joseph to serve beyond his maximum sentence date, Attorney Pudleiner did not thoroughly examine whether the Board erred in failing to provide Joseph with counsel to assist him with his administrative appeal after Joseph waived his right to counsel.

In *Zerby v. Shanon*, 964 A.2d 956, 962 (Pa. Cmwlth. 2009), this court stated that counsel seeking leave to withdraw must include in a no-merit letter “substantial reasons” for concluding that a petitioner’s arguments lack merit. Because counsel in *Zerby*

did not provide “substantive authority,” i.e., statutory authority or case law, to support his conclusion that one of the issues lacked merit, this court denied counsel leave to withdraw without prejudice to submit an amended no-merit letter within thirty days. *Id.* at 963.

Here, in addressing Joseph’s claim that the Board improperly denied him counsel to assist with his administrative appeal, Attorney Pudleiner cited no legal authority to support his conclusion that Joseph’s claim lacked merit. In fact, Attorney Pudleiner begins his analysis of the issue with the words “Counsel *feels* this argument is without merit” (No-Merit Letter at 4, emphasis added.) If Attorney Pudleiner had done legal research on the issue, he might have concluded otherwise.

Joseph waived his right to counsel prior to the revocation hearing. (C.R. at 22.) “[A] written waiver of counsel continues in effect . . . until revoked by a parolee.” *McKenzie v. Pennsylvania Board of Probation and Parole*, 963 A.2d 616, 621 n.5 (Pa. Cmwlth. 2009). In *McKenzie*, the parolee revoked his waiver of counsel after the Board issued a recommitment order. “At that point, he was provided counsel.” *Id.* Attorney Pudleiner does not explain why the Board denied Joseph counsel after he revoked his waiver when the Board provided counsel in *McKenzie* under the same circumstances.

In *Coades v. Pennsylvania Board of Probation and Parole*, 480 A.2d 1298, 1308 (Pa. Cmwlth. 1984), this court held that the Board has no obligation to procure counsel for a parolee. The Board’s only obligation is to provide a parolee with the name and address of the appropriate public defender.¹ *Id.* In *Coades*, the Board provided public

¹ See 37 Pa. Code §71.4(2)(ii) (requiring the Board to provide the name and address of the public defender to a parolee before a revocation hearing); see also 37 Pa. Code §71.4(3) (stating that, if the **(Footnote continued on next page...)**)

defender information on the back of its hearing notice. *Id.* at 1305, 1308. If Attorney Pudleiner had examined the record here, he would have discovered that the Board's hearing notices did not contain the name and address of the public defender. (C.R. at 19-20, 22-23.) Attorney Pudleiner does not explain how the Board provided Joseph with the name and address of the public defender, as required by law, so that Joseph could contact the public defender.

Because Attorney Pudleiner failed to conduct a thorough review of the issue involving Joseph's right to counsel, I would deny the petition to withdraw as counsel without prejudice.

ROCHELLE S. FRIEDMAN, Senior Judge

(continued...)

parolee cannot afford counsel, the Board will notify the appropriate public defender by transmitting to the public defender a copy of the written notice given to the parolee).