IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose Vello,	:	
Petitioner	:	
	:	
v.	:	785 C.D. 2007
	:	Submitted: February 1, 2008
Pennsylvania Board of Probation and Parole,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: March 6, 2008

Jose Vello (Vello) petitions for review of the April 3, 2007, order of the Pennsylvania Board of Probation and Parole (Board), which affirmed the Board's calculation of Vello's parole violation maximum date as December 19, 2007. Counsel for Vello has filed an amended application for leave to withdraw,[1] asserting that Vello's appeal is frivolous. We grant Counsel's amended application and affirm.

On March 18, 2002, Vello was paroled from the State Correctional Institution at Smithfield (SCI-Smithfield), where he had been serving a two-and-a-half-year to five-year sentence for drug-related offenses. The Board declared Vello

[1] Counsel previously filed an application to withdraw, which this court denied without prejudice to file a proper application.

delinquent on May 12, 2002, and, subsequently, recommitted him as a technical parole violator (TPV) to serve twelve months backtime. The Board set Vello's maximum date as September 1, 2004. (C.R. at 1, 6, 10-11.)

The Board re-paroled Vello from SCI-Smithfield on July 14, 2003, but he was arrested on September 21, 2003, and charged with aggravated assault, criminal conspiracy and related offenses. The Board filed a detainer the next day and, subsequently, recommitted Vello as a TPV to serve fifteen months backtime, when available. (C.R. at 16, 20, 21, 39.)

On March 16, 2005, Vello filed with the trial court a motion for immediate release on nominal bail pursuant to Rule 600(E).[2] Although the Board had filed a detainer in 2003, the trial court released Vello to the street.[3] A few months later, Vello filed a motion to dismiss the charges against him under Rule 600(G), which governs defendants at liberty on bail.[4] On October 17, 2005, the first day of his trial, the trial court issued a bench warrant. (C.R. at 47-48.)

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[2] Pa. R.Crim.P. 600(E) states that no defendant shall be held in pre-trial incarceration on a given case for a period exceeding 180 days, and any defendant held in excess of 180 days is entitled upon petition to immediate release on nominal bail.

[3] The trial court evidently released Vello to the street because his maximum date of September 1, 2004, had expired. *See Choice v. Pennsylvania Board of Probation and Parole*, 357 A.2d 242 (Pa. Cmwlth. 1976) (stating that the Board lifted its detainer on the date the parolee's maximum date expired).

[4] Pa. R.Crim.P. 600(A)(3) states that, when the defendant is **at liberty on bail**, trial shall commence no later than 365 days from the date on which the complaint is filed. Pa. R.Crim.P. 600(G) states that defendants on bail after the expiration of 365 days may apply for an order dismissing the charges with prejudice.

On October 18, 2005, Vello was arrested and charged with drug-related offenses. On November 17, 2005, Vello posted bail in connection with those charges,[5] and, once again, the trial court released Vello to the street.[6] Vello was convicted on May 3, 2006, and received a sentence of eleven and a half months to twenty-three months, concurrent with any other sentence. (C.R. at 23-25.)

As for the charges associated with Vello's previous arrest, the trial court convicted Vello of aggravated assault and criminal conspiracy on August 1, 2006. On August 31, 2006, the Board filed a detainer, and, on September 5, 2006, Vello was sentenced to two consecutive terms of five-to-ten years. (C.R. at 36, 39, 59-60.)

On January 26, 2007, following a parole revocation hearing, the Board issued a decision to recommit Vello as a convicted parole violator (CPV) to serve his unexpired term of one year, three months and eleven days. The Board set Vello's new maximum date as December 19, 2007. (C.R. at 91.)

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[5] The certified record contains no evidence indicating that the Board filed a detainer in connection with this arrest, and Vello does not contend that he was held solely under a Board detainer after posting bail at this time.

[6] The filing of charges against a parolee constitutes an automatic detainer for fifteen days. Section 21.1(a.1) of the Act commonly known as the Parole Act, Act of August 6, 1941, P.L. 861, *as amended*, added by section 5 of the Act of August 24, 1951, P.L. 1401, *as amended*, 61 P.S. §331.21a(a.1). Here, Vello posted bail more than fifteen days after the filing of charges against him. Thus, at no time was Vello held solely on a Board detainer.

Vello filed a request for administrative relief, challenging the Board's calculation of his maximum date. Vello argued that the Board failed to give him credit for all time served solely under a Board detainer, but Vello did not specify any particular period of time during which he was confined solely on a Board detainer. Vello also argued that the Board failed to comply with the law governing the order of sentences, thereby causing Vello to improperly serve consecutive time, but Vello did not indicate how the Board failed to comply with that law. (C.R. at 92.)

On April 3, 2007, the Board issued a decision affirming the maximum date. Absent a specific argument as to when Vello was held solely on a Board warrant or how the Board failed to comply with the law governing the order of sentences, the Board simply set forth its calculations.[7] The Board explained that: (1) the Board paroled Vello on July 14, 2003, 415 days before the expiration of his September 1, 2004, maximum date; (2) as a CPV, Vello lost credit for all time he spent on parole after July 14, 2003; (3) Vello also lost credit for fifty-five days he previously spent on parole from March 18, 2002, to May 12, 2002, so Vello owed a total of 470 days on his sentence; (4) Vello was available to begin serving his original sentence on September 5, 2006; and (5) Vello's new maximum date, December 19, 2007, is 470 days from September 5, 2006. (C.R. at 96.)

[7] We note that the failure of an appeal or petition for administrative review to present with specificity whatever is essential to a ready and adequate understanding of the factual and legal points requiring consideration will be a sufficient reason for denying the appeal or petition. 37 Pa. Code §§73.1(a)(3) and 73.1(b)(2).

Vello now petitions this court for review of the Board's decision.[8] Counsel for Vello has filed an amended application for leave to withdraw, asserting that Vello's appeal is frivolous.[9] When counsel determines that the issues raised by a petitioner are frivolous, and this Court concurs, counsel will be permitted to withdraw. *Reavis v. Pennsylvania Board of Probation and Parole*, 909 A.2d 28 (Pa. Cmwlth. 2006). However, counsel also must satisfy the requirements set forth in *Craig v. Pennsylvania Board of Probation and Parole*, 502 A.2d 758 (Pa. Cmwlth. 1985).

I. *Craig* Requirements

Under *Craig*, counsel must: (1) notify the parolee of the request to withdraw; (2) furnish the parolee with either an *Anders*[10] brief or a no-merit letter pursuant to *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988); and (3) inform the parolee of his right to retain new counsel or submit a brief on his own behalf. If counsel provides a no-merit letter under *Turner*, the letter must discuss the nature and extent of counsel's review, the issues that the parolee has raised and counsel's analysis in concluding that the parolee's appeal is frivolous. *Reavis*.

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[8] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with law and whether the necessary findings are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

[9] A frivolous appeal is one that lacks any basis in law or fact. *Davis v. Pennsylvania Board of Probation and Parole*, 579 A.2d 1372 (Pa. Cmwlth. 1990).

[10] An *Anders* brief satisfies the requirements set forth in *Anders v. State of California*, 386 U.S. 738 (1967).

Here, counsel sent Vello a no-merit letter, informing Vello of the request to withdraw and advising Vello of his right to obtain substitute counsel or to submit a brief on his own behalf. Counsel set forth the issues raised by Vello and indicated that, after reviewing the record and relevant law, he concluded that Vello's appeal is frivolous. In particular, Counsel concluded that the Board did not fail to give Vello credit for time served solely under a Board detainer and that the Board did not cause Vello to improperly serve consecutive sentences. Thus, we conclude that counsel has complied with *Turner*. The next step is for this court to make an independent judgment as to whether the appeal is frivolous. *Craig*.

II. Board Detainers

Vello first argues that the Board failed to give Vello credit for time served solely under a Board detainer. We disagree.

In this case, the Board filed two detainers. The first detainer was issued on September 22, 2003, following Vello's September 21, 2003, arrest. Vello did not post bail following this arrest; thus, the time Vello served after September 22, 2003, would be credited to the sentence he ultimately received on the new charges. Moreover, when Vello posted bail in 2005 pursuant to his Rule 600(E) motion, Vello was released to the street because his maximum date had expired in 2004. Therefore, Vello never was detained solely on the Board's first detainer.

The Board issued its second detainer on August 31, 2006, following Vello's August 1, 2006, conviction. There is no evidence indicating that Vello

ever posted bail after the Board issued this detainer. Thus, there is no evidence that Vello was ever detained solely under the Board's second detainer.

III. Improper Consecutive Sentences

Vello also argues that the Board failed to follow the law regarding the order of sentences, and, as a result, the Board caused him to improperly serve consecutive sentences. Vello does not refer to specific facts or events in making this argument; thus, it is difficult to ascertain what Vello would have us address. Apparently, Vello believes that, because his county sentence of eleven and a half to twenty-three months was to be served concurrently with any other sentence, Vello should receive credit on his original sentence for the time he served on his county sentence. We disagree.

A parolee must serve an original sentence prior to a new sentence whenever the parolee was paroled from a state institution and the new sentence is to be served in a state institution or whenever the parolee was paroled from a county institution and the new sentence is to be served in a county institution; otherwise, the parolee must serve the new sentence prior to the original sentence. Section 21.1(a) of the act known as the Parole Act, Act of August 6, 1041, P.L. 861, added by section 5 of the Act of August 24, 1051, P.L. 1401, *as amended*, 61 P.S. §331.21a(a). In other words, an original sentence cannot run concurrently with any new sentence imposed for an offense committed during parole, notwithstanding a court order that the new sentence be concurrent. *Harris v. Pennsylvania Board of Probation and Parole,* 393 A.2d 510 (Pa. Cmwlth. 1978).

Here, although Vello received a county sentence that was to run concurrently with any other sentence, Vello was required by statute to serve the county sentence before serving his original sentence. Thus, in applying the law governing the order of sentences, the Board did not cause Vello to improperly serve the county sentence consecutive with the original sentence.

Accordingly, we grant counsel's amended application for leave to withdraw and affirm.

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ROCHELLE S. FRIEDMAN, Judge

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O R D E R

AND NOW, this 6th day of March, 2008, the order of the Pennsylvania Board of Probation and Parole, dated April 3, 2007, is hereby affirmed. In addition, the amended application for leave to withdraw as counsel is granted.

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ROCHELLE S. FRIEDMAN, Judge