

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rashad Jenkins,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 811 C.D. 2007
	:	
Pennsylvania Board of Probation and Parole,	:	Submitted: March 28, 2008
	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: June 11, 2008

Rashad Jenkins (Jenkins) petitions for review of the order of the Pennsylvania Board of Probation and Parole (Board) denying his administrative appeal from his recommitment as a convicted parole violator. This Court now considers the Petition for Withdrawal of Appearance (Withdrawal Petition) filed by Jenkins' appointed counsel, Raymond J. Ortwein, Esquire, (Counsel) of the Clearfield County Public Defender's Office. Counsel requests permission to withdraw on the grounds that Jenkins' Petition for Review is frivolous and without merit. In his Petition for

Review, Jenkins argues that the Board did not timely hold his revocation hearing and erred in determining the verification date of his underlying conviction.

Jenkins was paroled in October 2003 from a two-to-four year sentence for drug charges, of which he had served two years. At the time of his parole, Jenkins' maximum date was October 15, 2005. On November 24, 2004, Jenkins was arrested on drug charges after he and his wife were found with \$4,330.00 and more than two and a half pounds of marijuana. On November 25, 2004, the Board issued a warrant to detain Jenkins. Following a detention hearing, Jenkins was detained pending disposition of his new criminal charges. On June 9, 2005, Jenkins was sentenced to serve two years imprisonment pursuant to his guilty pleas to charges of possession with intent to deliver,¹ criminal conspiracy,² possession of marijuana,³ possession of drug paraphernalia,⁴ and tampering with evidence.⁵ Jenkins appealed this sentence but later, on January 10, 2006, withdrew his appeal, at which time the two year sentence was reimposed, to run concurrently with his other sentences. The Board received confirmation of Jenkins' conviction on August 22, 2006. On December 12, 2006, Jenkins represented himself at a revocation hearing before a hearing examiner. At the revocation hearing, Jenkins admitted that he had pled guilty to the new charges. The Board then issued an order recommitting Jenkins as a convicted parole

¹ Section 113(a)(30) of The Controlled Substance, Drug, Device and Cosmetic Act (Drug Act), Act of April 14, 1972, P.L. 233, as amended, 35 P.S. § 780-113(a)(30).

² Section 903 of the Crimes Code, 18 Pa. C.S. § 903.

³ Section 113(a)(31) of the Drug Act, 35 P.S. § 780-113(a)(31).

⁴ Section 113(a)(32) of the Drug Act, 35 P.S. § 780-113(a)(32).

⁵ Section 4910 of the Crimes Code, 18 Pa. C.S. § 4910.

violator and requiring him to serve 18 months of backtime. The Board recalculated Jenkins' maximum date to be May 6, 2007.⁶

Jenkins sought administrative relief from the Board, arguing that the Board failed to give him adequate notice of his parole revocation hearing and that the Board failed to hold the hearing within the 120-day period mandated by 37 Pa. Code § 71.4(1).⁷

We now turn to Counsel's Withdrawal Petition. Appointed counsel wishing to withdraw from representation of an indigent parolee must:

notify the parolee of his request to withdraw, furnish the parolee with either a copy of a brief complying with [Anders v. California, 386 U.S. 738 (1967)], or a no-merit letter satisfying the requirements of [Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988)], and inform the parolee of his right to retain new counsel or submit a brief on his own behalf.

Reavis v. Pennsylvania Board of Probation and Parole, 909 A.2d 28, 33 (Pa. Cmwlth. 2006) (citing Craig v. Pennsylvania Board of Probation and Parole, 502 A.2d 758

⁶ Although this maximum date has already passed, Jenkins' appeal is not moot. Parolees must serve sentences for crimes committed on parole consecutively with sentences for their original crimes. Section 21(a) of the Act of August 6, 1941, P.L. 861, as amended, 61 P.S. § 331.21a(a), commonly known as the Parole Act. Therefore, Jenkins could not begin serving the balance of his two-year sentence for his new crimes until he had completed serving his old sentence.

⁷ This section provides, in relevant part, that:

[a] revocation hearing shall be held within 120 days from the date the Board received official verification of the plea of guilty or nolo contendere or of the guilty verdict at the highest trial court level

37 Pa. Code § 71.4(1).

(Pa. Cmwlth. 1985)). Here, Counsel, in a Turner letter, advised Jenkins that he was withdrawing from Jenkins' case and that Jenkins had the right to obtain new counsel or to file a pro se brief with this Court.

In order to comply with the requirements of Turner, a no-merit letter must: 1) detail "the nature and extent of [counsel's] review"; 2) list "each issue the petitioner wishe[s] to have raised"; and 3) provide "counsel's explanation of why those issues [are] meritless." Turner, 518 Pa. at 494-95, 544 A.2d at 928. Additionally, this Court must independently review an appointed counsel's petition to withdraw and concur with the counsel's assessment that the parolee's appeal is frivolous before we may permit withdrawal. Hont v. Pennsylvania Board of Probation and Parole, 680 A.2d 47, 48 (Pa. Cmwlth. 1996). An appeal is wholly frivolous when it presents no points "which might arguably support an appeal." Congo v. Pennsylvania Board of Probation and Parole, 522 A.2d 676, 678 (Pa. Cmwlth. 1987) (citing Reale v. Pennsylvania Board of Probation and Parole, 512 A.2d 1307 (Pa. Cmwlth. 1986)).

In this case, we must deny Counsel's Withdrawal Petition because our independent review reveals that Jenkins' Petition for Review presents issues which might arguably support his administrative appeal. In his Petition for Review, Jenkins argues that the Board did not hold his revocation hearing in a timely fashion. Jenkins acknowledges that the Board's regulations state that the mandated 120-day period does not begin to run until the Board receives official verification of his guilty plea; however, he argues that the Board may not unreasonably delay his hearing.

When a parolee raises the issue of whether his revocation hearing is timely, “the Board bears the burden of proving by a preponderance of the evidence that the hearing was timely.” Johnson v. Pennsylvania Board of Probation and Parole, 890 A.2d 45, 49 (Pa. Cmwlth. 2006) (citing Abbruzzese v. Pennsylvania Board of Probation and Parole, 524 A.2d 1049 (Pa. Cmwlth. 1987)). Where the record does not contain sufficient facts to resolve the question of timeliness, this Court may remand the case to the Board, to be remanded to the hearing examiner, for further factual findings. See Goods v. Pennsylvania Board of Probation and Parole, 590 Pa. 132, 912 A.2d 226 (2006) (affirming a Commonwealth Court decision vacating the Board’s decision and remanding the case for factual determinations regarding the timeliness of the revocation hearing).

In Jenkins’ request for administrative relief, he raised the issue of the timeliness of his revocation hearing. (Jenkins’ Appeal Seeking Administrative Relief at 1-4, R. at 62-65.) Jenkins argues in his administrative appeal that the delay between the reinstatement of his sentence upon the withdrawal of his appeal on January 10, 2006 and his revocation hearing on December 12, 2006 (a period of 11 months) was unreasonable and without justification. We note that the Board did not request certification of Jenkins’ conviction until more than seven months after his conviction, on August 15, 2006. There have been circumstances in which this Court has found a revocation hearing untimely held though it was held within 120 days of the Board’s receipt of the official verification of a parolee’s conviction. See, e.g., Fitzhugh v. Pennsylvania Board of Probation and Parole, 623 A.2d 376 (Pa. Cmwlth. 1993) (vacating the Board’s order recommitting parolee as a convicted violator and remanding the matter for factual findings regarding timeliness where four months

elapsed between parolee's conviction and the Board's receipt of official verification of the conviction). Therefore, because the burden of proof is on the Board to show that it timely held Jenkins' revocation hearing, and because of the delay between Jenkins' conviction and the Board's request for the official verification of his conviction, Jenkins' Petition for Review may have merit and, thus, is not *wholly* frivolous.

For these reasons, we cannot grant Counsel's Withdrawal Petition. We therefore order Counsel to submit a brief on the merits on behalf of Jenkins within 30 days of the date of this Order.

RENÉE COHN JUBELIRER, Judge

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Pennsylvania Board of Probation and Parole,	:	
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ORDER

NOW, June 11, 2008, the Petition for Withdrawal of Appearance filed by counsel of record for the Petitioner in the above-captioned matter is hereby **DENIED**. Counsel is directed to file a brief on the merits on behalf of Petitioner within 30 days of the date of this Order.

RENÉE COHN JUBELIRER, Judge