

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ranfis Diaz,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 867 C.D. 2008
	:	
	:	
Pennsylvania Board of	:	Submitted: October 3, 2008
Probation and Parole,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: November 26, 2008

Ranfis Diaz (Diaz) petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) that recommitted him to serve 18 months' backtime as a technical parole violator. Kent Watkins, Esquire (Counsel), Diaz's appointed counsel, petitions for leave to withdraw. Because the issues raised in Diaz's petition for review are wholly frivolous, we affirm the Board's order and grant Counsel's petition.

In 1992, Diaz was convicted and sentenced to 10 to 20 years for aggravated assault. In March 2004, the Board released Diaz on parole. Approximately three-and-a-half years later, parole supervision staff arrested Diaz for technical parole violations.

After hearing, the Board determined Diaz committed two technical parole violations and ordered Diaz recommitted to serve 18 months' backtime.

More specifically, the Board determined Diaz violated condition 3A, failure to report as instructed, and condition 3C, failure to report a change of status within 72 hours.

Diaz filed a request for administrative relief, arguing the Board's determination that he violated condition 3C lacked record support. Diaz also objected to the length of the recommitment period. The Board denied Diaz's request for administrative relief.

Diaz filed a petition for review to this Court generally asserting the Board erred as a matter of law, violated his constitutional rights, and the Board's decision was not supported by substantial evidence. In his brief, however, Diaz raised claims similar to those raised in his petition for administrative relief.

After reviewing Diaz's petition for review, Counsel filed an application to withdraw based on his determination that there were no grounds for Diaz's appeal and it was therefore frivolous. In support, Counsel filed a no-merit letter consistent with Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988).

At the outset, we note an indigent parolee is entitled to appointed counsel on appeal, but appointed counsel is not required to prosecute a frivolous appeal. Presley v. Pa. Bd. of Prob. & Parole, 737 A.2d 858 (Pa. Cmwlth. 1999). Therefore, when in the exercise of his professional judgment, counsel determines the issues raised are wholly frivolous, and when this Court concurs, counsel will be permitted to withdraw. Id. A wholly frivolous appeal is one completely devoid of

points that might arguably support an appeal. Congo v. Pa. Bd. of Prob. & Parole, 522 A.2d 676 (Pa. Cmwlth. 1987).

To withdraw, counsel must comply with the procedural requirements established in Craig v. Pa. Bd. of Prob. & Parole, 502 A.2d 758 (Pa. Cmwlth. 1985). The attorney must notify the parolee of his request to withdraw, provide the parolee with a copy of a brief satisfying the requirements established by Anders v. State of California, 386 U.S. 738 (1967), or a no-merit letter complying with Turner, and inform the parolee of his right to retain new counsel or file an appeal on his own behalf. Reavis v. Pa. Bd. of Prob. & Parole, 909 A.2d 28 (Pa. Cmwlth. 2006).

If counsel proceeds under Turner, the no-merit letter must substantively contain: 1) the nature and extent of counsel's review; 2) the issues the parolee wishes to raise; and, 3) counsel's analysis in concluding the parolee's appeal is frivolous. Id.; see Funk v. Pa. Bd. of Prob. & Parole, 795 A.2d 489 (Pa. Cmwlth. 2002). We require counsel to comply with these requirements to ensure an inmate's claims are considered and counsel has substantial reasons for determining the claims are frivolous. Reavis.

Counsel's no-merit letter satisfies the technical requirements established in Craig. Counsel notified Diaz of his request to withdraw and advised him of his right to retain new counsel or file an appeal on his own behalf. Further, Counsel sent Diaz copies of the petition to withdraw and the no-merit letter. Counsel also provided analysis of both issues Diaz seeks to raise on appeal.

Further, Counsel's no-merit letter complies with Turner. It contains a statement indicating Counsel reviewed the proceedings affecting Diaz, Diaz's petition for review, and the record. The no-merit letter also addressed the issues Diaz raised on appeal. Moreover, it set forth Counsel's analyses of the issues and why they are frivolous. Accordingly, Counsel complied with Turner, and we may now conduct an independent review to determine whether Counsel's characterization of the appeal as frivolous is correct. Reavis.

Diaz appeals the Board's denial of administrative relief.¹ However, as noted above, Diaz's petition for review merely restates our standard of review. The petition contains a single objection to the Board's determination: "The denial of relief from respondent's order revoking parole constitutes an error of law, a violation of petitioner's constitutional rights and is not supported by substantial evidence." Pet. for Review at ¶5.

A petition for review must conform to the requirements of Pa. R.A.P. 1513(d). Rule 1513(d) requires "a general statement of the objections to the order or other determination." This general statement will be deemed to include every subsidiary question fairly comprised therein. Id. However, more than a restatement of our scope of review is required. Deal v. Unemployment Comp. Bd. of Review, 878 A.2d 131 (Pa. Cmwlth. 2005). This Court will not consider issues raised in a party's brief when they are not sufficiently addressed in the petition for review. Pierce v. Pa. Bd. of Prob. & Parole, 406 A.2d 1186 (Pa. Cmwlth. 1979).

¹ Our review is limited to determining whether the Board's decision was supported by substantial evidence and whether the Board erred as a matter of law or violated the parolee's constitutional rights. Prebella v. Pa. Bd. of Prob. & Parole, 942 A.2d 257 (Pa. Cmwlth. 2008).

Diaz's petition for review made no specific challenge to the recommitment period, nor did it identify any specific finding of fact allegedly not supported by substantial evidence. Accordingly, Diaz waived both issues analyzed in Counsel's no-merit letter.

Further, a review of the merits of the issues shows support for Counsel's conclusion. Diaz argues that his technical parole violation of condition 3C is not supported by substantial evidence. The sufficiency of the evidence is left to the discretion of the Board, and we will not interfere with the Board's finding of a technical parole violation if it is supported by substantial evidence. Hawkins v. Pa. Bd. of Prob. & Parole, 490 A.2d 942 (Pa. Cmwlth. 1985). A parolee's admission alone can constitute substantial evidence to support the finding of a violation. DeMarco v. Pa. Bd. of Prob. & Parole, 758 A.2d 746 (Pa. Cmwlth. 2000). Our review of the record shows there is substantial evidence to find Diaz violated condition 3C of his parole, requiring him to report any change in status, "including but not limited to employment, on the job training and education." 37 Pa. Code § 63.4(3)(iii). At the Board hearing, Diaz's parole officer testified Diaz changed jobs without notifying parole supervision staff. Certified Record (C.R.) at 21. In addition, Diaz admitted he did not inform parole supervision staff he started a new job. C.R. at 23-24. The parole officer's testimony, coupled with Diaz's admission, constitutes substantial evidence to support the Board's determination that Diaz violated condition 3C of his parole. Thus, this issue lacks merit and is frivolous.

Diaz also objects to the Board's imposition of an 18-month recommitment period. He argues he should be recommitted based only on his admitted violation of condition 3A, failure to report as instructed, resulting in a recommitment period of three to six months.

Contrary to Diaz's assertion, multiple violations of condition 3 carry a presumptive range of six to 18 months. 37 Pa. Code §75.4. Further, this Court holds:

Where there exists substantial evidence in the record to support the Board's finding that a parolee violated parole and the backtime imposed is within the published presumptive range for that parole violation, we will not interfere with the Board's exercise of its discretion in setting the amount of backtime to be served.

Hawkins, 490 A.2d at 948. Eighteen months is clearly within the presumptive range of six to 18 months; therefore, Diaz's challenge to the recommitment period is frivolous.

In short, the Board's order is supported by substantial evidence and the recommitment period imposed is within the published presumptive range. Thus, Diaz's appeal has no merit and is wholly frivolous. Counsel's petition to withdraw is granted and the Board's order is affirmed.

ROBERT SIMPSON, Judge

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ORDER

AND NOW, this 26th day of November, 2008, the order of the Pennsylvania Board of Probation and Parole is **AFFIRMED**, and the petition of Kent Watkins, Esq. to withdraw as counsel is **GRANTED**.

ROBERT SIMPSON, Judge