

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tiheef Richard Marshall,	:	
	:	
Petitioner	:	
	:	
	:	
v.	:	No. 868 C.D. 2010
	:	Submitted: October 1, 2010
Pennsylvania Board of	:	
Probation and Parole,	:	
	:	
Respondent	:	
	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FLAHERTY

FILED: December 10, 2010

This case is before us on Kent D. Watkins' (Counsel) petition to withdraw from his representation of Tiheef Richard Marshall (Marshall) who petitions for review of an order of the Pennsylvania Board of Probation and Parole (Board) that denied his *pro se* request for administrative review from his recommitment order. We grant Counsel leave to withdraw and affirm the Board's determination.

Marshall was first sentenced on July 13, 2004 to two (2) years, six (6) months to seven (7) years for criminal conspiracy and robbery. Marshall's maximum release date was set at January 2, 2010. On May 17,

2006, Marshall was granted parole to a county detainer. Marshall's actual release date was August 8, 2006, to a Bucks County detainer. Marshall actually arrived at the ADAPPT Treatment Services in Reading on January 12, 2007. On March 15, 2007, Marshall walked out of the group home without signing out, without permission, and did not return thereafter. Marshall was discharged from the home unsuccessfully. On March 21, 2007, Marshall was declared delinquent by the Board, effective March 15, 2007.

On March 27, 2007, Marshall was arrested and charged with violating condition #2 and #7 of his parole, pursuant to a warrant to commit and detain issued by the Board. Marshall was placed at Penn Capp on March 28, 2007. On July 20, 2007, Marshall was released from Penn Capp to reside at 226 S. 4<sup>th</sup> Street in Reading. On January 10, 2008, Marshall was arrested by the Reading police department and charged with simple assault and harassment. He was taken to the Berks County Prison. On January 25, 2008, the simple assault and harassment charges were withdrawn and Marshall was released from Berks County Prison on January 29, 2008.

On September 3, 2008, Marshall was arrested by the Reading police and charged with possession with intent to deliver, possession and criminal conspiracy. On that same date, a warrant was issued to commit and detain Marshall. On October 21, 2008, the Board issued an order detaining Marshall pending disposition of his criminal charges. On March 6, 2009, Marshall was sentenced to eleven and a half (11 ½) to twenty-three (23) months followed by three (3) years of probation. The effective date of the

sentence was March 6, 2009 and Marshall was given credit of 184 days for time served.

On July 30, 2009, a revocation hearing was held at the Berks County Prison before the hearing examiner. On August 18, 2009, Marshall was paroled to a state parole violation detainer. Marshall returned to the State Correctional Institution at Mahanoy on August 26, 2009.

On August 27, 2009, the Board recommitted Marshall to a state correctional institution as a convicted parole violator to serve eighteen (18) months backtime, when available pending completion of or parole from his Berks County prison sentence of eighteen (18) months for criminal conspiracy to commit delivery of a controlled substance. Marshall subsequently became available and the Board, on December 2, 2009, issued a decision establishing Marshall's parole violation maximum date as October 13, 2012.

Marshall owed 1152 days backtime. Marshall was given credit for 91 days from March 27, 2007 through June 26, 2007. Marshall was returned to custody on August 18, 2009. Marshall's maximum release date was, therefore, set at October 13, 2012. Marshall filed a *pro se* request for administrative relief questioning the Board's failure to provide 75 days of credit when Marshall was available in Berks County. Marshall alleges he was available for 165 days and only received 90 days credit.

On April 28, 2010, the Board denied Marshall's request for administrative review and affirmed the Board's action. Marshall now petitions this court for review.

Initially, we address Counsel's petition to withdraw. If appointed counsel subsequently determines that a case lacks merit, counsel must file a petition to withdraw. Commonwealth v. Turner, 518 Pa. 491, 494, 544 A.2d 927, 928 (1988); Zerby v. Pennsylvania Board of Probation and Parole, 964 A.2d 956 (Pa. Cmwlth. 2009). This court does not immediately grant such applications, but stays disposition pending an opportunity for the ex-parolee to obtain substitute counsel or file a brief in support of the petition for review *pro se*. Craig v. Pennsylvania Board of Probation and Parole, 502 A.2d 758 (Pa. Cmwlth. 1985).

An appeal will be considered frivolous if it is determined to lack any basis in law or fact. Smith v. Pennsylvania Board of Probation and Parole, 542 Pa. 500, 547 A.2d 558 (1990). Frivolous is not synonymous with lack of merit. Commonwealth v. Greer, 455 Pa. 106, 314 A.2d 513 (1974). Frivolousness is a slightly higher standard than lack of merit; an argument may be meritless but not frivolous. Smith, 524 Pa. at 507, 574 A.2d at 562. Counsel is permitted to withdraw if the case lacks merit, even if the case is not deemed wholly frivolous. Zerby, 964 A.2d at 960.

Here, Counsel believes the appeal lacks merit and seeks leave to withdraw as counsel by submitting a no-merit letter. The 'no-merit' letter must contain (1) the nature and extent of the counsel's review, (2) the issues petitioner wishes to raise, and (3) counsel's analysis in concluding petitioner's appeal to lack merit. Commonwealth v. Wrecks, 931 A.2d 717 (Pa. Super. 2007). Counsel has discharged his responsibility if he correctly concludes that the appeal is meritless; an allegation of frivolous appeal is not required. Hont v. Pennsylvania Board of Probation and Parole, 680 A.2d 47,

48 (Pa. Cmwlth. 1996); Wesley v. Pennsylvania Board of Probation and Parole, 614 A.2d 35, 356 (Pa. Cmwlth. 1992); Frankhouser v. Pennsylvania Board of Probation and Parole, 598 A.2d 607, 608 (Pa. Cmwlth. 1991).

In performance of his duties, Counsel has reviewed the record certified by the Board to this court and set forth in his letter the issues raised in Marshall's petition for review from the Board's determination. Marshall's sole issue on appeal is that the Board failed to give him credit for time served exclusively pursuant to the Board's warrant. After conducting an exhaustive examination of the record, as hereinafter set forth, Counsel concludes that Marshall's petition is without merit and lacks support in either law or fact.

After setting forth a thorough review of the facts in the record, Counsel sets forth in his no-merit letter the following analysis:

Mr. Marshall was arrested September 3, 2008. (Certified record, p. 77) He did not post bail. (Certified record, p. 77, 79)

On March 6, 2009, petitioner pled guilty to criminal conspiracy to engage in drug manufacture/sale or possession with intent to deliver and received a sentence of 11 months, 15 days to 23 months. (Certified record, p. 82) At the time of sentencing he received 184 days credit toward time served. (Certified record, p. 98) This would be the period of time he was incarcerated for both lack of bail and under the Pennsylvania Board of Probation and Parole's warrant. The petitioner was paroled to the state parole violator's warrant on August 18, 2009. (Certified record, p. 112) He was returned to S.C.I. Mahanoy on August 26, 2009. (Certified record, p. 113) Therefore, the petitioner was not available to start serving his backtime until August 18, 2009. *Gaito v. Pennsylvania Board of Probation and Parole*,

128 Pa. Cmwlth. Ct. 253, 563 A.2d 545 (1989). The Pennsylvania Board of Probation and Parole also gave the petitioner credit for the time served at Conewago-Wernersville from March 27, 2007, through June 26, 2007 (Certified record, p. 118); a period of 91 days.

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However, review of the record reveals he has received all of the time credit to which he is entitled. The record does not reveal any other issues that may be raised on Mr. Marshall's behalf.

Counsel no-merit letter, July 30, 2010, at 3-4.

Marshall's appeal questions whether the Board erred when it failed to give him credit for time served exclusively pursuant to the Board's warrant. We have made an independent review of the issue of Marshall's backtime and credit for time served. We agree with Counsel that Marshall's contention is without merit because the calculations of the Board are correct and Marshall was given the appropriate backtime credit for the time he was incarcerated pursuant to the Board's warrant.

We conclude that Counsel has thoroughly examined the certified record, set forth the issues, researched the applicable law and analyzed the merits in Marshall's appeal. We have also reviewed the issues independently and agree with Counsel's assessment that Marshall's appeal from the recommitment order has no basis in law or in fact and is without merit. In view of our conclusion that the letter is submitted in compliance with the requirements of Turner, the application of Counsel filed with this court for leave to withdraw his appearance as Marshall's counsel is granted.

Accordingly, because the issues raised in Marshall's appeal to this court are without merit, Counsel's application for leave to withdraw his appearance is granted and the order of the Board is affirmed.

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JIM FLAHERTY, Senior Judge

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**ORDER**

AND NOW, this 10<sup>th</sup> day of December, 2010 the Application for Leave to Withdraw as Counsel filed by Kent D. Watkins is granted. The order of the Pennsylvania Board of Probation and Parole is affirmed.

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JIM FLAHERTY, Senior Judge