

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin Thompson, :
Petitioner :
 :
v. : No. 921 C.D. 2008
 : Submitted: October 10, 2008
Pennsylvania Board of Probation :
and Parole, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: November 7, 2008

Before this Court is an Application for Leave to Withdraw as Counsel filed by Jennifer B. Dale, Assistant Public Defender (Counsel), appointed counsel for Kevin Thompson's (Thompson) appeal from the Pennsylvania Board of Probation and Parole's (Board) order recommitting him to a state correctional institution as both a technical and a convicted parole violator and changing his maximum release date.

Thompson is currently incarcerated at the Pennsylvania State Correctional Institution at Huntingdon (SCI-Huntingdon) for a five to 10 year sentence imposed by the Court of Common Pleas of Philadelphia County for

robbery.¹ According to the record, Thomson's sentences were to run concurrently. His original maximum release date was December 21, 2006. By Board order dated May 5, 2005, he was reparaoled to an approved plan on July 14, 2005. Thompson was arrested on new charges (terroristic threats) by the Philadelphia Police on May 18, 2006. That same date, the Board issued a board warrant to commit and detain and Thompson was held in custody. The next day, Thompson posted bail but his bail was revoked on February 7, 2007.

Thompson was sentenced for the new charges on April 16, 2007, and by Board action dated September 7, 2007, was recommitted as a technical parole violator to serve six months backtime and as a convicted parole violator to serve nine months backtime concurrently, for a total of nine months backtime. He was given a new maximum release date of January 15, 2009. Thompson, via Counsel, requested administrative relief in a letter to the Board alleging the following:

(a) The Board committed error in its calculation of the parolee's recalculated maximum date by setting a maximum date substantially beyond the time period which parolee can be required to serve on the underlying sentence. Specifically, the Board failed to properly credit time served by the Petitioner due solely to the Board's detainer, and does not accurately reflect the periods of time during which Petitioner was incarcerated and under the Board's jurisdiction.

(b) The Board committed error in its calculation of the parolee's recalculated maximum date by setting a maximum date substantially beyond the time period for

¹ In February and April of 1990, he was sentenced and was incarcerated for aggravated assault and criminal conspiracy serving one to two years for each crime to run concurrently.

which the parolee could be required to serve on the underlying sentence. Specifically, the Board failed to comply with the laws of Pennsylvania in certain procedures relating to the order in which Petitioner served his sentences, and improperly causing Petitioner to serve consecutive time.

By letter dated April 24, 2008, the Board replied to Counsel indicating that the Board issued a modified recalculation decision that changed his maximum release date from January 15, 2009, to December 7, 2008. The letter further explained: “The new max date reflects that Mr. Thompson became available to serve his original sentence again on April 16, 2007 and he received 264 days of credit on his original sentence for the period he was incarcerated from May 19, 2006 to February 7, 2007. Thus, your objection to the prior max date is now moot.” Thompson sent another request for administrative relief by letter dated April 7, 2008, again requesting the identical relief. By letter dated May 1, 2008, the Board affirmed its March 19, 2007 decision.

Thompson then filed a petition for review with this Court through Counsel arguing that his maximum release date was excessive. Specifically, he argues that the Board failed to properly credit time served by him due solely to the Board’s detainer, and it failed to comply with the laws of Pennsylvania in certain procedures relating to the order in which he served his sentences causing him to serve consecutive time.

Counsel now petitions for leave to withdraw with an attendant no-merit letter stating that after her review of the entire record and the merits, Thompson’s appeal is frivolous. Counsel has also sent a copy of the letter to

Thompson advising him that there is no merit to his appeal and notifying him of the right to retain new counsel or to raise points which he deems worthy of consideration in a *pro se* brief that he could file with this Court.

Before we may allow court-appointed counsel to withdraw because the appeal is frivolous, the withdrawing counsel must have (1) notified the inmate of his request to withdraw; (2) furnished the inmate with a copy of an *Anders* brief² or no-merit letter; and (3) informed the inmate of his right to retain new counsel or raise points that he might deem worthy of consideration. *Reavis v. Pennsylvania Board of Probation and Parole*, 909 A.2d 28 (Pa. Cmwlth. 2006). We must also ensure that withdrawing counsel's brief or no-merit letter sets forth (1) the nature of counsel's review of the case; (2) the issues the petitioner wishes to raise; and (3) counsel's analysis concluding that the appeal is frivolous. *Banks v. Pennsylvania Board of Probation and Parole*, 827 A.2d 1245 (Pa. Cmwlth. 2003). Once we are satisfied that these technical requirements have been met, we will then make an independent evaluation of the proceedings before the Board to determine whether the appeal is wholly frivolous – one that is completely devoid of points that might arguably support an appeal – before we allow counsel to withdraw. *Id.*

Upon our review of the record, Counsel has notified Thompson of her request to withdraw, has furnished him with a no-merit letter, and has informed Thompson of his right to retain new counsel or raise points that he might deem worthy of consideration. We have also reviewed Counsel's no-merit letter and conclude that she has set forth in great detail the nature of Thompson's case. She

² See *Anders v. California*, 386 U.S. 738 (1967).

has also set forth the issues that Thompson wishes to raise: that the Board erred in its calculation of his maximum release date because: 1) it failed to properly credit time served by Thompson due solely to the Board's detainer; and 2) it failed to comply with the laws of Pennsylvania in certain procedures relating to the order in which Thompson served his sentences causing him to serve consecutive time. Finally, Counsel's no-merit letter explains why she concludes the appeal is frivolous citing Section 21.1(a) of the Pennsylvania Parole Act of August 6, 1941, P.L. 861, *as amended*, (commonly referred to as the Parole Act) 61 P.S. §331.21(a), which enables the Board to retake and hold in custody without further proceedings any parolee charged after his parole with an additional offense. She then performs the calculations and comes up with the same maximum date as does the Board.

However, Counsel has failed to make the same meticulous analysis with regard to Thompson's second issue: whether the recalculation of his sentence has caused him to serve his sentences consecutively rather than concurrently as they were originally ordered. Accordingly, we must deny her request to withdraw until she can provide a sufficient legal analysis as to why Thompson's appeal is wholly frivolous and without merit.

DAN PELLEGRINI, JUDGE

