

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mr. Omar L. Hill,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Board of	:	
Probation and Parole,	:	
	:	No. 947 C.D. 2009
Respondent	:	Submitted: January 22, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE JOHNNY J. BUTLER, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE BUTLER

FILED: February 24, 2010

Mr. Omar L. Hill (Hill), an inmate currently imprisoned at State Correctional Institution of Huntingdon, petitions for review of the order of the Pennsylvania Board of Probation and Parole (Board) for administrative relief from the revocation of his parole. Jennifer B. Habel, Esquire (Counsel), Hill's appointed counsel, has filed an application for leave to withdraw her appearance on the grounds that his appeal has no merit. She has submitted a letter in support of the application. For reasons set forth in this opinion, we grant Counsel's petition for leave to withdraw, and affirm the order of the Board.

Hill was originally sentenced to 3½ to 20 years for robbery. On June 27, 2008, he was paroled to a community corrections center (CCC). He was subsequently taken into custody on October 1, 2008 for violating his parole. On October 13, 2008, the Board served Hill with a Notice of Charges for violation of

parole conditions 5(c) for assaultive behavior, and 7 for non-completion of the CCC program. Hill waived a parole revocation hearing and pled guilty to the alleged violations. The Board recommitted Hill to serve 18 months of backtime for violation of parole condition 7. There was no mention of the condition 5(c) violation in the Board's decision.

Hill filed a timely request for administrative relief on December 15, 2008, based on his belief that the Notice of Charges was erroneous and misleading. On April 17, 2009, the Board denied administrative relief on the basis that Hill admitted to parole violations in exchange for his parole agent's recommendation that he would be placed in a "Back on Track" program. Hill appealed the denial of administrative relief to this Court.<sup>1</sup> Counsel filed a motion with this Court to withdraw as counsel, claiming that Hill's appeal lacks merit.

Hill argues that the Board abused its discretion and denied him his due process and equal protection rights when it denied him administrative relief, stating that he pled guilty to the parole violations due solely to his parole agent's subterfuge. Specifically, he contends that, but for the assaultive behavior charge, he would not have waived his right to a hearing and, since the assaultive behavior was not included in the Board's decision, he was misled into pleading guilty. Counsel claims that there is no merit to Hill's arguments since he freely waived his rights to a violation hearing.

Under *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) (*Turner/Finley*), when

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<sup>1</sup> Our scope of review of the Board's decision denying administrative relief is limited to determining whether necessary findings of fact are supported by substantial evidence, an error of law was committed, or constitutional rights have been violated. *McNally v. Pennsylvania Bd. of Prob. and Parole*, 940 A.2d 1289 (Pa. Cmwlth. 2008).

counsel wants to withdraw representation, she must review the case zealously, and then:

submit a ‘no-merit’ letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel’s diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

*Zerby v. Shanon*, 964 A.2d 956, 960 (Pa. Cmwlth. 2009). “A no-merit letter must include ‘substantial reasons for concluding that’ a petitioner’s arguments are meritless.” *Id.* at 962 (quoting *Jefferson v. Pennsylvania Bd. of Prob. and Parole*, 705 A.2d 513, 514 (Pa. Cmwlth. 1998)). This Court’s duty to examine the merits of the underlying appeal is triggered only if the application to withdraw complies with *Turner/Finley*. See *Hont v. Pennsylvania Bd. of Prob. and Parole*, 680 A.2d 47 (Pa. Cmwlth. 1996). In the present case, Counsel’s letter detailed the nature and extent of her review of the case, listed Hill’s issues, and explained why and how those issues lacked merit.

Hill’s first issue in his petition for review was whether the Board violated his due process rights under the Constitutions of Pennsylvania and of the United States, as well as the Board’s own rules and regulations, when it failed to provide Hill with adequate information as to his charges. Counsel concludes that Hill was entitled to a violation hearing where the Board would bear the burden of proving that he violated parole, but he chose to waive his rights to that hearing with the understanding that he would receive preferential treatment from the Board. Counsel’s letter further offers that Hill complained of the charges only after receiving a lengthy amount of backtime for his technical parole violation.

In order to effectuate a knowing and voluntary waiver in Parole Board cases, all that is required is for the Board to

show that it followed its own regulations and provided the necessary information to the offender prior to the offender signing the written waiver form. The waiver need not be effectuated in an ‘on the record colloquy.’ Rather, as here, execution of the Board’s form is sufficient.

*Prebella v. Pennsylvania Bd. of Prob. & Parole*, 942 A.2d 257, 261 (Pa. Cmwlth. 2008) (citations omitted). In addition, Hill never attempted to withdraw his waiver/admission of guilt which he had the opportunity to do. Certified Record (C.R.) at 77; *see also Prebella*. Therefore, Hill’s first argument is meritless.

The second issue Hill raised in his petition for review was that the Board’s factual statements and conclusions of law set forth in the Notice of Charges and greensheet were factually in error or were not supported by substantial evidence. Again, Counsel concludes that Hill freely, and without coercion, waived his rights to a hearing and admitted the violations. Had Hill thought that there was any falsity in the charges against him, he had every right to a violation hearing, where it would have been up to the Commonwealth to prove the parole violations. *See Miller v. Pennsylvania Bd. of Prob. & Parole*, 837 A.2d 618 (Pa. Cmwlth. 2003). Instead, Hill chose to admit to his parole violations, and he cannot now, after receiving an unfavorable sentence, claim that the facts were in error. Therefore, Hill’s second argument is also meritless.

Even if it could be determined that Hill’s waiver was coerced or against his free will, his claims are still ultimately meritless. Hill argues that but for his violation of parole condition 5(c), he would not have violated condition 7, and that because the Board’s decision was based only on condition 7, his parole should not have been revoked. We disagree. Hill was charged with violations of conditions 5(c) and 7. Condition 5(c) required that Hill refrain from any assaultive behavior. C.R. at 52. Assuming *arguendo* that this Court believes, as Hill contends, that his “verbal

assaults” on CCC staff members do not rise to the level of “assaultive behavior,”<sup>2</sup> he still would have to prove that he did not violate condition 7. C.R. at 62. Condition 7 states: “You shall comply with the special conditions listed on page 2 imposed by the Board and with special conditions imposed by the parole supervision staff.” C.R. at 52. The special conditions of Hill’s parole stated, in relevant part:

*In addition to the conditions of parole previously imposed, you are subject to the following conditions which are being imposed pursuant to Condition No. 7 of the original conditions governing your parole.*

COUNT 1: EFFECTIVE 9/8/2008, YOU WILL ENTER THE GAUDENZIA DRC HALF WAY BACK PROGRAM LOCATED AT 3200 HENRY AVENUE, PHILA, PA 19129. YOU ARE TO REMAIN AT THIS FACILITY FOR 90 DAYS. YOU WILL ABIDE BY ALL CONDITIONS IMPOSED BY GAUDENZIA DRC STAFF AND ALL CONDITIONS IMPOSED BY THE PAROLE SUPERVISION STAFF. FAILURE TO ABIDE BY ALL CONDITIONS IMPOSED WILL BE AN IMMEDIATE VIOLATION OF YOUR PAROLE.

C.R. at 54 (emphasis added). According to a letter from the inpatient supervisor at the CCC, Hill was unsuccessfully discharged for rule infractions which included verbal aggression and abusive speech toward staff, being in unauthorized areas, refusal to participate in treatment activities, and being disruptive when present at treatment activities. C.R. at 58. Although some of Hill’s infractions at the CCC

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<sup>2</sup> *Jackson v. Pennsylvania Bd. of Prob. & Parole*, 885 A.2d 598, 601-02 (Pa. Cmwlth. 2005) defines assaultive behavior and

requires that the behavior, if it does not involve actual physical harm, must be such that it clearly evoke[s] a reasonable apprehension of bodily harm in the person assaulted.

....

[T]he ‘assault’ component of assaultive behavior require[s] either a violent physical or verbal attack or an apparent violent attempt or a willful offer with force to harm another without actual use of force.

involved verbal abuse of the staff, it does not appear that the CCC requires the abuse to rise to the level of assaultive behavior in order to successfully discharge a person from its program. Conditions 5(c) and 7 are separate conditions; and revocation of parole is warranted upon the violation of any one condition. Therefore, even if Hill had not waived his right to a violation hearing, his argument that, but for the violation of condition 5(c) he would not have violated condition 7, is meritless.

Having made an independent evaluation of the issues presented and having found that Counsel's no-merit letter satisfied the *Zerby* requirements and adequately addressed the issues, we grant the application for leave to withdraw appearance, and affirm the Board's order.<sup>3</sup>

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JOHNNY J. BUTLER, Judge

Judge Pellegrini concurs in the result only.

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<sup>3</sup> On August 6, 2009, this Court ordered that Counsel's petition for leave to withdraw as counsel was to be considered along with the merits of Hill's petition for review, and Hill was advised that he could file a brief on the merits on his own behalf, which he did on October 19, 2009. By order dated October 22, 2009, the Court granted an application by the Board to stay briefing on the merits of the underlying petition for review until the Court disposed of Counsel's application to withdraw. Having extensively reviewed Hill's brief on the merits in its entirety, this opinion addresses all of the issues sufficiently preserved and presented therein. Thus, we deem that an additional review by this Court of the merits of Hill's appeal would be unnecessary, and would not be in the interest of judicial economy. Thus, this Court affirms the Board's order at this time.

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Pennsylvania Board of	:
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Respondent	:

No. 947 C.D. 2009

ORDER

AND NOW, this 24<sup>th</sup> day of February, 2010, Counsel's application for leave to withdraw appearance is granted, and the order of the Pennsylvania Board of Probation and Parole is affirmed.

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JOHNNY J. BUTLER, Judge