

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mr. Carlos Royster a.k.a. Mr. Carlos	:	
Muhammad,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Board of	:	
Probation and Parole,	:	
	:	No. 964 C.D. 2009
Respondent	:	Submitted: December 18, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: January 22, 2010

Carlos Royster (Petitioner), an inmate at the State Correctional Institution at Somerset, petitions for review of the order of the Pennsylvania Board of Probation and Parole (Board) denying his request for administrative relief. Petitioner’s counsel, Robert Feller Morocco, Esquire (Counsel) has filed an application for leave to withdraw his appearance on behalf of Petitioner on the ground that the appeal is frivolous and has no merit, and has submitted a letter in support of the application. For reasons set forth in this opinion, we grant Counsel’s petition to withdraw and affirm the order of the Board.

On July, 16, 2007, Petitioner was released on parole with conditions. One of those conditions, specifically condition 5C, was to refrain from assaultive behavior. On August 28, 2008, the Board issued a warrant to commit and detain

Petitioner for violating condition 5C. Petitioner was arrested that same date. A preliminary hearing was held September 11, 2008, and a violation hearing was held on December 19, 2008. On February 11, 2009, the Board recommitted Petitioner as a technical parole violator to serve 18 months backtime for violating condition 5C. Petitioner filed an administrative appeal from the Board's decision, and in a decision mailed April 24, 2009, the Board affirmed its previous decision. On May 18, 2009, Petitioner timely filed a Petition for Review with this Court. The Public Defender was appointed to represent Petitioner on June 1, 2009, and on October 13, 2009; Counsel filed an application for leave to withdraw and a no merit letter.

Under *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1998) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) (*Turner/Finley*), when counsel wants to withdraw representation, he 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)). Here, Counsel's letter detailed the nature and extent of Counsel's review of the case, listed Petitioner's issues, and explained why and how those issues lacked merit.

Petitioner argues that the Board failed to provide a timely preliminary hearing, a timely violation hearing and sufficient evidence to recommit him for

violating condition 5C.¹ Counsel concludes that the preliminary hearing was held within 14 days of the detention of the Petitioner on the Board's warrant, and was therefore timely. We agree.

Section 71.2(3) of the Pennsylvania Code, 37 Pa. Code §71.2(3) specifically states: "The preliminary hearing shall be held within 14 days of the detention of the parolee on the Board warrant." Here, Petitioner was arrested on August 28, 2008, and the preliminary hearing was held exactly 14 days later, on September 11, 2008. Hence, Petitioner's argument is meritless.

Counsel also concludes that the violation hearing was held within 120 days of the preliminary hearing, and therefore timely. We agree. Section 71.2(10) of the Pennsylvania Code, 37 Pa. Code §71.2(10) specifically states: "If a violation hearing is scheduled, it shall be held not later than 120 days after the preliminary hearing." Here, the preliminary hearing was held on September 11, 2008, and the violation hearing was held 99 days later on December 19, 2008. Hence, Petitioner's argument is meritless.

Lastly, Counsel concludes, based on the testimony of Mary Mitchell at the violation hearing, that there was substantial evidence to recommit Petitioner for violating condition 5C. We agree. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Price v. Pennsylvania Bd. of Prob. and Parole*, 863 A.2d 173 (Pa. Cmwlth. 2004). At the hearing, Mary Mitchell testified that on August 23, 2009, Petitioner hit her on her cheekbone causing her eye to swell. She further testified that she went to the

¹ Petitioner has also submitted an affidavit from Mary Mitchell, his fiancé and the victim of his assaultive behavior which led to this parole violation, stating she was forced to testify against Petitioner at the violation hearing; however, said affidavit is not part of the record and thus not currently before the Court.

emergency room the next day. In addition, photos of her black eye were submitted. Clearly there was sufficient evidence for a reasonable mind to conclude that Petitioner had not refrained from assaultive behavior and thus, violated parole condition 5C. Hence, Petitioner's argument 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, this Court grants the application for leave to withdraw appearance, and affirms the Board's order.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 22nd day of January, 2010, Counsel's application for leave to withdraw appearance is granted, and the order of the Pennsylvania Board of Probation and Parole is affirmed.

JOHNNY J. BUTLER, Judge