

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jerry Fuller,	:	
Petitioner	:	
	:	
v.	:	No. 597 C.D. 2014
	:	Submitted: September 26, 2014
Pennsylvania Board of Probation	:	
and Parole,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: December 11, 2014

Jerry Fuller (Fuller) petitions for review of an adjudication of the Pennsylvania Board of Probation and Parole (Board) denying his administrative appeal. Fuller's appointed counsel, Kent D. Watkins, Esquire (Counsel), has filed an application for leave to withdraw his representation. For the reasons that follow, we deny Counsel's application to withdraw.

Fuller is in the State Correctional Institution at Mahanoy serving a sentence of five to ten years on a charge of drug manufacturing/delivery or possession with intent to deliver and a concurrent three year and six month to seven year sentence on a charge of firearms not to be carried without a license. At the time of his conviction, Fuller's minimum release date was December 2, 2010, and his maximum release date was December 2, 2015. Fuller was paroled on December 8, 2010.

On September 7, 2012, Fuller was arrested for possession of firearms not to be carried without a license, possession of a loaded firearm in a vehicle, possession of a handgun and receiving stolen property. On May 17, 2013, Fuller pled guilty to the charges and was sentenced to two years and six months to five years in prison, followed by three years of probation.

Accordingly, the Board determined that Fuller was both a convicted and technical¹ parole violator. On July 29, 2013, the Board entered an order recommitting Fuller as a technical parole violator to serve 12 months backtime and as a convicted parole violator to serve 36 months concurrent backtime. The Board subsequently informed Fuller that his recalculated parole eligibility date was December 16, 2015, and his maximum release date was December 10, 2017.

Fuller wrote letters to the Board, dated August 19 and 21, 2013, requesting administrative relief and an explanation of how the Board calculated his rep parole eligibility date. The Board responded as follows:

The Board recommitted Mr. Fuller as a convicted parole violator to serve 36 months for the offenses of Possession of a Firearm Prohibited and Receiving Stolen Property. The recommitment ranges for these offenses are 18 to 24 and 6 to 12 months, respectively. 37 Pa. Code § 75.2. This means the maximum recommitment term that would fall within the presumptive ranges was 36 months. Thus, the 36-month

¹ Fuller violated conditions 7a and 7b of his parole. These conditions state

CONDITION #7[a] – YOU SHALL NOT OPERATE A MOTOR VEHICLE WITHOUT A VALID PENNSYLVANIA DRIVER’S LICENSE, PROOF [OF] INSURANCE, VEHICLE REGISTRATION AND SUPERVISING AGENT’S WRITTEN PERMISSION.

CONDITION #7[B] – YOU SHALL NOT POSSESS AMMUNITION UNDER ANY CONDITION OR FOR ANY REASON.

Certified Record at 19.

recommitment imposed by the Board does not exceed the presumptive recommitment range and is not subject to challenge.

Certified Record at 77. The letter further stated that Fuller had earned 218 days of credit on his original sentence “for the time he was incarcerated solely on the Board detainer from October 11, 2012 to May 17, 2013.” *Id.* The letter concluded that “adding the 36-month recommitment term to the July 22, 2013 [recommitment] date, minus the 218 days of credit [Fuller] received, yields a reparole eligibility date of December 16, 2015.” *Id.* at 78. Accordingly, the Board affirmed its order and denied Fuller’s petition for administrative review. Fuller filed a petition for review with this Court on April 19, 2014.

On appeal,² Fuller argues that the Board erred in its calculation of his recommitment term. Specifically, he contends:

The recommitment period of 36 months is excessive and outside of the presumptive range for recommitment as set forth in 37 Pa. Code §75.2. The presumptive range for possession of a firearm prohibited is 18 to 24 months. The dockets do not indicate the degree of the theft charge and therefore [the degree of the charge] cannot be higher than a misdemeanor of the third degree with a presumptive recommitment range of one to six months for a total maximum of 24 to 30 months.

Petition for Review ¶ 6. Counsel has filed an application for leave to withdraw and a no-merit letter concluding that there is no factual or legal basis for Fuller’s appeal.

² Our scope of review is limited to determining whether the Board erred as a matter of law or violated the parolee’s constitutional rights and whether the Board’s decision is supported by substantial evidence. *Harden v. Pennsylvania Board of Probation and Parole*, 980 A.2d 691, 695 n. 3 (Pa. Cmwlth. 2009).

The technical requirements for appointed counsel seeking to withdraw his representation are set forth in *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988). As summarized by this Court,

[c]ounsel seeking to withdraw from representation of a petitioner seeking review of a determination of the Board must provide a “no-merit” letter which details “the nature and extent of [the attorney’s] review and list[s] each issue the petitioner wished to have raised, with counsel’s explanation of why those issues are meritless.”

Zerby v. Shanon, 964 A.2d 956, 961 (Pa. Cmwlth. 2009). If this Court determines that counsel’s no-merit letter complies with the requirements of *Turner*, we then consider the merits of the parolee’s appeal. *Zerby*, 964 A.2d at 960. If counsel fails to comply with the requirements of *Turner*, we may not consider the merits of the appeal. *Zerby*, 964 A.2d at 960.

In the matter *sub judice*, Counsel’s no-merit letter does not satisfy the technical requirements of *Turner* because it does not address the single issue raised in Fuller’s petition for review. Counsel’s letter details the Board’s calculations and concludes that the Board correctly calculated Fuller’s backtime. Therefore, Counsel contends that Fuller’s appeal lacks merit. Fuller does not argue, however, that the Board’s math was incorrect. Fuller argues only that, because the record does not indicate the degree of the receiving stolen property charge lodged against him, the Board could not apply a presumptive recommitment range greater than one to six months for that offense.

As we stated in *Zerby*, “[a]lthough [the parolee’s] issue may prove not to be meritorious, it is still incumbent upon Counsel to include it in the No-Merit letter and explain why it is meritless.” *Zerby*, 964 A.2d at 962. Because Counsel’s no-merit letter fails to address whether the Board assessed the correct presumptive

range for Fuller's conviction for receiving stolen property, we must deny Counsel's withdrawal application, without prejudice, and grant Counsel leave to file either a renewed withdrawal application and amended no-merit letter or a brief on the merits of Fuller's petition for review.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 11th day of December, 2014, it is hereby ORDERED that the Application to Withdraw Representation filed by Kent D. Watkins, Esquire in the above-captioned matter is DENIED without prejudice. Mr. Watkins is granted leave to file a renewed Application to Withdraw Representation and amended no-merit letter, or a brief on the merits of Petitioner Jerry Fuller's Petition for Review, within 30 days of the date of this order.

MARY HANNAH LEAVITT, Judge