



Caldwell v. Pennsylvania Boards of Probation and Parole

2002 | Cited 0 times | Supreme Court of Pennsylvania | April 10, 2002

Submitted: November 2, 2001

OPINION NOT REPORTED

MEMORANDUM OPINION

Thomas Caldwell petitions for review of the February 6, 2001 order of the Pennsylvania Board of Probation and Parole (Board) that denied Caldwell's request for administrative relief from an order that revoked his parole and recommitted him as a technical parole violator when available to serve twelve months and recommitted him as a convicted parole violator when available to serve his unexpired term. Caldwell's petition asserts that the Board failed to give him credit for all time served solely under its warrant and failed to hold a revocation hearing within 120 days from his return to a state correctional facility or official verification of his conviction. Caldwell's appointed counsel, Kent D. Watkins, Esquire, has filed an application for leave to withdraw as counsel along with a letter pursuant to *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988).

According to the certified record and the information provided in counsel's letter, Caldwell is serving a sentence of "one year, nine months to three years, six months" based upon his conviction in Lawrence County on charges of possession with intent to deliver and impersonating a public officer. His minimum expiration date was June 23, 1998 and his maximum date was March 23, 2000, and he was released on parole on September 30, 1998. Caldwell was arrested on August 10, 1999 in Beaver County on an out-of-state warrant for alleged offenses from the State of Virginia of forgery and grand larceny, and he did not post bail at the time of arrest. The Board's warrant was filed the same day. On January 14, 2000, the Board declared Caldwell delinquent effective October 25, 1999.

On February 25, 2000, Caldwell was arrested in Lawrence County on one charge of four counts of passing bad checks; he pled guilty on June 9, 2000 and received a sentence of four to twelve months followed by one year of probation. On May 4, 2000, Caldwell was recommitted to a state correctional institution as a technical parole violator when available to serve twelve months backtime for multiple admitted technical violations, including failure to report an arrest and a change of status within seventy-two hours. On May 26, 2000, Caldwell was arrested on a charge of theft by unlawful taking, and on June 9, 2000 he pled guilty to that charge and received a sentence of twelve to twenty-four months followed by one year of probation to run consecutively to the sentence imposed for the bad checks. The Board received written verification of the new convictions on June 19 and June 28, 2000. Caldwell waived his right to a panel hearing on revocation based upon the new criminal convictions



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on June 30, 2000.

Caldwell was scheduled for a parole revocation hearing on August 15, 2000. However, he was taken to Virginia on August 9, and on September 12, 2000, he pled guilty in Virginia to grand larceny and to the offense of "forge and utter." By orders of October 23 and October 26, 2000, Caldwell was sentenced on the grand larceny conviction to one year commitment and one year suspended sentence and on the forge and utter conviction to two years, suspended; a related contempt of court case was dismissed. Caldwell was returned to Pennsylvania custody on November 1, 2000. A revocation hearing was held November 14, at which certified copies of the convictions and sentences for passing bad checks and for theft by unlawful taking were introduced. Counsel questioned the timeliness of the hearing but Caldwell chose not to make any statement.

On February 6, 2001, the Board issued the order noted above, referring to the May 4, 2000 Board action and recommitting Caldwell as a technical parole violator when available to serve twelve months and also recommitting him to serve his unexpired term based upon the new convictions in Pennsylvania and Virginia. Caldwell requested administrative relief, which the Board denied by letter of April 20, 2001, and he then timely petitioned for review.² Pursuant to *Turner*, the procedure to be followed when court-appointed counsel seeks to withdraw from representation because the issues raised by the petitioner are frivolous is that counsel must file a "no-merit" letter detailing the nature and extent of his or her review and listing each issue that the petitioner wishes to raise, with an explanation as to why those issues lack merit. *Hont v. Pennsylvania Board of Probation and Parole*, 680 A.2d 47 (Pa. Cmwlth. 1996).

If counsel's application to withdraw satisfies the *Turner* requirements, the Court is then required to conduct its own independent review and must concur in counsel's assessment before the Court may grant leave to withdraw. *Id.* In the present case, counsel filed a no-merit letter with the Court. By order of August 22, 2001, the Court directed that the application for leave to withdraw be considered along with the merits of the petition for review and that Caldwell might retain substitute counsel or file a brief on his own behalf and that appointed counsel should file proof of service of the Court's order upon Caldwell. No other appearance has been entered on Caldwell's behalf, and he has not filed a brief; therefore, the record and the no-merit letter constitute what is available for review.

In the no-merit letter counsel first addresses the contention that the November 14, 2000 revocation hearing was not timely. Under 37 Pa. Code §71.4, relating to conviction for a new criminal offense:

(1) A revocation hearing shall be held within 120 days from the date the Board received official verification of the plea of guilty or nolo contendere or of the guilty verdict at the highest trial court level except as follows:

(i) If a parolee is confined outside the jurisdiction of the Department of Corrections, such as confinement out-of-State, confinement in a Federal correctional institution or confinement in a



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county correctional institution where the parolee has not waived the right to a revocation hearing by a panel in accordance with Commonwealth ex rel. Rambeau v. Rundle, 455 Pa. 8, 314 A.2d 842 (1973), the revocation hearing shall be held within 120 days of the official verification of the return of the parolee to a State correctional facility.

Counsel's no-merit letter represents that Caldwell was scheduled for a panel revocation hearing on August 15, 2000, but because he was not in the state it was rescheduled. Caldwell was not available until November 1; the November 14 hearing was clearly within 120 days of the Board's receipt of official verification.

Counsel notes that when Caldwell was sentenced on June 9, 2001 in Lawrence County, he was given credit toward the bad-check sentence for ninety-six days already served and was sentenced on the theft by unlawful taking charge to a consecutive term. There is no indication that he posted bail. Counsel agrees that pursuant to Section 21.1(a) of the Act commonly known as the Parole Act, Act of August 16, 1941, P.L. 861, as amended, added by Section 5 of the Act of August 24, 1951, P.L. 1401, 61 P.S. §331.21a(a), where Caldwell was paroled from a State penal or correctional institution and the new term is to be served in a State institution, service of the balance of the term originally imposed shall precede commencement of the new term. Counsel has satisfied his burden under Turner.

The Court concurs with counsel's assessment that the period when Caldwell was in Virginia for adjudication of charges there constituted time when he was confined outside the jurisdiction of the Department for purposes of 37 Pa. Code §71.4(1)(i). See Toth v. Pennsylvania Board of Probation and Parole, 470 A.2d 206 (Pa. Cmwlth. 1984) (holding that a 1980 revocation hearing for 1975 conviction was timely where the parolee was imprisoned outside the jurisdiction of the then Bureau of Corrections, first in a county institution without waiver of the right to a panel hearing and then in Florida following convictions there after escaping from Pennsylvania custody). In addition, the record reveals no basis for any claim by Caldwell that there was a period when he was detained on the Board's warrant only. The Court therefore affirms the order of the Board and also grants the application of counsel for leave to withdraw from representation.

DORIS A. SMITH-RIBNER, Judge

ORDER

AND NOW, this 10th day of April, 2002, the order of the Pennsylvania Board of Probation and Parole is affirmed. The application of appointed counsel for leave to withdraw from representation of Thomas Caldwell is granted.

DORIS A. SMITH-RIBNER, Judge

1. This case was assigned to the opinion writer prior to the date when Judge Kelley assumed the status of senior judge on



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January 1, 2002.

2. This Court's review of the Board's decision is limited to determining whether there was a constitutional violation or an error of law and whether the necessary findings of fact are supported by substantial evidence in the record. Walker v. Pennsylvania Board of Probation and Parole, 729 A.2d 634 (Pa. Cmwlth. 1999).

