

COMMONWEALTH COURT OF PENNSYLVANIA

Gilberto Melendez v. Pennsylvania Parole Board

Melendez · No. 929 C.D. 2021 · Decided March 9, 2023

OPINION

PER CURIAM.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA Gilberto Melendez, Petitioner: v.: No. 929 C.D. 2021: Submitted: October 21, 2022 Pennsylvania Parole Board, Respondent: BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge HONORABLE MICHAEL H. WOJCIK, Judge HONORABLE LORI A. DUMAS, Judge OPINION NOT REPORTED MEMORANDUM OPINION BY JUDGE DUMAS FILED: March 9, 2023 Gilberto Melendez (Melendez) petitions for review of the decision mailed July 21, 2021, by the Pennsylvania Parole Board (the Board), denying his request for administrative relief.

1 Daniel C. Bell, Esq. (Counsel), Melendez's court- 0F appointed counsel, has filed an application to withdraw because the appeal lacks merit. 2 We grant Counsel's application to withdraw and affirm the Board's decision. 1F I. BACKGROUND On September 9, 1996, Melendez was sentenced to 7 to 26 years of incarceration with a maximum sentence date of March 21, 2022.

See Sentence Status Summ., 4/24/97, at 1. Thereafter, following parole, revocation thereof, and conviction for new charges, the Board recalculated the controlling maximum date as September 15, 2024. See Not. of Bd. Decision, 9/29/11, at 1.

On August 12, 2018, Melendez was reparaoled. See Order to Release on Parole, 4/5/18, at 1-2. Shortly 1 The decision is dated July 19, 2021. See Resp. to Admin. Remedies Form, 7/21/21. 2 See Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988); Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988) (en banc). thereafter, Melendez was declared delinquent, effective August 15, 2018.

See Not. of Charges and Hr'g, 8/8/19, at 1. On June 3, 2019, Melendez was arrested in Florida on new charges as well as violation of his parole. See Violation Hr'g Report, 11/2/19, at 1-6 (unpaginated); Osceola Cnty. Unif. Charging Aff., 6/3/19, at 1-2.

On November 12, 2019, Melendez was recommitted as a technical parole violator for nine months. See Not. of Bd. Decision, 11/12/19, at 1. On January 21, 2020, Melendez was recommitted as a convicted parole violator (CPV), to serve nine months' backtime, concurrent to the nine months previously imposed. See Order to Recommit, 2/7/20, at 1 (Recommitment Order).³ The Board recalculated the maximum date as August 2F 28, 2025.

See *id.* On June 18, 2020, the Board issued a decision denying Melendez parole. See Not. of Bd. Decision, 6/18/20, at 1-2. On June 29, 2020, Melendez administratively appealed the denial of parole. See Admin. Remedies Form, 6/29/20, at 1-2.4 On June 18, 2021, Melendez 3F submitted an additional administrative remedies form, purporting to appeal the Recommitment Order.

See Admin. Remedies Form, 6/18/21, at 1. 5 The Board 4F denied both administrative appeals. See Resp. to Admin. Remedies Form, 7/21/21, at 1. The Board noted that (1) there is no authorization for administrative relief from the denial of parole and (2) the appeal from the Recommitment Order was untimely. See *id.* Melendez timely petitioned this Court for review.

Counsel was appointed and filed a Turner/Finley letter and application to withdraw as counsel. 3 The Recommitment Order was issued on January 21, 2020, but it was mailed on February 7, 2020. See Resp. to Admin. Remedies Form, 7/21/21, at 1. 4 This form is hand-dated June 29, 2020; it was received on July 7, 2020. 5 This form is hand-dated June 18, 2021; it was received on July 19, 2021.

2 On December 17, 2021, this Court instructed Melendez to hire new counsel or file a brief in support of his petition pro se. On June 3, 2022, Melendez pro se filed a brief raising additional issues. II. TURNER/FINLEY REQUIREMENTS We first determine whether Counsel's application to withdraw complies with the Turner/Finley requirements. A Turner/Finley letter must detail "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) (citation omitted). Further, counsel must "also send to the petitioner: (1) a copy of the 'no-merit' letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed pro se or by new counsel." *Id.* (citation omitted). If counsel satisfies these technical requirements, we must then conduct our own review of the merits of the case.

Id. If we agree that the claims are without merit, we will permit counsel to withdraw and deny relief. *Id.* Upon review, we conclude Counsel has satisfied the technical requirements of Turner/Finley. Counsel discussed the nature of his review, identified the issues raised in Melendez's administrative appeal, and explained why those issues lack merit. Counsel's Br. at 1-4.

Counsel sent a copy of the brief and application to withdraw to Melendez and advised him of his right to proceed pro se or with new counsel. See Appl. to Withdraw as Counsel, 12/15/21, at 1-2; Certificate of Service, 12/15/21. Melendez has not retained new counsel but has filed a pro se response.

Accordingly, we review the merits of Melendez's appeal. 3 III. ISSUES Counsel has identified one issue that Melendez wished to raise on appeal, namely, that his new conviction from the state

of Florida, which resulted in the imposition of nine months' backtime, was not within the presumptive range for an equivalent Pennsylvania offense. See Counsel's Br. at 3.

In Melendez's pro se brief he purports to raise three additional issues. See Pet'r's Br. at v. First, Melendez contends that the Board abused its discretion on August 4, 2011, by failing to consider whether to grant Melendez credit for time spent at liberty on parole. See *id.* Second, Melendez argues that his procedural due process rights were violated by the fact that he was not able to challenge the Recommitment Order.

See *id.* Melendez's third issue is nearly incomprehensible but appears to argue that the Board interfered with his attempts to obtain reparole. See *id.* The Board responds that Melendez has no right to petition for review from the Board's denial of his parole, and that his attempt to challenge his recommitment as a CPV was untimely. See Resp't's Br. at 7-9. IV.

ANALYSIS 6 5F A. Petition for Review of the Recommitment Order First, Melendez challenges the Board's denial of his administrative appeal of the Recommitment Order. Counsel's Br. at 3-4. Specifically, Counsel characterizes this claim as a challenge to the imposition of nine months of backtime, asserting that this was not within the presumptive range for an equivalent 6 In appeals from determinations of the Board, our standard of review is limited to determining whether the Board committed an error of law, whether its findings are supported by substantial evidence, and whether its decision violated constitutional rights.

Young v. Pa. Bd. of Prob. & Parole, 189 A.3d 16, 18 n.3 (Pa. Cmwlth. 2018). 4 Pennsylvania offense. See *id.* at 3. However, Counsel concedes that this administrative appeal was untimely filed. See *id.* at 3-4. The timeliness of an administrative appeal is a jurisdictional issue. *Wagner v. Pennsylvania Board of Probation & Parole*, 522 A.2d 155, 157 (Pa. Cmwlth.

1987). The Board's regulations provide that petitions for administrative review "shall be received at the Board's Central Office within 30 days of the mailing date" of the challenged decision. 37 Pa. Code § 73.1(b)(1).

We have held that this deadline is jurisdictional, meaning the Board lacks authority to consider untimely petitions. *McCullough v. Pa. Bd. of Prob. & Parole*, 256 A.3d 466, 471 (Pa. Cmwlth. 2021) (citation omitted). An exception exists for a "showing of fraud or a breakdown of the administrative process." *Smith v. Pa. Bd. of Prob. & Parole*, 81 A.3d 1091, 1094 (Pa.

Cmwlth. 2013). In the instant case, Melendez's appeal is facially untimely. The Recommitment Order was mailed on February 7, 2020; accordingly, Melendez had thirty days, or until March 9, 2020, to file his appeal. He did not file an administrative remedies form until June 18, 2021, over a year too late. Further, Melendez did not plead fraud or a breakdown of the administrative process to the Board nor to this Court on appeal; thus, we have no basis upon which to consider an exception to the timeliness constraints on the Board's jurisdiction.

See, e.g., Smith, 81 A.3d at 1094. Accordingly, the Board properly denied Melendez's appeal as untimely filed, and the issue is without merit. McCullough, 256 A.3d at 471; Smith, 81 A.3d at 1094; Zerby, 964 A.2d at 960; Wagner, 522 A.2d at 157. B. Melendez's Pro Se Issues We now turn to the issues Melendez sought to raise pro se in his response to Counsel's petition to withdraw.

Insofar as we can interpret them, 5 Melendez seeks to challenge an August 2011 determination of the Board that denied him credit for time spent at liberty on parole, raises allegations of due process violations, and attempts to argue that the Board somehow interfered with his attempts to gain reparole. See Pet'r's Br. at v. 1. Time Spent at Liberty on Parole Initially, Melendez argues that the determination of the Board on August 4, 2011, denying him credit for time spent at liberty on parole, was in error.

See Pet'r's Br. at v, 2-3. Melendez is not entitled to relief for two reasons. First, this challenge is facially untimely. As noted above, a petitioner has 30 days from the mailing date of the challenged decision to file a petition for administrative review. 37 Pa. Code § 73.1(b)(1). This deadline is jurisdictional. See McCullough, 256 A.3d at 471; Wagner, 522 A.2d at 157.

Here, Melendez did not challenge the 2011 determination until 2022, eleven years later. He has not pleaded any fraud or breakdown of the administrative process. Smith, 81 A.3d at 1094. Accordingly, we lack jurisdiction to consider this issue. See McCullough, 256 A.3d at 471; Wagner, 522 A.2d at 157. Further, issues not raised before the Board in an administrative appeal are waived for purposes of appellate review by this Court, and the Pennsylvania Code requires that a prisoner seeking administrative relief must specifically set forth the facts and legal basis for which relief should be granted.

McCaskill v. Pa. Bd. of Prob. & Parole, 631 A.2d 1092, 1094-95 (Pa. Cmwlth. 1993); 37 Pa. Code § 71.5(h). Moreover, any issues not raised in a petition for review are deemed waived. Chesson v. Pa. Bd. of Prob. & Parole, 47 A.3d 875, 879 (Pa. Cmwlth. 2012). Melendez did not raise this issue before the Board or in his petition for review.

Accordingly, due to Melendez's failure to preserve this issue below and 6 waiver of this issue for appeal, the issue is without merit. Chesson, 47 A.3d at 879; Zerby, 964 A.2d at 960; McCaskill, 631 A.2d at 1094-95. 2. Due Process Violations In Melendez's second pro se issue, he appears to assert a due process challenge. See Pet'r's Br. at v. Although difficult to parse, it appears that Melendez avers that his procedural due process rights were violated because his recommitment as a CPV increased the time he was required to serve and he was denied the opportunity to "effectively challenge" the recommitment order.

See id. Again, his argument is nearly incomprehensible, but appears to contend that it was error for the Board to increase his backtime based upon out-of-state charges. See id. at 4. Again, this challenge is facially untimely.

As noted above, a petitioner has 30 days from the mailing date of the challenged decision to file a petition for administrative review. 37 Pa. Code § 73.1(b)(1). This deadline is jurisdictional. See McCullough, 256 A.3d at 471; Wagner, 522 A.2d at 157.

Here, Melendez was recommitted as a CPV in January 2020, following the Florida arrest and charges, and did not attempt to file a form seeking administrative relief until over a year later. He has not pleaded any fraud or breakdown of the administrative process. Smith, 81 A.3d at 1094.

Accordingly, the Board properly denied his appeal as untimely, and the issue is without merit. McCullough, 256 A.3d at 471; Smith, 81 A.3d at 1094; Zerby, 964 A.2d at 960; Wagner, 522 A.2d at 157. 3. Denial of Reparole In Melendez's final pro se issue, he contends that the Board erred in denying his reparole after he was recommitted as a CPV. See Pet'r's Br. at v. The Pennsylvania Supreme Court has held that there is no right to appellate review from a Parole Board decision denying parole under either the 7 Administrative Agency Law 7 or the Federal Constitution, since the decision does not 6F constitute an adjudication.

See Rogers v. Pa. Bd. of Prob. & Parole, 724 A.2d 319, 322-23 (Pa. 1999). Instantly, the Board appropriately noted that "the Board's regulation authorizing administrative relief does not apply to decisions denying parole," and that, rather, the regulation applies to decisions revoking parole and recalculations based on those commitments. See Resp. to Admin.

Remedies Form, 7/21/21, at 1. Accordingly, the Board did not commit an error of law or violate Melendez's constitutional rights, and this issue is without merit. Rogers, 724 A.2d at 323; Young, 189 A.3d at 18 n.3; Zerby, 964 A.2d at 960.

V. CONCLUSION For these reasons, we conclude Counsel has fulfilled the requirements of Turner/Finley, and our independent review of the record confirms that Melendez's appeal lacks merit. Accordingly, we grant Counsel's application to withdraw his appearance and affirm the Board's decision. See Zerby, 964 A.2d at 960. LORI A. DUMAS, Judge 7 2 Pa. C.S. §§ 501-50, 701-704.

8 IN THE COMMONWEALTH COURT OF PENNSYLVANIA Gilberto Melendez,: Petitioner:
v.: No. 929 C.D. 2021 Pennsylvania Parole Board,: Respondent: ORDER AND NOW, this 9th day
of March, 2023, the order of the Pennsylvania Parole Board entered in the above-captioned matter
is AFFIRMED, and Counsel's application to withdraw is GRANTED. LORI A. DUMAS, Judge