

STATE OF MICHIGAN
COURT OF APPEALS

ROBIN LIBBEY,

Plaintiff-Appellant,

v

PAROLE BOARD,

Defendant-Appellee.

UNPUBLISHED

February 22, 2000

No. 206934

Wexford Circuit Court

LC No. 96-012565-AP

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Plaintiff, who was convicted in November 1992 of second-degree criminal sexual conduct, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b), appeals by leave the circuit court order denying his application for leave to appeal from the Parole Board's decision to deny him parole. We affirm.

Plaintiff first argues that the Parole Board failed to articulate substantial and compelling reasons that justified denying him parole despite his high score under the parole guidelines. Although we review the Parole Board's decision to deny parole for an abuse of discretion, this discretion is limited by various statutory guidelines. *In re Parole of Johnson*, 219 Mich App 595, 597-598; 556 NW2d 899 (1996). Accordingly, "we review the Parole Board's exercise of discretion as it is governed by the parole guidelines." *Id.* at 599.

Here, because plaintiff received a score of +5 under the parole guidelines, he had a "high probability of parole" and could therefore be denied parole only for "substantial and compelling reasons stated in writing." See *In re Parole of Franciosi*, 231 Mich App 607, 610, n 2; 586 NW2d 542 (1998), clarified and affirmed on other grounds ___ Mich ___ (Docket No. 113550, decided 2/1/2000), and MCL 791.233e(6); MSA 28.2303(6)(6). The board gave the following reasons for denying plaintiff parole despite his +5 score: (1) plaintiff's denial that he committed the crime prevented him from benefiting from sex-offender therapy, (2) the crime involved an indiscriminate use of force or threats, (3) the crime violated a position of trust or authority and was committed with sexual intent, and (4) plaintiff had an unstable domestic history.¹ We disagree that these factors did not amount to substantial and compelling reasons justifying a departure from the parole guidelines. Indeed, these

factors are more extensive than the factors deemed sufficient to deny parole despite a high guidelines score in *Franciosi*, *supra* at 610-612, 619.²

Contrary to plaintiff's contentions, the reasons given by the Parole Board to deny parole did not merely duplicate the elements of the original offense, and the Parole Board, in denying plaintiff parole, was therefore not acting as a court of sentencing review. Indeed, having an unstable domestic history and failing to participate in therapy because of a refusal to admit guilt are not elements of second-degree criminal sexual conduct. The Parole Board could have concluded, based on these two factors alone, that plaintiff posed a danger to society and should not be released on parole despite his +5 score under the guidelines. *Id.* See also MCL 791.233(1)(a); MSA 28.2303(1)(a) (a prisoner shall not be granted parole if the circumstances, including the prisoner's mental and social attitude, indicate that he poses a menace to society or to the public safety).

Plaintiff argues that his failure to participate in sex-offender therapy was an improper consideration because he was required to first admit guilt in order to participate in therapy. Plaintiff believes that requiring him to admit guilt before participating in therapy – therapy that would ultimately enhance his chances for parole – amounts to a violation of his right against self-incrimination. See US Const, Am V; Const 1963, art 1, § 17. We disagree. Except with regard to the accused at a criminal trial (who has the absolute right not to testify), one cannot invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate. *People v Ferency*, 133 Mich App 526, 533-535; 351 NW2d 225 (1984). Here, the “testimony” sought to be elicited from plaintiff was the fact that he committed the crime for which he had been convicted. By providing this “testimony,” plaintiff would not be subject to incrimination. Indeed, any subsequent prosecution of defendant for the same crime would violate the constitutional prohibition against double jeopardy. Accordingly, the board did not violate plaintiff's right against self-incrimination by requiring him to admit his guilt before allowing him to participate in sex-offender therapy. *Id.*; see also *Phillips v Deihm*, 213 Mich App 389, 399-400; 541 NW2d 566 (1995) (privilege against self-incrimination applies where response would incriminate in future criminal proceedings), and *Russell v Eaves*, 722 F Supp 558, 559-561 (ED Mo, 1989) (prisoner set forth a legally frivolous argument when he contended that requiring him to admit guilt in order to participate in rehabilitative therapy violated his right against self-incrimination, even though the therapy was a prerequisite for parole).

Plaintiff's final argument is that his +5 score under the parole guidelines gave him a due process liberty interest in being released on parole. We need not address this argument, however, because (1) plaintiff concedes that the Parole Board may nonetheless infringe upon this alleged liberty interest for substantial and compelling reasons, and (2) as indicated earlier, the board did

indeed have substantial and compelling reasons for denying plaintiff parole in spite of his guidelines score.

Affirmed.

/s/ Richard A. Bandstra

/s/ Patrick M. Meter

Markman, J. did not participate.

¹ We reject plaintiff's argument that in reviewing the Parole Board's decision, this Court must consider only those factors listed on the Parole Board's Notice of Action under the heading "Substantial and Compelling Reasons for Guideline Departure." Plaintiff cites no authority for this argument, and we can discern no reason why the factors listed under the heading "Reasons in Support of Parole Board Action" should not also be considered.

² We note that the circuit court decisions plaintiff cites in support of his arguments do not constitute binding authority upon this Court.