

STATE OF MICHIGAN
COURT OF APPEALS

OAKLAND COUNTY PROSECUTOR,

Plaintiff-Appellee,

v

RAYMOND GORDON,

Defendant-Appellant.

UNPUBLISHED

July 7, 2000

No. 223587

Oakland Circuit Court

LC No. 99-013851-AP

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant appeals by leave granted from the circuit court order vacating the Parole Board's decision to grant defendant parole. We reverse.

The Parole Board's decision to grant or deny parole is reviewed for a clear abuse of discretion; it is the aggrieved party's burden to prove that the board abused its discretion. MCR 7.104(D)(5)(b); *Hopkins v Parole Bd*, 237 Mich App 629, 632-633; 604 NW2d 686 (1999). Generally, an abuse of discretion is found where an unprejudiced person, considering the facts on which the decisionmaker acted, would say there is no justification or excuse for the ruling. *Id.*

The board may not grant parole until it "has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." MCL 791.233(1)(a); MSA 28.2303(1)(a). The board's discretion is also limited by the parole guidelines. *Killebrew v Dep't of Corrections*, 237 Mich App 650, 655; 604 NW2d 696 (1999). The board may parole prisoners with a low probability of parole, and deny parole to prisoners with a high probability of parole, for substantial and compelling reasons only. *Id.* In this case, because defendant scored in the average probability of parole category, the board was not restricted by the parole guidelines and could grant or deny defendant parole for legitimate reasons that were neither substantial nor compelling. *Id.* at 655-656.

The Parole Board based its decision to grant parole on the following reasons: defendant had no prior criminal history or record of violent behavior; his last misconduct was two years and eight months before the evaluation; he had satisfactory block reports and excellent work reports;

he had worked hard to get his GED and was the chair of his substance abuse group; and defendant had a positive attitude and got along well in his unit. The Parole Board also recognized the following negative factors: defendant was initially assessed in 1982 as an individual who can become threatened easily and defendant had accumulated fifty-three misconducts during his eighteen years' imprisonment, four of which were for threatening behavior. Significantly, the Parole Board recognized that defendant, "[t]hough not a model prisoner when he entered the system at age 18, during the last 2 years and 8 months, [had] managed to reduce his custody level to level 1, remain[ed] ticket free and continue[d] to work at completing his program recommendations."

The Parole Board weighed the facts and circumstances surrounding defendant's request for parole and considered both the positive and negative aspects of defendant's record. Nevertheless, the prosecution argues that the board abused its discretion because the negative factors, which the board considered, do not lead to the reasonable assurance that defendant will not become a menace to society or to public safety. The circuit court agreed. However, the circuit court may not substitute its judgment for that of the Parole Board. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 154; 532 NW2d 899 (1995).

After carefully reviewing the entire record, we cannot conclude that an unprejudiced person, considering the facts on which the board acted, could say there was no justification or excuse for the board's decision to grant defendant parole. Although defendant was incarcerated for an extremely violent crime and had over fifty misconduct violations while he was in prison, he remained free of violations for two years and eight months prior to the board's grant of parole and he also made efforts to improve his behavior and lifestyle during that time.¹ Because the circuit court improperly substituted its judgment for that of the Parole Board, *id.*, we reverse the circuit court order vacating the board's grant of defendant's parole.

¹ The prosecution argues that the Parole Board clearly abused its discretion in granting defendant parole because just six days earlier the Department of Corrections had denied defendant for community placement. However, the notation on that denial states that defendant had been specially designated the prior year because he was an unwarranted risk and that defendant was not eligible for community placement. The board could have reasonably concluded that defendant was not even considered for community placement six days prior to their decision because he had received a special designation the year before. Therefore, defendant's denial for community placement does not render the Parole Board's decision a clear abuse of discretion. Furthermore, we do not find the recommendation of defendant's 1982 psychological evaluation that defendant be re-evaluated prior to his parole dispositive. The board could have reasonably concluded that defendant's conduct during the 2½ years prior to his parole evidenced defendant's ability to control his behavior.

In light of our disposition of the foregoing issue, we need not consider the remaining issue on appeal.

Reversed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Helene N. White