

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT C. HICKS,

Petitioner-Appellee,

v

PAROLE BOARD,

Respondent-Appellant.

UNPUBLISHED

January 9, 2001

No. 224807

Alleghen Circuit Court

LC No. 99-026053-AP

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Respondent Parole Board appeals by leave granted the circuit court's order reversing respondent's decision to deny petitioner Robert C. Hicks parole and ordering petitioner paroled. We reverse.

In April 1993, a jury convicted petitioner of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), based on a 1989 incident involving an eleven-year-old child. He was sentenced to eight to thirty years' imprisonment. Petitioner has, at all times, denied any involvement in the crime.

Petitioner's first parole hearing was set for October 1999. Petitioner was evaluated as having a "high probability of parole,"¹ but was denied parole. Respondent's reason for denial was petitioner's failure to participate in a sex offender group therapy program while imprisoned. According to respondent, petitioner's non-participation "preclude[d] the ability to adequately assess reduction of risk, thus deviation was warranted."

Petitioner appealed respondent's decision to the circuit court. After reviewing petitioner's department of corrections file, the court found that respondent abused its discretion in denying parole. The court found no objective and verifiable reasons to justify respondent's deviation from the parole guidelines. The court noted that petitioner's file suggested he was a model prisoner who participated in all programs except sex offender group therapy. The court

¹ He was given a parole guideline score of "+7." A score of "+4" or higher constitutes a "high probability" score.

reversed respondent's decision and ordered that petitioner be released on parole pursuant to any rules and conditions properly imposed by respondent.

Respondent filed a motion for reconsideration in the circuit court, relying on this Court's decision in *Hopkins v Michigan Parole Board*, 237 Mich App 629; 604 NW2d 686 (1999). Respondent argued that the holding in *Hopkins* regarding separation of powers precluded the circuit court from ordering petitioner's parole. The court denied respondent's motion.

In the meantime, petitioner was not released on parole, but instead in November 1999, was reevaluated by respondent. Petitioner was again evaluated as having a "high probability for parole,"² but was again denied parole. The parole notice of action states that respondent lacked reasonable assurance petitioner would not become a menace to society or to the public safety. In addition, respondent included its "substantial and compelling reasons for guideline departure," stating that petitioner's likelihood for recidivism was difficult to determine because he "does not take responsibility for the offense" and remains in "denial." Respondent concluded that petitioner "remains a risk to young children."

Petitioner again appealed respondent's decision to the circuit court. On January 19, 2000, the court again found that respondent abused its discretion in denying parole. The court reasoned that respondent ignored the rationale of the court's prior ruling and denied parole on the basis of generalized criteria that did not justify denial in light of the objective data in petitioner's department of corrections file. Insofar as respondent relied on *Hopkins* as authority precluding the court from ordering parole, the court ruled that the relied-on portion of *Hopkins* is dicta and, therefore, not binding precedent. Consequently, the court again reversed respondent's denial of parole and ordered that petitioner be released on parole. It is from that order that respondent now appeals to this Court.

A parole board's decision whether to parole a prisoner is reviewed for a "clear abuse of discretion." MCR 7.104(D)(5)(b); *In re Glover (After Remand)*, 241 Mich App 127, 129; 614 NW2d 714 (2000). An abuse of discretion is generally 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.* In reviewing an appeal from a circuit court's ruling on the parole board's decision to grant or deny parole, we do not specifically consider whether the circuit court acted within its discretion in ruling on the parole board's decision, but instead conduct a de novo review of whether the parole board abused its discretion in deciding to grant or deny parole. See *id.*, *Hopkins*, *supra*, and *Killebrew v Department of Corrections*, 237 Mich App 650; 604 NW2d 696 (1999). We may not substitute our judgment for that of the parole board. MCR 7.104(D)(5); *In re Glover*, *supra*. In reviewing an administrative decision, we determine whether the decision was supported by competent, material and substantial evidence and whether it was contrary to law. *Oakland Co Probate Court v Dep't of Social Services*, 208 Mich App 664, 666; 528 NW2d 215 (1995).

² That second evaluation resulted in a parole guideline score of "+6."

On appeal, respondent argues that the circuit court erred in ruling that it abused its discretion in denying parole. Respondent also argues that the court exceeded its power in ordering that petitioner be released on parole.

The parole board's discretion is limited by statute. Whether the parole board abused its discretion in granting or denying parole is determined by looking to the record and the statutory requirements. *Hopkins, supra* at 633; *Killebrew, supra* at 653. MCL 791.233; MSA 28.2303 provides, in pertinent part:

(1) The grant of a parole is subject to all of the following:

(a) A prisoner shall not be given liberty on parole until the board 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.

That section establishes the minimum standard that must be met before parole may be granted. See *Hopkins, supra* at 633, *Killebrew, supra* at 653 (observing that § 233(1)(a) is the “[f]irst and foremost” factor to be examined when determining whether a parole board abused its discretion) and *In re Parole of Johnson*, 219 Mich App 595, 598; 556 NW2d 899 (1996) (characterizing § 233(1)(a) as “[t]he most basic limitation on the Parole Board’s discretion”).³

In addition to that statutory framework, our Legislature mandated the development and use of parole guidelines.⁴ MCL 791.233e(1); MSA 28.2303(6)(1), provides:

The department shall develop parole guidelines that are consistent with section 33(1)(a) and that shall govern the exercise of the parole board's discretion pursuant to sections 34 and 35 as to the release of prisoners on parole under this act. The purpose of the parole guidelines shall be to assist the parole board in making release decisions that enhance the public safety.

Each potential parolee is evaluated under the guidelines and receives a high, average, or low probability of parole score. *Killebrew, supra* at 653-654; *In re Parole of Johnson, supra* at 598-599; see 1999 AACCS, R 791.7716 (expressing the factors to be considered in calculating a guidelines score). However, the guidelines do not hamper the parole board's discretion absolutely. *Killebrew, supra* at 654. MCL 791.233e(6); MSA 28.2303(6)(6) provides:

The parole board may depart from the parole guideline by denying parole to a prisoner who has a high probability of parole as determined under the parole guidelines or by granting parole to a prisoner who has a low probability of parole

³ Additional statutory limits on parole decisions include the general requirements that a prisoner serve his minimum sentence, make arrangements for honorable and useful employment, and earn his high school diploma or equivalent before being eligible for parole. MCL 791.233(1)(b) to (e); MSA 28.2303(1)(b) to (e).

⁴ See 1999 AACCS, R 791.7715 *et seq.*

as determined under the parole guidelines. A departure under this subsection shall be for substantial and compelling reasons stated in writing. The parole board shall not use a prisoner's gender, race, ethnicity, alienage, national origin, or religion to depart from the recommended parole guidelines.

Thus, the parole board has discretion to deny parole to a high probability of parole prisoner for substantial and compelling reasons set forth in writing.

In the present case, it is evident from the parole notice that respondent considered the circumstances of petitioner's crime. According to the eleven-year-old victim, petitioner was her mother's live-in boyfriend. On the morning of the incident, after the victim's mother left for work, petitioner entered the victim's bedroom and forcefully raped the victim. Despite petitioner's assertion of innocence, a jury found him guilty of the offense. The trial court determined that the offense warranted an eight-to-thirty-year prison sentence. The parole board properly considered petitioner's continued denial of involvement in the crime when assessing whether petitioner presents a danger to society. See MCL 791.233(1)(a); MSA 28.2303(1)(a) (requiring the parole board to consider "all of the facts and circumstances, including the prisoner's mental and social attitude") and 1999 AACS, R 791.7715(2)(d)(i) (allowing the parole board to consider whether a prisoner "[d]emonstrated willingness to accept responsibility for past behavior" in determining if parole is in the best interests of society and public safety). Petitioner's crime was assaultive, sexually motivated, and involved a minor child over whom petitioner held a position of trust. While the evidence suggests that petitioner has behaved satisfactorily during his incarceration, under these circumstances, we cannot conclude that respondent was without justification or excuse in determining a lack of reasonable assurance that petitioner would not present a danger to society. MCL 791.233(1)(a); MSA 28.2303(1)(a).

The very same facts support the conclusion that respondent did not abuse his discretion in departing from petitioner's high probability of parole guideline under § 233e(6). In denying petitioner parole for the second time, respondent stated that it was departing from the high parole guideline because petitioner "remains a risk to young children." In reaching that conclusion, respondent considered the circumstances of the crime, the effect on the victim, and the difficulty determining whether petitioner would re-offend as a result of petitioner's refusal to admit responsibility for the crime.⁵ Respondent noted that petitioner remained in "denial."⁶

⁵ It is not the case that respondent considered only subjective factors in reaching its decision. See *Killebrew, supra* at 655. It is evident that respondent considered the objective circumstances of the crime, the effect on the victim and petitioner's denial together in reaching the conclusion that petitioner remains a risk to young children.

⁶ Whether there is medical evidence to support respondent's conclusion that petitioner is in "denial" is not dispositive of whether respondent properly denied parole. It is undisputed that petitioner continues to deny any involvement in the crime. Even if petitioner is not technically in "denial" in the medical sense, as discussed, *infra*, petitioner's continued refusal to acknowledge involvement in the crime contributed to respondent's conclusion that petitioner continues to

(continued...)

The department of corrections has been granted exclusive jurisdiction over the parole of prisoners. MCL 791.204; MSA 28.2274. Consequently, the judiciary's review of decisions by the parole board is significantly limited by principles of separation of powers. See Const 1963, art 2, § 2. As discussed, *supra*, our review of respondent's decision is limited to whether it clearly abused its discretion. MCR 7.104(D)(5)(b); *In re Glover*, *supra* at 129. Under that standard, we must afford the parole board substantial deference and may reverse the parole board's parole decision only when, considering the facts on which the parole board acted, there is no justification or excuse for its decision. *Id.* With that standard in mind, once an individual is convicted by a jury and sentenced, a reviewing court is hard-pressed to conclude that the parole board clearly abused its discretion in determining that the convicted felon is in denial for refusing to accept responsibility for his actions.

In the present case, petitioner continues to deny guilt. We recognize that he is within his right to do so. However, if respondent does not believe that petitioner is actually innocent and is not convinced that he is worthy of parole, it may deny parole for substantial and compelling reasons. It is evident that respondent believes petitioner committed the CSC offense. Consequently, as evidenced by respondent's statements within the parole notice, respondent views petitioner's denial of any involvement in the crime as compelling proof that he is a danger to re-offend and remains a risk to young children. We cannot say that determination was without justification or excuse.⁷ Whether members of this panel, were they on the parole board, would have believed petitioner's claim of innocence or would not have concluded that he remains a risk to young children is irrelevant to our determination on appeal. We cannot substitute our judgment for that of respondent, but instead are limited to reviewing whether respondent clearly abused its discretion. We conclude that respondent's reasons for departing from petitioner's high probability of parole guideline constitute substantial and compelling reasons under § 233e(6). Moreover, respondent's decision to deny parole was supported by competent, material and substantial evidence regarding the crime, the effect on the victim, and petitioner's refusal to accept responsibility as it relates to his likelihood to re-offend. *Oakland Co Probate Court*,

(...continued)

present a danger to the public and we must afford respondent considerable deference in that determination.

⁷ The specific issue whether a prisoner's failure to take part in required therapy as a result of his refusal to admit guilt may be considered a basis for denying parole is not before us. That issue is currently before a different panel of this Court, Docket No. 225518, on respondent's appeal from a trial court ruling on petitioner's separate mandamus action.

Furthermore, whether petitioner was properly denied admission into the required group therapy is not determinative of whether respondent has provided substantial and compelling reasons for denying parole. It is evident that to the extent respondent relied on petitioner's failure to admit guilt in denying parole, it did so on the basis that petitioner's refusal evidenced a failure to take responsibility for past actions and, therefore, a likelihood that petitioner would re-offend. It is not the case that respondent denied parole the second time on the sole basis that petitioner did not take part in therapy.

supra. Accordingly, respondent did not clearly abuse its discretion in departing from the high probability guideline and in denying parole.

Given that the circuit court erred in reversing respondent's decision to deny petitioner parole, we need not consider respondent's additional argument challenging the court's order that petitioner be paroled.

Reversed.

/s/ Gary R. McDonald

/s/ Janet T Neff

/s/ Brian K. Zahra