

STATE OF MICHIGAN
COURT OF APPEALS

GARLAND DEMPKEY,

Plaintiff-Appellee,

v

PAROLE BOARD,

Defendant-Appellant.

UNPUBLISHED

January 9, 2001

No. 224978

Mason Circuit Court

LC No. 99-000259-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 Garland Dempkey parole and ordering that petitioner be placed in a sex offender therapy program or paroled. We reverse.

In October 1991, a jury convicted petitioner of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), based on an incident involving his thirty-one-year-old stepdaughter. He was sentenced to five to fifteen years' imprisonment.

On December 9, 1999, petitioner was denied parole, despite having a "high probability of parole" score of "+10."¹ 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: "Inmate is a diagnosed pedophile, who needs to gain a greater insight and understanding of his sexually deviant behavior towards underage female [sic] in order to demonstrate that his risk of reoffending has been reduced." On petitioner's appeal to the circuit court, the court found that respondent abused its discretion in denying parole. The court ordered that petitioner be placed in a sex offender therapy program within sixty days or that petitioner be paroled and provided therapy as a condition of parole. It is from that order that respondent now appeals.

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

¹ A score of "+4" or higher constitutes a "high probability" score.

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).

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 when it ordered that petitioner be placed in a therapy program or paroled.

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”).²

In addition to that statutory framework, our Legislature mandated the development and use of parole guidelines.³ 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

² 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).

³ See 1999 AACS, R 791.7715 *et seq.*

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 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, respondent did not clearly abuse its discretion in denying petitioner parole. It is evident from the parole notice that respondent considered the circumstances of petitioner's crime. According to petitioner's oldest stepdaughter, petitioner came to her home on May 31, 1991, and forcibly raped her. The victim told police that petitioner engaged in similar sexual assaults three to four times per week since she was ten years old. The record also indicates that petitioner's two other stepdaughters claim that petitioner regularly molested them over a period of years. According to the psychological assessment performed on November 1, 1999, petitioner admits he molested the three stepdaughters for several years. The molestation began when the stepdaughters were minors and continued into adulthood. The examining psychologist diagnosed petitioner as a pedophile. While the record suggests that petitioner has not engaged in any major misconduct 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 if paroled. MCL 791.233(1)(a); MSA 28.2303(1)(a). The very same facts support the conclusion that respondent did not abuse its discretion in departing from petitioner's high probability of parole guideline under § 233e(6). Petitioner completed a nine-month sex offender therapy program and his most recent psychological assessment indicates that he recognizes the impact of his behavior on his family. However, there is no evidence in the record specifically suggesting that petitioner has gained sufficient insight into his deviant behavior so as not to present a significant risk of re-offending. Given the considerable deference we must afford respondent in parole decisions, we cannot say that respondent acted without justification or excuse in determining that petitioner has not demonstrated that he is unlikely to re-offend. Indeed, respondent's decision to deny parole was supported by competent, material and substantial evidence regarding the crime, petitioner's admitted involvement in widespread molestation, and petitioner's state of mind. See *Oakland Co Probate Court, supra*. The risk that petitioner may re-offend constitutes a substantial and

compelling reason for departure from the high probability of parole guideline. MCL 791.233e(6); MSA 28.2303(6)(6). Accordingly, respondent did not clearly abuse its discretion in denying petitioner parole.

Given that that the circuit court erred in reversing respondent's decision to deny petitioner parole, we need not consider respondent's additional arguments regarding whether the court erred in ordering that petitioner be placed in therapy or paroled.

Reversed.

/s/ Garu R. McDonald

/s/ Janet T. Neff

/s/ Brian K. Zahra