

STATE OF MICHIGAN
COURT OF APPEALS

MACOMB COUNTY PROSECUTOR,

Plaintiff-Appellee,

v

ANDREW PAUL OSANTOWSKI,

Defendant-Appellant,

and

PAROLE BOARD,

Intervening Appellant.

UNPUBLISHED

June 15, 2010

No. 291628

Macomb Circuit Court

LC No. 2009-001207-AP

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's opinion and order reversing the parole board's decision to grant him parole. We affirm.

Defendant was convicted of making a false report or threat of terrorism, MCL 750.543m, using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(f), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a two-year prison term for the felony-firearm conviction to be served consecutively to concurrent prison terms of 30 months to 20 years for the other convictions. This Court affirmed his convictions but ruled in favor of the prosecution on its cross-appeal regarding an offense variable (OV) issue. See *People v Osantowski*, 274 Mich App 593; 736 NW2d 289 (2007), rev'd in part 481 Mich 103; 748 NW2d 799 (2008). The Supreme Court reversed this Court on the OV issue and reinstated defendant's 30-month to 20-year sentence. *Osantowski*, 481 Mich at 105, 112.

The underlying facts of the criminal case are set forth in great detail in this Court's opinion in *Osantowski*, 274 Mich App at 595-600. Briefly, defendant had conversations in an Internet chat room in which he characterized himself as a "mass murderer" and communicated plans for death and terror on his family members and others, including a police officer who was a liaison officer for his school system. Defendant intimated there would be multiple killings at his high school. After his arrest, numerous weapons were found at his home, as well as a significant amount of ammunition and the components for making pipe bombs.

As defendant neared the completion of his minimum sentence, the Michigan Department of Corrections (“MDOC”) began considering him for parole. Ultimately, the parole board reviewed various reports, including a “COMPAS”¹ assessment that indicated a low probability for violence, a medium probability for recidivism, and a recommendation of low supervision. A parole guidelines worksheet indicated that defendant had a final score of six, which indicated a high probability of parole. The parole board issued a notice of decision to grant defendant parole for a period of 24 months. The board noted that defendant had accepted responsibility for his crimes. It also indicated that he had completed self-help programming, had a positive attitude about his challenges, and had identified gains from the program involvement. The board concluded that there were reasonable assurances that he “would not become a menace to society or the public safety.”

A notice of parole was sent to the prosecutor, who filed a claim of appeal in the trial court. The parole board then suspended the parole decision to reconsider the matter. A new COMPAS assessment was prepared showing that defendant’s risk probabilities for violence and recidivism were low. However, he received “highly probable” scores of eight for current violence, ten for criminal thinking observation, nine for depression and mental health, eight for financial problems, and eight for cognitive/behavioral/psychological. In regard to the latter category, defendant exhibited justifications and rationalizations for his crimes, refusal to take responsibility, and blame for the victims. The assessment noted that “a more in-depth mental health assessment” might be warranted and that defendant’s mental health history included depression and suicidal tendencies. Following issuance of this COMPAS assessment, the parole board issued a notice of decision, again granting defendant parole for 24 months.

The trial court issued an opinion and order finding that the parole board had erred in granting parole to defendant.

The parole board’s grant or denial of parole is reviewed for a clear abuse of discretion. MCR 7.104(D)(5)(b). The prosecutor has the burden of proof. MCR 7.104(D)(5). An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). We agree with the trial court that the parole board clearly abused its discretion.

MCL 791.233 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.

¹ Defendant represents that this stands for “Correctional Offender Management Profiles for Alternative Sanctions”.

In this case, there were many facts and circumstances favoring defendant. Assessments, including the COMPAS assessment, as well as the parole guidelines score, all indicated that parole was warranted. Further, there were indicators that defendant had made significant progress toward rehabilitation while in prison. He had no misconduct citations, had successfully participated in numerous programs as well as therapy, and had an excellent work record. Further, the board and defendant's therapist determined that he had accepted responsibility for his crimes.²

Nonetheless, we find that the parole board relied too heavily on defendant's conduct while incarcerated. It failed to consider the nature of defendant's crimes and recent assessments of defendant's mental health. The individual factors on the COMPAS assessment are particularly troubling, especially given the initial potential for a horrific crime. Having threatened to murder numerous people, it was of concern that the initial overall COMPAS assessment, even though changed shortly thereafter, indicated that defendant had a medium risk of recidivism. Given the substantial danger to public safety, a medium risk of recidivism would not be acceptable. Moreover, the therapy termination report also indicated that, although there were positive indicators to the contrary, there were concerns with reoffending.

The parole board did conclude in the subsequent COMPAS report that the risk of recidivism was low. But given the extreme nature of defendant's crimes, the COMPAS score of eight for current violence, ten for criminal thinking observation, nine for depression and mental health, and eight for cognitive/behavioral/psychological were cause for considerable concern. So was the indication that a scale score on the cognitive/behavioral/psychological factor and the depression and mental health factor might warrant a more in-depth mental health assessment. Also, given the implication that defendant's crimes emanated from instability and perhaps depression, a mental health/depression score of nine is disturbing, as is the score of eight for current violence. These isolated scores, even though they did not trigger an overall result that was alarming, were indeed alarming in and of themselves. They refute that there could be any "reasonable assurance" that defendant would not "become a menace to society or to the public safety." MCL 791.233(1)(a).

Defendant posits that the trial court should not have focused on the COMPAS assessment because it was only one factor in deciding whether he should be paroled. Further, the board asserts that this assessment was a tool aimed at designing a plan for defendant while on parole and should not be so heavily weighted in determining whether parole should be granted in the first instance. However, the factors identified by this assessment, regardless of the assessment's intended purpose, compel a finding that defendant was not ready to be paroled.

The parole board argues that it could not deviate from the parole guidelines absent substantial and compelling reasons. This is in fact what is provided in MCL 791.233e(6).

² Defendant's acceptance of responsibility at first blush appears inconsistent with the cognitive behavior/psychological narrative on his COMPAS assessment. However, the narrative spoke of what *the scale score* indicated, not of defendant's actual remorse. The more specific assessments are more reliable.

However, there were substantial and compelling reasons to depart, and the board abused its discretion by not acting on those reasons. Despite the “high probability of parole” arrived at pursuant to the guidelines, there were indicators of no “reasonable assurance, after consideration of all of the facts and circumstances, including [defendant’s] mental and social attitude, that [he] will not become a menace to society or to the public safety.” MCL 791.233(1)(a).

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering