

STATE OF MICHIGAN
COURT OF APPEALS

In re Parole of BRIAN LEE TODD.

PEOPLE OF THE STATE OF MICHIGAN,

Appellee,

v

PAROLE BOARD,

Appellant.

UNPUBLISHED

August 2, 2012

No. 299967

Lapeer Circuit Court

LC No. 97-005999-FC

ON REMAND

Before: K. F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

In *In re Parole of Brian Lee Todd*, 490 Mich 1001; 807 NW2d 325 (2012), our Supreme Court vacated this Court’s decision in *In re Parole of Brian Lee Todd*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2011 (Docket No. 299967), which affirmed the circuit court’s order reversing the Parole Board’s (Board) order of parole for Brian Lee Todd. The Supreme Court has remanded the case to this Court “for reconsideration in light of [*In re Parole of Elias*, 294 Mich App 507; ___ NW2d ___ (2011)].” *In re Parole of Todd*, 490 Mich at 1001. For the reasons set forth in this opinion, we reverse the circuit court’s order and reinstate the Board’s order granting parole.

I. FACTS & PROCEDURAL HISTORY

In January 1997, Brian Todd pleaded no contest to one count of first-degree criminal sexual conduct involving his five-year-old stepdaughter. On February 3, 1997, he was sentenced to 14 to 30 years’ imprisonment. Todd was first considered for parole in early 2008. His parole guideline score was +11, indicating a high probability for parole. An 11-point score requires that the Board find substantial and compelling reasons for denying parole. MCL 791.233e(6). The Board denied parole in March 2008, finding that Todd identified risk factors that were not relevant to his offense, “expressed no empathy or remorse,” and needed more insight to reduce his risk.

Todd was reevaluated for parole in 2009. Before the review, the Department of Corrections (DOC) prepared a COMPAS¹ report. The report's risk assessment showed a low violence and low recidivism probability, and recommended a low supervision level. The report also indicated that Todd had an unlikely criminal personality, that he was unlikely to lead a high-risk lifestyle or make impulsive decisions, and that he was unlikely to blame others, make excuses, or minimize the seriousness of his offense. A cognitive therapy report did not appear to be necessary. On February 26, 2009, the DOC also prepared a VASOR² score for Todd. The score indicated that Todd was an overall "moderate risk," with a re-offense risk of 20 out of 80, and a violence risk of 35 out of 80. Todd was interviewed by Board member David Fountain on May 18, 2009. In a decision dated May 29, 2009, the Board found that there was reasonable assurance that Todd would not become a menace to society or to the public safety, and granted Todd a two-year term of parole contingent on his adherence to 20 special conditions including GPS monitoring.

The Lapeer County Prosecutor challenged the grant of parole, asserting that the Board failed to obtain the psychological or psychiatric examination required for predatory or assaultive sex offenders, see Mich Admin Code, R 791.7715(5), and that the decision to grant parole was an abuse of discretion. On November 23, 2009, the circuit court remanded the matter to the Board for completion of a psychological evaluation and a more specific explanation of the Board's reasons for granting parole. On remand, psychologist William Sarasin conducted an interview with Todd and prepared an evaluation dated November 6, 2009, based on the interview and his review of Todd's records. The evaluation was positive. The Board also presented favorable affidavits from two members, who each voted to grant parole. One of them, Fountain, interviewed Todd in May 2009. Fountain indicated that, during the interview, Todd expressed remorse for his actions and showed insight into the victimization he was responsible for. Fountain also noted that Todd had a very good institutional record, with good work and educational reports, and had completed multiple self-help programs. Todd's sex offender therapy termination report was positive, his relapse prevention plan was realistic, and Sarasin's psychological report was also positive. Fountain also stated that Todd had served more than his minimum sentence, had a positive institutional adjustment, and had supportive family in the community.

After remand, the circuit court reversed the Board's order of parole. The circuit court noted that defendant had not served his minimum sentence; one of the affidavits stated that it relied on the psychological report, which was not completed until after the Board made its decision; defendant had not participated in any sex offender therapy since 2008; defendant's COMPAS assessment featured several high-risk scores; and defendant's VASOR assessment indicated that he was a moderate risk to reoffend. The circuit court also found that Sarasin's psychological evaluation was "totally inadequate" because, in part, the report did not reflect any psychological testing, and contained an inaccurate reference to defendant as "Mr. Scott."

¹ Correctional Offender Management Profiling for Alternative Sanctions.

² Vermont Assessment of Sex Offender Risk.

The Board filed an application for leave to appeal on September 2, 2010, which this Court granted. On August 25, 2011, this Court affirmed the circuit court's order despite disagreeing with portions of the circuit court's analysis.³ Our Supreme Court subsequently vacated this Court's decision and remanded "for reconsideration in light of [*In re Parole of Elias*, 294 Mich App at 507]." *In re Parole of Brian Lee Todd*, 490 Mich at 1001.

II. ANALYSIS

"Judicial review of the Board's decision to grant parole is limited to the abuse of discretion standard." *In re Parole of Elias*, 294 Mich App at 538. When the Board grants a prisoner parole, the prosecutor or the victim may appeal to the circuit court. *Id.*, citing MCL 791.234(11); *Morales v Parole Bd*, 260 Mich App 29, 35; 676 NW2d 221 (2003). The challenging party must show that the Board's decision "was in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation" or was a "clear abuse of discretion." MCR 7.118(H)(3). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *In re Parole of Elias*, 294 Mich App at 538, citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "Importantly, a reviewing court may not substitute its judgment for that of the Board." *Id.*, citing *Morales*, 260 Mich App at 48.

In *In re Parole of Elias*, 294 Mich App at 510, this Court held that the circuit court stepped outside the appropriate bounds of judicial review when it reversed the Board's decision to parole Michelle Elias. In that case, Elias was convicted of second-degree murder and in 1986 she was sentenced to 20 to 40 years' imprisonment. *Id.* at 523. Elias became eligible for parole in 2006 after serving 21 years and 3 months of her sentence. *Id.* at 524. The Board denied Elias' parole on four separate occasions even though her parole guidelines score eventually reached +15 points, "well above the score of +3 points necessary for placement in the high-probability-of-parole-category." *Id.* at 524-528. Finally, in 2010, the Board granted Elias parole and the prosecutor appealed the decision to the circuit court. *Id.* at 529-533.

The circuit court reversed the Board's decision. *Id.* at 534. The court reasoned that the Board abused its discretion because it "failed to fully consider the egregious nature of the crime," gave inadequate weight to Elias' misconducts during her prison sentence, and improperly relied on Elias' participation in and completion of therapy for assaultive offenders (AOT). *Id.* The court also considered "other factors" and concluded that the record was unclear as to whether the Board considered letters sent by the victim's relatives. *Id.* at 534-535.

This Court reversed the circuit court and noted that Elias had a parole-guidelines score of +15 points, which amounted to a "high-probability" of parole category under the guidelines. *Id.* at 539. Thus, "the Board was required to grant parole absent substantial and compelling reasons to depart from that decision." *Id.* at 542. This Court proceeded to construe the phrase "substantial and compelling" after noting that Michigan courts had not yet done so in a parole context. *Id.* This Court considered that our Supreme Court in *Babcock* defined the phrase as

³ K. F. KELLY, P.J., concurred in the result only.

“an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases.” *Id.*, quoting *Babcock*, 469 Mich at 258 (quotation and citation omitted). However, this Court reasoned that, in a parole context, some modification was necessary, stating:

Under the parole guidelines, however, the Board is not held to a requirement of absolute objectivity. *Killebrew v Dep’t of Corrections*, 237 Mich App 650, 655; 604 NW2d 696 (1999). Rather, the Board must consider “all of the facts and circumstances, including the prisoner’s mental and social attitude.” MCL 791.233(1)(a). “An evaluation of a prisoner’s mental and social attitude involves a subjective determination for which the parole guidelines cannot account.” *Killebrew*, 237 Mich App at 655. As the Legislature has directed the Board to consider certain subjective factors in making a parole decision, reliance on the objective analytical process underlying *Babcock*’s definition of “substantial and compelling” reasons for a sentencing departure would be misplaced. The Board may identify reasons “that keenly or irresistibly grab[] [its] attention” and are “of considerable worth in deciding” whether it should deny parole to a prisoner who was otherwise assessed as having a high chance of parole . . . And, if those substantial and compelling reasons also qualify as “objective and verifiable,” a reviewing court would be more apt to affirm the Board’s decision. [*Id.* at 542-543.]

In holding that the Board did not abuse its discretion, this Court noted that the Board personally interviewed Elias and performed a full review of her file including numerous reports prepared for its consideration. *Id.* at 539. In particular, the DOC provided the Board with a parole eligibility report, which was compiled in accord with applicable statutory and regulatory procedures for evaluating Elias’ probability for parole. *Id.* The report detailed the documents in Elias’ prison file and was prepared in accordance with procedures outlined in the DOC directives. *Id.* Further, the DOC prepared a COMPAS risk assessment, which indicated that Elias had a “low risk” of engaging in violent or recidivist behavior, and indicated that Elias had a positive mental-health outlook. *Id.* at 539-540. A narrative summary indicated that Elias lacked character traits that lead to criminal behavior and, pursuant to the Michigan Prisoner ReEntry Initiative (MPRI), the DOC prepared a transition accountability plan (TAP) with Elias to prepare her for the possibility of release. *Id.* at 540. Moreover, Elias participated in AOT therapy, where, although she did not complete her therapeutic objectives, she displayed “better understanding and more effective management of her criminal behaviors.” *Id.* at 540-541. Elias accepted responsibility for her actions, she had financial and emotional support from her family, and she was 48 years old and had spent 26 years in prison. *Id.* at 546-547. In addition, this Court noted that the Board did not abuse its discretion in granting parole simply because previous panels denied Elias parole based on the same evidence. *Id.* at 546.

This Court ultimately concluded that the circuit court overstepped the proper bounds of judicial review and explained:

Rather than affording any meaningful deference to the Board, the circuit court substituted its determination that substantial and compelling reasons mandated denial of Elias’s parole. In reaching this result, the circuit court relied

excessively on static factors such as the nature of the sentencing offense and Elias's former prison misconduct. [*Id.* at 543-544.]

The prosecutor and the circuit court mistakenly assume that unchangeable factors related to past events, such as the sentencing offense, must be given greater consideration when formulating a COMPAS risk assessment and in scoring the parole guidelines. Nothing in the statutes, regulations, or COMPAS guidelines supports that assumption. *Rather, the Board must also look to the prisoner's rehabilitation and evolution throughout his or her incarceration.* Giving the various static and dynamic factors similar weight allows the Board to effectuate both the punitive and rehabilitative features of the corrections system. As noted by our Supreme Court in *People v Schultz*, 435 Mich 517, 531-532; 460 NW2d 505 (1990),

“[f]our factors may be taken into consideration to determine the appropriateness of a sentence: rehabilitation, deterrence, the protection of society, and punishment. . . .

* * *

. . . [T]he ultimate goal of sentencing in this state is not to exact vengeance, but to protect society through just and certain punishment reasonably calculated to rehabilitate and thereby convert bad citizens into good citizens.” [*Id.* at 544-545 (emphasis added).]

In this case, having reviewed the record in light of *In Re Parole of Elias*, we conclude that the circuit court overstepped the proper bounds of judicial review when it held that the Board abused its discretion in ordering parole. Here, the Board conducted a personal interview with Todd and reviewed a multitude of reports and scored the guidelines in accord with the legislative and regulatory procedures. The Board did not abuse its discretion or violate the Constitution, or any regulation, rule or statute. Like in *In re Parole of Elias*, in this case, rather than giving the Board deference, the circuit court determined on its own that there were substantial and compelling reasons to deny Todd parole. This was improper.

The circuit court took issue with the psychological evaluation; however, as we previously concluded, although the report contained a typographical error, the report contained numerous correct references to Todd's name, and nothing in the report suggested that the evaluation was conducted as a mere technical formality. With respect to the court's reference to Todd's minimum sentence, the prosecutor did not contest that Todd had served his minimum sentence and was eligible for parole and the court failed to consider whether Todd was awarded for good time or had received disciplinary credits. See *In re Parole of Elias*, 294 Mich App at 510, citing MCL 791.233(1)(b) through (d) (“[a] prisoner sentenced to a term of years comes under the jurisdiction of the Board when he or she has served the minimum sentence, *adjusted for any good time or disciplinary credits*” (emphasis added)). Moreover, nothing in the relevant statutory or administrative factors that the Board is required to consider supports that the fact that a prisoner has only served his minimum sentence amounts to a substantial and compelling reason

to deny parole. Similarly, Fountain's reference to the psychological evaluation that was prepared after the Board rendered its decision does not support that the Board abused its discretion.

With respect to the circuit court's concern that Todd's many negative aspects in the parole eligibility report were substantially outweighed by the high score awarded to Todd for his good behavior, while we previously agreed with the circuit court that the Board placed too much emphasis on Todd's good institutional behavior, having reviewed the circuit court's analysis in light of *In re Parole of Elias*, we now conclude that the circuit court overstepped the proper bounds of judicial review in reaching this conclusion.

As previously noted, the ultimate goal of sentencing in this state is not to exact vengeance, but to protect society through just and certain punishment reasonably calculated to rehabilitate and thereby convert bad citizens into good citizens, *Id.* at 544-545. Additionally, the DOC "specifically intended to give a potential parolee positive treatment under the guidelines for maintaining a clean prison record over an extended period." *In re Parole of Elias*, 294 Mich App at 544. This focus on institutional conduct is required pursuant to Mich Admin Code R 791.7716(3)(c), and, in the DOC's judgment, exemplary prison conduct does relate to the risk of recidivism. *Id.* Even if we were to place less emphasis on prison conduct than the Board did, this does not establish an abuse of discretion on the part of the Board. Because Todd's score here resulted in a "high probability of parole," the Board had to find reasons that "keenly and irresistibly" would draw one's attention in order to deny him parole. *Id.* at 542-543. In other words, the Board was required to parole Todd unless it found a valid reason not to do so. The fact that Todd had good institutional conduct certainly would not qualify as a reason to deny parole and the Board did not grossly under-analyze or minimize possible negative factors when it considered Todd's institutional conduct. As such, the Board's treatment of Todd's good conduct did not amount to an abuse of discretion.

We also disagree with the circuit court's conclusion that the Board gave improper weight to several negative factors in Todd's COMPAS and VASOR reports. Here, the Board considered the reports in their entirety and it imposed special conditions on Todd's parole that, by their very nature, were designed to address Todd's negative risk factors. In particular, the Board ordered Todd not to have any direct or indirect contact with any individual age 17 or under and ordered Todd not to reside in any home where such child lived. The Board prohibited Todd from possessing any sexually stimulating material, prohibited Todd from residing, working, or being within 1,000 feet of any student school safety zone, prohibited Todd from owning any photography equipment, prohibited Todd from accessing sexually-oriented entertainment, and prohibited Todd from having any contact with his former wife and her immediate family. Absent prior approval from a field agent, the Board ordered Todd to avoid relationships with persons who had children under the age of 17, prohibited Todd from being within 500 feet of any park, playground, swimming pool, arcade or other places where children normally congregate, prohibited Todd from possessing any device capable of connecting to the Internet or residing in a residence with such equipment, and prohibited Todd from entering bars or possessing alcohol. Additionally, the Board ordered Todd to complete sexual offender treatment as directed by his field agent and required Todd to waive confidentiality and allow information from the treatment to be disclosed to the field agent. The Board set a strict curfew for Todd and ordered Todd to submit to GPS monitoring and register as a sex offender. And, the Board's order of parole was contingent on Todd's completion of the DOT's MPRI InReach Phase training program.

Moreover, in addition to imposing numerous special conditions on Todd's parole, the Board considered a wealth of other information, scored the parole eligibility guidelines, and personally interviewed Todd before it decided to grant parole. Specifically, the Board considered the parole eligibility report, which the DOT prepared in accord with applicable statutory and regulatory guidelines. The report indicated that Todd had no prior felonies, was assigned the lowest security level in the prison system, his last misconduct was in 1999, he had "good work and education reports," and he completed his GED, and worked in food service where he received "good work reports." The report indicated that Todd did not have any substance abuse problems and recommended psychological counseling. As a condition of parole, the Board ordered Todd to participate in sexual offender therapy as directed by his field agent. The report listed 14 different self-help programs that Todd completed during his sentence, and indicated that Todd had completed all facility recommended programs with two-thirds completed above average with "good reports." The report indicated that Todd listed placement with his father as his first living choice and alternatively listed community placement.

The Board also considered Todd's therapy termination report, which noted that Todd attended 44 sessions of therapy, where he "participated in group discussions in a meaningful way and provided appropriate feedback." Additionally, Todd made good progress toward his individualized goals, took responsibility for his actions, and expressed remorse for his conduct. His therapist further indicated that Todd's relapse prevention plan was "both realistic and well constructed." Following completion of the therapy, Todd continued to update his relapse prevention plan. The therapist indicated that Todd would benefit from additional individual therapy upon his parole, and indicated that "high risk" behavior included relationships with women with minor children and unsupervised contact with minor children "inside and outside of his family." In granting parole, the Board ordered Todd to participate in sexual offender therapy as directed by his field agent and ordered Todd not to reside in any home where minor children lived, to avoid areas where children congregate, and to avoid relationships with persons who had minor children.

The Board considered the COMPAS report, which indicated Todd had a low risk for violence, a low risk for recidivism, and recommended a low supervision level. The report indicated that Todd had an unlikely criminal personality, that he was unlikely to lead a high-risk lifestyle or make impulsive decisions, and that a cognitive therapy report was not necessary. Furthermore, the VASOR assessment indicated that Todd was a moderate risk with a re-offense score of 20 of 80 and a violence score of 35 of 80. While the VASOR assessment indicated Todd was a moderate risk, and while the COMPAS report contained several negative factors including an indication that Todd may need to limit or structure his contact with certain family members, as noted above, the Board considered this information and imposed conditions on Todd's parole that address these negative risk factors.

In addition to the reports, a Board member conducted a personal interview with Todd where he expressed remorse and showed insight into the victimization he was responsible for. Todd indicated that therapy gave him understanding about the emotional and physical trauma that he caused.

After considering all of the information, scoring the guidelines, and conducting the interview, the Board granted parole and properly articulated reasons in support of its decision.

The Board indicated that Todd expressed remorse and accepted responsibility, that Todd had good block reports, recognized good behavior, had no prior parole violations, completed his GED, and completed vocational training and counseling. The Board noted that Todd had adequate involvement in work assignments, completed self-help programs, and identified gains from his involvement in the programs. In addition, the Board noted that Todd recognized the need to continue sexual offender therapy upon his release and saw value in education. The Board found that Todd had a positive attitude, and accepted challenges ahead. The Board indicated that Todd maintained family support in the community and that his placement was acceptable. While the COMPAS report indicated that it was “highly likely” that Todd needed to structure or minimize contact with “certain” family members, the Board considered the report before it granted parole and, as previously noted, it placed conditions on the parole that were designed to address Todd’s negative risk-factors. That the Board did not find Todd’s family criminality to be a “substantial and compelling” reason to deny parole, in and of itself, did not amount to an abuse of discretion. *In re Parole of Elias*, 294 Mich App at 538; *Babcock*, 469 Mich at 269.

In sum, we conclude that the Board properly considered Todd’s entire record and acted within the scope of its discretion when it granted parole consistent with Todd’s parole guidelines score. The circuit court erred when it focused on the negative aspects of the record evidence in order to substitute its determination that substantial and compelling reasons existed that mandated denial of Todd’s parole. *In re Parole of Elias*, 294 Mich App at 538-539. Accordingly, we reverse the circuit court’s order and remand for reinstatement of the Board’s order granting Todd parole.

/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello