STATE OF MICHIGAN

COURT OF APPEALS

In re Parole of DAVID GROVES

LAPEER COUNTY PROSECUTOR,

Appellee,

v

DAVID GROVES,

Defendant,

and

PAROLE BOARD,

Appellant,

and

STATE OF MICHIGAN,

Amicus Curiae.

UNPUBLISHED
July 20, 2010

No. 294771
Lapeer Circuit Court
LC No. 01-007281-FH

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

The parole board appeals by leave granted the circuit court's order reversing the board's decision to parole defendant. We reverse.

Defendant pleaded guilty to two counts of first-degree criminal sexual conduct, MCL 750.520b, involving his nine-year-old stepdaughter. On June 24, 2002, he was sentenced to seven to thirty years' imprisonment.

Defendant successfully completed sex offender programming, and he first became eligible for parole on April 5, 2008. His parole guideline score indicated an average probability

of parole. In a decision mailed November 9, 2007, the parole board denied parole, noting that defendant was currently serving a sentence for CSC, he demonstrated pedophilic tendencies, the crime involved a child family member, and defendant violated a position of trust or authority. Defendant was again denied parole for the same reasons in a decision mailed December 22, 2008.

On February 11, 2009, defendant was assessed using the Vermont Assessment of Sex Offender Risk (VASOR) system. The system is specifically designed to determine the risk of paroling individuals convicted of sex offenses. Defendant's VASOR score showed a low overall risk. Based on defendant's VASOR score, the parole board reconsidered his case and, in a decision mailed June 12, 2009, granted defendant parole contingent on his successful completion of MPRI InReach Phase.

The Lapeer County Prosecutor appealed the parole board's decision to the circuit court, asserting that the board failed to consider the strong community opposition to defendant's parole, as reflected by a petition against the parole signed by 290 people. The prosecutor also argued that the board failed to consider legislative opposition to parole of sex offenders that was indicated by 2006 PA 169, imposing a minimum sentence of 25 years for first-degree criminal sexual conduct. After hearing argument on September 21, 2009, the court issued its decision from the bench. The court stated its belief that there was "no cure for criminal sexual conduct." The court also believed that there was significant community objection to the parole, and that the amended statute reflected the will of the people regarding the proper minimum sentence for criminal sexual conduct. The court concluded:

> The court is satisfied that the parole board has failed to properly consider the community objection, failed to consider the will of the people regarding the penalty for criminal sexual conduct, and failed to consider the threat to the community. Simply because he sat through a sexual offender class and has complied with prison requirements does not mean that he is able to control his behavior or change the overwhelming compulsion to take advantage of those who cannot protect themselves.
>
> The court is satisfied that any reasonable person, including this court, would find, under the circumstances, there is not sufficient justification or excuse for the ruling. The court denies the parole board decision to release Mr. Groves.

The circuit court entered its order reversing the decision of the parole board on October 6, 2009. The parole board filed its application for leave to appeal on October 27, 2009. By order issued December 21, 2009, leave to appeal was granted, as was the attorney general's motion for leave to file an amicus curiae brief. *In re Parole of David Groves*, unpublished order of the Court of Appeals, entered December 21, 2009 (Docket No. 294771).

First, the parole board argues that the circuit court erred in concluding that the board clearly abused its discretion by failing to consider public opposition to defendant's parole because (a) the parole board did consider the public opposition information, as well as the entire record, but (b) the parole board was not even required to consider public opposition before reaching its decision. We agree.

A parole board's decision whether to grant a prisoner parole is reviewed for a clear abuse of discretion. *In re Parole of Glover (After Remand)*, 241 Mich App 127, 129; 614 NW2d 714 (2000). An abuse of discretion is found when an unprejudiced person, considering the facts on which the decisionmaker acted, would find that there is no justification or excuse for the ruling. *Id*. The board's discretion is limited by statutory requirements, and whether it abused its discretion must be determined in light of the record and the statute. *Killebrew v Dep't of Corrections*, 237 Mich App 650, 652; 604 NW2d 696 (1999). The court may not substitute its judgment for that of the parole board. *Id*. at 653.

The Legislature has conferred on the Department of Corrections (DOC) exclusive jurisdiction over paroles. MCL 791.204(b); *Hopkins v Michigan Parole Bd*, 237 Mich App 629, 641; 604 NW2d 686 (1999). Pursuant to MCL 791.233e(1), the DOC was directed to develop parole guidelines, that are consistent with MCL 791.233(1)(a), to govern the exercise of the parole board's discretion as to the release of prisoners. MCL 791.233(1)(a) provides:

> (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 became a menace to society or to the public safety.

The purpose of the parole guidelines are to "assist the parole board in making release decisions that enhance the public safety." MCL 791.233e(1). In developing the parole guidelines, certain factors were to be considered, including the offense for which the prisoner was incarcerated, the prisoner's institutional program performance, the prisoner's institutional conduct and prior criminal record, as well as other relevant factors as determined by the DOC. MCL 791.233e(2). Public opinion or public opposition was not one of the factors deemed a required consideration. See MCL 791.233e(2). Neither the prosecution nor the amicus set forth any legal support for the position that public opinion or public opposition to parole is a mandatory consideration of a parole decision and we could find no such support.

The parole factors to be considered are set forth at 1999 AACS, R 791.7715 *et al* and, consistent with the Legislative directive, 1999 AACS, R 791.7715(1) provides that "a prisoner shall not be released on parole until the parole board has considered all relevant facts and circumstances, including the prisoner's probability of parole as determined by the parole guidelines set forth in R 791.7716 and any crime victim's statement provided under . . . § 780.771 of the Michigan Compiled Laws." MCL 780.771(1) provides that "[a] victim has the right to address or submit a written statement for consideration by a parole board member or a member of any other panel having authority over the prisoner's release on parole." Thus, although a victim statement is a specific factor that must be considered by the parole board, public opposition or public opinion as to parole is not a required consideration. After review of the parole factors, R 791.7715 *et al*, it appears that they involve matters that would lead to a determination as to whether the objective of the penal system—rehabilitation—has been in a real sense achieved in the case of the specific prisoner. That is, just as sentencing is individualized, *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000), so too are parole decisions.

In this case, however, it appears that the parole board was aware of the public opposition to defendant's release. The record evidence included a petition signed by members of the public that requested the "parole board to keep Mr. Groves incarcerated for the maximum sentence allowed." The parole board has repeatedly indicated that it gave due consideration to the opposition petition as part of its nonpublic record. The petition was kept "nonpublic" because it included the names, addresses, and telephone numbers of those that signed the petition. The parole board was not required to make a specific finding on the record regarding its consideration of the public opposition to its decision to grant defendant parole. Our Supreme Court, in *Glover v Parole Bd*, 460 Mich 511, 525; 596 NW2d 598 (1999), held that the parole board is not required to provide extensive findings of fact and conclusions of law, nor is it required to state legal opinions when it grants or denies parole. Rather, to comply with MCL 791.235(12), the board should simply indicate what it relied on in reaching its decision. While MCL 791.235(12) requires the board to state reasons for denying parole, there is no similar provision requiring the board to state specific reasons for granting parole.

Further, it appears that the circuit court improperly substituted its judgment for that of the parole board. The court stated its belief that sexual offenders can never be rehabilitated, and cannot successfully resist the compulsion to reoffend. Thus, it found that the parole board must not have fulfilled its duty to consider the threat to the community. The parole board argues that it did fulfill its duty to consider the threat to the community as illustrated by the numerous conditions of parole designed to protect the public. We agree with the parole board. It is apparent from the record evidence that the parole board considered several factors relating to the potential threat to the community including defendant's successful completion of sex offender therapy and his VASOR score showing a low risk of reoffending. And, the several conditions of defendant's parole addressed the potential threat to the community in that defendant was required to: successfully complete the MPRI program, continue sex offender treatment, submit to GPS monitoring, and avoid any and all contact with individuals 17 years old or under, including avoiding all locations and areas "primarily used by individuals age 17 or under." Defendant was prohibited from accessing the internet. And defendant was prohibited from possessing photographic equipment, as well as children's clothing, toys, games, and videos.

In summary, it appears that the parole board considered the community opposition to defendant's parole—although it was not a mandatory factor of consideration—as well as the threat to the community; thus, the circuit court's conclusions to the contrary were erroneous. Accordingly, the court's holding that the parole board abused its discretion, premised on these grounds, is reversed.

Second, the parole board argues that the circuit court erred in concluding that the board abused its discretion by failing to consider a later-enacted minimum sentence requirement with regard to its parole decision. Again, we agree.

Neither the prosecutor nor the circuit court identified a lawful basis for imposing the requirement that the board consider a post-conviction change in the sentencing requirements for first-degree criminal sexual conduct. There was no legislative intent to impose stricter sentencing at the time of defendant's conviction. Defendant completed his minimum sentence, and the parole decision cannot be based on an ex post facto decision to increase his punishment.

Under MCL 791.233(1)(a), the decision must be based on whether the board had reasonable assurance that defendant will not become a menace to society or to the public safety. Because the parole board was not required to consider the change in the law since defendant's conviction, the circuit court erred in holding, on the basis of the board's alleged failure to do so, that the board's decision was without justification or excuse.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald