

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

RICHARD E. MESERVE,

Petitioner,

v

File No. 13-29720-AH
HON. PHILIP E. RODGERS, JR.

MICHIGAN PAROLE BOARD,
DEPARTMENT OF CORRECTIONS,
PUGSLEY CORRECTIONAL FACILITY,
and WARDEN SHIRLEE HARRY,

Respondents.

John C. Secrest (P41505)
Attorney for Petitioner

pc: Michigan Parole Board
Michigan Department of Corrections
Shirlee Harry

DECISION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner was charged with one count of Criminal Sexual Conduct, Third Degree, pursuant to MCL § 750.520d(1)(c). After pleading guilty, Petitioner was sentenced on September 2, 2008, to serve 48 to 180 months with the Michigan Department of Corrections (MDOC).

On April 20, 2012, the Michigan Parole Board (hereinafter “Board”) granted the Petitioner a parole term of 24 months, pending investigation and approval of proposed placement and contingent upon the successful completion of the Michigan Prisoner ReEntry Initiative (MPRI) InReach Phase.¹ The projected parole date provided by the Board was August 28, 2012.

¹ *People v Armisted*, 295 Mich App 32, 40; 811 NW2d 47 (2011) [Holding that even after parole is granted, it is not unreasonable to impose additional requirements before parolee is actually released.]

“InReach Phase” refers to completion of in-reach programming provided to prisoners eligible for parole. See *In re Parole of Haeger*, 294 Mich App 549, 567; 813 NW2d 313 (2011) citing DOC Policy Directive 03.02.101.

On August 9, 2012, the Board suspended Petitioner's parole in order to consider information received after the original parole release decision.² Subsequently, on September 12, 2012, the Board rescinded the April 2012 parole order, suspended parole reconsideration for 24 months and recommended corrective action that may facilitate release.

On or about February 5, 2013, this Court received a Petition for Writ of Habeas Corpus, challenging the legality of Petitioner's incarceration at Pugsley Correctional Facility in Grand Traverse County. The Petition states that the Board improperly, and without due process of law, revoked Petitioner's parole and failed to provide counsel during the revocation process.³ Furthermore, the Petition alleges that the Board failed to state a substantial and compelling reason as to why it lacks reasonable assurance that the prisoner will not become a menace to society or to the public safety. On March 8, 2013, the Court received a Supplemental Brief in Support of Petition for Writ of Habeas Corpus.⁴

Pursuant to MCL § 600.4301 *et seq*:

[A]n action for habeas corpus to inquire into the cause of detention may be brought by or on the behalf of any person restrained of his liberty within this state under any pretense whatsoever, except...persons convicted, or in execution, upon legal process, civil or criminal [and] persons committed on original process in any civil action on which they were liable to be arrested and imprisoned, unless excessive and unreasonable bail is required.⁵

Thus, habeas corpus cannot serve as a substitute for an appeal or writ of error and cannot be used to review the merits of a criminal conviction.⁶ MCL § 600.4310(3) prohibits a habeas action by or on behalf of "persons convicted, or in execution, upon legal process, civil or criminal," and is not a means of testing the conditions of admittedly lawful custody.⁷

² The "Other New Information Received" was a letter dated July 31, 2012, from Alpena County Prosecutor's Office victim advocate Nancy Szejbach (hereinafter the "Szejbach Letter.")

³ *Morales v Parole Bd*, 260 Mich App 29, 34-40; 676 NW2d 221 (2003) [In the event the Board has denied a prisoner parole or revoked a prisoner's parole exclusively on the basis of race, religion, natural origin, then a complaint of habeas corpus would be proper.]

⁴ The Supplement Brief states, in its entirety, "Petitioner relies upon the similar facts and case law of the following case, *Huron County Prosecutor v Philip J Paquette and Parole Board*, Mich App. No. 301140, (Nov. 2011)" and attaches the relevant case.

⁵ MCL § 600.4307; § 600.4310.

⁶ *Cross v Dep't of Corrections*, 103 Mich App 409; 303 NW2d 218 (1981).

⁷ *Harris v Nelson*, 394 US 286; 89 S Ct 1082; 22 L Ed 2d 281 (1969); *Walker v Wainwright*, 390 US 335; 88 S Ct 962; 19 L Ed 2d 1215 (1968), rehearing denied, 390 US 1036; 88 S Ct 1420; 20 L Ed 2d 299.

A prisoner enjoys no constitutional or inherent right to be conditionally released from a validly imposed sentence.⁸ A prisoner comes under the jurisdiction of the Board after serving his minimum sentence, adjusted for good time or disciplinary credits.⁹ Statutorily mandated parole guidelines form the backbone of the parole-decision process and the guidelines attempt to quantify various factors relevant to the parole decision in order to inject more objectivity and uniformity into the parole process, but ultimately matters of parole lie solely within the broad discretion of the Board and the freedom enjoyed by a paroled prisoner is a limited freedom.¹⁰ Each member of the Board has the discretion to consider the evidence and make a reasonable choice regarding which version of evidence to believe, and it is not an abuse of discretion for two fact-finders to reach different conclusions from the complex and potentially conflicting information within a prisoner's record.¹¹ The granting of parole is conditioned upon the inmate not being released until satisfactory evidence, pursuant to statute, is provided to the Board.¹²

In situations where the Board enters an order granting parole, either the prosecutor of the county from which the prisoner was committed or the victim of the crime may apply for leave to appeal the Board's decision in the circuit court.¹³ After the Board enters said order, it retains discretion to rescind that order for cause before the prisoner is released and after the Board conducts an interview with the prisoner.¹⁴ Furthermore, the entrance of such an order does not grant the prospective parolee a constitutionally protected liberty interest until the order is effectuated.¹⁵

⁸ *Jones v Dep't of Corrections*, 468 Mich 646; 664 NW2d 717 (2003).

⁹ *In re Parole of Hill*, 298 Mich App 404; ___ NW2d ___ (2012).

¹⁰ *Jones v Dep't of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003); *Haeger, supra*.

¹¹ *Haeger, supra*.

¹² *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 154; 532 NW2d 899 (1995).

¹³ MCL § 791.234(11); *In re Parole of Elias*, 294 Mich App 507, 538; 811 NW2d 541 (2011). A prisoner may respond to the application for leave to appeal through retained counsel or in propria persona, although no response is required, however, a prisoner has no right to appeal the Board's decision to deny parole. MCR 7.118(D)(3)(b)(i); see also *Morales v Parole Bd, supra*.

¹⁴ MCL § 791.236(2).

¹⁵ US Const, Am XIV [Potential parolee who remains in prison has no liberty interest to protect for due process purposes]; *Hill, supra* citing *Greenholtz v Inmates of Neb Penal & Correctional Complex*, 442 US 1, 9; 99 S Ct 2100; 60 L Ed 2d 668 (1979). [A potential parolee, while imprisoned, has not yet acquired a protected liberty interest. The United States Supreme Court found, and Michigan courts have affirmed, that parole release and parole revocation are different. The Michigan Court of Appeals has held that, "There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires. A prisoner awaiting release on parole remains confined and thus subject to all of the necessary restraints that inhere in a prison. The mere hope that the benefit of parole will be obtained is too general and uncertain, and therefore, is not protected by due process."]

The Legislature has included a mechanism in the parole process allowing a prosecutor or victim to appeal a Board decision granting parole in the circuit court.¹⁶ This discretionary review process is however, distinct from parole revocation proceedings.¹⁷ Courts have recognized that:

[A] parole-release decision is more subtle and depends on an amalgam of elements, some of which are factual, but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release.¹⁸

Therefore, during circuit court review, the court is limited to the abuse-of-discretion standard in determining whether the Board abused its discretion and/or violated any constitutions, statutes, administrative rules or other regulations in reaching its decision.¹⁹ An abuse of discretion occurs when the Board's decision falls outside the range of reasonable and principled outcomes.²⁰ However, a reviewing court may not substitute its judgment for that of the Board.²¹ Conversely, when the Board denies granting parole or rescinds an order granting parole for cause before the prisoner is released, there is no appeal of right.²²

In this case, the Petitioner argues that the "Board revoked petitioner's parole and failed to provide counsel during the revocation process...revoked Petitioner's parole without due process of law...[and] failed to state a substantial and compelling reason [in writing]." This Court disagrees.

As indicated above, parole revocation is distinct from a discretionary parole process that incorporates circuit court review.²³ In *Hill*, the Court noted:

In sum, given that an appeal to the circuit court is part of the parole process, an inmate's constitutional liberty interest is not triggered when the Board enters its order granting parole. Instead, such interest is triggered after the parole process has run its course and the inmate is released from prison. [The Defendant did] not have a constitutionally protected liberty interest when the Board granted him parole such that he was entitled to appointed counsel during the pendency of the prosecutor's appeal.²⁴

¹⁶ MCL § 791.234(11); *Hill, supra*.

¹⁷ *Hill, supra*.

¹⁸ *Id.* citing *Greenholtz, supra*.

¹⁹ *Elias, supra* at 538; *Haeger, supra*.

²⁰ *Id.* [In parole cases, an abuse-of-discretion will generally be found where an unprejudiced person, considering the facts on which the decision maker acted, would say there is no justification or excuse for the ruling.]

²¹ *Haeger, supra*.

²² MCR 7.118.

²³ *Hill, supra*.

²⁴ *Id.*

Similarly, the Petitioner here remained in MDOC custody prior to the Board rescinding its order. Therefore, the Petitioner did not have a constitutionally protected liberty interest entitling him to appointed counsel during the revocation/rescission process.

Pursuant to MCL § 791.233e(6), the parole board may depart from the parole guidelines 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. However, a departure must be for substantial and compelling and reasons and must be stated in writing.²⁵

After noting that Michigan courts had not yet defined the phrase “substantial and compelling” in a parole context, the Court of Appeals found:

Under the parole guidelines, the Board is not held to a requirement of absolute objectivity. Rather, the Board must consider ‘all of the facts and circumstances, including the prisoner’s mental and social attitude.’ An evaluation of a prisoner’s mental and social attitude involves a subjective determination for which the parole guidelines cannot account. 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. [*People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), defined ‘substantial and compelling’ as ‘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.’] 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.²⁶

In re Parole of Elias, the Defendant was convicted in 1985 of second-degree murder and possession of a firearm during the commission of a felony.²⁷ The Defendant first became eligible for parole in 2006.²⁸ The Board noted that, since her imprisonment, the Defendant had earned her GED, completed a vocational training program, worked full-time, voluntarily participated in several substance abuse programs and completed group therapy for assaultive

²⁵ MCL § 791.233e(6)

²⁶ *In re Todd*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2012 (Docket No. 299967).

²⁷ *Supra*, at FN 13.

²⁸ *Id.* at 523.

offenders (AOT).²⁹ The AOT report stated that Defendant displayed honesty and was able to describe what led to her crimes and to accept responsibility for those acts.³⁰ After interviewing the Defendant, the Board found that she minimized her responsibility by rationalizing she had been under the influence when she committed her crimes and it denied her parole.³¹

In 2007, the Defendant's parole-guideline score had improved such that she was placed in the high-probability-of-parole category.³² After being interviewed, the Board indicated that the Defendant had accepted responsibility for her crime and felt remorse for her actions.³³ However, the Board again denied parole, stating as its substantial and compelling reasons for departure that the Defendant did not demonstrate enough insight into her crime and had showed no empathy for her victim.³⁴ In 2008, the Board denied parole because the Defendant minimized her criminal responsibility, failed to comprehend the seriousness of her offense and related little interest in the victim.³⁵ In 2009, the Board denied parole because the Defendant demonstrated a lack of insight into her behavior and emotions.³⁶ Each time the Board was required to provide substantial and compelling reasons for denying parole to a high-probability parole candidate, its explanation was limited, but succinctly stated.

The Board's rationale in this case is comparable and equally concise and to the point. According to the September 12, 2012 Decision, after receipt of the Szejbach Letter and further review of the Petitioner's file, the Board felt that the Petitioner needed to develop more personal insight prior to being paroled, specifically stating "P needs to develop more insight into sexual behaviors." The Recommendations for Corrective Action included demonstrating responsible behavior by earning positive reports in any applicable programs, demonstrating responsible behavior by avoiding situations which result in misconduct citations, developing a positive work record, and complying with any recommendation for psychological screening and/or therapeutic programming when referred.

²⁹ *Id.* at 524.

³⁰ *Id.* at 525.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 525-526.

³⁴ *Id.*

³⁵ *Id.* at 528.

³⁶ *Id.*

This Court, after reviewing the Board's decision to rescind parole, does not find that the Board abused its discretion or violated any constitutions, statutes, rules or regulations. The Board's decision to rescind parole did not fall outside the range of reasonable and principled outcomes and this Court finds that the "substantial and compelling reason" provided also qualifies as objective and verifiable.

The Board met the requirements imposed under MCL § 791.233e(6), Petitioner was not entitled to counsel during this particular portion of the parole review process and his due process rights were not infringed, therefore, his arguments are meritless. Furthermore, a habeas action here is improper because the Petitioner was legally convicted and is lawfully incarcerated. For the reasons stated herein, the Petition for Writ of Habeas Corpus is denied.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge