

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

KEVIN THOMAS MERKEL,

Petitioner,

v

File No. 13-29809-AH
HON. PHILIP E. RODGERS, JR.

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

Respondents.

John C. Secret (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 Home Invasion, Second Degree, pursuant to MCL § 750.110a(3) and one count of Arson, First Degree, pursuant to MCL § 750.72. After being found guilty by a jury, Petitioner was sentenced on July 16, 2001, to serve 84 to 240 months with the Michigan Department of Corrections (MDOC).

On August 16, 2011, the Petitioner was paroled and moved into transitional housing. On November 13, 2011, the Petitioner breached the terms of his parole by consuming alcohol and violating a no-contact order.¹ Furthermore, the Petitioner engaged in assaultive, abusive, threatening and/or intimidating behavior after being taken into custody by law enforcement.²

¹ The Petitioner's Parole Order prohibited use or possession of alcoholic beverages or other intoxicants under Special Condition 2.0 and prohibited him from having contact with Britt Oliver and/or being within 500 feet of her residence or place of employment pursuant to Special Condition 4.5.

² Assaultive, abusive, threatening and/or intimidating behavior are prohibited under Standard Condition 4 of Petitioner's Parole Order.

At his arraignment on December 9, 2011, the Petitioner pled guilty to Counts I and III, and pled *nolo contendere* to Count II.³ On January 19, 2012, the Michigan Parole Board (hereinafter “Board”) revoked the Petitioner’s parole, with a reconsideration date of November 12, 2012. On July 15, 2012, the Board issued a Notice of Decision denying Petitioner parole for 24 months, with a reconsideration date of November 12, 2014.⁴

On or about June 11, 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 unjustly, and without due process of law, revoked Petitioner’s parole.⁵ 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.

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.⁶

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.⁷ 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.⁸

A prisoner enjoys no constitutional or inherent right to be conditionally released from a validly imposed sentence.⁹ A prisoner comes under the jurisdiction of the Board after serving his

³ The Parole Violation Arraignment Summary and Parole Board Action states that, “In exchange for...waiving the appearance of the Parole Agent, any procedural argument, and pleading No Contest to Count 2; OFP **will recommend a six (6) month reparole**, effective November 13, 2011.” (Emphasis added.)

⁴ The Board extended the term of parole denial after Petitioner received a ticket for fighting in June 2012.

⁵ *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.]

⁶ MCL § 600.4307; § 600.4310.

⁷ *Cross v Dep’t of Corrections*, 103 Mich App 409; 303 NW2d 218 (1981).

⁸ *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.

⁹ *Jones v Dep’t of Corrections*, 468 Mich 646; 664 NW2d 717 (2003).

minimum sentence, adjusted for good time or disciplinary credits.¹⁰ 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.¹¹ 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.¹² The granting of parole is conditioned upon the inmate not being released until satisfactory evidence, pursuant to statute, is provided to the Board.¹³

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.¹⁴ 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.¹⁵ Furthermore, the entrance of such an order does not grant the prospective parolee a constitutionally protected liberty interest until the order is effectuated.¹⁶

¹⁰ *In re Parole of Hill*, 298 Mich App 404; ___ NW2d ___ (2012).

¹¹ *Jones v Dep't of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003); *Haeger, supra*.

¹² *Haeger, supra*.

¹³ *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 154; 532 NW2d 899 (1995).

¹⁴ 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*.

¹⁵ MCL § 791.236(2).

¹⁶ 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.¹⁷ This discretionary review process is however, distinct from parole revocation proceedings.¹⁸ 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.¹⁹

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.²⁰ An abuse of discretion occurs when the Board's decision falls outside the range of reasonable and principled outcomes.²¹ However, a reviewing court may not substitute its judgment for that of the Board.²² 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.²³

According to the Petitioner, he pled guilty at the Arraignment Hearing with the belief that his parole would be re-instated within 6 months. He states that MDOC made "illusory and material" representations which he detrimentally relied upon, which resulted in Petitioner being denied his protected liberty interests. This Court disagrees.

The Parole Violation Arraignment Summary and Parole Board Action (hereinafter "Arraignment Summary") specifically states that "OFP will recommend a six (6) month re-parole."²⁴ This statement implies that re-parole will be suggested or proposed, however, it does not mean that re-parole is assured. An action may be 'recommended,' but this does not guarantee or promise a certain result. In the Arraignment Summary, there is nothing indicating that the Petitioner was promised a 6 month detainer in exchange for his guilty pleas, nor does it appear anywhere in the record that Petitioner was promised re-parole by MDOC. Alternatively,

¹⁷ MCL § 791.234(11); *Hill, supra*.

¹⁸ *Hill, supra*.

¹⁹ *Id.* citing *Greenholtz, supra*.

²⁰ *Elias, supra* at 538; *Haeger, supra*.

²¹ *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.]

²² *Haeger, supra*.

²³ MCR 7.118.

²⁴ Parole Violation Arraignment Summary and Parole Board Action, Decision Date January 19, 2012, Mailed January 23, 2012. *Supra*, at FN 3.

it appears the Petitioner mistakenly believed a recommendation for re-parole by the OFP was synonymous with guaranteed re-parole. There is nothing to indicate that MDOC intentionally or purposely mislead the Petitioner in order to obtain his plea. Furthermore, in addition to the Petitioner's voluntary guilty pleas, there were factual bases to support findings of guilt for Counts I, II and III. Therefore, the Court finds that the Petitioner's parole was not unjustly revoked and that his protected liberty interests were not denied.

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

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.

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 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. The Board's January Decision indicated the Petitioner's parole was revoked for the admitted violations that occurred on November 13, 2011. The Board recommended corrective actions including: demonstrating responsible behavior by earning positive work and program reports, avoiding situations resulting in misconduct citations, identifying and developing community resources to address special needs identified through group therapy and demonstrating positive prison behavior during the 12 month continuance period.

²⁸ *Id.* at 523.

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.*

After the Petitioner received a misconduct citation for fighting on June 17, 2012, the Board issued a supplemental decision.³⁷ In the July Decision the Board denied parole, indicating that it lacked reasonable assurance that the Petitioner would not become a menace to society and/or public safety. The Board found that Petitioner continued to exhibit "very serious threatening behavior," minimized his behaviors, including criminal responsibility, had not received additional programming while incarcerated and had a history of violent misdemeanors. Furthermore, the Board found that the Petitioner's ability to manage his behavior remained a risk.³⁸ Board recommendations for corrective action included entering into or staying involved in substance abuse programming, continuing involvement in group therapy and participating in cognitive behavioral programming.

This Court, after reviewing the Board's January Decision revoking parole and the July Decision denying parole, does not find that the Board abused its discretion or violated any constitutions, statutes, rules or regulations. Neither Decision issued by the Board falls outside the range of reasonable and principled outcomes and this Court finds that the substantial and compelling reasons provided qualify as objective and verifiable.

The Board met the requirements imposed under MCL § 791.233 *et seq.*, and Petitioner's guilty and *nolo contendere* pleas were knowingly and voluntarily given. Therefore, the Court finds the Board's Decisions, both revoking Petitioner's parole in January 2012 and denying parole in July 2012, were properly issued. Further, the Court finds that Petitioner's due process rights were not infringed. 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

³⁷ The "supplemental decision" refers to the July Decision, which was issued on July 15, 2012 and mailed to the Petitioner on July 19, 2012.

³⁸ The Court also interprets this statement as a valid concern by the Board that the Petitioner's inability to manage his inappropriate, threatening behavior poses a risk to society and/or public safety.