



1 of 2 DOCUMENTS

DAVID KLINGEBIEL, Appellant, v. NEW JERSEY STATE PAROLE BOARD,
Respondent.

DOCKET NO. A-5341-04T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2008 N.J. Super. Unpub. LEXIS 3018

April 7, 2008, Argued
August 11, 2008, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3*
FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

On appeal from the New Jersey State Parole Board.
Klingebiel v. N.J. State Parole Bd., 2007 N.J. Super.
Unpub. LEXIS 1046 (App.Div., Jan. 31, 2007)

CORE TERMS: parole, eligibility, presumptive, criminal behavior, ineligibility, sentencing, eligible, prosecutor, sentence, murder, inmate's, notice, confidential, anger, parole hearing, sexual assault, significant impact, documented, infraction, certif, woman, juvenile, Parole Act, administrative determination, substantial likelihood, sentence of life imprisonment, commit a crime, psychological evaluations, preponderance, psychological

COUNSEL: Eric J. Marcy argued the cause for appellant (Wilentz, Goldman & Spitzer, attorneys; Mr. Marcy, of counsel and on the brief).

Keith S. Massey, Jr., Deputy Attorney General, argued the cause for respondent (Anne Milgram, Attorney General, attorney; Patrick DeAlmeida, Assistant Attorney General, of counsel; Mr. Massey, on the brief).

JUDGES: Before Judges Stern, Collester and C.L. Miniman.

OPINION

PER CURIAM

David Klingebiel appealed from the final administrative determination of the Parole Board entered on May 6, 2005, denying parole and imposing a 180-month (15-year) future eligibility term (FET).¹ Appellant argued that "the Board has ignored and undervalued substantial evidence and relied on the same erroneous justifications to deny parole that it employed in *State v. Trantino*,"² "the arbitrary imposition of [the 15-year FET] is a denial of due process in violation of New Jersey and United States constitutions," and if parole is denied, appellant should receive annual reviews of his parole status.

1 Technically, the Board affirmed a two-person Panel decision to deny parole and refer the matter to a three-member Panel to establish the FET, and the three-member [*2] Panel decision to establish the 180-month FET.

2 See *Trantino v. N.J. State Parole Bd.*, 166 N.J. 113, 197, 764 A.2d 940, modified, 167 N.J. 619, 772 A.2d 926 (2001).

Appellant is serving a life sentence for murder,³ and was previously denied parole by final administrative determinations in December 1994 and June 2001.

3 His conviction by guilty plea to aggravated sexual assault was merged therein.

After noting that the three-member Panel and Board clearly understood this was a Title 2C case and responding to appellant's challenges to the determinations and reasoning of the two-member and three-member Panels, the full Board's 2005 final administrative determination concluded that:

The full Board has determined that the Adult Panel pursuant to *N.J.A.C. 10A:71-3.18(f)* sufficiently documented the reasons for denial of parole, that pursuant to *N.J.A.C. 10A:71-3.11* the Adult Panel considered and based its decision on the aggregate of all factors; and that the three (3) member Panel has documented the particular and specific reasons for the establishment and imposition [of] a future eligibility term outside the administrative guidelines.

The full Board found the Adult and three (3) member Panels appropriately considered your [*3] client's prior criminal record and noted that his prior opportunity on probation has failed to deter his criminal behavior. The Adult and three (3) member Panels also noted his insufficient problem resolution, specifically the lack of insight into his criminal behavior and minimizing his conduct as demonstrated by his Panel interview, documentation in the case file and confidential material and professional reports. Finally, the Adult and three (3) member Panels considered the lack of an adequate parole plan to assist him in his successful reintegration back into the community.

The full Board additionally determined the Adult and three (3) member Panels appropriately considered in mitigation that your client is infraction free, his participation in institutional programs and participation in programs specific to behavior. In addition his attempt made to enroll and participate in programs but not being admitted and minimum custody status being achieved and maintained were also considered.

Based on a consideration of the facts cited above, the full Board has determined that the Adult Panel has documented, by a preponderance of evidence, that there is a substantial likelihood that your [*4] client would commit a crime if released on parole at this time and the three (3) member Panel has documented pursuant to *N.J.A.C. 10A:71-3.21(d)* that a future eligibility term established pursuant to *N.J.A.C. 10A:71-3.21(a)* and (c) is clearly inappropriate due to the lack of satisfactory progress in reducing the likelihood of future criminal behavior.

On January 31, 2007, we remanded the matter for reconsideration of the final administrative decision. We explained:

The murder occurred on June 28, 1980 and defendant was sentenced to life imprisonment on January 9, 1981. As a result, this case is governed by the parole law applicable to offenses which occurred between the effective date of the Code of Criminal Justice, on September 1, 1979, and the date on which the sentencing provision with respect to the crime of murder was amended, effective September 6, 1982. *See Williams v. N.J. State Parole Bd.*, 336 N.J. Super. 1, 7, 763 A.2d 747 (App. Div.), certif. denied, 165 N.J. 523, 760 A.2d 779 (2000); *see also Trantino v. N.J. State Parole Board*, 166 N.J. 113, 197, 764 A.2d 940, modified, 167 N.J. 619, 772 A.2d 926 (2001). By virtue of *N.J.S.A. 2C:11-3* in effect at the time of defendant's offense, a judge could impose a sentence for the crime [*5] of murder of 10 to 30 years, with up to 50 percent thereof to be served before parole eligibility, or 30 years with 15 years to be served before parole eligibility. *See N.J.S.A. 2C:11-3* (L. 1979, c. 178, § 21). Alternatively, the trial court had discretion to impose an extended life sentence under *N.J.S.A. 2C:43-7*, with or without a 25-year period of parole ineligibility. *See State v. Maguire*, 84 N.J. 508, 519-26, 423 A.2d 294 (1980); *see also State v. Pennington*, 154 N.J. 344, 360, 712 A.2d 1133 (1998) (making clear that imposition of the 25-year period of parole ineligibility on a discretionary extended term of life imprisonment was not mandatory).

This defendant received a sentence of life imprisonment without a parole ineligibility term. Accordingly, under the Parole Act, as it then provided, appellant became "primarily eligible for parole after having served . . . 25 years where no mandatory minimum term has been imposed less commutation time for good behavior and credits for diligent application to work and other institutional assignments." *N.J.S.A. 30:4-123.51(b)*. *See L. 1979, c. 441, § 7*. The Parole Act of 1979

also provided for "presumptive parole." See *N.J.S.A. 30:4-123.53(a)*; *In re Application of Trantino*, 89 N.J. 347, 355-56, 446 A.2d 104 (1982); [*6] *N.J. State Parole Bd. v. Cestari*, 224 N.J. Super. 534, 547, 540 A.2d 1334 (App. Div.), certif. denied, 111 N.J. 649, 546 A.2d 558 (1988). Furthermore, the Act, as it relates to appellant serving a Title 2C sentence imposed at the time it was, "place[d] the burden on the State . . . to prove that the prisoner is a recidivist and should not be released." *Ibid.* (quoting *N.J. Parole Bd. v. Byrne*, 93 N.J. 192, 205, 460 A.2d 103 (1983)).

Thus, appellant was entitled to "be released on parole at the time of parole eligibility, unless information supplied in [the report prepared prior to the parole ineligibility date as required by *N.J.S.A. 30:4-123.54*] indicate[d] by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time." *N.J.S.A. 30:4-123.53(a)* (see *L. 1978, c. 441, § 9*).

We also noted that:

When appellant was denied parole in 1994, there was no objection by the Union County Prosecutor and a three-year FET was established. He subsequently took a different position, and the Board's 2005 decision points out that the Prosecutor's "input may change over time as the circumstances of the inmate's incarceration, can and do, [*7] change over time" and that the Prosecutor's present "independent determination" to object to parole was "not subject to the influence of the Board or any other entity." While the Board also noted, several times, that appellant "was infraction free" during his twenty-five years in custody, and was given credit for "participation in programs specific to behavior [and attempts] made to enroll and participate in programs," there is no explanation for the Prosecutor's change of position, its impact on the Board and how it squares with the provisions of *N.J.S.A. 30:4-123.53* and *-123.56*. See *L. 1979, c.*

441, § 9. Nor does the Board explain what "new information" it relied on to deny parole a third time and establish an FET in 2005 five times longer than that established in 1994, despite appellant's institutional record, as well as his actual and attempted program participation.

Accordingly, we directed the Board to:

reconsider defendant's parole with specific reference to the law governing parole consideration in this case. Parole is considered when a sentence is imposed under the Code of Criminal Justice, see *N.J.S.A. 2C:43-2; 44-1(c)(2)*, and the Parole Act, therefore, transferred much of [*8] the decision-making relating to parole "substantially to the judiciary as a function of its sentencing authority under the Code." *Byrne, supra*, 93 N.J. at 205. See also *Cestari, supra*, 224 N.J. Super. at 547. In the absence of a copy of the sentencing transcript and an ineligibility term, we must believe that the sentencing judge anticipated that appellant would be paroled in about fifteen years, and so intended. However, the Board did not consider that expectation or address its impact on the Board's exercise of discretion.

We thus directed the Board to address the expectations of the sentencing judge in imposing the sentence he did. We also directed it to "consider all relevant reports and consider the [appellant's] psychological history as a whole, even though the most recent evaluations should carry more weight." See *Trantino, supra*, 166 N.J. at 175.

The appellant was again interviewed by hearing officers on June 5, 2007, and the full Board met to consider the matter on July 18, 2007. It also interviewed appellant. At the end of the hearing, he was advised orally:

Mr. Klingebiel, unfortunately, the Board has decided to deny parole. The case has been referred to the full Board to determine [*9] a future eligibility date.

On August 15, 2007, the full Board rendered its "Notice of Decision." It considered appellant's "personal background"; "prior offense record"; "facts and circumstances of present offenses"; a "discussion of present parole hear-

ing"; appellant's "prior offense record"; the "nature of offense record increasingly more serious" when comparing his juvenile record with the present offense; ⁴ his "prior opportunity on community supervision (juvenile probation) failed to deter criminal behavior"; "insufficient problem resolution"; "confidential material" and "prosecutor objection both of which were said to have no "significant impact on the Board panel's decision" and "mitigating factors." The "Notice" concluded:

The Board notes that at this time your parole eligibility date is July 20, 2003. This is due to the Superior Court-appellate Division vacating the last future parole eligibility term imposed. The presumptive schedule of future parole eligibility terms that could be set in your case is 27+/-9 months. As the maximum future parole eligibility term pursuant to the presumptive schedule (i.e. 36 months) would still render you "past eligible" for parole consideration [*10] and, thus, immediately eligible for parole consideration again, the Board has determined that there is an additional period of time that you must serve in order to adequately address the issues put forth in this notice prior to becoming eligible for parole again. For this reason, the Board has determined to set a future parole eligibility term that exceeds the presumptive guidelines.

The Board's summary stated:

On July 18, 2007, the Full Board denied parole and determined that due to your lack of satisfactory progress in reducing the likelihood of future criminal behavior an eligibility term in excess of the Board's schedule is required in your case.

4 The Board treats the sexual assault separately from the murder despite the merger at sentencing.

On September 19, 2007, "the Full Board [again] reviewed all of the records pertaining to [appellant's] parole hearing" and "set a future eligibility term of one hundred and forty-four (144) months." The Board repeated the contents of its September "Notice" and the added "Specific Reasons for the Imposition of the One Hundred and Forty-Four (144) [month] Future Parole Eligibility Term." After noting its prior determination with respect to the FET, [*11] it concluded:

The Board also noted that in assessing an appropriate future parole eligibility term, the Board may establish a future parole eligibility date, which differs from the presumptive schedule if the presumptive schedule is clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior. In making this determination the Board shall consider the factors enumerated in *N.J.A.C. 10A:71-3.11*. *N.J.A.C. 10A:71-3.21(d)*.

During its deliberations when imposing the future parole eligibility term, the Board determined that the factors supporting the denial of parole, collectively, are of such a serious nature as to warrant the setting of a future parole eligibility term, which differs from the presumptive term of twenty-seven (27) months (+/- 9 months) regardless of the fact that you were past eligible at the time of your Board hearing.

Accordingly, the Board believes that a minimum of a one hundred and forty-four (144) month future parole eligibility term (which commences on your parole eligibility date and which is reduced by applicable credits) is necessary in order to address the issues detailed herein. When imposing this [*12] particular future parole eligibility term, the Board took notice that your actual future parole eligibility date projects to be September 27, 2010 which includes commutation credit and projected work and minimum credits.

The specific issues that the Board has identified that will require additional programming are reflected in the following points:

. You continue to lack candor regarding your motivation and intent on why you chose your victim and why you re-entered her home after the initial sexual assault was complete. Your alleged reason for going into the victim's home a second time was to check on her health and or welfare. This assertion is not convincing to the Full Board; and

. You continue to respond to Board Member questioning in an overly rehearsed and practiced manner; and

. You have not adequately addressed the tumultuous relationship with your father. You assert that your feelings of anger, rage, low self-esteem and rejection were as the result of your poor relationship with your father. The Full Board finds it highly improbable that recent dialog with you[r] father has addressed *years* of mental and physical abuse. As proof of this belief is the fact that at your recent Full [*13] Board Hearing you recited a story to the Board Members of what you clearly believed to have been a traumatic event between you and your father that involved you both being intoxicated and having a physical altercation. When you were done recounting the event, you stated that in regards to the incident "to this day we've never spoken about it." This issue is especially important taking into account that your current parole plan is to your mother and father's residence; and

. You continue to demonstrate no genuine remorse or empathy for the victim of the crimes you have committed. Your assertions to the Full Board claiming that you have "empathy and compassion" towards the victim and her family were tempered with multiple statements emphasizing that you believe you have met the requirements for your parole release. Your offerings of empathy and remorse were therefore viewed as being self-regarding and egocentric in nature; and

. You continue to minimize the brutality of your murderous attack. When speaking of the final moments before you beat your victim into a vegetative state, ultimately causing her death, you continue to emphasize that the victim "kept flailing at me," inferring that [*14] her defensive posturing precipitated her own death; and

. You continue to significantly downplay the extent of your relationship with the victim and her husband and avoided using her name when speaking of her at your recent Full Board Hearing. These details, along with your unconvincing stance that you chose the victim solely because you knew she would be alone, demonstrates an avoidance on your part to come

to any understanding why you chose that *specific* woman to be your victim.

Given the enormity of your crimes, the Board hopes that you make appropriate use of your continued confinement to address these issues.

In its September "Notice" the Board examined Klingebiel's "prior offense record" and noted that while "somewhat attenuated in time, [] your present offenses were not your first brush with the law." It further noted that the "nature of offense record [was] increasingly more serious" and that Klingebiel's offenses of being a "juvenile delinquent" and "maliciously injuring property" made a "cataclysmic jump" to sexual assault and murder. The Board also noted that Klingebiel's "prior opportunity on community supervision (juvenile probation) failed to deter criminal behavior" even [*15] though he was discharged from such supervision "with improvement."

Moreover, the Board determined that Klingebiel exhibited "insufficient problem resolution." This was the factor to which the Board dedicated its most in-depth analysis. The first area of concern addressed Klingebiel's lack of candor, specifically emphasizing that Klingebiel's assertion that he was prompted to commit this crime due to a "reject[ion]" by a woman at a bar earlier that night was "severely tempered" by other witnesses at the bar that evening and further that the preponderance of the evidence shows that he did not choose his victim solely because he knew that she would be alone on the night that he attacked her, but instead he had chosen her because he had "a romantic interest" in her. The Board rejected Klingebiel's claim that he returned to the victim after his initial assault in order to "check on her welfare and render aid" as not credible, as he allowed himself into the home and, when confronted by the victim, "proceeded to pummel her into a coma."

The Board was also concerned with Klingebiel's relationship with his father. The Board characterized Klingebiel's relationship with his father as one full of [*16] "anger, rage, low self-esteem and rejection" and that his claim that his relationship with his father is now built upon "trust and love" or "respect and love" is "highly improbable." Specifically the Board determined that it is "highly improbable that you have been able to truly address the many years of anger, rage, low self-esteem and rejection brought about as a result of the relationship that you had with your father merely due to your father's medical condition" and recommended "significant additional ongoing intensive psychological counseling" to address his relationship with his father.⁵

5 The record reveals his father died on August 28, 2007, but the Board was not so advised until October 18, 2007.

Finally, the Board determined that many of Klingebiel's "statements and comments to [the Board] were rehearsed and scripted." The Board based this determination upon the fact that he referred to the woman he killed as "the woman" or "the victim" in his parole hearing rather than referring to her by name. This, in addition to the full Board's observation that Klingebiel's presentation was "emotionless" and the fact that he "assisted a great number of inmates in preparing for their [*17] own hearings before the Parole Board" led the Board to determine that Klingebiel was not sincere and therefore not ready for parole. It concluded that his "statements and comments [to the full Board] were rehearsed and scripted."

As already noted, the Board also based its decision on the fact that "confidential material" provided by Klingebiel did not have a "significant impact" on determining if parole was appropriate. Similarly, the "prosecutor[s] objection" to parole "did not have a significant impact on the Board's decision."

Finally, the Board also acknowledged the "mitigating factors" that Klingebiel participated in programs in "Behavior Modification, One-On-One Counseling, Focus On The Victim, Alcoholics Anonymous, Self Awareness (2), Advanced Mental Health (2), Transformation Group and Group Psyche" in addition to presently being involved with "Alcoholics Anonymous and the Impact Project" and having "Above Average Work & Housing Reports" and "infraction free conduct."

Psychological evaluations were also before the Board, and have been presented to us in a confidential appendix; however, no new evaluation appears to have been conducted on the remand. The Board had the favorable [*18] evaluation of Dr. Figurelli which it did not previously consider because of its late submission.

While we granted the Board's motion for reconsideration of our remand opinion, and we removed reference to the "new information" standard of *N.J.S.A. 30:4-123.56(c)*, eliminated by the 1997 amendment, see *L. 1979, c. 441, § 9*; see also *Trantino v. N.J. State Parole Board*, 331 N.J. Super. 577, 591-612, 752 A.2d 761 (*App. Div. 2001*), there were no new facts or institutional history which reflected evidence of a risk beyond the Board's assessment warranting a conclusion that now a 144 month, or a twelve-year, FET was warranted.⁶ The confidential material and prosecution's objection no longer were deemed to have a significant impact on the decision, and the Board acknowledged his "infraction-free" institutional history, his above-average work and housing reports and his participation in therapy and

groups to the maximum extent possible. While updated and current psychological evaluations are very important at the time of the parole hearing, the Board considered the psychological evaluations, including Dr. Figurelli's, and found them to be "in equipoise."

6 As the Board noted, because his parole eligibility [*19] date was July 20, 2003, a standard FET would have made him immediately eligible for a new hearing. The Board calculated that the 144 month FET, with expected credits, would make him eligible for parole again in September 2010.

We recognize our limited scope of review, *Trantino, supra*, 166 N.J. at 172-73, and the deference to which the Board is entitled, *id.* at 200, but the Board cannot deny presumptive parole, as required for this offense, merely by stating "there is a substantial likelihood that the inmate will commit a crime under the laws of this state if released on parole at such time," the governing standard at the time, *N.J.S.A. 30:4-123.53(a)*, see *L. 1997, c. 213, § 1*.⁷ The record in this case, and the applicable presumption in favor of parole given the date of this offense, continue to warrant relief. See *Trantino*, 166 N.J. at 197; *N.J. State Parole Bd. v. Cestari*, 224 N.J. Super. 534, 547, 540 A.2d 1334 (*App. Div.*), *certif. denied*, 111 N.J. 649, 546 A.2d 558 (1988). In fact, the Board does not dispute that the sentencing judge who did not impose the twenty-five year parole ineligibility term would have expected parole after approximately fifteen years absent some post-sentence development warranting [*20] longer incarceration.

7 As developed in our prior opinion, the pre-1997 standard applies. *Williams v. N.J. State Parole Bd.*, 336 N.J. Super. 1, 7, 763 A.2d 747 (*App. Div.*), *certif. denied*, 165 N.J. 523, 760 A.2d 779 (2000).

We are concerned, as was the Board, in the appropriate exercise of its jurisdiction with Klingebiel's demeanor and credibility, which affects an evaluation of his respect for law and the possibility of recidivism. We also acknowledge the importance of appellant's present relationships with others and their potential impact. We note, however, that the death of his father, unknown to the Board in making its decisions on remand, avoids the potential for wrongdoing sparked by that relationship, and also positively impacts on the stability of his parole plan.⁸ In any event, given Klingebiel's lack of institutional infractions, multiple in-depth psychological evaluations determining that counseling and enrollment in programs such as Alcoholics Anonymous would make him a low risk for repeat criminal behavior, the fact that parole under the 1979 Act was presumptive and the sentence of

life imprisonment was imposed with the understanding at the time that Klingebiel would be paroled in about fifteen years [*21] (because a sentence of life imprisonment without a parole ineligibility term was imposed), we must treat this case similar to *Trantino* whose institutional record and background was analogous. See *Trantino, supra*, 166 N.J. 113. Nothing is cited to us that should lead us to alter the remedy which must be imposed. The record does not support the further denial of parole and imposition of a 144-month FET, *id. at 175-94*, and the Board must now expeditiously review Klingebiel's parole plan and set conditions for parole including placement in a halfway house facility in anticipation of release, *id. at 194-98*.

8 At the hearings on remand, Klingebiel talked at length about his father's abuse, that he intended to "control" and "rape" the victim, and that his

acts constituted "transference" of his "anger" towards his father. However, he said that he did not "kill her so she couldn't tell anybody about this" or identify him. While there may be legal issues which flow from an inmate's failure to admit guilt long after a trial at which he denied guilt, and from adherence to a memory of a version disputed by the evidence, but which he really believes, Klingebiel acknowledged he was "fully responsible" [*22] for the death and expressed remorse even though he insisted he "wasn't thinking" of the "consequences" that "she'd be able to identify him" and "had no control over [his] anger at that time."

The matter is remanded for further proceedings consistent herewith.



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SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary

No subsequent appellate history. Prior history available.

Citing References: None

PRIOR HISTORY (1 citing reference)

1. *Klingebiel v. N.J. State Parole Bd.*, 2007 N.J. Super. Unpub. LEXIS 1046 (App.Div. Jan. 31, 2007)

Appeal after remand at, Remanded by (CITATION YOU ENTERED):
Klingebiel v. New Jersey State Parole Bd., 2008 N.J. Super. Unpub. LEXIS 3018 (App.Div. Aug. 11, 2008)