



MAXWELL MELVINS, Appellant, v. NEW JERSEY STATE PAROLE BOARD,
Respondent.

DOCKET NO. A-1761-08T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2010 N.J. Super. Unpub. LEXIS 1948

March 23, 2010, Argued
August 12, 2010, Decided

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THE APPROVAL OF THE APPELLATE DIVISION.

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FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

On appeal from the New Jersey State Parole Board.

CORE TERMS: parole, inmate, reconsideration, sentence, eligibility, recidivism, progress, adult, prison, arbitrarily, presumptive, murder, panel decision, participated, repealed, duration, larceny, assault, psychological evaluations, crimes committed, possession of a weapon, substantial likelihood, rehabilitation, inappropriate, modification, breaking, commit, infraction, probation, new crime

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

Ellen Hale, Deputy Attorney General, argued the cause for respondent (Paula T. Dow, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Ms. Hale, on the brief).

JUDGES: Before Judges Grall, Messano and LeWinn.

OPINION

PER CURIAM

Appellant Maxwell Melvins is an inmate confined at Bayside State Prison in Leesburg. He appeals from a final decision of the New Jersey State Parole Board (Board) denying parole and establishing a future eligibil-

ity term (FET) of 120 months. The Board applied the wrong parole standard; arbitrarily refused to address Melvins's request for parole to a community release program; arbitrarily refused to apply a regulation permitting applications for reconsideration that was repealed after the three-member panel heard his case; and declined to consider new psychological evidence and address favorable reports in the record. Accordingly, we reverse and remand for reconsideration.

Melvins's sentence is for crimes he committed in 1980 when he was twenty years old. On July 25, 1980, [*2] Melvins fired shots on a public street in Camden. He had been involved in a dispute over a drug transaction and chased the person with whom he had the disagreement, shooting at him as he pursued him. A stray bullet hit and killed an innocent bystander.

A jury found Melvins guilty of murder, *N.J.S.A. 2C:11-3*; possession of a weapon for an unlawful purpose, *N.J.S.A. 2C:39-4*; and unlawful possession of a handgun, *N.J.S.A. 2C:39-5(b)*. Following his conviction for murder and the related weapons offenses, Melvins pled guilty to entering without breaking with intent to steal, *N.J.S.A. 2A:94-1*, and larceny, *N.J.S.A. 2A:119-2*. Melvins was sentenced on December 23, 1980. He received a life sentence for murder, which is subject to a twenty-five-year period of parole ineligibility, *N.J.S.A. 2C:11-3*; a consecutive ten-year term for possession of a weapon for an unlawful purpose, *N.J.S.A. 2C:39-4*; and a concurrent five-year term for unlawful possession of a handgun, *N.J.S.A. 2C:39-5(b)*. The judge also imposed one three-year term and one two-year term for entering without breaking with intent to steal, *N.J.S.A. 2A:94-1*, and larceny, *N.J.S.A. 2A:119-2*. The sentences for these crimes committed prior to [*3] the enactment of Title

2C were concurrent with his sentence for murder, and they were served long before Melvins first became eligible for parole.

Parole determinations require "highly 'individualized discretionary appraisals.'" *Trantino v. N.J. State Parole Bd.*, 154 N.J. 19, 25, 711 A.2d 260 (1998). (*Trantino IV*) (citations omitted). Despite the Board's broad discretion, we must review the decision, as we do decisions of other administrative agencies, to determine whether the Board has exercised its power arbitrarily or capriciously. *Trantino v. N.J. State Parole Bd.*, 166 N.J. 113, 172-73, 764 A.2d 940 (2001) (*Trantino VI*); *N.J. State Parole Bd. v. Cestari*, 224 N.J. Super. 534, 547-48, 540 A.2d 1334 (App. Div.), certif. denied, 111 N.J. 649, 546 A.2d 558 (1988).

In conducting that review for arbitrary action, we must consider:

- (1) [*4] whether the agency's action violates express or implied legislative policies, i.e., did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[*Trantino IV*, *supra*, 154 N.J. at 24.]

Under the applicable law, Melvins is entitled to release on parole unless a "preponderance of the evidence" indicates that "there is a substantial likelihood that [he] will commit a crime under the laws of this State if released on parole." *N.J.S.A. 30:4-123.53(a)* (as adopted by L. 1979, c. 441, § 9); *cf. L. 1997, c. 213, § 1* (effective August 18, 1997). That standard applies because Melvins committed the crime in 1980 before the new standard was adopted. *See Trantino VI, supra*, 166 N.J. at 124.

Under this standard, the severity of the crimes committed has limited relevance. "[T]he gravity of the crime may not [] be considered an independent reason for continuing punishment and denying parole . . ." *In re Trantino*, 89 N.J. 347, 373, 446 A.2d 104 (1982). [*5] The punitive aspects of a sentence imposed under Title 2C are deemed satisfied at the time of parole eligibility. *Trantino IV, supra*, 154 N.J. at 25-26; *see N.J. State Parole Bd. v. Byrne*, 93 N.J. 192, 205 n.6, 460 A.2d 103 (1983). Thus, the question is not whether the inmate has been punished enough to exact adequate retribution. *Trantino VI, supra*, 166 N.J. at 122. Rather, the question

is "whether the offender's punishment has been adequate to insure his individual progress toward rehabilitation." *In re Trantino, supra*, 89 N.J. at 373-74. "Rehabilitation is relevant . . . only as it bears on the likelihood that the inmate will not again resort to crime. It need not be total or full or real rehabilitation in any sense other than there is no likelihood of criminal recidivism." *Trantino IV, supra*, 154 N.J. at 31.

The Board's decision does not apply the applicable standard. Because the Board did not apply the law, we remand for reconsideration. *Id.* at 24 (quoted above).

The Board urges us to disregard that error on the ground that it is a misstatement and the two- and three-member panels recited the proper standard. It is, however, the Board's decision that we are reviewing. Moreover, recitation of [*6] the standard is not a formality; the evidence presented to the Board must be assessed in light of the standard, and the Board should address the relevance of the two- and three-member panels' reliance on factors such as "lack [of] insight" based on findings such as the following: "After twenty years of incarceration, you are unable or unwilling to offer an acceptable explanation as to why you conducted yourself in the anti-social manner you did leading up to your present offenses."

We recognize the Board members' expertise and that we are not to substitute our view for theirs, but without guidance from the Board it is difficult to understand why Melvins's explanation was deemed "unacceptable." Melvins had offered his insight as to why he committed the crimes. These are the passages of Melvins's presentation that the panels selected to demonstrate that his explanation was not "acceptable." He admitted he was "reckless at the time" because he "was a reckless person" and "[b]ecause of who [he] was at the time and the life that [he had been] living . . . it was only [a matter] of time that something like that would be happening." In addition, he noted that at that time he "had no problem [*7] solving skills . . . no control over [his] anger." He was "an irresponsible person" and "he[ld] no regards to authority for anybody at that time." He also said, in passages quoted in other parts of the three-member panel decision, that he could "never forgive [himself] for the crime" and that there was nothing that could "justify" what he had done.

As we are remanding due to legal error on the part of the Board, we do not burden this opinion with a lengthy or detailed discussion of the facts relevant to the merits. The case before the members of the Board was not an easy one. Melvins had extensive involvement with the juvenile and criminal justice systems before he committed these crimes in 1980. He was adjudicated delinquent nine times for conduct that, if he were an adult,

would have constituted trespass, possession of stolen property, attempted assault and battery, arson, possession of a stolen vehicle, breaking and entering, robbery, larceny, property damage and assault and battery on a police officer. As a consequence of those adjudications, he received a variety of sanctions, including sentences to probation, Jamesburg and Yardville. He violated probation twice. As an adult, Melvins [*8] was convicted of assault and larceny in New Jersey and possession of a weapon, robbery, assault, recklessly endangering a person, and terroristic threats in Pennsylvania. He violated probation as an adult, and he was on parole from his Pennsylvania sentences when he committed this murder in Camden.

Following his imprisonment, Melvins had twenty infractions between 1981 and 1997, and no infractions between July 1997 and July 2007. The violations are, threatening another with bodily harm in 1981, abusive/obscene language in 1981, four refusals to obey orders in 1981 and 1982, seven instances of possessing or introducing or using narcotic paraphernalia or drugs in 1981, 1982, 1984, 1985, 1993 and 1997, failing to comply with a written rule or regulation in 1982, possessing something not authorized in 1985, engaging in conduct which disrupts the order of the facility in 1982, fighting in 1988, entering an unauthorized area in 1988, "correspondence/conduct with a visitor" in 1989, and offering a bribe to a member of the prison staff in 1992.

In contrast to that behavior, while incarcerated Melvins also completed and was actively involved in many programs. The list of programs is extensive [*9] and includes Moral Reconciliation Therapy (MRT); behavior modification; Positive Alternatives for Life Management (PALM); anger management, including a program entitled "Cage-the-Rage"; substance abuse programs, including AA and the ADDICT Program; programs addressing issues related to the transition from prison to the community, such as S*T*A*R*S and "Life after Prison Re-entry and Transition"; Families in Crisis; domestic violence and parenting. Melvins also participated in group and one-on-one counseling.

Melvins did not just attend programs. He served as the vice president and president of the Lifer's Group, which organized the "Scared Straight Program" to deter juvenile delinquency, as a facilitator and paraprofessional for the MRT program and as a mentor for PALM. He also produced songs and videos designed to help young people avoid destructive behavior and was nominated for a Grammy. Melvins also achieved and maintained minimum custody status for several years. Much, but not all, of Melvins's participation in prison programs was during the years approaching and after his first eligibility for parole, which was in December 2005.

In short, there is a significant difference in Melvins's [*10] prison record during the early and later years of his confinement. Nonetheless, Melvins had not committed any infraction for ten years and reports on his behavior in recent years were all average and above average.

We turn to consider Melvins's claim that the Board acted arbitrarily by denying reconsideration and refusing to accept new psychological evaluations or to address his request for parole to a community release program. The facts set forth below provide context essential to understand these claims. In September 2005, before his first parole eligibility date, the Department had Gregg Gambone, Ph.D., do a psychological evaluation. In Gambone's opinion, Melvins was a high risk for recidivism. Gambone recommended against parole.

Melvins, however, asked the authorities to postpone consideration of his parole. Thereafter, he participated in additional rehabilitative programs. It was during that period that Melvins was recognized for outstanding service as a "Project Broken Dreams" speaker and as an addictions education facilitator and completed several of the programs in which he participated.

On June 27, 2007, Melvins notified the Board that he wanted to proceed with the process prefatory [*11] to parole. Accordingly, Dr. Gambone re-evaluated Melvins in July 2007. Dr. Gambone concluded that Melvins now posed a medium risk for recidivism.

Melvins participated in a pre-parole interview in July 2007. As required by *N.J.A.C. 10A:71-3.15(b)*, his case was referred to a two-member panel of the Board. He appeared before that panel on August 20, 2007.

After interviewing Melvins and reviewing his file, the panel denied Melvins parole because "a substantial likelihood exists that [he] would commit a new crime if released on parole at this time." The panel also determined that Melvins should not be eligible for reconsideration of parole at the presumptive FET, which is twenty-seven months, plus or minus nine months. *N.J.A.C. 10A:71-3.21(a)(1)*, (c). Because the panel concluded that the presumptive FET was inappropriate, a third member of the Board was added to establish a later FET, as required by *N.J.A.C. 10A:71-3.21(d)(1)*.

Following the two-member panel decision, Melvins completed additional programs. He also took advantage of the opportunity to submit additional information for the three-member panel to consider pursuant to *N.J.A.C. 10A:71-3.21(d)(3)*.

On December 12, 2007, the three-member [*12] panel met. After considering Melvins's letter of mitigation and the confidential and professional material, that panel also denied parole on the ground of "a substantial likelihood" that Melvins "would commit a new crime if

released on parole at this time." They imposed a 120-month FET. The three-member panel's written decision was not issued until February 4, 2008.

On July 24, 2008, within the 180-day period permitted under the regulation in effect at the time of the three-member panel decision, Melvins sought reconsideration and filed an administrative appeal with the full Board pursuant to regulations formerly codified as *N.J.A.C. 10A:71-4.1* and *-4.2*. See *N.J.A.C. 4.2* (amended and recodified as *N.J.A.C. 40A:71-4.3*, effective June 16, 2008); see also 39 *N.J.R.* 5049(a) at 5052. His attorney submitted a letter memorandum and a two-volume appendix, which included a report of a psychological evaluation conducted by Dr. Gerard A. Figurelli, Ph.D.

On July 25, 2008, the Board's Executive Director accurately advised Melvins's attorney that the regulation permitting reconsideration had been repealed effective June 16, 2008. 40 *N.J.R.* 3726(b) (June 16, 2008) (repealing and replacing *N.J.A.C. 10A:71-4.1*). [*13] But the Board's rejection of this request for reconsideration was less than reasonable under the circumstances. The rule was not repealed until several months after Melvins received the three-member panel's decision. And, Melvins sought reconsideration to provide "significant information" that was not available to him at the time of the three-member panel hearing and, thus, was "not considered" by the panel. See 39 *N.J.R.* 5049(a) at 5051 (citing former rule).

In the alternative, the Board could have considered Figurelli's report in the first instance. Indeed, the Executive Director's letter gave Melvins and his attorney reason to believe that the Board would consider the report. The Executive Director wrote, "Because the Administrative Code no longer provides for a request for reconsideration, it is the intent to process your submission as an appeal to the Full Board. However, prior to doing so I would appreciate your advising whether you deem your submission[, which includes Figurelli's report,] to be complete [or] whether you believe it is necessary to supplement the material submitted." The attorney advised that the submission was complete. Nonetheless, the Board did not consider [*14] the report on the ground that it was not available to the three-member panel.

The Board's regulation, however, provides that an inmate may submit a private psychologist's report "to the Board panel or Board." *N.J.A.C. 10A:71-3.7(j)*. And, that regulation is consistent with judicial decisions on the issue. The Board must consider "all of the relevant evidence." *Trantino VI, supra*, 166 *N.J.* at 175 (internal quotations omitted); see *N.J.A.C. 10A:71-3.13(c)* (requiring the Board to "receive as evidence any relevant and reliable documents"). That obligation includes "the opinions of the psychiatrist[s] and psychologists who [may]

conclude[] that [the inmate's] prognosis for success on parole [is] good." *Cestari, supra*, 224 *N.J. Super.* at 551; see *N.J.A.C. 10A:71-3.13(e)* (providing inmate "right to rebut any evidence and . . . to present evidence on his or her own behalf").¹ Where parole was denied before receiving the information, the Board is not obligated to assign it great weight but should consider it. *Trantino VI, supra*, 166 *N.J.* at 184.

1 Figurelli's report is not the only favorable psychological report that went without mention in the decisions of the panel and the Board. From the Board's [*15] decision, it appears that Board members assumed that if the panel had information then the panel considered it. More than possession is required. An agency's statement of findings must be sufficient to allow us to conclude that it has considered the information that it collected. *Bailey v. Bd. of Review*, 339 *N.J. Super.* 29, 33, 770 *A.2d* 1216 (*App. Div.* 2001).

Figurelli's report is related to the second claim, which is that the Board arbitrarily refused to consider the possibility of paroling him to a community release program. Figurelli's report provides information relevant to that request. The Board summarily refused to entertain the request:

The Adult Panel had the option to parole Mr. Melvins to a community release program, but found that he was unsuitable for parole at this time. In addition, your request is not an appealable issue as it fails to meet the criteria for appeal to the full Board pursuant to *N.J.A.C. 10A:71-4.1*.

This summary rejection was arbitrary. The three-member panel did not address the issue at all. Having recognized that parole on community release was an option, the Board clearly had the authority to review Melvins's claim that the panel failed to consider parole on community [*16] release. That is especially true in light of the fact that the Board repealed the regulation permitting an inmate to seek reconsideration after the panel made its decision.

For the foregoing reasons, we conclude that a remand for reconsideration is warranted. We leave it to the Board to determine whether to reconsider the matter in conformity with this opinion in the first instance or refer the reconsideration to a two- or three-member panel.

On remand, the duration of the FET should be reconsidered as well. The exercise of discretion involved in

setting an FET, like the exercise of discretion in granting or denying parole, is not unbridled. It is limited by statute and regulations. *N.J.S.A. 30:4-123.56* provides, in pertinent part:

a. The board shall develop a schedule of future parole eligibility dates for adult inmates denied release at their eligibility date. In developing such schedule, particular emphasis shall be placed on the severity of the offense for which he was denied parole and on the characteristics of the offender, such as, but not limited to, the prior criminal record of the inmate and the need for continued incapacitation of the inmate.

b. If the release on the eligibility [*17] date is denied, the board panel which conducted the hearing shall refer to the schedule published pursuant to subsection a., and include in its statement denying parole notice of the date of future parole consideration. If such date differs from the date otherwise established by the schedule, the board panel shall include particular reasons therefor. . . .

The schedule of presumptive FETs established by the Board and the standards for deviation therefrom are set forth in *N.J.A.C. 10A:71-3.21*. A two-member panel may deviate from the prescribed FET by increasing or decreasing the FET by nine months. When, in the opinion of the Board panel, the presumptive range is "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior," a three-member panel may set a later, or extraordinary, FET. *N.J.A.C. 10A:71-3.21(d)*. The Board's regulations do not limit the permissible duration of an extraordinary FET except to prohibit an FET beyond the inmate's maximum term. *N.J.A.C. 10A:71-3.21(g)*.

The standard appropriately focuses on the need to reduce the risk of recidivism, which is the criterion for denial of parole. *N.J.S.A. 30:4-123.53(a)* [*18] (as adopted by L. 1979, c. 441, § 9). As we have noted, the Supreme Court's decision in "*Trantino* clarified the requirement that the Board focus its attention squarely on the likelihood of recidivism. That focus applies to the FET determination as well." *McGowan v. N.J. State Parole Bd.*, 347 N.J. Super. 544, 565, 790 A.2d 974 (App.

Div. 2002). Because the focus is the same, retributive goals and rehabilitative goals beyond reduction of the risk of a repetition of criminality are irrelevant. Thus, facts particular to the crime and information about the inmate's background and institutional behavior may be considered only to the extent relevant to the likelihood of recidivism and the need for continued incapacitation until that risk is diminished. See *N.J.S.A. 30:4-123.53*, *N.J.S.A. 30:4-123.56*.

The decision to impose an extraordinary FET requires two determinations: 1) that the extended presumptive is clearly inappropriate; and 2) the appropriate duration for the extraordinary FET to be imposed. Thus, where *N.J.S.A. 30:4-123.56(b)* requires "particular reasons" for an FET "date [that] differs from the date otherwise established by the schedule," the panel must explain both determinations.

This court [*19] previously considered an extraordinary FET assigned to an inmate who had been sentenced for a crime committed prior to 1979. *McGowan*, *supra*, 347 N.J. Super. at 561. As we noted in *McGowan*, an FET for an inmate serving a sentence for a pre-Code crime is reviewed annually after the first eighteen months. *Id.* at 565; *N.J.A.C. 10A:71-3.21(f)*. On that automatic review, the Board Panel may, where warranted, refer the inmate for a parole release hearing or reduce the FET. *N.J.A.C. 10A:71-3.21(f)(2)(ii)-(iii)*; see *McGowan*, *supra*, 347 N.J. Super. at 565.

Inmates like Melvins who are serving a sentence imposed pursuant to the Code do not receive annual review under the same standard. While a Board Panel is required to "annually monitor the progress of each adult inmate and provide the inmate with a written statement of any changes in his parole eligibility," *N.J.S.A. 30:4-123.52(c)*, modification of the inmate's FET is authorized only if the inmate "has made exceptional progress, as evidenced by documented participation and progress in institutional or community educational, training or other programs . . ." *N.J.S.A. 30:4-123.52(b)*. Because modification requires "exceptional progress," the duration [*20] must be reasonably and rationally related to reduction of the risk of recidivism that justifies denial of parole.

On remand, the FET should be reconsidered in light of the foregoing standards.

Reversed and remanded for reconsideration in conformity with this opinion.



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SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary

No subsequent appellate history.

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PRIOR HISTORY (0 citing references)

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