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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5672-14T3

YERO TAKUMA,

Appellant,

v.

NEW JERSEY STATE PAROLE
BOARD,

Respondent.

Submitted April 4, 2017 – Decided May 2, 2017

Before Judges Messano and Suter.

On appeal from the New Jersey State Parole
Board.

Yero Takuma, appellant pro se.

Christopher S. Porrino, Attorney General,
attorney for respondent (Lisa A. Puglisi,
Assistant Attorney General, of counsel;
Gregory R. Bueno, Deputy Attorney General, on
the brief).

PER CURIAM

Yero Takuma (appellant) appeals the final administrative decision of the New Jersey Parole Board (Board), denying his parole and setting a 120-month future parole eligibility term (FET). We

reverse the Board's decision and direct it to conduct a new hearing within forty-five days.

We recount only such facts as are necessary for our decision. In February 1984 when appellant was sixteen, he shot and killed a cab driver during the course of a robbery. Later that same day, in a separate incident, he shot and killed another person during an altercation. Appellant pled guilty to murder, N.J.S.A. 2C:11-3(a)(3), for the first homicide, and in 1985 was sentenced to life in prison with a thirty-year period of parole ineligibility.¹ Appellant pled guilty to aggravated manslaughter, N.J.S.A. 2C:11-4(a), for the second homicide, and was sentenced to a ten-year term of imprisonment, which was to run concurrently with the life sentence. That ten-year term has been served.

In 2009, appellant pled guilty to aggravated assault on a law enforcement officer, N.J.S.A. 2C:12-1(b)(5)(a), and resisting arrest by physical force or violence, N.J.S.A. 2C:29-2(a)(3)(a), for assaulting corrections officers while incarcerated at the South Woods State Prison. He was sentenced to three years on the aggravated assault charge, to be served consecutive to the life

¹ He also pled guilty to first-degree robbery, N.J.S.A. 2C:15-1, third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b), and second-degree possession of a weapon for unlawful purposes, N.J.S.A. 2C:39-4(a), and was sentenced to concurrent terms for these offenses, all of which now have been served.

sentence, and to a three-year term on the resisting arrest charge to be served concurrently.

Appellant became eligible for parole on August 17, 2014, having by that time served most of the mandatory minimum term of thirty years on the murder conviction. He applied for parole, but in June 2014, his request was denied by a two-member panel of the Board. The two-member panel found that appellant showed "poor judgment and impulsive behavior" and that he "would become involved in future crime, regardless of his acknowledgement of responsibility." The panel found he was incarcerated for multiple convictions, including one while incarcerated, had sixty-six "institutional infractions" that were "numerous, persistent, and serious in nature and include[d] the loss of commutation time, confinement in detention, and administrative segregation." He exhibited "insufficient problem resolution" skills and scored high on the risk assessment evaluation, although the panel noted he had no, or a minimal, prior criminal record and had participated in institutional programs. The panel recommended substance abuse, anger management, one-to-one and behavior modification counseling.

The two-member panel amended its decision in October 2014 to add the additional mitigating factor that appellant had a portion of his commutation time restored. However, the two-member panel

also changed, without explanation, the standard it had used to review appellant's parole. Previously, it had determined "a substantial likelihood exists that [appellant] would commit a new crime if released on parole." In the October decision, however, it "determined there is a reasonable expectation that [appellant] will violate conditions of parole if released on parole."

In November 2014, a three-member panel of the Board concluded that the standard FET for murder of three years was not appropriate for appellant, see N.J.A.C. 10A:71-3.21(a)(1) & (c), and instead imposed a FET of 120 months. N.J.A.C. 10A:71-3.21(d) (allowing a three-member panel to "establish a future parole eligibility date which differs from [the regulation] if . . . [it would be] clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior"). In a detailed written decision, which took into consideration factors set forth in N.J.A.C. 10A:71-3.11, the three-member panel found appellant "continue[d] to remain a substantial threat to public safety" because he had not addressed "the root causes and basis of [his] actions," he had committed serious infractions while in prison and lacked "a true introspection into [his] violent crime." The three-member panel stated that because "your offenses were committed after August 19, 1997, the future eligibility term will

not be reduced by commutation credit, earned work credit and earned minimum custody credits."

In its final agency decision in May 2015, the Board affirmed the decisions of the two- and three-member panels, finding "that a preponderance of the evidence indicates that there is a reasonable expectation that [appellant] would violate the conditions of parole if released at this time." The Board rejected arguments by appellant that the decision was based only on the negative aspects of his record, or that it failed to take into consideration mitigating information or applicable regulatory factors.

Appellant raises these issues on appeal:

POINT I. THE PAROLE BOARD ARBITRARILY DENIED APPELLANT PAROLE; FAILED TO CONSIDER EMPIRICAL EVIDENCE OF REHABILITATION; AND FAILED TO PROVE LIKELIHOOD BY PREPONDERANCE OF THE EVIDENCE IN VIOLATION OF TRANTINO.

POINT II. THE TWO MEMBER PANEL FAILED TO PROPERLY CONSIDER APPELLANT'S AGE AT THE TIME OF THE OFFENSE.

POINT III. THE THREE MEMBER PANEL ARBITRARILY IMPOSED THE EXTRAORDINARY FET OF 120 MONTHS, BY FAILING TO FOLLOW LEGISLATIVE POLICIES IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION ARTICLE I, AND ARTICLE V II 2 OF THE NEW JERSEY CONSTITUTION.

The scope of our review is very limited. "[T]he Parole Board is the 'agency charged with the responsibility of deciding whether an inmate satisfies the criteria for parole release under the Parole Act of 1979.'" Acoli v. N.J. State Parole Bd., 224 N.J. 213, 222 (citation omitted), cert. denied, ___ U.S. ___, 137 S. Ct. 85, 196 L. Ed. 2d 37 (2016). "The decision of a parole board involves 'discretionary assessment[s] of a multiplicity of imponderables'" Trantino v. N.J. State Parole Bd., 166 N.J. 113, 201 (2001) ("Trantino V") (alteration in original) (quoting Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 10, 99 S. Ct. 2100, 2105, 60 L. Ed. 2d 668, 677 (1979)). "[T]he Board 'has broad but not unlimited discretionary powers[.]'" Id. at 173 (citations omitted). The Board's decision regarding parole will not be disturbed unless "arbitrary, capricious or unreasonable, or . . . not supported by substantial credible evidence in the record as a whole." In re Stallworth, 208 N.J. 182, 194 (2011) (citation omitted); see Acoli, supra, 224 N.J. at 222-23.

Appellant is serving a life sentence for the murder he committed in 1984, and thereafter will serve a three-year consecutive sentence for aggravated assault committed in 2006.

Before August 18, 1997, N.J.S.A. 30:4-123.53a and 30:4-123.56c provided that when an inmate

becomes eligible for parole, the Parole Board may deny parole release if it appears from 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."

[Williams v. N.J. State Parole Bd., 336 N.J. Super. 1, 7 (App. Div.), certif. denied, 165 N.J. 523 (2000).]

Under that iteration of the statute, "[t]he Parole Board's ultimate determination of parole fitness must be based on whether there is a likelihood that [appellant] will again engage in criminal activity." Trantino v. N.J. State Parole Bd., 154 N.J. 19, 39 (1998) ("Trantino IV").

The statute was amended in 1997. Currently, N.J.S.A. 30:4-123.53(a) provides that

[a]n adult inmate shall be released on parole at the time of parole eligibility, unless information supplied in the report filed pursuant to . . . [N.J.S.A.] 30:4-123.54 or developed or produced at a hearing held pursuant to . . . [N.J.S.A.] 30:4-123.55 indicates by a preponderance of the evidence that the inmate has failed to cooperate in his or her own rehabilitation or that there is a reasonable expectation that the inmate will violate conditions of parole imposed pursuant to . . . [N.J.S.A.] 30:4-123.59 if released on parole at that time. In reaching such determination, the board panel or board shall state on the record the reasons therefor.

Thus, before 1997, the focus of the parole decision was on the likelihood of the inmate engaging in criminal activity if released

and now it is on the likelihood of the inmate violating conditions of parole.

Here, the two-member panel appears to have applied both of these standards at different times without explanation. In the June decision, it applied the pre-1997 standard. In the October amendment, it applied the post-1997 standard. The Board then affirmed the panel without clarification of the standard, using what appears to be the current iteration of the statute. The record does not permit us to determine what standard the Board was applying when it affirmed the two-member panel or even why the post-1997 standard would apply to appellant's sentence for an offense committed in 1984 that he was still serving, and was the basis for his parole application. "[T]he Parole Board is obligated to apply the proper statutory standard." Trantino IV, supra, 154 N.J. at 44. Because of the Board's imprecise application of the statutory standard, we are constrained to reverse the Board's decision and to remand the matter to the Board for a new hearing on appellant's application for parole. We also are constrained to reverse the Board's decision on the FET because the Board must first determine whether appellant's request for parole is denied before it determines whether the FET is appropriate.

In setting aside the Board's decision, we specifically make no judgment on the underlying merits of appellant's application for parole or any FET. Rather, we simply direct that appellant's application for parole be considered anew by the Board under the appropriate standard.

Reversed and remanded. The Board is to conduct a new hearing on appellant's parole application within forty-five days. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION