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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2875-22**

FRED KRUG,

Appellant,

v.

NEW JERSEY STATE
PAROLE BOARD,

Respondent.

Argued May 7, 2024 – Decided June 24, 2024

Before Judges Natali and Puglisi.

On appeal from the New Jersey State Parole Board.

Kevin Scott Finckenauer, Assistant Deputy Public Defender, argued the cause for appellant (Jennifer Nicole Sellitti, Public Defender, attorney; Kevin Scott Finckenauer, of counsel and on the briefs).

Christopher C. Josephson, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Janet Greenberg Cohen, Assistant Attorney General, of counsel; Christopher C. Josephson, on the brief).

PER CURIAM

Appellant Fred Krug appeals from the April 26, 2023 final agency decision of the New Jersey State Parole Board (Board) denying him parole and establishing a thirty-six-month future eligibility term (FET). We affirm.

Krug is serving a life sentence for murder, with a consecutive twenty-three-year aggregate term for assault with a deadly weapon, assault with intent to kidnap, threatening to kill, and assault and battery on a police officer.

In September 1973, P.T.¹ was reported missing in East Brunswick. Her car was located in the parking lot of a bar where she had met a friend the night before. Signs of a struggle were evident in the parking lot, where police located P.T.'s personal items strewn about the scene. Three days later, P.T.'s nude body was found floating in the Raritan River, her hands tied behind her back by her shirt. The autopsy revealed P.T. had sustained severe head injuries that would have been fatal, but she died of asphyxiation caused by drowning. Her purse and partially burned clothing, including her pantyhose, were found in a wooded area about a mile from where her body surfaced and close to where Krug resided with his parents. Krug's fingerprint was lifted from the pantyhose. Because of

¹ We use the victims' initials to protect their privacy.

the state of decomposition, detectives were unable to determine whether P.T. had been sexually assaulted.

Two and a half months later, H.P. went to retrieve her laundry in the laundry room of her apartment building. Krug approached her from behind, bound her, and dragged her to the rear of the building. He assaulted her and threatened to kill her, then fled when he was observed by other individuals. H.P. sustained extensive swelling on her face and bruising under her eyes and above her wrist and ankle. When police officers later stopped Krug, he became combative and punched an officer in the eye.

In January 1974, Krug was arrested and charged with murder and kidnapping of P.T. In September 1974, a jury found Krug guilty of both offenses and he was later sentenced to life imprisonment. The kidnapping conviction was subsequently vacated, leaving the life sentence for murder. Krug also pleaded guilty to assault with intent to kidnap and threatening to kill for his attack on H.P., and assault and battery on a police officer. The resulting aggregate twenty-three-year sentence was imposed consecutive to the life sentence.

After four prior denials, Krug became eligible for parole consideration for the fifth time on August 15, 2022. He refused to participate in the initial hearing

before a hearing officer, who referred the matter to a two-member Board panel for a hearing. In July 2022, the panel denied parole and referred the matter to a three-member panel to establish an extended FET. That decision was later vacated after the Board learned that the psychologist who conducted Krug's evaluation was accused of fraudulent conduct in civil insurance litigation. Accordingly, Krug was scheduled for a psychological evaluation with a different psychologist and a de novo hearing before a different two-member Board panel.

During the in-depth evaluation, the psychologist interviewed Krug and administered several actuarial tests. With regard to the murder of P.T., Krug told the psychologist he was drinking and "sniffing" at the bar. He talked and danced with P.T. and when they left, he asked for her number and she declined to give it to him. Krug explained, "I got mad. I beat her up so bad she was dead. Next thing you know I leave her by the water, hoping the water [would] tak[e] her away." When asked about the victim's hands being tied, Krug "had no idea as to why he did that or why he took her clothing instead[] stating 'I'm ashamed. Embarrassed. I have such regret.'"

With regard to his assault on H.P., Krug explained he was working as a maintenance man and was tasked with taking care of the laundry room to prevent vandalism. He stated that when he saw H.P. overloading a machine, he told her

to stop and they got into an argument. Krug claimed, "Next thing I know I was running from the cops, all dr[u]gged out, so drugged out." Although he claimed not to remember the incident, he did not deny "fighting with the cops to get away."

The evaluation noted Krug's motivation for programming was below average, with "his statements suggesting little need for or interest in [Department of Corrections] programming." His "[i]ndependent living skills were marginal at best prior to incarceration," and his "limited, unclear" supports in the community would make his parole plans "likely challenging for him."

Krug's Level of Service Inventory – Revised (LSI-R) score of 29 indicated a medium risk of recidivism, and his Static-99R score indicated an above average risk of sexual reoffending, although he did not meet the criteria for civil commitment as a sexually violent predator. His Millon Clinical Multiaxial Inventory-III (MCM-III) profile was consistent with an individual who has been "deeply involved in the abuse of drugs." After discussing the risk factors for success and failure, the psychologist determined Krug's likelihood for successfully completing a parole term was "fair to poor."

On January 23, 2023, a two-member panel conducted the hearing. The panel discussed Krug's prior criminal convictions for assault with a deadly

weapon, rape and aggravated assault. Particularly, the panel recounted that Krug pointed a rifle out a car window and threatened an individual, sexually assaulted another victim and, while attempting to rob a woman, cut her with a knife. In discussing his prior and current offenses, the panel inquired of Krug why he committed these crimes, how he thought his actions impacted the victims, and why he believed he would not commit another offense if released. Throughout the interview, the panel noted Krug was agitated, aggravated and combative, particularly when pressed to discuss the motivations and consequences of his criminal behavior.

When asked why he committed the prior sexual assault, Krug answered, "I felt like it," and when asked how he thought it affected the victim, he stated, "Badly." When questioned why he thought that he committed the sexual assault "just because [he] felt like it," Krug responded, "I don't know." The panel then asked, "So what happens if someone really ticks you off in the future? What's your plan?" and Krug responded, "I already answered those questions. You keep asking me the same questions over and over again. I'm not gonna [sic] keep answering the same things over and over again." A panel member pointed out to Krug, "[Y]ou committed these heinous crimes . . . because you were agitated because people annoyed you or they were[not] following your rules that you

have. So if you still get agitated easily why should I believe you're not going to hurt someone else?" Rather than answer the question, Krug instead challenged the panel's line of questions.

The panel also discussed with Krug his institutional adjustment. Although he had been infraction free since 2003, Krug committed an asterisk or more serious offense of refusing to submit to a search in 2017. Krug stated a corrections officer stopped him and wanted to search him because he thought Krug put something in his mouth, and Krug refused the search. In contrast to Krug's version, the report indicated the officer observed Krug retrieve an unidentified object, possibly contraband, from a fire hose area. The officer ordered Krug to show him what was in his hand, and instead Krug placed the object in his mouth and swallowed it. During the hearing, Krug insisted he did not ingest drugs, as verified by a negative urine test and three days he spent in a dry cell wherein he did not excrete any illicit substances. When the panel reminded him contraband did not have to be drugs, but could have been a note or something else, Krug responded, "There you go with the negative stuff."

The panel also discussed Krug's lack of a viable parole plan, noting that he would need support particularly because he had been incarcerated for a substantial period of time and had not identified anyone who could assist him if

he was "down on [his] luck," had an "urge to use" or "need[ed] a ride." Instead, Krug sought placement in a halfway back program, which he understood would assist him in obtaining a job, driver's license and federal benefits. The panel explained halfway back services were not intended to be "forever," and asked Krug, "[C]an you survive on your own? Can you not drink and hurt someone? If you don't know why you raped people will you do it again if you have the opportunity?" Krug pointed out that he had only been convicted of one sexual assault, which he "did it just to do it, something to do."

The panel reminded Krug that if he were released, he would be subject to home visits by a parole officer, searches and drug tests, and would be required to answer questions and provide verification of employment and counseling. The panel asked Krug how he would respond to such intensive and intrusive scrutiny, since he was not having a productive dialogue answering the panel's inquiries during the parole interview. He responded:

Again, I'm going to repeat myself—in 2012, 2016 and 2022 I told the . . . Board members to decide my case on the records that you have before you going back to 1974. All right? I appreciate you coming in but this is not the way that—that I feel that my parole hearing should go. I have nothing else to say.

The panel also asked Krug about his participation in institutional programming and what he learned about his past behavior that led him to commit

crimes, to which he responded, "Nothin [sic] that I already did[not] know." Throughout the interview, the panel continually pressed Krug to elaborate on how he would handle conflict, given the apparent motivation for his violent crimes, and he demurred. At the end of the hearing, the panel repeatedly told Krug "the floor is yours" and asked him to explain why he would be a good candidate for parole. Instead of addressing the question, Krug instead focused on how many prior hearings he had and why the prior panel's decision had been vacated.

The Board panel denied parole and established a thirty-six-month FET. In support of its determination a substantial likelihood existed that Krug would commit a crime if released on parole, the panel noted the following reasons for denial:

- Facts and circumstances of offense(s). Specifically: Murder [first] degree.
- Prior offense record is extensive.
- Offense record is repetitive.
- Prior offense record noted.
- Nature of criminal record increasingly more serious.
- Committed to incarceration for multiple offenses.

- Prior opportunities on community supervision (parole) revoked for the commission of new offenses.
- Committed new offenses on community supervision (parole) but status not formally revoked.
- Prior opportunities on community supervision (probation/parole) have failed to deter criminal behavior.
- Prior opportunities on community supervision (probation/parole) have been violated/terminated/revoked in the past for technical violations.
- Prior incarceration(s) did not deter criminal behavior.
- Institutional infraction (since last panel hearing): Last infraction [April 5, 2017].
- Institutional infraction(s): numerous/persistent/serious in nature; loss of commutation time; confinement in detention and/or Administrative Segregations; consistent with offense record. Last infraction: [April 5, 2017].²
- Insufficient problem resolution. Specifically:
 - lack of insight into criminal behavior;
 - minimizes conduct;
 - other: [Inmate] shows no signs of remorse for victims. [Inmate] downplays his criminal behavior. [Inmate's] criminal thinking and behavior are concern by failing to comply with previous supervision. [Inmate] has not fully addressed criminal sexual behavior. [Inmate] has no adequate parole plan. As demonstrated

² Although the panel members checked off this factor, nothing is underlined to indicate their reasons for doing so.

by: interview; documentation in case file; confidential material/professional report.

- Lack of adequate parole plan to assist in successful reintegration into the community.
- Risk assessment evaluation.
- Other: LSI[-]R 29.

The panel also suggested Krug remain infraction free and finish his current programs, and noted the following mitigating factors:

- Participation in programs specific to behavior.
- Participation in institutional programs.
- Institutional reports reflect favorable institutional adjustment.
- Attempt made to enroll and participate in programs but was not admitted.
- Minimum custody status achieved/maintained.
- Commutation time restored.

Krug appealed the two-member panel's decision to the full Board, which affirmed the denial of parole and FET. Krug now appeals from that decision, raising the following issues for our consideration:

POINT I

IT WAS AN UNCONSTITUTIONAL EX POST FACTO VIOLATION FOR THE PAROLE BOARD TO CONSIDER INFORMATION OTHER THAN "NEW INFORMATION" WITHIN THE MEANING OF THE APPLICABLE 1979 PAROLE ACT IN DENYING . . . KRUG'S PAROLE.

POINT II

THE BOARD'S USE OF . . . KRUG'S POVERTY AND INABILITY TO SECURE HOUSING AS REASONS FOR DENYING HIM PAROLE VIOLATE THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION AND THE PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT.

A. The Board's Use of . . . Krug's Poverty and Inability to Secure Housing as Significant Factors for Denying Him Parole Violates State and Federal Constitutional Guarantees of Equal Protection.

B. Use of . . . Krug's Poverty as a Basis for Denying Parole Similarly Violates State and Federal Constitutional Prohibitions Against Cruel and Unusual Punishment.

POINT III

THE BOARD MEMBERS WHO TOOK PART IN THE INITIAL TWO-MEMBER DECISION THAT WAS VACATED SHOULD HAVE RECUSED THEMSELVES FROM PARTICIPATING IN THE FULL BOARD REVIEW OF THE DE NOVO HEARING.

POINT IV

THE BOARD OTHERWISE FAILED TO MEET ITS BURDEN OF ESTABLISHING BY A PREPONDERANCE OF THE EVIDENCE THAT THERE IS A "SUBSTANTIAL LIKELIHOOD" . . . KRUG WOULD COMMIT A NEW OFFENSE IF RELEASED, PARTICULARLY IN LIGHT OF HIS ADVANCED AGE AND INFIRMED HEALTH.

We begin our analysis mindful the Board's "decisions are highly 'individualized discretionary appraisals,'" Trantino v. N.J. State Parole Bd., 166 N.J. 113, 173 (2001) (Trantino VI) (quoting Beckworth v. N.J. State Parole Bd., 62 N.J. 348, 359 (1973)), entitled to both a presumption of validity, see In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), and our deference to the Board's "expertise in the specialized area of parole supervision," J.I. v. N.J. State Parole Bd., 228 N.J. 204, 230 (2017).

We may not upset the determination of the Board absent a showing it was arbitrary, capricious, or unreasonable; that it lacked fair support in the evidence; or that it violated legislative policies. Trantino v. N.J. State Parole Bd., 154 N.J. 19, 24-25 (1998) (Trantino IV). The burden is on the inmate to show the Board's actions were unreasonable. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002).

Because the decision on Krug's parole is governed by the 1979 Parole Act, he is entitled to "be released on parole at the time of parole eligibility, unless [it is shown] by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime . . . if released on parole at such time." Acoli v. N.J. State Parole Bd., 250 N.J. 431, 455 (2022) (alterations and omissions in original) (quoting Trantino VI, 166 N.J. at 126). The 1979 Act "shift[ed] the burden to the State to prove that the prisoner is a recidivist and should not be released." Id. at 456 (alterations in original) (quoting N.J. State Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983)).

Our Supreme Court has explained that requiring the Board to show "a substantial 'probability' that an inmate will reoffend is a fairly high predictive bar that must be vaulted—even though such an assessment will defy scientific rigor and involves a certain degree of subjectivity." Ibid. "Assessing the risk that a parole-eligible candidate will reoffend requires a finding that is more than a mere probability and considerably less than a certainty." Ibid. It is not enough for the Board to find "the mere 'potential' that an inmate if released may reoffend Only when the risk of reoffending rises to 'a substantial likelihood' may a parole-eligible inmate be denied parole" under the 1979 Act. Ibid.

The Acoli Court noted the 1979 Act requires the Board to assess the twenty-four factors listed in N.J.A.C. 10A:71-3.11(b), which includes:

facts and circumstances related to the underlying crime; offenses and disciplinary infractions committed while incarcerated; participation in institutional programs and academic or vocational education programs; documentation reflecting personal goals, personal strengths or motivation for law-abiding behavior; mental and emotional health; parole plans; availability of community resources or support services; statements by the inmate reflecting on the likelihood that he [or she] will commit another crime; the failure to rehabilitate; history of employment and education; and statement or testimony of any victim.

[250 N.J. at 457.]

The Board's decision must "be based on the aggregate of all pertinent factors," as well as any others the Board deems relevant. N.J.A.C. 10A:71-3.11(a) to (b). We now address Krug's contentions in light of our standard of review.

First, we reject Krug's claim the Board violated the Ex Post Facto Clauses of the federal and state constitutions by considering information that preceded the Board's prior parole denial, thereby allegedly violating the 1979 Parole Act, which limited the Board's consideration for parole after an initial denial to "new information" contained in a pre-parole report or hearing. L. 1979, c. 441, § 9 (amended by L. 1997, c. 213, § 1, and codified at N.J.S.A. 30:4-123.56(c)). We

rejected a similar argument in Trantino v. N.J. State Parole Bd., 331 N.J. Super. 577, 610 (App. Div. 2000) (Trantino V), in which we held the Board's application of the 1997 amendment that deleted the new information mandate to the parole hearing of an inmate whose offense occurred prior to 1997 "did not violate the ex post facto clause," because the change in the law was simply "a procedural modification that does not constitute a substantive change in the parole release criteria." We reasoned the amendment "simply allow[ed] the Board to consider all available evidence relevant to" the release standard set forth in the 1979 law. Id. at 610-11. See also McGowan, 347 N.J. Super. at 561 ("The current standard for Title 2A inmates involves a limited consideration of rehabilitation as it affects individual deterrence; i.e., whether there is a substantial likelihood that the inmate will commit a crime if released on parole.").

We were also "persuaded that much of the additional information considered by the Board at the remand hearings was, arguably, 'new information' and could be considered by the Board even under the pre-1997 version of N.J.S.A. 30:4-123.56(c)." Trantino V, 331 N.J. Super. at 611. We conclude the same is true here. Our review of the Board's decision makes evident that new information gleaned from Krug's parole interview and in-depth psychological

evaluation figured prominently in the Board's decision. Having reviewed the record, we are satisfied application of the 1997 amendment in this case did not create a significant risk of increasing Krug's punishment so as to violate the Ex Post Facto Clauses in the federal and state constitutions. See Garner v. Jones, 529 U.S. 244, 255 (2000) (holding when considering retrospective application of a particular change in a parole law, which does not on its face show a significant risk of a longer period of incarceration than under the earlier rule, the inmate "must show that as applied to his own sentence the law created a significant risk of increasing his punishment").

We are also unconvinced by Krug's argument the Board denied him parole based on his poverty and inability to secure housing, because this contention is belied by the record.³ The Board members asked legitimate, probing, substantive questions about Krug's plans for housing, employment and support if he were to be released. As the Board pointed out, this area of inquiry was particularly important given Krug's length of time incarcerated and the fact that

³ The Board contends Krug failed to raise this issue in his administrative appeal and urges us not to consider it. See J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). We interpret Krug's contentions before us regarding poverty to be sufficiently related to the arguments in his administrative appeal regarding his inability to obtain housing, and therefore we will address it.

he committed new crimes while on community supervision in the past. Accordingly, the panel asked practical questions such as whether Krug knew the cost of groceries and whether he had determined his eligibility for federal programs, which he did not. This inquiry was consistent with N.J.A.C. 10A:71-3.11(b), which permits the Board to consider an inmate's parole plans and the availability of community resources or support services. Nothing in the record indicates the Board asked inappropriate questions or rested its decision on an impermissible basis.


We likewise reject Krug's contention the Board members who conducted the hearing in July 2022 should have been recused from deciding his administrative appeal. N.J.A.C. 10A:71-1.5(b) provides that a "Board member shall not participate in any Board or Board panel disposition of the member's initial decision." Here, the July 2022 decision was vacated and the de novo hearing, conducted by different panel members, did not reference or rely on that prior decision. Because the administrative appeal concerned only the new hearing, the July 2022 Board panel members were not precluded from deciding it.

As to Krug's final point, "whether there is a substantial likelihood an inmate will commit another crime if released, although predictive of future

conduct rather than a finding as to past conduct, is essentially factual in nature." N.J. State Parole Bd. v. Cestari, 224 N.J. Super. 534, 547 (App. Div. 1988). Thus, our task is only to determine whether the Board's factual finding Krug was substantially likely to commit another crime if released on parole could reasonably have been reached on the sufficient credible evidence in this record.

Since his last parole hearing in 2016, Krug committed a serious institutional infraction; continued to exhibit insufficient problem resolution, including lack of insight into his criminal behavior, minimization of his conduct and failure to address his criminal behavior; and was unable to formulate a viable, supportive parole plan. Consistent with the impressions and conclusions reflected in Krug's psychological evaluation, he was hostile to the Board panel members, sidestepped their questions and failed to take advantage of his opportunity to provide positive information to them. Although the panel members discussed Krug's advanced age and infirmities, those issues do not override the other factors militating against parole release. Given this record, we cannot conclude the Board acted arbitrarily in concluding there exists a substantial likelihood Krug would commit another crime if released on parole at this time.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION