

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF DELTA

PEOPLE OF THE STATE OF
MICHIGAN and VICTIM'S FAMILY,

Plaintiffs-Appellants,

v.

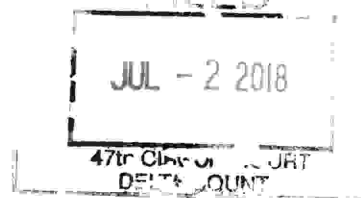
File No. 17-23722-AP

HANS CHRISTIAN NELSON,

Defendant-Appellee,

MICHIGAN PAROLE BOARD,

Appellee-Intervenor.



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DECISION ON APPEAL

PROCEDURAL HISTORY:

The Defendant/Appellee, Hans Christian Nelson, shot and killed Todd Newman on August 17, 1995. On July 11, 1996, Mr. Nelson was found guilty by a Delta County jury of Second Degree Murder with use of a firearm in the commission of the felony. On August 22, 1996, he was sentenced in the Delta County Circuit Court to twenty-five to forty-eight years for the murder and he also received a two-year mandatory sentence for the felony firearm conviction. At the

time he committed the murder, Mr. Nelson was 22 years old and had no prior criminal convictions.

On or about September 28, 2017, the Michigan Parole Board rendered a decision to grant parole to Mr. Nelson. The disciplinary credits he had earned while in prison availed to him eligibility for parole release as of December 26, 2017. On or about October 27, 2017, the Delta County Prosecuting Attorney and the family of Todd Newman filed applications for leave to appeal the decision of the Parole Board. In turn, the Michigan Parole Board intervened in the appeal to advocate its position. Mr. Nelson has been represented by his own counsel throughout these appellate proceedings.

This Court granted the applications for leave to appeal and briefs were submitted by the Delta County Prosecutor, Mr. Nelson through counsel, and by the Michigan Parole Board. The matter was heard on oral argument on May 11, 2018 and, by order of the Court, Mr. Nelson has remained incarcerated throughout the pendency of this appeal.

STANDARD OF REVIEW:

This Circuit Court has jurisdiction over this appeal pursuant to MCR 7.118 and MCL 791.234(11). "A prisoner has no constitutionally protected or inherent right to parole, only a hope or expectation of it." *People v Mack*, 265 Mich App 122, 129 (2005), quoting *Morales v Parole Board*, 260 Mich App 29, 48 (2003). The manifestation of this "hope or expectation" depends upon the sole discretion of the only entity vested with the power to make the determination - - not the courts, not the prosecutors, not the attorneys, the police or the general public - - the exclusive authority to lawfully grant parole rests squarely with the Parole Board pursuant to MCL 791.234(11) and MCL 791.235(1). However, the discretion of the Parole Board, "...is not unfettered but...is circumscribed by the many requirements of the [applicable statutes]." *Wayne County Prosecutor v Parole Bd.*, 210 Mich App 148 (1995).

Pursuant to MCR 7.118(H)(3), a party challenging a Michigan Parole Board decision to grant parole status to a prisoner has the burden of establishing that the decision was either, (a) in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to MCL 24.207; or (b) a clear abuse of discretion. As applied to the instant matter, the Michigan Parole Board is not required to prove anything. Mr. Nelson is not required to prove anything. The only parties assigned with the task of clearing the proverbial hurdle imposed by the law are the two parties making the appeal, the Prosecutor and the family of Todd Newman.

It is this Circuit Court which is assigned with the task of determining whether the Appellants have met the burden. Again, however, the Court's decision is not rooted in a re-trial of the case or in idle speculation of what ought to be. Rather, the Court's function is to specifically measure the actions of the parole board against the aforementioned criteria necessary for the appellants to satisfy their burden.

APPELLANT ARGUMENT I: "THE PAROLE BOARD VIOLATED MICHIGAN ADMINISTRATIVE CODE, RULE 791.7715 IN GRANTING PAROLE TO HANS NELSON"

"Appellant" shall hereinafter be referred to in the singular for the purpose of the Court's legal analysis for the reason that Appellant Delta County Prosecutor/People of the State of Michigan was the only appellant to file a brief as required under MCR 7.118(H)(2) and MCR 7.111(A)(1)(a).

Appellant argues that the decision of the Parole Board was made in violation of Michigan Administrative Code, Rule 791.7715, which states in pertinent part:

Except as provided in section 34a of Act No. 232 of the Public Acts of 1953, as amended, being S791.234a of the Michigan Compiled Laws, a prisoner shall not be released on parole until the parole board has considered all relevant facts and circumstances, including the prisoner's probability of parole as determined by the parole guidelines set forth in R791.7716 and any crime victim's statement

provided under section 21 of Act No. 87 of the Public Acts of 1985, as amended, being S780.771 of the Michigan Compiled Laws.

Within this framework, the Appellant's specific argument is that the Parole Board violated its duty to, "...consider all relevant facts and circumstances," as required under R791.7715(1), "...in determining whether parole is in the best interests of society and public safety," as required under R791.7715(2).

At this juncture it is important to clarify that the full sum of the Appellant's R791.7715 violation argument relies upon one single claim - - that the Parole Board's failure to review a Transitional Accountability Plan (TAP) until after the parole decision was made constitutes a violation of the administrative rules which requires reversal. A Transitional Accountability Plan is one tool among many by which a Parole Board can evaluate a prisoner's transition back into society. Since R791.7715 does not explicitly reference a TAP by name, the appellant relies instead upon two principal cases to establish that an administrative rule violation occurred in the absence of a TAP.

In re Haeger:

The first such case is *In re Haeger*, 294 Mich App 549 (2011), wherein the Michigan Court of Appeals determined that the Parole Board had violated administrative rules by granting parole based upon an incomplete record that lacked case summary reports, in-reach services reports, a psychological or psychiatric evaluation, and a TAP. The case involved a male prisoner who had committed the crimes of breaking and entering an occupied dwelling with the intent to commit a felony and first-degree criminal sexual conduct committed during a felony.

Although the *Haeger* Court indeed emphasized the importance and purpose of a TAP in advance of a Parole Board release decision, it did not reach its decision based upon the absence of the TAP alone. Indeed the Court could have simply stated from the outset of the decision that the absence of a TAP, in and of itself, rendered the Parole Board decision invalid. It did not do this, however.

Instead, the *Haeger* Court based its decision upon the absence of *multiple* important pieces of data *among which* was the TAP. It was the *cumulative* absence of these *multiple pieces* of proper data that invalidated the Parole Board decision, not the absence of the TAP alone.

Still, it would appear that the *Haeger* Court indeed equated the absence of a TAP with a violation of R791.7715(2)(c)(iii) which provides for the development of a suitable and realistic parole plan. However, such a plan is one, among a list, of the things that the Parole Board “*may*” consider in determining whether parole ought to be granted. Moreover, the administrative rule does not restrict the means by which such a plan can be prepared, to a TAP alone. As stated before, the rule never references a “Transitional Accountability Plan” or a “TAP” by name. Therefore, the *Haeger* Court’s determination that the absence of a TAP ran afoul of R791.7715(2)(c)(iii), was essentially to say that a TAP would have been **a** means, but not the **only** means, by which that provision could have been accounted for.

In re Elias:

The Appellant also relies upon *In re Elias*, 294 Mich App 507 (2011), wherein the Michigan Court of Appeals found that the circuit court improperly invaded the Parole Board’s authority when it reversed the board’s decision to grant parole. The case involved a female prisoner who had been convicted of second degree murder and possession of a firearm in the commission of a felony. The prisoner broke into the home of her girlfriend and her girlfriend’s husband while they were away. When they arrived, along with two young children, the prisoner positioned herself at a second-story window and used a shotgun to shoot her girlfriend’s husband twice, reloading the shotgun in the process. The prisoner then exited the home, stood over the man’s body, and shot him in the face at close range.

During much of her incarceration, she was a problem-prisoner who collected 35 major misconduct tickets which included disobedience, sexual contact

with other prisoners, malicious destruction of a prison vending machine, and starting a fire in the prison dumpster. Yet, after being denied parole multiple times, she was ultimately granted parole after demonstrating notable progress and good behavior for a sustained period of time. Despite this, the circuit court reversed the decision of the Parole Board to grant parole. The Court of Appeals, in turn, reversed the circuit court and reinstated the order of the Parole Board.

In reaching its decision, the Court of Appeals took the opportunity to delve into an exhaustive analysis of the parole process in Michigan - - something that had not been fully or adequately examined by Michigan courts up until that time. The Court touched upon the series of tools relied upon by parole boards to make their decisions including Parole Eligibility Reports (PER), the statutorily mandated parole guidelines and the Michigan Prisoner Reentry Initiative (MPRI), which includes consideration of a TAP which, in turn, incorporates a COMPAS (correctional offender management profiling for alternative sanctions) risk assessment.

In addressing the TAP, the *Elias* Court stated that, "A staff member from the Department of Corrections must formulate a TAP with each prisoner, mostly to assist the prisoner's reentry into society, but also to assist the Board in rendering its parole decision." *Id.* at 519-520. The TAP contains four elements which include Needs, Goals, Tasks and Activities. Notably, however, the needs, which address criminogenic factors that contribute to risk, are assessed by using the COMPAS risk assessment instrument. In other words, the Needs element of a TAP, which is arguably the most important element, relies upon a separate assessment instrument, the COMPAS. Therefore, the completion of the COMPAS is akin to the completion a critically important prong of the TAP.

Another important takeaway from the *Elias* decision was that the TAP considered by the Parole Board was actually somewhat negative, indicating that the prisoner needed to further develop her social attitude and manage her criminal thoughts. Notwithstanding this, the Parole Board still granted parole. Notably, the

Court of Appeals stated that the TAP at issue was prepared over a year prior to the Parole Board decision and that:

“(t)he Board was **not required to treat this 14-month-old document as accurately summarizing (the prisoner’s) current potential to successfully transition into society and could assess for itself** whether (the prisoner) had met the outlined goals and was ready for parole.” *Id.* at 540, *emphasis added*.

This guidance from the *Elias* Court begs the question - - *how singularly indispensable is the TAP to a parole decision when a stale and inaccurate TAP is not an impediment to the Court of Appeals upholding a grant of parole?*

In re Stephens:

A very recent unpublished Court of Appeals case directly addresses the TAP issue in a way that this Court finds particularly persuasive. On May 22, 2018 the Michigan Court of Appeals decided the case of *In re Parole of Arthur John Stephens*, 2018 WL 2324106, wherein the Circuit Court’s decision to reverse the Parole Board’s decision to grant parole was, in turn, reversed by the higher court.

In that case, the prosecutor argued that the Parole Board had violated its regulatory duties under R791.7715(1) and (2)(c)(iii) when it failed to produce a TAP for the prisoner at intake. In this case, at least one TAP had been prepared on behalf of the prisoner, but it had not been prepared at intake. The Court of Appeal echoed, as has this Court, the language of the rule which states that the Parole Board “may” consider in determining the propriety of parole, a prospective parolee’s readiness for release as demonstrated by the development of a suitable and realistic parole plan. The Court noted that the term “*may*” denotes, “permissive, discretionary action, as opposed to mandatory action.” *Id.* at 8-9.

The Court then went on to address the Prosecutor’s argument that the *Haeger* and *Elias* cases, *supra*, require the consideration of a TAP at intake for each prospective parolee. In analyzing the specific language of those cases, the Court stated:

"Although the circuit court correctly noted that our decisions in *Haeger* and *Elias* make it clear 'that a TAP is a very relevant consideration in regard to a prisoner's parole and that a TAP should be considered prior to parole being granted,' there is no basis for the additional conclusion that the Board abused its discretion and failed to comply with the administrative rules merely because no 'initial' TAP was in the record. As noted, under Mich. Admin. Code, R791.7715(2)(c)(iii), the Board '*may consider*' readiness for release as demonstrated by 'development of a suitable and realistic parole plan.' ***Under the plain language of the Rule, then, the Board is not required to consider any specific plan, let alone a TAP. Furthermore, this Court did not hold, in either Haeger or Elias, that the Board's failure to consider a TAP - - initial or otherwise - - before granting parole alone constitutes an abuse of discretion.*** Rather, while the *Haeger* Court did conclude that the Board abused its discretion, *in part*, by failing to prepare or consider a TAP, this was only one of several 'omissions' in *Haeger's* file that, together, indicated that the Board had 'violated its duty to consider all relevant facts and circumstances...in determining whether parole is in the best interest of society and public safety.'" *Id.* at 11-12, *emphasis added*.

Instant Case:

Under the facts of our case, an initial TAP was never prepared for Mr. Nelson. Given this, the Parole Board never considered one in conjunction with its initial decision to grant parole. However, the Parole Board was subsequently furnished with Parole Action Referral Form CFJ-167 which directed the Board as follows:

*"P was granted parole with a release date of 1/4/2018. On 10/30/2017, an Application for Leave to Appeal was received from the Delta County Prosecutor's Office. Parole was suspended on 10/31/2017. In reviewing P's Central Office file, the attached TAP was not included for the Parole Board's review and consideration at the time parole was granted. **Please advise if this changes your decision to grant parole.**" (emphasis added)*

Upon reviewing the attached TAP which identified Mr. Nelson's risk for violent recidivism, general recidivism and failure to appear as "Low" and which deemed his criminal associations, criminal opportunities, social isolation, substance abuse, criminal personality, criminal thinking, family criminality and

socialization failure all as “Unlikely,” the Parole Board made a decision. The Board could either choose to “Let Action Stand” or to “Suspend.” The Board elected to “Let Action Stand,” meaning it had decided to stand by its initial decision to grant parole. This is despite the furnished TAP also revealing that Mr. Nelson needed to develop a realistic residence-seeking plan.

The Court of Appeals analysis of the *Elias* and *Haeger* opinions with respect to the place that Transitional Accountability Plans have in the mosaic of a Parole Board’s analysis is consistent with this Court’s analysis. As such, this Court is not persuaded by the first of the Appellant’s two grounds and does not find that the absence of a TAP at the time of the Parole Board’s decision, alone, is grounds for reversal, or that R791.7715 was violated by the Board’s grant of parole to Mr. Nelson.

APPELLANT AGRUMENT II: “THE PAROLE BOARD ABUSED ITS DISCRETION IN GRANTING PAROLE TO THE APPELLEE”

The second ground advanced by the Appellant is that the Parole Board abused its discretion by granting parole to Mr. Nelson. The Appellant bases this upon the following specific claims:

- That the Parole Board failed to take into consideration Mr. Nelson’s need for mental health services.
- That the Parole Board failed to take into consideration the aggravating facts of Mr. Nelson’s criminal conviction.
- That the Parole Board failed to take into account Mr. Nelson’s risk to society.

The Appellant’s claims must be measured against the record actually relied-upon by the Parole Board in rendering its decision. That record can best be summarized as follows:

- Parole guidelines scoring is required pursuant to MCL 791.233e. The *Elias* Court cited the DOC policy directives in stating that a prisoner with a score of **+3 or greater** merits placement in the **high-probability of**

parole category, while a score of **-13 or less** warrants assignment to the **low probability of parole** category. A score **between** those figures falls within the **average probability category**. Mr. Nelson's final parole guidelines score was **+14** and his prison record shows only two misconduct tickets, one in 2001 for disobeying a direct order and one in 2013 for destruction or misuse of property.

- Mr. Nelson did, in fact, undergo a Qualified Mental Health Professional (QMHP) evaluation prior to the Parole Board decision. He was interviewed and his PSI reports, OMNI file, COMPAS Risk Score and electronic medical file were all considered. The QMHP was comprehensive and covered an extensive amount of territory including Mr. Nelson's mental status examination, his suicidal risk level, social history, mental health history, substance abuse history, criminal history, institutional record, awareness/insight into behaviors, support network and his significant social influences. The evaluation also includes Mr. Nelson's plans for residency and employment outside of the prison environment. He had coped with depression at the beginning of his incarceration and received appropriate services, but no major mental illness history was otherwise noted, he was not receiving mental health services within the MDOC at the time of the evaluation, and his suicide risk level was considered low, though he had attempted suicide in the past. The conclusion rendered by the evaluator states in pertinent part as follows:

- o *"Mr. Nelson appears to have the cognitive capacity to make good decisions and appears to have developed effective self-regulation skills. He is able to identify a support network that includes both family members and close friends, all of whom he has identified as having a positive impact on his life. If paroled, Mr. Nelson is recommended to follow through with any parole*

stipulations and to continue to develop a positive support network and community resources as he re-integrates into society, as he has been incarcerated for a significant amount of time.”

- A Parole Eligibility Report approved in July of 2017 describes the educational and vocational course work that Mr. Nelson successfully completed and states, *“Prisoner Nelson has adjusted well while incarcerated and has met all his requirements from RGC. Prisoner has excellent block and work reports throughout his incarceration and has continuously been employed during this time.”*

- An Assessment Narrative screening from July of 2017 addressed another comprehensive array of information including risk probability as well as a criminogenic needs narrative. This narrative included data regarding reentry matters such as social isolation, substance abuse, cognitive behavioral information, family history, education, social environment, residential stability and mental health. The assessment presented a thorough account of Mr. Nelson’s status, plans and progress and he scored acceptably in virtually every area. He was recommended for a mental health assessment relative to his past issues with anxiety, depression and suicide.

- Another comprehensive accounting of Mr. Nelson’s progress is the Case Summary Report for August of 2017 which details a broad spectrum of Mr. Nelson’s involvement with the MDOC, including a description of the criminal act which led to his incarceration. Among other things, the report reveals that Mr. Nelson was emotional during his interview and expressed remorse for what he had done and for how it affected the Newman family.

As the above reveals, the breadth of data compiled for the purpose of weighing Mr. Nelson's parole suitability was extensive. The Appellant's assertion that the Parole Board failed to take into account Mr. Nelson's mental health needs and his risk to society is belied by the fact that all relevant data to make those determinations was at the disposal of the Parole Board. In other words, the Parole Board made its determination precisely because of the content of this data, not despite it. In doing so, it exercised its sound judgment in granting Mr. Nelson parole. Moreover, the Court is prohibited from substituting its own judgment for that of the Parole Board. Aside from making mention of mental health and risk needs, the Appellant offers little by way of specifics to support their claim that discretion was abused as to these two particular issues.

As to the third issue argued by the Appellant, that the Parole Board failed to take into consideration the aggravating facts of Mr. Nelson's conviction, the Court again refers to the guidance offered by the *Elias* Court. The *Elias* Court admonished the Circuit Court for relying too heavily on "static factors" such as the nature of the sentencing offense and the prisoner's former misconduct, rather than the prisoner's rehabilitation and evolution throughout her incarceration. It should be noted that the circumstances of the *Elias* murder were particularly horrific, as it also involved the added cruelty of multiple shots using a shotgun and a final shot to the face at point blank range - - all of which occurred in the presence of innocent family members, including children.

In the instant matter, Mr. Nelson and Mr. Newman got into an altercation which eventually led to Mr. Nelson acquiring a shotgun and shells. He sawed off the barrel and stock and drove to a location down the road from Mr. Newman's home. He later went to the home, kicked in the back door and waited for Mr. Newman to appear. When he did, Mr. Nelson shot him at point-blank range, killing him, and then fired two additional shots elsewhere in the home to ensure that nobody else came out. Mr. Nelson then fled and was eventually apprehended in Wisconsin.

This Court's reference to the *Elias* facts is intended for the purpose of context, not to create some sort of morbid depravity competition between two unrelated cases. There can be no misinterpretation of the fact that Hans Nelson committed a despicable act of murder when he shot and killed Todd Newman. A Delta County jury determined his guilt and a Delta County court determined his punishment. This is what the Court of Appeals meant when referring to "static factors" - - things that will never change. The non-static, or perhaps "dynamic" factor in this timeline has been Mr. Nelson's conduct, progress and station in life during the decades of his incarceration. Based upon this record, due and just weight was given by the Parole Board as to the nature of the offense as well as to Mr. Nelson's progress since its commission.

It was the Supreme Court of Michigan that stated that, "*(T)he ultimate goal of sentencing in this state is . . . to protect society through just and certain punishment reasonably calculated to rehabilitate and thereby 'convert bad citizens into good citizens.'*" *People v Schultz*, 435 Mich 517, 532 (1990)

While this ideal may seem unattainable, or perhaps even naïve, it is a critical part of the foundation of the system of laws that binds our civil society. Ultimately, the Michigan Parole Board, cloaked in its exclusive authority over such important decisions, determined that the grant of parole to Hans Christian Nelson was lawful, reasoned and just. The record supports this outcome.

FINDINGS:

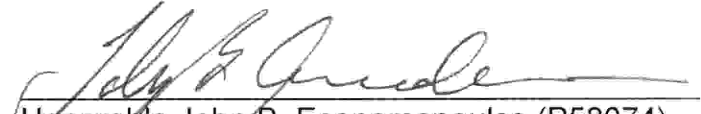
The Appellant has failed to meet its burden of establishing that the decision of the Michigan Parole Board was in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to MCL 24.207.

The Appellant has failed to meet its burden of establishing that the decision of the Michigan Parole Board was a clear abuse of discretion.

ORDER:

The decision of the Michigan Parole Board is AFFIRMED and the grant of parole to Hans Christian Nelson shall take effect immediately. This Court retains no further jurisdiction.

Dated: June 29, 2018


Honorable John B. Economopoulos (P58074)
47th Circuit Court Judge