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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3595-15T1

MARNELL JOHNSON,

Appellant,

v.

NEW JERSEY STATE PAROLE BOARD,

Respondent.

Submitted December 12, 2017 – Decided February 7, 2018

Before Judges Yannotti and Carroll.

On appeal from the New Jersey State Parole Board.

Marnell Johnson, appellant pro se.

Christopher S. Porrino, Attorney General,
attorney for respondent (Melissa Dutton
Schaffer, Assistant Attorney General, of
counsel; Gregory R. Bueno, Deputy Attorney
General, on the brief).

PER CURIAM

Marnell Johnson appeals from a final determination of the New Jersey State Parole Board, which denied his application for parole

and established a sixty-month future eligibility term (FET). We affirm.

I.

In August 1995, Johnson, an admitted drug dealer, and a rival drug dealer had a dispute. After exchanging words with the rival dealer, Johnson fired a TEC-9 machine gun, and four bystanders were injured, one fatally. Johnson was arrested on September 10, 1995, and a grand jury thereafter charged him with various offenses. Johnson was tried before a jury and found guilty of aggravated manslaughter, two counts of aggravated assault, unlawful possession of a weapon, and possession of a weapon for an unlawful purpose.

On June 4, 1996, the trial court sentenced Johnson to an aggregate term of forty years of incarceration, with a twenty-year period of parole ineligibility. While incarcerated, Johnson was found guilty of thirteen disciplinary infractions, ten of which were asterisk infractions, which are the most serious. N.J.A.C. 10A:4-4.1.

On September 6, 2015, Johnson first became eligible for parole. On May 14, 2015, a two-member Board panel considered the application and issued a notice of decision denying parole. The panel found that there was a substantial likelihood Johnson would commit a new offense if released on parole.

In its decision, the two-member panel noted as mitigating factors that Johnson: (1) had a minimal offense record; (2) completed an opportunity for community supervision without violations; (3) participated in institutional programs and programs specific to his behavior; (4) received institutional reports showing favorable adjustment; (5) sought to participate in other programs but was not permitted to do so; and (6) has commutation time restored.

The panel identified the following aggravating factors as reasons for denying parole. The offenses for which Johnson is incarcerated are serious in nature. He has a record of committing multiple property-related offenses, which includes his prior offense record. Johnson is presently incarcerated for multiple offenses. He has committed new offenses while on parole. Previously he was placed on probation and parole, but this did not deter further criminal behavior. He has committed numerous institutional infractions, which were serious in nature and resulted in the loss of commutation time, confinement in detention, and administrative segregation. He also has insufficient problem resolution, as shown by a lack of insight and minimization of his criminal conduct. In addition, he committed the offenses for which he is presently incarcerated while on parole and while released on bail for other charges.

The two-member panel also found that although Johnson had admitted his criminal conduct, he failed to show insight into his criminal behavior from the victim's viewpoint. The panel noted that Johnson had stated he did not intend to shoot the victims, but he failed to recognize that "his reckless behavior [resulted] in someone's death." The panel stated that a concern for the victim had not affected Johnson's behavior during his incarceration, noting "his assaultive behavior has persisted over [the] years." The panel observed, however, that Johnson's risk-assessment score was nineteen, which indicated a minimum risk of recidivism.

The two-member panel referred the matter to a three-member Board panel for a decision on Johnson's FET. On May 29, 2015, Johnson submitted a letter of mitigation to the three-member panel. On August 12, 2015, the panel issued a decision, establishing a sixty-month FET. Like the two-member panel, the three-member panel also found a substantial likelihood that Johnson would commit a new crime if released on parole and noted the same mitigating and aggravating factors for denying parole as the two-member panel.

On October 9, 2015, the three-member panel issued a narrative decision detailing its reasons for establishing a sixty-month FET. On November 9, 2015, Johnson filed an administrative appeal to the Board challenging the two-member panel's determination to deny parole and the three-member panel's decision to establish a sixty-

month FET. On March 23, 2016, after considering the entire administrative record, the full Board issued a final decision denying parole and establishing a sixty-month FET. This appeal followed.

II.

On appeal, Johnson argues that the Board erred by denying his application for parole. He contends the Board "retroactively applied" the August 19, 1997 amendments to N.J.S.A. 30:4-123.53(a) to his case, which he asserts "made it easier for the Board to deny [parole] release at the first hearing." He also argues that the sixty-month FET is excessive.

Appellate review of a decision of the Parole Board is "limited." Hare v. N.J. State Parole Bd., 368 N.J. Super. 175, 179 (App. Div. 2004). We will not reverse the Board's decision "unless found to be arbitrary . . . or an abuse of discretion." Pazden v. N.J. State Parole Bd., 374 N.J. Super. 356, 366 (App. Div. 2005) (quoting Trantino v. N.J. State Parole Bd., 154 N.J. 19, 25 (1998) (Trantino IV)). The Board has "broad but not unlimited discretionary powers" when it considers an inmate's record and renders a decision on a parole application. Trantino v. N.J. State Parole Bd., 166 N.J. 113, 173 (2001) (Trantino VI) (quoting Monks v. N.J. State Parole Bd., 58 N.J. 238, 242 (1971)).

In reviewing a final decision of the Board, we consider: (1) whether the Board's action is consistent with the applicable law; (2) whether there is substantial credible evidence in the record as a whole to support its findings; and (3) whether in applying the law to the facts, the Board erroneously reached a conclusion that could not have been reasonably reached based on the relevant facts. Trantino VI, 166 N.J. at 172 (quoting Trantino IV, 154 N.J. at 24).

III.

As noted, Johnson argues that the Board evaluated his eligibility for parole under the wrong standard. We disagree. Where the relevant offense was committed before August 18, 1997, the standard for parole is set forth in the version of N.J.S.A. 30:4-123.53(a) in effect at that time. Williams v. N.J. State Parole Bd., 336 N.J. Super. 1, 7 (App. Div. 2000). The statute then provided:

An adult inmate shall be released on parole at the time of parole eligibility, unless [the] information supplied [to the Parole Board] . . . or developed or produced at a hearing . . . indicates 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) (1996).]

For offenses committed after August 18, 1997, the statute, as amended, provides:

An adult inmate shall be released on parole at the time of parole eligibility, unless [the] information supplied [to the Parole Board] . . . or developed or produced at a hearing . . . 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 . . . if released on parole at that time.

[N.J.S.A. 30:4-123.53(a).]

Here, the standard in N.J.S.A. 30:4-123.53(a) prior to its amendment in 1997 applies because, as noted previously, Johnson committed the offenses for which he is incarcerated in 1995. Notwithstanding Johnson's argument to the contrary, the two-member panel, three-member panel, and the full Board applied the pre-1997 "substantial likelihood" standard in deciding whether Johnson should be paroled.

In their respective decisions, the two-member and three-member panels stated that "a substantial likelihood exists that [Johnson] would commit a new crime if released on parole at this time." Furthermore, in its final decision, the full Board affirmed the findings of both panels and also found "that a preponderance of evidence indicates that there is a substantial likelihood that [appellant] would commit a crime if released on parole at this

time." Therefore, we reject Johnson's contention that the Board applied the wrong standard when it denied parole.

IV.

Next, Johnson argues that the reasons cited by the Board are not sufficient to deny parole. He contends that under the applicable parole standard, the Board may not consider the serious nature of his offense or the gravity of the crimes for which he is presently incarcerated. He argues that the Board was disingenuous when it commented favorably on his treatment and program participation, and then found he lacked sufficient insight into his criminal behavior. Johnson acknowledges that he took the life of another person, but asserts he "has paid the penalty" for that offense.

Johnson also argues that he has admitted full responsibility for his crimes, and by stating that he has not shown remorse for the victim and failed to address the anger that led to the offenses, the Board ignored "the dynamics of his participation" in programs he attended "to help himself." He contends he immersed himself in counseling groups while in prison and the Board erred by finding he had not sufficiently addressed the underlying causes of the anti-social behavior that led to his criminal conduct.

We find no merit in these contentions. N.J.A.C. 10A:71-3.11(b) sets forth a non-exhaustive list of factors the Board

considers when determining whether to release an inmate on parole. These factors include, but are not limited to, the facts and circumstances of the offense, aggravating and mitigating factors surrounding the offense, the nature and pattern of previous convictions, the inmate's participation in institutional programs, and the inmate's mental and emotional health. Ibid. The Board is not required to consider each and every factor, but should consider those that apply to the particular case. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 561 (App. Div. 2002).

Here, the Board noted that in assessing Johnson's suitability for parole, the two-member panel considered Johnson's entire record, including his criminal history. The Board noted that Johnson has two juvenile adjudications and two adult convictions. Johnson has no employment history and a four-year history of alcohol abuse. He was previously sentenced to probation and parole but failed to benefit from those opportunities. He also committed the present offenses while on parole for two robbery offenses and while released on bail for a drug-related offense.

The Board found that the two-member panel had appropriately considered the facts and circumstances of the offenses for which Johnson is presently incarcerated. The Board noted that Johnson fired shots from a machine gun and injured four persons, one fatally. The Board also found that the record supported the panel's

determination that Johnson lacked insight into his crimes and minimized his criminal conduct. The Board determined that the panel's finding was appropriate in light of Johnson's responses to questions posed during the parole hearing.

The Board further found that while Johnson had made some progress during his incarceration, his criminal behavior remained a matter of concern, as shown by his criminal record and his many institutional infractions, which include sanctions for fighting, assault, and possession or introduction of a weapon in the facility. The Board found that Johnson's institutional record contradicted his claim that he had shown sufficient rehabilitation while incarcerated.

The Board also observed that Johnson admitted guilt for his previous offenses and this may help him "develop insight" into the causes for his criminal conduct, but his admission did not "equate to a change in [his] behavior." Based on all relevant factors, the Board found that there is a substantial likelihood Johnson will commit another crime if released on parole at this time.

We are convinced there is sufficient credible evidence in the record to support the Board's findings of fact and decision to deny parole. The Board's decision was not arbitrary or an abuse of discretion.

V.

Johnson also contends the Board erred by establishing a sixty-month FET, which he asserts is excessive. Again, we disagree.

When an inmate is not released on his parole eligibility date, the Board must establish an FET and does so in accordance with N.J.A.C. 10A:71-3.21. For "a prison inmate serving a sentence for murder, manslaughter, aggravated sexual assault or kidnapping or serving any minimum-maximum or specific sentence in excess of [fourteen] years for a crime not otherwise assigned pursuant to this section," the standard FET is twenty-seven months. N.J.A.C. 10A:71-3.21(a)(1).

The standard FET may be shortened or lengthened by up to nine months "when, in the opinion of the Board [p]anel, the severity of the crime for which the inmate was denied parole and the prior criminal record or other characteristics of the inmate warrant such adjustment." N.J.A.C. 10A:71-3.21(c). However, if the panel determines that an FET established in accordance with the aforementioned guidelines is "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior," the panel may establish a different FET. N.J.A.C. 10A:71-3.21(d).

In doing so, the panel must consider the factors enumerated in N.J.A.C. 10A:71-3.11, which are the same factors used to

determine whether an inmate should be released on parole. See N.J.A.C. 10A:71-3.21(d). If the FET established for a particular inmate departs from the guidelines, the panel must set forth specific reasons for its decision. N.J.S.A. 30:4-123.56(b).

As we stated previously, in this matter, the Board considered numerous factors identified in N.J.A.C. 10A:71-3.11(b), including the nature of the offenses committed, Johnson's prior criminal record, his pattern of institutional infractions, his program participation, and his mental and emotional health. The Board identified a number of factors that led it to conclude that an FET established in accordance with the guidelines would be inappropriate and a sixty-month FET was warranted.

We are convinced the Board's decision to establish a sixty-month FET is not arbitrary or an abuse of discretion. There is sufficient credible evidence in the record to support the Board's finding that a sixty-month FET was warranted in this matter. Johnson's arguments to the contrary lack sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION