SJC-13197

JOSE RODRIGUEZ vs. MASSACHUSETTS PAROLE BOARD.

Middlesex. March 7, 2022. – September 6, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Parole. Imprisonment, Parole. Administrative Law, Decision, Judicial review.

Civil action commenced in the Superior Court Department on May 6, 2020.

The case was heard by Douglas H. Wilkins, J., on motions for judgment on the pleadings.

The Supreme Judicial Court granted an application for direct appellate review.

Melissa Allen Celli for the plaintiff.

Todd M. Blume, Assistant Attorney General, for the defendant.

Benjamin Winters, of the District of Columbia, & Caitriona Fitzgerald, for Electronic Privacy Information Center, amicus curiae, submitted a brief.

Robert Hennessy, for private counsel division of the Committee for Public Counsel Services & another, amici curiae, submitted a brief.

BUDD, C.J. The plaintiff, Jose Rodriguez, who is serving a life sentence for committing rape at the age of sixteen, sought review in the Superior Court of the parole board's (board's) fourth denial of his request for parole. He now appeals from the judgment entered in favor of the board, arguing, as he did below, that he was denied the "meaningful opportunity to obtain release" that is to be afforded to juvenile offenders who have been sentenced to life in prison. Diatchenko v. District Attorney for the Suffolk Dist., 471 Mass. 12, 19 (2015) (Diatchenko II). We affirm.[1]

Background. The following facts are taken from the board's record of decision. The plaintiff initially was convicted of rape and assault and battery by means of a dangerous weapon, crimes he committed when he was sixteen years old.[2] Due to

[1] We acknowledge the amicus briefs submitted by the Electronic Privacy Information Center and by the private counsel division of the Committee for Public Counsel Services and the Northeastern University School of Law Prisoners' Assistance Project.

[2] The board's decision details that

> "[o]n September 27, 1976, 16-year-old Jose Rodriguez raped and assaulted a Boston University student in Brookline. As the woman walked from the train station, she soon realized that she was being followed. A few minutes later, Mr. Rodriguez called out to her and, when she turned around, he pretended to ask for directions and walked toward her. When he arrived within a few feet of the woman, Mr. Rodriguez thrust a broken bottle under her throat, spun her

errors at trial, the convictions were overturned and the plaintiff was released on bail pending a new trial. See Commonwealth v. Rodriguez, 378 Mass. 296, 310 (1979). The plaintiff thereafter fled to California, where he used an alias and lived as a fugitive for seven years. During that time, the plaintiff was convicted of two other sexual offenses (as an adult). Eventually, his parole officer discovered that the plaintiff had outstanding charges in Massachusetts. On being extradited to Massachusetts, the plaintiff was retried and again convicted of rape and assault and battery by means of a dangerous weapon. He was sentenced to life in prison with the possibility of parole and a concurrent term of from eight to ten years in prison, respectively.

At the parole hearing,[3] the plaintiff apologized to the victim, explaining that "as a juvenile, he lived his life with little regard for the consequences of his actions" and "had an inability to cope with feelings of rejection and abandonment." He further "spoke of his own victimization when he was bullied"

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around, and pushed her up a driveway and into a backyard. He threw her to the ground, covered her head with his jacket, and raped her. When Mr. Rodriguez left, the victim ran home and called the police."

[3] This hearing was held in 2019 and was the plaintiff's fourth parole hearing. The plaintiff had his initial parole hearing in 2000, and he subsequently had parole hearings in 2006 and 2013.

and described using drugs and alcohol from the age of twelve "to escape his problems."

In its written decision, the board noted that the plaintiff had completed the sex offender treatment program, had been attending Alcoholics Anonymous and Narcotics Anonymous, worked in the prison's clothing shop, and practiced Buddhism. The board further noted its consideration of the testimony and report of Dr. Joseph Plaud and of a "risk and needs assessment."

The board denied parole, concluding that the plaintiff "[was] not yet rehabilitated, and his release [was] not compatible with the welfare of society." The board explained:

> "[The plaintiff] has a history of sexual assault cases. Most notably, he committed this brutal rape of a stranger and then committed two serious sexual assaults while on bail. He has completed SOTP (Sex Offender Treatment Program), but only after several failures over the decades. He has made progress in his rehabilitation, but has yet to demonstrate a level of rehabilitative progress that would make his release compatible with the welfare of society."

The plaintiff sought relief in the Superior Court in the nature of certiorari under G. L. c. 249, § 4. The judge affirmed the board's decision. The plaintiff appealed, and then petitioned this court for direct appellate review, which we granted.

Discussion. 1. Legal framework. Because the granting of parole is a discretionary function of the executive branch, the role of the judiciary generally is limited to ensuring that the

board's decision and proceedings are constitutional and consistent with any applicable statutes. Deal v. Massachusetts Parole Bd., 484 Mass. 457, 460 (2020). See, e.g., Crowell v. Massachusetts Parole Bd., 477 Mass. 106 (2017) (reviewing claims that board's parole decision violated Massachusetts Constitution and Federal and State statutes by discriminating against prisoner on basis of his disability). Our role does not extend to reviewing the board's highly discretionary determination whether "there is a reasonable probability that, if the prisoner is released . . . , the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." G. L. c. 127, § 130. "This is in conformity to the sharp and strict separation of the legislative, the executive and the judicial departments of government in art[.] 30 of our Declaration of Rights." Commonwealth v. Cole, 468 Mass. 294, 303 (2014), quoting Sheehan, petitioner, 254 Mass. 342, 345 (1926). See Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, 451, S.C., 484 Mass. 1029 (2020), quoting Commonwealth v. Amirault, 415 Mass. 112, 117 (1993) ("judge cannot nullify the discretionary actions of the parole board"); Woods v. State Bd. of Parole, 351 Mass. 556, 559 (1967) ("The granting of a parole is discretionary. . . . The board may not

be required to exercise any discretion for the benefit of a prisoner").

Consistent with these principles, we review a board's parole decision of a juvenile offender sentenced to life in prison for whether the decision is consistent with such an offender's right to a meaningful opportunity for parole under art. 26 of the Massachusetts Declaration of Rights. See Deal, 484 Mass. at 461. This right derives from our holding that because juveniles have "diminished culpability and greater prospects for reform," sentencing a juvenile to life without the possibility of parole would violate the prohibition on cruel or unusual punishments in art. 26. Id. at 460, quoting Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 659-660 (2013) (Diatchenko I). To ensure that juvenile offenders who have been sentenced to life in prison have not been sentenced to what functionally is life without parole, they must receive a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (alteration omitted). Deal, supra at 461, quoting Diatchenko I, supra at 674.

As we announced in Diatchenko II, this requires that, when such offenders apply for parole, they have access to counsel and, in certain contexts, funds for expert witnesses. Diatchenko II, 471 Mass. at 24, 27-28. It also means that, in assessing the likelihood of reoffense, see G. L. c. 127, § 130,

the board must take into account any youth-related factors that may have contributed to the offense,[4] as well as whether these factors have fallen away through the juvenile's rehabilitative efforts or natural transition into adulthood. See Deal, 484 Mass. at 461. Finally, it means that, if the board denies parole, the juvenile offender is entitled to judicial review of whether the board complied with its obligation to so consider any youth-related factors. See id. However, as long as the board did so, there is no art. 26 violation; for the reasons described supra, we will not second-guess the board's discretionary judgment that, based on all the information before the board, the juvenile offender's release is not compatible with the welfare of society.

Two clarifications are in order regarding the Diatchenko II framework: one concerning which juvenile offenders qualify for the protections announced therein and one concerning when those protections apply. As to who qualifies, although we have expressly addressed juvenile homicide offenders, see, e.g., Deal, 484 Mass. at 460; Diatchenko II, 471 Mass. at 29; Diatchenko I, 466 Mass. at 672, our reasoning in the Diatchenko

[4] These factors include, inter alia, a "lack of maturity and an underdeveloped sense of responsibility," "vulnerability to negative influences and outside pressures," and a "unique capacity to change as they grow older" (quotation omitted). Diatchenko II, 471 Mass. at 30, quoting Diatchenko I, 466 Mass. at 660.

cases applies with equal or greater force to juveniles sentenced to life in prison for nonhomicide offenses. Cf. Commonwealth v. Lutskov, 480 Mass. 575, 583-584 (2018) (statutorily mandated minimum sentence for armed home invasion presumptively violates art. 26 as applied to juvenile offender where sentence results in longer parole ineligibility period than would be imposed for murder committed by juvenile); Commonwealth v. Perez, 477 Mass. 677, 685-686 (2017) (Perez I), quoting Graham v. Florida, 560 U.S. 48, 69 (2010) ("defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers"; aggregate term-of-years sentence for nonhomicide offenses committed by juvenile that results in longer parole ineligibility period than would be imposed for murder committed by juvenile presumptively violates art. 26). There is no reasoned basis to provide the constitutional protections announced in the Diatchenko cases to juvenile offenders sentenced to life for homicide offenses but not to juvenile offenders sentenced to life for nonhomicide offenses. Accordingly, the protections outlined in Diatchenko II, including judicial review, apply to all juvenile offenders sentenced to life in prison, not only to those sentenced to life for homicide.

However, each juvenile offender is entitled to receive judicial review of only one parole denial (any of the offender's choosing). Once judicial review confirms that the board denied parole after properly considering youth-related factors and concluding that the juvenile offender had not realized the "greater prospects for reform" distinctive of youth, Diatchenko II, 471 Mass. at 30, quoting Miller v. Alabama, 567 U.S. 460, 471 (2012), the offender has received the meaningful opportunity to obtain release to which he or she was entitled under art. 26. See Deal, 484 Mass. at 461. Because the youth-related factors are static, the board need not reconsider them at subsequent review hearings, and judicial review of subsequent parole denials is therefore unnecessary.[5] See Diatchenko II, supra at

[5] A defendant may not be sentenced to a prison term (let alone life in prison) unless he or she was at least fourteen years of age at the time of the crime. See G. L. c. 119, §§ 52 (defining "youthful offender" as between the ages of fourteen and eighteen), 58 (unlike child adjudicated delinquent, child adjudicated youthful offender may receive sentence provided by law for offense), 74 (general limitations on criminal proceedings against children). In addition, the earliest such a juvenile offender sentenced to life is eligible to apply for parole is after having completed fifteen years of his or her sentence. See G. L. c. 265, § 2; G. L. c. 279, § 24. Thus, any juvenile offender sentenced to life in prison would be well into adulthood at the time of his or her first parole review hearing. If the juvenile offender has not rehabilitated by that time, he or she simply has not realized the "greater prospects for reform" distinctive of youth. Diatchenko II, 471 Mass. at 30, quoting Miller, 567 U.S. at 471. Of course, the juvenile offender still may demonstrate rehabilitation at a subsequent

33 ("the judiciary's only role in these cases [is] to ensure . . . that the board properly has taken into account the offender's status as a child when the crime was committed" [emphasis added]). From that point forward, like other offenders who seek parole, as discussed supra, juvenile offenders sentenced to life in prison ordinarily will not be entitled to judicial review of parole denials.

Here, we have before us the board's denial of the plaintiff's fourth application for parole. His previous parole hearings took place prior to the publication of Diatchenko II in 2015, see note 3, supra, and the record does not reflect that he received judicial review in connection with any prior denial of parole. Accordingly, we provide such review now.

2. Application. Because the board in its decision considered a set of facts that reasonably may be connected to the various youth-related factors, we affirm. Compare Deal, 484 Mass. at 462-463. The decision notes that "as a juvenile, [the plaintiff] lived his life with little regard for the consequences of his actions," which bears on the plaintiff's "lack of maturity" and "underdeveloped sense of responsibility." Id. at 460, quoting Diatchenko II, 471 Mass. at 30. The

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review hearing; however, that rehabilitation would have occurred between two points in adulthood (the initial parole denial and the next review opportunity) and therefore be disconnected from the "prospects for reform" distinctive of youth. Id.

decision also acknowledges that the plaintiff was "victimiz[ed]" and "bullied" as a child, which relates to his "vulnerability to . . . outside pressures." Id. Finally, the decision recognizes that the plaintiff had completed the sex offender treatment program and had been attending Alcoholics Anonymous and Narcotics Anonymous, which implicate his "capacity to change as [he] grow[s] older." Id. "[T]he decision's inclusion of these facts supports the board's certification that it did consider the [youth-related] factors in a noncursory way." Deal, supra 462-463.

The plaintiff contends that the board insufficiently considered his advanced age and his rehabilitative efforts as factors weighing in favor of his release,[6] insufficiently explained its reasons for denying him parole in its written decision,[7] utilized an inappropriate tool (Level of Service/Case

[6] The plaintiff points to Plaud's conclusion that the plaintiff was not "a significant risk to public safety regarding sexual recidivism" if released, based largely on the plaintiff's advanced age.

[7] To the extent that the plaintiff argues that, as a matter of statutory interpretation, G. L. c. 127, § 130, requires that the board comprehensively detail its reasons for denying parole and recite each fact it considered in support of those reasons, we agree with the board that G. L. c. 127, § 130, requires only that the board indicate the reasons for its decision in summary form and that the board's decision here does so, if only barely. See G. L. c. 127, § 130 (board's written decision "shall contain a summary statement of the case indicating the reasons for the

Management Inventory) to perform the statutorily required "risk and needs assessment," and prejudiced his future attempts to secure parole by failing to release its decision until ten months after his review hearing. These arguments fall outside the scope of our review. We have emphasized that our review is limited to determining whether the board has taken into account the youth-related factors in making its decision, and that we will remand the decision only if the board has failed to do so. See Deal, 484 Mass. at 461; Diatchenko II, 471 Mass. at 31. As explained supra, we conclude that the board has taken youth-related attributes into account in coming to its decision; the plaintiff does not argue otherwise.

Apart from his invocation of protections for juvenile offenders sentenced to life imprisonment flowing from art. 26 as

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decision"); 120 Code Mass. Regs. § 301.08 (2017) ("When release on parole is denied, [the board] shall provide the inmate with a written summary of the reasons supporting the decision . . .").

With the acknowledgment that the board released its decision in this case without the benefit of our decision in Deal, we repeat here what we emphasized there: it would be better for the board to identify the facts it relies on in denying parole and to explain why those facts demonstrate that the applicant's recidivism risk is too high for release, notwithstanding that the applicant has aged out of childhood and thus potentially has outgrown any attributes of youth that may have contributed to the commission of the offense. See Deal, 484 Mass. at 464-465. See also id. at 466-468 (Gants, C.J., concurring); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting) ("it is not burdensome to give reasons when reasons exist").

interpreted in Diatchenko II, the plaintiff anchors his challenges in vague appeals to constitutional due process guarantees. However, we previously have held that prisoners in the Commonwealth lack due process rights in connection with their parole applications under the Federal Constitution.[8]

Conclusion. For the foregoing reasons, we affirm the Superior Court's judgment affirming the board's decision to deny the plaintiff release on parole.

So ordered.

[8] See Board of Pardons v. Allen, 482 U.S. 369, 373 (1987), quoting Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 11 (1979) (Federal due process clause guarantees prisoners procedurally sound parole decision only if State parole statute creates "expectation of parole"); Diatchenko II, 471 Mass. at 18 (Massachusetts parole statute, G. L. c. 127, § 130, does not create expectation of parole). We have not had occasion to decide whether art. 12 of the Massachusetts Declaration of Rights affords prisoners generally any due process rights in connection with their parole applications, see Quegan v. Massachusetts Parole Bd., 423 Mass. 834, 836 (1996); Greenman v. Massachusetts Parole Bd., 405 Mass. 384, 388 n.3 (1989), and we decline to do so sua sponte, see Guardianship of Penate, 477 Mass. 268, 279 n.12 (2017) (declining to address issue not addressed by party in brief on appeal); Maxwell v. AIG Dom. Claims, Inc., 460 Mass. 91, 112 n.14 (2011) (issues that have "not been presented by the parties . . . accordingly[] are not addressed [on] appeal").