

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1247

WILLIAM MCDERMOTT

vs.

MASSACHUSETTS PAROLE BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, William McDermott, sought and was denied parole in 2019. He filed an action in the nature of certiorari in the Superior Court, alleging, inter alia, that the parole board's (board) decision denying parole was arbitrary and capricious and constituted an abuse of discretion. On January 6, 2020, a Superior Court judge denied the plaintiff's motion for judgment on the pleadings and allowed the board's cross motion for judgment on pleadings, resulting in dismissal of the action. The defendant now appeals therefrom. We affirm.

Background. We recount the facts as found by the board, supplemented by uncontested facts presented in the plaintiff's parole application and hearing transcript, unless otherwise indicated. See Deal v. Massachusetts Parole Bd., 484 Mass. 457, 458 (2020). As the board found:

"Sometime around November 20, 1981, William McDermott (age 17) shot and killed Robert Kemp, manager of the Cohasset Golf Club. Mr. McDermott had worked for Mr. Kemp. On November 21, 1981, the head cook at the Cohasset Golf Club called police after he found blood on the kitchen floor and a gun outside the clubhouse. After a brief search, Mr. Kemp's partially buried body was found in a ditch near the 18th hole of the golf course. He had been shot 11 times, and his wedding ring, wallet, and several other rings were missing. When police located Mr. Kemp's missing car, they found Mr. McDermott's fingerprints on it. After the murder, Mr. McDermott fled to his sister's house in Pennsylvania, where he was arrested and returned to Massachusetts."

At trial, the plaintiff testified that he shot Kemp in self-defense to prevent Kemp from raping him. Commonwealth v. McDermott, 393 Mass. 451, 452 (1984). He claimed that "he had voluntarily participated in repeated oral sex with Kemp in exchange for money, and had accepted his job with Kemp in return for oral sex, yet resisted forcible anal intercourse." Id. at 454. He further testified that at the time of the killing, "he was drunk; he had consumed five drinks and had smoked 'a joint or two.'" Id. at 457-458. The jury convicted the plaintiff of murder in the first degree. On direct appeal, the Supreme Judicial Court (SJC) reduced his verdict to murder in the second degree and, accordingly, he is serving a life sentence with parole eligibility. See id. at 461.

At his first three parole hearings, the plaintiff maintained his story that he murdered Kemp in self-defense because Kemp was attempting to sexually assault him. At his

2012 parole hearing, the plaintiff admitted, for the first time, that he had conjured and clung to the lie that he acted in self-defense to prevent Kemp from raping him. He also testified at the 2012 hearing that he "was drunk" at the time that he shot Kemp and was fueled by "alcohol and anger."¹

At the 2018 parole hearing at issue in this case, the plaintiff testified, inter alia, that his "motive was to rob Mr. Kemp"; that he was not under the influence of drugs that evening, but was craving cocaine and "was a little intoxicated." Both the board and the plaintiff's witness, Dr. Robert Joss, expressed concern that the plaintiff had reduced his attendance at substance abuse programs over time.² In response to questions

¹ The plaintiff further testified at the 2012 parole hearing that he had taken the gun from the office earlier that day, shot at Kemp eleven times -- firing nine rounds, reloading and firing two more. Specifically, he shot Kemp in the front, "shot him four times in the back before [he] reloaded[,] . . . picked up the shell casings," and "went through [Kemp's] pockets and took his wedding band and the cash box."

² Dr. Joss submitted a psychiatric evaluation of the plaintiff and testified at the hearing. Dr. Joss noted that despite "occasional impulsive and angry interchanges resulting in significant disciplinary reports" during the plaintiff's first ten years of incarceration, "these have diminished considerably." Dr. Joss testified to and wrote of the plaintiff's participation in substance abuse treatment, and the declining risk of recidivism with age. He further testified that the plaintiff's "lies that [had] been conveyed [to the board]" over the years did not impact his findings. However, Dr. Joss expressed concern "that [the plaintiff] is not presently participating [in substance abuse programs] on a regular basis," and concerns that he "does not have a readily-made support system in the community." Nonetheless, in Dr. Joss's view, the plaintiff "does not exhibit many of the

about his sporadic or diminishing attendance at Alcoholics Anonymous meetings and rehabilitative programs since his prior hearing, the plaintiff explained that his work commitments sometimes conflicted with his ability to attend substance abuse programs.³

On April 5, 2019, the board issued its decision denying parole, and scheduling the plaintiff's next review for 2023.

The board concluded, in part, that the plaintiff

"has not yet demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. The [b]oard remains concerned as to [the plaintiff's] motive to murder the victim. For decades, he perpetuated lies and defamed the victim. Additionally, he is not currently attending substance abuse programming."

In its decision, the board also noted that it had taken into "consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders," and considered all of the relevant factors set forth in Miller v. Alabama, 567 U.S. 460, 471 (2012), and Diatchenko v. District Attorney for the Suffolk Dist., 471 Mass. 12, 30 (2015) (Diatchenko II). The board further considered Dr. Joss's evaluation and "whether risk reduction programs could effectively minimize [the plaintiff's] risk of recidivism."

characteristics expected of someone who is at high risk for reoffending."

³ Kemp's daughter and an assistant district attorney testified in opposition to the plaintiff's application for parole.

Finally, the board considered the plaintiff's institutional behavior and his participation in available work, educational, and treatment programs during his incarceration.

After exhausting potential administrative remedies, the plaintiff sought relief in the nature of certiorari pursuant to G. L. c. 249, § 4 in the Superior Court. The parties filed cross motions for judgment on the pleadings. Following a hearing, a Superior Court judge denied the plaintiff's motion and allowed the board's motion. The plaintiff appeals therefrom.

Discussion. "We review the allowance of a motion for judgment on the pleadings [filed] under Mass. R. Civ. P. 12 (c) . . . de novo" (citation omitted). C.M. v. Commissioner of the Dep't of Children & Families, 487 Mass. 639, 646 (2021). In the context of the denial of parole, our analysis centers on G. L. c. 127, § 130, pursuant to which the board may grant parole only where it finds, "after consideration of a risk and needs assessment, that there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." "The board is afforded significant deference with regard to its parole decisions. As the granting of parole is a discretionary function of the

executive branch, generally the judiciary's role is limited to reviewing the constitutionality of the board's decision and proceedings." Deal, 484 Mass. at 460. However, "[p]arole decisions for juvenile homicide offenders like the plaintiff are handled differently." Id.

Juvenile offenders sentenced to a mandatory term of life in prison "are entitled to a 'meaningful opportunity to obtain release [on parole] based on demonstrated maturity and rehabilitation.'" Deal, 484 Mass. at 461, quoting Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 674 (2013) (Diatchenko I). A "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" means that the board must consider the "distinctive attributes of youth" in determining whether the juvenile is likely to reoffend. Diatchenko II, 471 Mass. at 23, 30. In addition, "to ensure that juvenile homicide offenders receive a meaningful opportunity for parole, they are entitled to judicial review of board decisions on their parole applications under the abuse of discretion standard." Deal, supra at 461. "In this context, a denial of a parole application by the board will constitute an abuse of discretion only if the board essentially failed to take [the Miller] factors into account, or did so in a cursory way." Diatchenko II, supra at 31. See Miller, 567 U.S. at 471. Finally, in reviewing administrative decisions, we apply the

arbitrary and capricious standard of review, and accord considerable deference to administrative bodies. See Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 541 (2014).

Here, the plaintiff argues that the record did not support the board's decision to deny parole. He further argues that the board misconstrued evidence in the record and that the board's concern about the plaintiff's motive to murder Mr. Kemp was a pretextual reason to deny parole. Finally, he contends that the board's decision failed to provide a detailed basis for denying parole in violation of art. 26 of the Massachusetts Declaration of Rights and the Eighth Amendment to the United States Constitution. These claims are unavailing.

First, as discussed supra, the board considered the Miller and Diatchenko II factors. To the extent that the board's decision did not contain the detail sought by the plaintiff, the full administrative record, including the transcript of the hearing before the board and the questions asked by board members, reflects a thoughtful and sufficient consideration of these factors.⁴

⁴ During the hearing, the board explicitly recognized that it "receive[d] a report from Dr. Joss that . . . was really helpful in terms of painting a picture of [the plaintiff's] age, state of mind, and some of the character profiles that are still present today." The board questioned the plaintiff extensively about abuse the plaintiff allegedly suffered at the hands of his father. The board also questioned the plaintiff regarding his

Second, the record supports the board's concern with the plaintiff's failure to attend substance abuse programming. Indeed, even the plaintiff's expert, Dr. Joss, expressed concern that the plaintiff "is not presently participating [in substance abuse programs] on a regular basis." Moreover, the record reflects that the plaintiff had a "lack of interest and participation in suggested programming." The plaintiff further acknowledged that the "classification chair" at the department of correction wanted him to attend an anger maintenance program, but the plaintiff declined as he prioritized keeping his job while incarcerated at the correction facility. Likewise, the record supports the board's concerns with the plaintiff's shifting stories regarding his motive for murdering Kemp. Not only was this a valid concern recognized in our case law, but the record supports the board's concerns in light of the plaintiff's evolving and contradictory comments regarding his motive, as well as his level of sobriety at the time of the murder.⁵

rehabilitation as he grew older, or lack thereof, including his sobriety and anger management.

⁵ Here again, the plaintiff points, with a measure of persuasiveness, to the lack of detail in the parole board's decision. However, the transcript of the parole hearing and the administrative record paint a more fulsome picture of the plaintiff's inconsistent reasoning and narrative regarding the murder and motive therefore. In short, the administrative record supports the board's reasonable concerns and demonstrates that it did not act arbitrarily or capriciously.

Finally, we have reviewed the entire administrative record, which demonstrates that the "board based its decision on the statutory standard of rehabilitation and compatibility with the welfare of society, and its consideration of the distinctive attributes of youth was not merely cursory." Deal, 484 Mass. at 465. Furthermore, the record reflects that the board considered the "distinctive attributes of youth" in determining whether the plaintiff is likely to reoffend. Accordingly, the plaintiff's constitution-based arguments likewise fall short. See id. at 462-463.⁶

Judgment affirmed.

By the Court (Neyman,
Ditkoff & Hand, JJ.⁷),



Clerk

Entered: September 22, 2022.

⁶ We acknowledge the parties' supplemental briefs addressing the Supreme Judicial Court's recent decision in Rodriguez v. Commonwealth, 490 Mass. 596 (2022). Nothing in Rodriguez contradicts our analysis herein.

⁷ The panelists are listed in order of seniority.