No. 30442 – *State of West Virginia ex rel. Willis Ray Stollings v. William S. Haines, Warden, Huttonsville Correctional Center, and the West Virginia Parole Board*

FILED
August 5, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
August 7, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
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Albright, Justice, concurring in part and dissenting in part:

My original intent was to simply concur in the majority opinion. After fully reviewing that opinion, I have elected to concur in part and dissent in part. I concur in the decision with respect to the failure of the record to disclose that the Parole Board complied with the decision of this Court in *State ex rel. Carper v. West Virginia Parole Board*, 203 W.Va. 583, 509 S.E.2d 864 (1998).

However, I dissent and write separately because I do not agree that the record reveals that the Parole Board (hereinafter sometimes referred to as "the Board") complied with all the factors set forth in West Virginia Code § 62-12-13(i)(1) (1999), as suggested by the majority opinion. I also believe, contrary to assertions in the majority opinion, that one cannot determine from the record what degree of attention the Board gave the positive aspects of Mr. Stollings' record, especially since his confinement, and how or why the Board concluded, if it in fact did so conclude, that the negative factors upon which the record indicates the Board relied in denying parole outweighed those positive factors. This is especially critical in light

of the fact that the negative factors recited in the record are substantially beyond the power of the prisoner to change.

I would have preferred that this Court give the Parole Board further guidance regarding our holdings in *Tasker v. Mohn,* 165 W.Va. 55, 267 S.E.2d 183 (1980), and *Rowe v. Whyte*, 167 W.Va. 668, 280 S.E.2d 301 (1981), the seminal cases in this Court's approach to the issue of parole. In syllabus points one, three and four of *Tasker*, we held that under the provisions of the Constitution and laws of this State:

> 1. Our parole statute, W.Va. Code, 62-12-13 (1979), creates a reasonable expectation interest in parole to those prisoners meeting its objective criteria.
>
> 3. Release on parole is a substantial liberty interest and the procedures by which it is granted or denied must satisfy due process standards.
>
> 4. Due process requires that parole release interview processes include the following minimum standards:
>
> > . . .
> >
> > (2) An inmate is entitled to access to information in his record which will be used to determine whether he receives parole (absent overriding security considerations which must be recorded in his file);
> >
> > . . .
> >
> > (4) A record, which is capable of being reduced to writing, must be made of each parole release interview to allow judicial review; and

> (5) Inmates to whom parole has been denied are entitled to written statements of the reasons for denial.

165 W. Va. at 55, 267 S. E.2d at 184.

In *Rowe*, we reiterated the holdings in syllabus points one and three of *Tasker* and, relying on another point made in the body of the *Tasker* opinion, also held as follows in syllabus point three:

> The decision to grant or deny parole is a discretionary evaluation to be made by the West Virginia Board of Probation and Parole. However, such a decision shall be reviewed by this Court to determine if the Board of Probation and Parole abused its discretion by acting in an arbitrary and capricious fashion. *Tasker v. Mohn*, 267 S.E.2d 183, 190 (W.Va.1980).

167 W. Va. at 668, 280 S.E.2d at 301.

Before proceeding to a discussion of the implications of *Tasker, Rowe* and their progeny, I wish to emphasize that there are important public policy reasons – reasons in addition to the reasonable expectations of parole eligible prisoners – for this Court to address the parole process. First, the people of this State have a highly justified interest in assuring that persons unfit for release are not released from prison on parole, particularly by reason of arbitrary or capricious actions of the Board, when the *objective criteria* for parole are not met. On the other hand, our ever-increasing prison population, the growth of which in state and federal facilities in the State has recently been reported to be the fastest growing in the nation

– with the accompanying cost of building new prisons to house the convicts and the very substantial cost of keeping persons incarcerated – imposes a heavy financial burden on the taxpayers of this State that should not be exacerbated by arbitrary and capricious decisions to keep a person incarcerated who, *by objective criteria*, should be paroled.

Moreover, with respect to reliance on *objective criteria,* I recognize, as likely does each member of this Court, that no matter how thoroughly such *objective criteria* are articulated and applied, the decision to parole or not parole a given prisoner is, in the final analysis, a subjective judgment of the Parole Board which should not be disturbed by the judiciary unless there truly has been an arbitrary and capricious action. Even in those circumstances, I submit that, absent exceptional circumstances, the proper remedy for any such arbitrary and capricious action should be no more than a new parole hearing conforming to the law. It is likewise recognized that a parole decision once made – to grant or refuse – may turn out to be a good or, perhaps, a bad decision, in hindsight, and the Parole Board is entitled to due and full respect of its decisions, deliberately and faithfully made.

Nevertheless, I submit that at least since *Tasker* was announced over thirty-two years ago, it has clearly been the constitutional obligation of the Parole Board to grant each eligible prisoner a timely and meaningful hearing, based on objective standards, followed by a decision sufficiently explained to allow a prisoner of ordinary intelligence to understand the basis of the Board's decision in light of the factors enumerated in West Virginia Code § 62-

12-13(i)(1). The decisions of this Court after *Tasker* and *Rowe* have consistently applied the principles enunciated in those two leading cases. In *State ex rel. Wooding v. Jarrett*, 169 W.Va. 631, 289 S.E.2d 203 (1982), this Court said in a per curiam opinion that a new parole hearing was required for a prisoner where it could not be said with certainty that the Parole Board has considered both positive and negative factors in denying parole and it appeared to the Court that the Board's reliance on adverse community sentiment may have not been supported by the record. 169 W.Va. at 637, 289 S.E.2d at 206. In syllabus point 1 of *Rowe v. West Virginia Department of Corrections*, 170 W.Va. 230, 292 S.E.2d 650 (1982), this Court reinforced the concept that the Board of Parole possesses the ultimate power to grant or deny parole in striking down a Board regulation that required the approval of the Commissioner of Corrections of a parolee's release plan and holding:

> W.Va. Code, 62-13-2(d) (1965), expressly states that the final determination as to release of prisoners on parole is vested in the Board of Probation and Parole. This provision reinforces the language in W.Va.Code, 62-12-13, relating to the authority of the Board to grant parole.

170 W.Va. at 231, 292 S.E.2d at 650.

Other cases grounded on the principles of *Tasker* and *Rowe* include *Stanley v. Dale*, 171 W.Va. 192, 298 S.E.2d 225 (1982) (finding Parole Board had good cause to deny parole); *Vance v. Holland*, 177 W.Va. 607, 355 S.E.2d 396 (1987) (directing reconsideration

of parole status under now amended statute requiring parole hearing in *all* cases at least annually); *State ex rel. Smith v. Skaff*, 187 W.Va. 651, 420 S.E.2d 922 (1992) (requiring timely consideration for parole although prisoner had not been transferred to state custody).

With the principles underlying these cases in mind, I have carefully reviewed the papers filed with this Court in the instant case. Those papers include a copy of the "Parole Recommendation/Decision" form employed by the Board to notify the prisoner in this case of the reasons why parole was denied after the hearing at issue here.[1] From that form it may be ascertained that the Board considered ten separate *preprinted* factors to some degree in reaching its decision to deny parole. Those factors and the Board's one or two word evaluation of them are as follows:

1. The facts and circumstances of the prisoner's past crimes.	Extremely Negative
2. His criminal record. (The felony and 4 misdemeanors.)	Extremely Negative
3. His prison conduct in the last 12 months.	Extremely Positive
4. Improvement in his mental or moral condition.	Neutral
5. Changes in his overall behavior in the past *10 years*.	Extremely Positive
6. Statements of his attitude toward the trial judge, prosecutor, arresting police, the crime(s) committed, etc.	Neutral
7. His work record while incarcerated.	Extremely Positive

[1] A blank version of that form is set forth in the Appendix following this opinion.

8. His participation in educational, vocational and therapeutic programs. Positive
9. Community sentiment Negative
10. Official sentiment Negative

After making these findings, the Board selected from a list of *preprinted* reasons (which track the *preprinted factors*) four of those *preprinted* reasons as grounds for denying parole, together with a fifth *preprinted* reason selected from the portion of the form pertaining only to persons serving a life sentence:

1. Circumstances (Facts and circumstances of past crimes)
2. Convictions (Criminal record)
9. Community (Public) Sentiment
10. Official (including Judicial) Sentiment

The fifth *preprinted* reason checked advised that the prisoner's crime was "an egregious act of violence that warrants justification for extended parole consideration." Finally, the Board made three preprinted recommendations to the prisoner for his next parole hearing: (1) Stay out of trouble in prison; (2) participate in all recommended programs; and (3) obtain and maintain employment.

This "fill in the blanks" form constitutes the whole record of the basis for the Board's decision to deny parole to this prisoner. While I recognize this form as a good faith effort to assure that there is a record which indicates consideration of positive, as well as negative, aspects of a given parole application, it is very clear that the form gives no clue as to

what consideration the Board in fact gave the positive aspects of the application nor any indication of why the negative aspects were determined to outweigh the positive ones, what an inmate might do to redress the imbalance or, for that matter, *what objective standards were considered* to reach the ultimate decision to deny parole.

In *Rowe v. Whyte,* former Justice McHugh wrote:

> It is clear that the provisions of *W.Va. Code*, 62-12-13, reflect an intention on the part of the West Virginia Legislature to require the parole board to consider positive as well as negative factors in the granting or denial of parole. The parole board should follow with particularity all statutes and its own rules and regulations concerning parole decisions. *The concentration of the parole board upon the petitioner's criminal record and the negative community sentiment report limited the scope of the parole board's inquiry to a consideration of factors beyond the ability of the petitioner to modify after his incarceration.* In fact, the parole board, in its emphasis upon the petitioner's criminal activity prior to incarceration, acted in a manner similar to a sentencing court in which, more appropriately, such criminal activity would be highly determinative.

167 W.Va. at 678, 280 S.E.2d at 306-07 (emphasis added.)

At another point in the *Rowe* opinion, Justice McHugh explained clearly that due process requires more than just the completion of forms when he wrote:

> As we held in *Tasker,* "Inmates to whom parole has been denied are entitled to written statements of the reasons for denial." 267 S.E.2d at 191. By this holding we intended that *written reasons of the parole board for the denial of parole be more than ". . . characterized by a mechanistic quality.*"

167 W. Va. at 678, 280 S.E.2d at 306 (emphasis added).

While it appears that in the case before us, unlike *Rowe*, the Board did at least have before it positive aspects of the prisoner's conduct since the commission of the crime, it is equally clear that, as in *Rowe*, the factors to which the Board appears to have given overwhelming weight are all matters "beyond the ability of the petitioner to modify after his incarceration." *Id*. In light of the apparently exemplary record of the prisoner prior to the parole hearing and the Board's insistence on postponing further parole consideration for at least two years, one is left with the impression that the Board simply decided that this prisoner should have no "expectation of parole," regardless of his conduct in prison or his suitability for re-integration into society that he might have developed during incarceration. *Tasker*, 165 W.Va. at 59-60, 267 S.E.2d at 186-87. The Board reached that decision without any meaningful articulation of the basis for it or any reference to the *objective criteria* required by the parole statute, *Tasker, Rowe* and their progeny.

That impression is strengthened by my reading of the transcript of the parole hearing, the letters from the victim's family, and a copy of petitions circulated in Logan County opposing the prisoner's parole (on which, in many instances, several of the signatures on various sections of the petition appear to have been written by the same hand). The transcript reveals that the prisoner's family spoke up for him and that the victim's family spoke vigorously against parole. According to the transcript, the questions asked of the prisoner by

the Board during the parole hearing centered on two issues: (1) Urging the prisoner to describe the commission of the crime in detail (the prisoner took full responsibility for the crime but claims "amnesia" with respect to the details of the killing); and (2) impressing on the prisoner the clear connection between his criminal record and the abuse of alcohol. Reading between the lines, one might conclude that the Board member inquiring of the prisoner's recollection of the details of his crime did not believe the claim of "amnesia." We are left, however, to speculate as to what bearing the Board, in its wisdom, might have thought that particular circumstance had on suitability for parole, given the prisoner's unequivocal admission of his crime. With respect to his prior abuse of alcohol, the prisoner's records indicated near perfect attendance at the so-called "twelve-step" meetings designed to build resistance to continued substance abuse. In its decision-making mode, we have absolutely no clue as to what impact the Board thought this record had on the possibility that prisoner, if paroled, might be able to conform his conduct regarding substance abuse to the requirements of living among society as a law-abiding citizen. In short, the transcript and the accompanying documents offer no reassurance that the Board addressed the required *objective criteria*, or exercised any particular reasonable discretion in reaching the decision to deny parole. I would have required a new, full and fair hearing.

Whatever the improvements in parole procedure since *Tasker* and *Rowe* – and I firmly believe there have been substantial improvements in procedure since then – it still must be said that the written reasons for the denial of parole given to the prisoner in this case

are "characterized by a mechanistic quality." *Rowe*, 167 W.Va. at 678, 280 S.E.2d at 306. Upon a review of the "Parole Recommendation/Decision" and the transcript in this case, one is left with no means of understanding how it is, in the judgment of the Board, that an extremely positive change in overall behavior lasting some ten years can bring about only a *neutral* improvement in a prisoner's mental or moral condition. We are not aware of any psychiatric or psychological study of the prisoner which might shed light on these two apparently conflicting findings. (At one point, the papers indicate consideration of such a study but the record offers no insight on its results.) One cannot determine whether or why the Board concluded that steady attention to work, unfailing participation in the "twelve-step" program for substance abuse and perfect or near perfect prison conduct fails to merit more than a rating of a *neutral* change or improvement in one's mental or moral condition. Given that the Board apparently judged the "community sentiment" and "official sentiment" to be only "negative," and not "extremely negative," what might an incarcerated person do to turn that around before the next hearing? On that, the record is silent. Why did the Board conclude that the "extremely positives" were outweighed by the several "negatives," extreme or not? Presumably, the Board or these particular members accord greater weight to some factors than to others, an exercise in discretion that might be proper if there were an understanding of how the weighting particular factors serves the consideration of the *objective criteria* set forth in our parole statute. Are there standards against which such matters as the seriousness of the crime or its particular egregious violence should be measured for the purposes of parole

consideration? These, and similar questions, underlie my conclusion that the prisoner in this case did not receive a fundamentally fair parole hearing.

This Court should be encouraging the Parole Board to further develop its ability to give a person who is denied parole a clear picture of what must be done, or not done, to bring that prisoner's "liberty interest" in the "expectation of parole" beyond expectation to fruition. *Tasker*, 165 W.Va. at 59-60, 267 S.E.2d at 186-87. In my view, our task is not to set those standards (except as we must to assure due process). The development of such standards is, in the first instance, the proper work of, and within the statutorily protected expertise of, the Board. The problem here is that the failure to further develop the ability of the Board to give a person denied parole a clear picture of what must be done or not done to earn parole almost guarantees that on another day, in another case, this Court will find itself compelled to intervene to assure due process, a fundamentally fair proceeding, and one that reaches conclusions to grant or deny parole in accord with the *objective criteria* provided by the parole statute. From my review of current literature on the subject, there are a myriad of tools available, means to defining and articulating reasonable standards for the difficult decisions the Board must make – tools that also assure that the Board's decisions cannot reasonably be found to be arbitrary and capricious, tools that may be applied within the integrated framework of our sentencing statutes and the parole provisions of our Code.

As I indicated above, it is my settled opinion that the prisoner in this case did not receive a full and fair hearing and that the record clearly indicates that the Board's action denying him parole was arbitrary and capricious. It is my hope that this prisoner and others entitled to parole consideration will receive the full and fair consideration required by law in the future, without any further attention to the issue by this Court.

I am authorized to say that Justice Starcher joins in this opinion.