STATE OF MICHIGAN

COURT OF APPEALS

In re Parole of CRAIG CEHAICH.

MACOMB COUNTY PROSECUTOR,

Appellee,

v

MICHIGAN PAROLE BOARD,

Appellant,

and

CRAIG CEHAICH,

Defendant.

UNPUBLISHED
October 1, 2013

No. 312386
Macomb Circuit Court
LC No. 2012-001646-AP

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Appellant, Michigan Parole Board, appeals by leave granted the circuit court order reversing the board's decision to grant parole to defendant Craig Cehaich.[1] We affirm.

In February 2000, defendant pleaded guilty to five counts of first-degree criminal sexual conduct. Defendant's convictions arose from the sexual molestation of his daughter between January 1995 and January 1997. Although he admitted guilt to the crimes, defendant asserted that he could not remember committing the acts because of alcohol use. In March 2000, defendant was sentenced to 12 to 40 years' imprisonment for each offense, to be served concurrently. Although sex offender therapy was recommended, defendant never received any such therapy. Rather, to determine his eligibility for parole, the board considered three risk assessment tools, the Correctional Offender Management Profiling for Alternative Sanctions

[1] *In re Parole of Cehaich*, unpublished order of the Court of Appeals, issued November 2, 2012 (Docket No. 312386).

(COMPAS), the Vermont Assessment of Sex Offender Risk (VASOR), and the STATIC 99-R, and determined that he was a low risk for reoffending. The administrative rules requiring sex offender therapy prior to release were rescinded with regard to male prisoners, and a new policy authorized the board to release prisoners with the condition that completion of sex offender therapy occur following release. Consequently, in November 2011, defendant received a qualified mental health professional evaluation (QMHP). This evaluation acknowledged that defendant was using drugs and alcohol at the time he committed the sexual acts upon his daughter. In addition to the substance abuse, defendant also attributed his crimes to "his rebellion against authority, anger and his lack of success with the opposite sex." The evaluator concluded that defendant had not, unlike other inmates, committed substance abuse while in prison. The evaluation also noted that defendant took pain pills for back pain and for sleep. The report concluded that defendant was a low risk for violence and recidivism, and the interview did not change the risk level.

In addition to the QMHP, defendant also received a health care assessment. This report delineated that defendant had "medical issues" that "moderately impaired" his agility and endurance. The report also stated that defendant was 6'5", weighed 245 pounds, and was diagnosed as bipolar. However, defendant did not like being on medications and used coping skills to handle his symptoms. Thus, despite episodes of auditory hallucinations, periods of depression, and mania, defendant addressed these symptoms by drawing, writing, or "keeping busy."

The prosecutor appealed the parole board's decision to release defendant with the condition that he complete therapy while on parole. The circuit court reversed the board's decision, ruling as follows:

> The Court thinks this is an absolute abuse of discretion, when we rely on an experimental standard that requires professional analysis associated with it, besides other tools, there is absolutely no professional intervention associated with this prisoner.
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> This prisoner has not had counselling [sic] appropriate to his needs, has not demonstrated professionally [sic] anything other than a self serving type of remorse, and to suggest that we can put him in society and say okay, we put a tether on him, we're going to make him take polygraphs. That's interesting.
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> I understand there's more and I read the conditions. But it's all interesting. It's all interesting based upon the availability of the parole agent, the parole agent's accessibility, the parole agent's diligence. We've now taken him out of a confined setting and put him and trust him with one person who ostensibly has the time, the resources and ability to assure that society is safe.
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> I think it's outrageous without having the treatment and professional analysis – professional analysis by a psychiatrist or at least someone capable of doing it and saying this man is not a threat to society, this man has reached the stage – and you know what. It's not to say he won't reach that stage, it's not to say he's not there now, but without the appropriate counselling [sic] and analysis,

> this is just carte blanche saying this is what the parole department is saying, "Hey, we don't need to see these people, deal with these people, we don't need these people here. We have a test, a standard that's experimental, we fill in the blanks. If they come to comply with the blanks and they say they're sorry, we let them out, put a tether on them and society is safe." This court's not buying that.

From this ruling, the board appeals by leave granted.

The standard of review for parole cases is as follows:

> Judicial review of the Board's decision to grant parole is limited to the abuse-of-discretion standard. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 153; 532 NW2d 899 (1995). Either the prosecutor or the victim of an offense may appeal in the circuit court when the Board grants a prisoner parole. MCL 791.234(11); *Morales v Parole Bd*, 260 Mich App 29, 35; 676 NW2d 221 (2003). Under MCR 7.[118(H)(3)], the challenging party has the burden to show either that the Board's decision was "a clear abuse of discretion" or was "in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation." An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Importantly, a reviewing court may not substitute its judgment for that of the Board. *Morales*, 260 Mich App at 48. [*In re Parole of Elias*, 294 Mich App 507, 538; 811 NW2d 541 (2011) (footnote omitted.)]

The parole board's discretion is limited by statutory requirements and parole guidelines. *Killebrew v Dep't of Corrections*, 237 Mich App 650, 652-653; 604 NW2d 696 (1999). To determine whether an abuse of discretion occurred, the record must be examined in light of the statutory conditions. *Id*.

MCL 791.233 governs the grant of parole and provides, in relevant part:

> (1) The grant of a parole is subject to all of the following:
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> (a) A prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety.
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> * * *
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> (3) Pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, the parole board may promulgate rules not inconsistent with this act with respect to conditions to be imposed upon prisoners paroled under this act.

The interpretation and application of a statute presents a question of law that the appellate court reviews de novo. *People v Zajaczkowski*, 493 Mich 6, 12; 825 NW2d 554 (2012). "[T]he intent

of the Legislature governs the interpretation of legislatively enacted statutes." *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). The intent of the Legislature is expressed in the statute's plain language. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required. *Id*. "[I]f a statute specifically defines a term, the statutory definition is controlling." *People v Williams*, 298 Mich App 121, 126; 825 NW2d 671 (2012). When interpreting a statute, the court must avoid a construction that would render part of the statute surplusage or nugatory. *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011).

The use of the term "shall" in a statute generally denotes mandatory, rather than permissive, action. *People v Kern*, 288 Mich App 513, 519; 794 NW2d 362 (2010). "Although agencies are authorized to interpret the statutes they are charged with administering and enforcing, agencies may not do so by promulgating rules that conflict with the statutes they purport to interpret." *Chrisdiana v Dep't of Community Health*, 278 Mich App 685, 688; 754 NW2d 533 (2008). Agency policy and rules need not reiterate or mirror the statute, but must be within the matter governed by the enabling statute, must comply with the underlying legislative intent, and must not be arbitrary and capricious. *Id*. at 688-689. When the board fails to comply with regulatory provisions before reaching its parole decision, an abuse of discretion occurs and reversal of the Board's decision is warranted. *In re Parole of Haeger*, 294 Mich App 549, 551-552; 813 NW2d 313 (2011). "An evaluation of the prisoner's mental and social attitude involves a subjective determination for which the parole guidelines cannot account." *Killebrew*, 237 Mich App at 655.

The board contends that its decision to parole defendant given the change in policy to allow sex offender treatment as a condition of parole coupled with the low risk of offending scores was within the range of reasonable and principled outcomes and the circuit court erred by reversing the parole determination. On this record, we disagree. The parole board's discretion is limited by the statutory requirements. *Killebrew*, 237 Mich App at 652-653. The statutory requirements must be examined in light of the record to determine whether an abuse of discretion occurred. *Id*. The plain language of MCL 791.233(1)(a) provides that a prisoner "shall not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." *Cole*, 491 Mich at 330. The use of the term "shall" denotes mandatory, not permissive action. *Kern*, 288 Mich App at 519. Although the parole board may promulgate rules to be imposed on parolees, those rules must be consistent with the plain language of the statute. MCL 791.233(3). Here, the transfer of a condition of parole—the receipt of sex offender therapy—to a future contingent event *during* the prisoner's release by administrative rule does not comply with the statutory requirement that a prisoner *shall not* be given liberty until there are reasonable assurances he will not become a menace to society or to the public safety. See *Chrisdiana*, 278 Mich App at 688-689 (agency interpretations may not clearly contradict the will of the Legislature). Here, the parole board abused its discretion when it required defendant to receive sex offender therapy *after* being paroled. This does not comply with the statutory requirement that a prisoner *shall not* be given liberty until there are reasonable assurances he will not become a menace to the society or to the public safety. See *Elias*, 294 Mich App at 538; *Haeger*, 294 Mich App at 551-552.

Additionally, our review of the record reveals that there was a cursory two-hour interview with defendant and a medical evaluation. Defendant's placement and housing needs were determined and addressed. His home placement provided a barrier free, first floor residence. However, there was no indication in the record of how and when sex offender therapy would be completed. The record lacks any evidence of how the supervising agent would ensure that defendant received the appropriate therapy, the individual contracted to perform the therapy, and a time requirement for completion of the therapy. The new policy invoked by the board transferred an unfulfilled burden of the department of corrections to defendant's supervising agent without any procedure to ensure it would be completed on release.

Furthermore, the circuit court examined the risk tools used to assess defendant's recidivism and appropriately questioned their validity in light of the limited evaluation of defendant's mental and social attitudes. The VASOR manual acknowledged that it was merely an experimental instrument, and its reliability and validity studies were "encouraging." It was designed not to be used by mental health professionals, but to create a system to be easily scored by probation, parole, and correctional workers. The score was determined in part by "credible offender, victim, and other collateral reports." One of the VASOR scores included the consideration of specialized sex offender treatment, a consideration now nullified by the board's new policy. Similarly, the COMPAS score also acknowledged that its statistical tests were invalid when presented with inadequate data or individuals who lie, refuse, or sabotage the test. Although these risk assessment tools were created and utilized for some time, the board failed to provide any data indicating their reliability.[2] In light of the above, the circuit court did not abuse its discretion or substitute its judgment for that of the parole board by reversing the grant of parole. *Elias*, 294 Mich App at 538; *Haeger*, 294 Mich App at 551-552.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

[2] "An evaluation of the prisoner's mental and social attitude involves a subjective determination for which the parole guidelines cannot account." *Killebrew*, 237 Mich App at 655. In the absence of therapy, it will be difficult to discern the mental and social attitude of the prisoner. For instance, in *In re Grier*, unpublished per curiam opinion of the Court of Appeals, issued December 15, 2011 (Docket No. 304908), the prisoner participated in sex offender group therapy. In the third month of therapy, the prisoner suggested that the minor victim initiated the sexual contact, in part, by the way she dressed. He characterized his molestation of the minor child as a "lost love story" in the final month of therapy. *Id*. at slip op pp 2-3. In the absence of sex offender therapy before the prisoner is released, it is questionable whether a prisoner's view of his acts may be adequately disclosed in light of the acknowledged deficiencies of the standard risk assessment tests of VASOR and COMPAS.