FILED
United States Court of Appeals
Tenth Circuit

September 6, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JAMES SARDAKOWSKI,

Petitioner - Appellant,

v.

MIKE ROMERO, Warden,

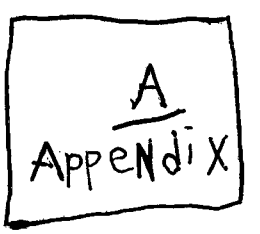
Respondent - Appellee.

No. 19-1219
(D. Colo.)
(D.C. No. 1:18-CV-02925-WJM)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **HOLMES**, **MURPHY**, and **CARSON**, Circuit Judges.

James Sardakowski, a Colorado state prisoner serving an eighteen-year sentence for child abuse and a four-year sentence for assault in the second degree, filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 on November 11, 2018. In the application, Sardakowski alleged the Colorado Parole Board's ("CPB") decision to deny him parole was made in violation of the Americans with Disabilities Act and, thus, violated the Fourteenth Amendment. He also alleged the CPB violated his due process rights by denying him parole based on his lack of housing and failing to properly consider his risk of reoffending.



After considering CPB's response, the district court denied Sardakowski's § 2241 application. As to Sardakowski's Fourteenth Amendment claim, the court concluded the CPB did not categorically deny parole based on Sardakowski's mental disabilities. *See Thompson v. Davis*, 295 F.3d 890, 896, 898 (9th Cir. 2002) (recognizing the applicability of Title II of the ADA to state parole decisions). Instead, the court concluded, the CPB's decision was an individualized determination based on the severity and circumstances of the offense conduct, the lack of a suitable parole plan, and Sardakowski's failure to take his psychiatric medication. As to Sardakowski's procedural due process claim, the district court first concluded that Sardakowski does not have an entitlement to parole under Colorado's discretionary parole scheme and, thus, his claim failed. *See Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7 (1979) (holding the Constitution does not create a protected liberty interest in a prisoner's release prior to the expiration of a valid sentence); *Straley v. Utah Bd. of Pardons,* 582 F.3d 1208, 1214 (10th Cir. 2009) (holding a state inmate "has no federal right to release on parole" when the state parole board has "complete discretion in making parole decisions"); *Thiret v. Kautzky*, 792 P.2d 801, 805 (Colo. 1990) (holding that Colorado inmates are subject to a discretionary parole system unless their offense of conviction was committed between July 1, 1979, and June 30, 1985). The court further concluded that the CPB's decision did not result in an "abridgement of Sardakowski's constitutional

rights." *Wildermuth v. Furlong*, 147 F.3d 1234, 1236 (10th Cir. 1998) (quotation omitted) ("Where the denial of parole rests on one constitutionally valid ground, the Board's consideration of an allegedly invalid ground would not violate a constitutional right." (quotation and alterations omitted)).[1]

Sardakowski now seeks a certificate of appealability ("COA") to enable him to appeal the district court's denial of his § 2241 application. *See* 28 U.S.C. § 2253(c)(1)(A). This court will issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). To satisfy this standard, Sardakowski must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

This court has reviewed Sardakowski's application for a COA and appellate brief, the district court's order, and the entire record on appeal pursuant to the framework set out by the Supreme Court in *Miller-El* and concludes Sardakowski is not entitled to a COA. The district court's resolution of Sardakowski's claims is not reasonably subject to debate and the claims are not

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[1]In reaching this decision, the district court necessarily interpreted *Wildermuth* as permitting a state inmate to raise a substantive due process claim without identifying a liberty interest in parole. Because reasonable jurists could not debate the court's resolution of such claim, assuming it exists, it is not necessary for us to determine whether *Wildermuth* so held.

adequate to deserve further proceedings. Accordingly, Sardakowski is not entitled to a COA. 28 U.S.C. § 2253(c)(2).

This court **denies** Sardakowski's request for a COA and **dismisses** this appeal. Sardakowski's motion to proceed *in forma pauperis* on appeal is **granted**.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martinez

Civil Action No. 18-cv-2925-WJM

JAMES SARDAKOWSKI,

Applicant,

v.

MIKE ROMERO, Warden,

Respondent.

ORDER ON APPLICATION FOR A WRIT OF HABEAS CORPUS

Applicant, James Sardakowski, a state prisoner, has filed, *pro se*, an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (Docket No. 1). Applicant challenges a decision by the Colorado Parole Board to deny parole. Respondent has filed a Response to Petition for Writ of Habeas Corpus (Docket No. 19) and Applicant has filed a Reply (Docket No. 24). For the reasons discussed below, the Application is DENIED.

I. Background

Applicant is serving an 18-year sentence based on his conviction of Child Abuse (Adams County District Court Case No. 04CR3051), and a 4-year sentence based on his conviction for Assault in the Second Degree (Fremont County District Court Case No. 12CR240). (Declaration of Denise Balazic, Colorado Parole Board Member, Docket No. 19-1 at ¶ 5; *see also* Docket No. 19-3, Notice of Parole Board Action).

B
Appendix

Applicant first became eligible for parole on January 30, 2015, and his estimated mandatory release date is February 12, 2024. (*Id.* at ¶ 6).

Parole Board member Balazic met with Applicant for a parole interview on October 11, 2018 to determine whether Applicant should be recommended for parole. (Balazic Decl., at ¶ 4). During the interview, Ms. Balazic asked Applicant about the circumstances of the child abuse offense. (*Id.* at ¶ 8; *see also* Docket No. 20, CD audio recording of parole interview). Applicant responded that he had killed his nephew. (*Id.*). Applicant further admitted to abusing two children, and stated that it happened when he was young and was not taking his psychiatric medications. (Balazic Decl., at ¶¶ 9, 10; Docket No. 20). Applicant further stated that he experienced hallucinations that told him to hurt the children, and that he hears voices and does "really bad things" when he is off his medications. (Balazic Decl., at ¶ 10; Docket No. 20). Applicant told Ms. Balazic that while incarcerated, he has tried to mutilate his genitals because voices have told him he should become a eunuch. (Balazic Decl. at ¶11; Docket No. 20). Applicant admitted that he had not been consistent in taking his psychiatric medications before his incarceration. (Balazic Decl. at ¶ 12; Docket No. 20). Ms. Balazic was informed that Applicant's medication use while incarcerated had also been inconsistent. (Balazic Decl., at ¶12). Applicant further stated that he had committed two Code of Penal Discipline violations within the seven months prior to his parole hearing because he was "stressed out." (Balazic Decl., at ¶ 13-14; Docket No. 20).

During the interview, Ms. Balazic also asked Applicant about his parole plan. Applicant responded that due to his long-term schizophrenia diagnosis, he intended to collect SSI benefits, as he had prior to his incarceration. (Balazic Decl., at ¶15; Docket No. 20). However, Applicant did not have a clear plan for supporting himself until he was able to receive SSI benefits. (Balazic Decl., at ¶16; Docket No. 20). Applicant also indicated that he would probably live with his mother once paroled, but admitted that his mother had not actually agreed to allow him to live in her residence. (Balazic Decl., at ¶ 17; Docket No. 20).

Ms. Balazic and another Parole Board member determined that Applicant's parole should be deferred until October 2019. (Docket No. 19-3). The October 11, 2018 Notice of Colorado Parole Board Action indicates that the decision to defer parole was based on the severity and circumstances of Applicant's offense, the Board members' serious concerns about Applicant's mental health, and Applicant's lack of a parole plan. (*Id.*). Ms. Balazic provides the following explanation for the Parole Board's decision:

> The decision was based on the severity of Mr. Sardakowski's offense and the violence against children that he previously exhibited; serious concerns regarding his mental health and his inconsistent compliance with his psychiatric medications, leading to episodes of self-harm during his incarceration; his recent disciplinary violations; his lack of housing arrangements and means to support himself outside of prison; and the apparent lack of support in the community from family or others.
>
> In view of the totality of the circumstances, the Parole Board felt that Mr. Sardakowski poses a risk to the community, and the Parole Board did not feel that Mr. Sardakowski should be released to parole in October of 2018.

(Balazic Decl., at ¶¶ 19-20).

On November 13, 2018, Applicant filed a § 2241 Application asserting the following claims: (1) the Colorado Parole Board discriminated against him on the basis of a mental disability in deferring his parole; (2) the Parole Board improperly denied parole based on Applicant's lack of housing, in violation of COLO. REV. STAT. ("C.R.S.") § 17-22.5-403(8)(a) (2018), which requires the Division of Adult Parole to find him adequate housing upon parole; and, (3) the Parole Board failed to properly take into consideration his risk of reoffending, as required by § 17-22.5-404(1), C.R.S. (2018), resulting in a deprivation of his federal due process rights. (*See generally* Docket No. 1). For relief, Applicant seeks an order directing the Parole Board to provide him with a new parole hearing or to grant him parole. (*Id.* at 7).

II. Legal Standards

Habeas corpus relief is warranted only if an applicant "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). An application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 "is an attack by a person in custody upon the legality of that custody, and the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *see also McIntosh v. United States Parole Comm'n*, 115 F.3d 809, 811 (10th Cir.1997). A challenge to the denial of parole is properly brought under 28 U.S.C. § 2241. *Henderson v. Scott*, 260 F.3d 1213, 1214 (10th Cir. 2001).

The Court construes Applicant's filings liberally because he is not represented by an attorney. *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted); *see also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972). However,

a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). Applicant's pro se status does not entitle him to an application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

III. Analysis

A. Disability Discrimination

Applicant first claims that the Colorado Parole Board discriminated against him because of a mental disability in deferring his parole.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2018). The United States Supreme Court has recognized that state prisons are public entities within the meaning of Title II of the ADA. *See Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 210 (1998). Like state prisons, state parole boards "fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government.'" *Yeskey*, 524 U.S. at 118 S.Ct. at 210 (quoting 42 U.S.C. § 12131(1)(B)).

In *Thompson v. Davis*, 295 F.3d 890, 896, 898 (9th Cir. 2002), the Ninth Circuit recognized the applicability of Title II of the ADA to state parole decisions, concluding that Title II prohibited "categorically exclud[ing] a class of disabled people [such as

former drug addicts] from consideration . . . because of their disabilities [i.e., a history of drug addiction." However, the Ninth Circuit held that Title II "does not categorically bar a state parole board from making an individualized assessment of the future dangerousness of an inmate by taking into account the inmate's disability." *Id.* at 898 n. 4. *See also Gilkey v. Kansas Parole Bd.*, No. 07-3110-SAC, 2008 WL 2704480 at *2 (D. Kan. July 8, 2008) (same) (citing *Thompson*). *Accord Hughes v. Colorado Dept. of Corrections*, 594 F.Supp.2d 1226, 1244 (D. Colo. 2009) ("[E]ven assuming that the Parole Board revoked Hughes' parole based on his disability-caused conduct, the Parole Board is entitled to account for how a parolee's disability affects his fitness for continuation of parole following a parole violation," citing *Thompson*). "A person's disability that leads one to a propensity to commit crime may certainly be relevant in assessing whether that individual is qualified for parole." *Thompson*, 295 F.3d at 898 n.4.

Here, the reasons stated in the Notice of Parole Board Action do not reflect a categorical denial of parole based on Applicant's mental disabilities. Instead, the Parole Board made an individualized determination that, due to Applicant's offense conduct, which Applicant attributed to his mental illness, he was not fit to be released on parole in October 2018, particularly where he had a history of not taking his psychiatric medications consistently and did not have a solid parole plan. The Colorado Parole Board's decision did not violate Title II of the ADA. Accordingly, claim one of the Application is dismissed.

B. Improper Denial of Parole under Colorado Parole Statutes

Applicant next claims that the Colorado Parole Board's decision to deny parole violated his federal due process rights and constituted an abuse of the Parole Board's discretion.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits the state deprivation of life, liberty, or property without due process of law. *See Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994). Applicant was not deprived of life or property when he was denied release on parole. His claim therefore must implicate a constitutionally-protected liberty interest. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

Generally, a liberty interest may arise from either the United States Constitution or state law. *See Fristoe v. Thompson*, 144 F.3d 627, 630 (10th Cir.1998); *Boutwell v. Keating*, 399 F.3d 1203, 1213 (10th Cir. 2005) (recognizing that a state statute may "create a liberty interest when the statute's language and structure sufficiently limits the discretion of a parole board."). The Constitution itself does not create a protected liberty interest in a prisoner's release prior to the expiration of a valid sentence. *See Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (per curiam); *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7 (1979). Furthermore, a review of the applicable Colorado parole scheme demonstrates that Applicant does not have a legitimate claim of entitlement to parole under Colorado law.

Inmates in Colorado generally are subject to a discretionary parole system unless they were convicted of offenses committed between July 1, 1979, and June 30,

1985. *See Thiret v. Kautzky*, 792 P.2d 801, 805 (Colo. 1990). For prisoners serving sentences for crimes committed after July 1, 1985, the Parole Board has "'unlimited discretion'" to grant or deny prisoners parole. *Childs v. Werholtz*, No. 13-1045, 516 F. App'x 708, 709 (10th Cir. 2013) (unpublished) (quoting *Mulberry v. Neal*, 96 F. Supp.2d 1149, 1150 (D. Colo. 2000)); *Thiret*, 792 P.2d at 805. Applicant was convicted of crimes occurring after July 1, 1985, and, therefore, he is subject to Colorado's discretionary parole scheme. *Id.*

Applicant has no entitlement to parole under a discretionary parole scheme. *Greenholtz*, 442 U.S. at 7; *see also Straley v. Utah Bd. of Pardons*, 582 F.3d 1208, 1214 (10th Cir. 2009). Nonetheless the Tenth Circuit has recognized that federal habeas relief may be warranted where the decision to deny parole constituted an abuse of the parole board's discretion such that it "resulted in an abridgement of the petitioner's constitutional rights." *Wildermuth v. Furlong*, 147 F.3d 1234, 1236 (10th Cir. 1998). *See also Schuemann v. Colorado State Bd. of Adult Parole*, 624 F.2d 172, 173 (10th Cir.1980) (stating that a court "may review [a] decision of the parole board to determine if it was arbitrary, capricious or an abuse of discretion.").

The Court first considers the state procedures applicable to parole proceedings. Colorado law does not create any limits on the procedures to be used by the parole board when it considers a state prisoner's parole application. State law provides only that a parole interview shall be conducted by one Colorado Parole Board member, and that any final action on an offender's parole application requires the concurrence of at least two Parole Board members. *See* § 17-2-201(9)(a)(I), C.R.S. (2018). The

statutory procedure was followed in Applicant's case and he does not contend otherwise. Therefore, the question remaining is whether the decision to deny and defer parole was arbitrary, capricious or an abuse of discretion.

The Colorado Parole Board may not release an offender on parole unless "there is a strong and reasonable probability that the person will not thereafter violate the law and that release of such person . . . is compatible with the welfare of society." § 17-2-201(4), C.R.S. (2018). The Parole Board's decision regarding whether to release an inmate is "subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release." *Greenholtz*, 442 U.S. at 9-10. On federal habeas review, the court's inquiry is limited to "whether there is a rational basis in the record for [the Parole Board's] conclusions embodied in its statement of reasons." *Mulberry*, 96 F.Supp.2d at 1151. "So long as there was sufficient evidence before the Parole Board to support its decision, its actions are not an abuse of discretion." *Id.* Federal courts may not reweigh evidence, rule on credibility matters, or substitute their judgment for the judgment exercised by a parole board. *Fiumara v. O'Brien*, 889 F.2d 254, 257 (10th Cir. 1989).

The Colorado Parole Board denied parole based on the severity and circumstances of Applicant's offense, which was a class 2 felony and involved the death of a child that he had abused. (Docket No. 19-3). The Parole Board's notice of action also cited serious concerns relating to Applicant's mental health and Applicant's lack of

a suitable parole plan. (*Id.*). Although the Parole Board's explanation in the notice of action is terse, there is no question that the nature of the crime committed is a proper factor for consideration. *See Schuemann*, 624 F.2d at 174; *see also Childs v. Clements*, No. 12-cv-01401-CMA, 2013 WL 389087 at *5 (D. Colo. Jan. 31, 2013) (concluding that decision to deny parole based on the nature of the offense was sufficient and not an abuse of discretion). Moreover, "[i]t would be discordant to require unduly specific and detailed reasons from a Board vested with a subjective, predictive, and experimental function." *Schuemann*, 624 F.2d at 174.

Applicant contends that the Parole Board's decision failed to consider his likelihood of reoffending, as required by § 17-22.5-404(1)(a), C.R.S. (2018). Section 17-22.5-404(1)(a) states that "[t]he risk of reoffense shall be the central consideration by the state board of parole in making decisions related to the timing and conditions of release on parole. . . ."

The record indicates that the Parole Board considered Applicant's failure to consistently take his psychiatric medications in prison; Applicant's admission that he did not consistently take his medications before he was incarcerated; and, Applicant's admission that he did "really bad things" when he was not on his medications. Applicant's mental health issues are directly tied to his likelihood of reoffending if released on parole, particularly given his statement that he abused two children because his hallucinations were commanding him to do so. Although Applicant informed Ms. Balazic during the parole interview that he now understands that he must

take his medications consistently (*see* Docket No. 20), the Board's failure to credit that statement in light of his past behavior was not arbitrary or an abuse of discretion.

Moreover, Applicant acknowledged that he was convicted of two prison disciplinary offenses in the seven months preceding his parole interview because of "stress," which indicates that he has ongoing issued in controlling his behavior. The Colorado parole scheme requires the Parole Board to consider the "totality of the circumstances" in considering an offender for parole and "[t]he determination of how to monitor an offender's progress and what, if any, weight the Parole Board chooses to place on the evidence before it are matters solely for the Parole Board's consideration and discretion." *White v. People,* 866 P.2d 1371, 1373 (Colo. 1994). *See also* § 17-22.5-404(4)(a) (stating that the state board of parole shall consider the "totality of the circumstances" in considering offenders for parole, including the factors listed).

Applicant also claims that the Parole Board improperly denied parole based on his lack of housing, in violation of § 17-22.5-403(8)(a), C.R.S. (2018). The statute provides, in relevant part:

> For persons who are granted parole pursuant to paragraph (a) of subsection (7) of this section, the division of adult parole shall provide parole supervision and assistance in securing employment, housing, and such other services as may affect the successful reintegration of such offender into the community while recognizing the need for public safety.

§ 17-22.5-403(8)(a).

The Tenth Circuit has determined that the Colorado statute does not create a protected liberty interest in being provided with housing assistance on parole. *See Scott v. Teklu*, No. 10-1334, 403 F. App'x. 344, 345 (10th Cir. Nov. 30, 2010)

(unpublished). Moreover, the Colorado parole guidelines instruct the Parole Board to consider "[t]he adequacy of the offender's parole plan," in determining whether an offender should be paroled. *See* § 17-22.5-404(4)(a)(VI), C.R.S. A lack of stable housing may affect the parolee's successful reintegration into the community. An inability to successfully reintegrate may, in turn, affect whether the parolee would pose a potential risk to others, especially where the parolee has a history of harming himself and others when his mental health issues are not properly controlled by medication. The Parole Board properly considered Applicant's lack of a suitable housing plan as part of the totality of the circumstances in determining that he was not suitable for parole. *See Schuemann*, 624 F.2d at 174.

The Court finds that there was a rational basis for the Parole Board's decision to deny parole and defer reconsideration for one year. Consequently, Applicant fails to demonstrate the parole board's decision was arbitrary, capricious or an abuse of discretion.

IV. Orders

For the reasons discussed above, it is

ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (Docket No. 1), filed by James Sardakowski, *pro* se, is DENIED and this action is DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that no certificate of appealability will issue because Applicant has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c). It is

FURTHER ORDERED that pursuant to 28 U.S.C. § 1915(a)(3), the Court certifies that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status is DENIED for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal he also must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24. It is

FURTHER ORDERED that the Prisoner Motion for Appointment of Counsel (Docket No. 23) is DENIED as moot.

Dated this 5th day of June, 2019.

BY THE COURT:

William J. Martinez
United States District