

102 Mass.App.Ct. 1104

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

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).

Appeals Court of Massachusetts.

Eusebio RODRIGUEZ

v.

DEPARTMENT OF CORRECTION & others.¹

22-P-256

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Entered: December 13, 2022

By the Court (Sullivan, Neyman & Brennan, JJ.²)MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

*1 Eusebio Rodriguez, incarcerated for a term of life without parole after conviction for murder in the first degree, appeals from a judgment entered in the Superior Court upholding a decision of the commissioner of the Department of Correction denying his application for medical parole. See  G. L. c. 127, § 119A. For the reasons which follow, we vacate the judgment and remand to permit further review by the commissioner.

Background. “[T]he statute requires the commissioner to make three determinations: (1) is the prisoner ‘terminally ill’ or ‘permanently incapacitated’? (2) if released, will the prisoner live and remain at liberty ‘without violating the law’? and (3) is the prisoner's release ‘incompatible with the welfare of society’?” Buckman v. Commissioner of Correction, 484 Mass. 14, 19 (2020), quoting  G. L. c. 127, § 119A (e). In making this determination, the commissioner relies on the recommendations of medical professionals, the superintendent of the facility in which the petitioner is housed, and the district attorney.  G. L. c. 127, § 119A (a)-(d).  501 Code Mass. Regs. § 17.04 (2019).

The commissioner summarized the reports and recommendation as follows. Rodriguez suffers from renal neoplasm of the left kidney, GERD, rheumatoid arthritis, chronic pain, and other medical conditions. At one point, Rodriguez lived in general population and appeared to be able to attend to the activities of daily living. However, the prison's medical director later concluded that Rodriguez was “medically incapacitated” and recommended his transfer to a health care unit. As the commissioner summarized the various reports, Rodriguez

“is now dependent on others, particularly nurses and other clinical staff, to perform his activities of daily living. Given his cancer diagnosis, this condition is likely to worsen. His medical restrictions consist of a transfer to the CSU for a higher level of care and no work status because of difficulty in performing simple tasks due to joint pain and stiffness.... According to Wellpath, the recent diagnosis of malignant neoplasm of left kidney, except renal pelvis is not likely to result in death

within 18 months, but is likely to severely impair his functional status. Also according to Wellpath, it is unlikely that Mr. Rodriguez will live beyond 36 months.”

The commissioner did not explicitly state whether she credited the reports of a degenerating medical condition, the lethality of the illness within thirty-six months, or impaired functional status, but neither did she discredit them.³ We assume without deciding that those are the operative facts for purposes of our review.⁴

*2 The commissioner concluded that, after consideration of the medical director's “opinion that [] Rodriguez is permanently incapacitated, I do not find that he is so physically debilitated that he no longer poses a public safety risk.” In arriving at that determination, the commissioner relied on several factors, including Rodriguez's statements in a clemency petition admitting that his offenses were related to alcohol abuse, the lack of voluntary attendance at alcohol treatment programs while incarcerated, the lack of recent treatment program attendance, his decision not to undergo a drug screen, a 1997 “guilty filed” disposition for headbutting a corrections officer, and disciplinary infractions for assaulting a corrections officer and concealing a weapon. In addition, the commissioner quoted at length and relied explicitly on the recommendation of the district attorney, stating, “I specifically credit the Essex County District Attorney's Office's statements that Mr. Rodriguez's actions in showing a lack of remorse for the brutal murder of his girlfriend by his repeated attacks on his convictions and petitions for clemency.”⁵ Based on these considerations, the commissioner determined that Rodriguez posed a risk to public safety and that his release was incompatible with the welfare of society. No standardized risk assessment was presented to the commissioner.⁶

Discussion. On appeal, Rodriguez claims, among other things, that the commissioner violated her own regulations by failing to perform a risk assessment using standardized assessment tools, see  501 Code Mass. Regs § 17.04(f) (2019), and that the commissioner improperly considered the fact that he filed an appeal, motions for postconviction relief, and petitions for clemency.

1. Risk assessment. The statute requires that the superintendent make a recommendation which encompasses, among other things, the risk posed by release. See  G. L. c. 127, § 119A (c) (1) (“The superintendent shall transmit with the recommendation: (i) a medical parole plan; (ii) a written diagnosis by a physician licensed to practice medicine under section 2 of chapter 112; and (iii) an assessment of the risk for violence that the prisoner poses to society”). The regulation applicable to risk provides, in pertinent part:

“17.04: Multidisciplinary Review Team

The Multidisciplinary Review Team (MRT) shall be responsible for reviewing the petitioner's proposed medical parole plan for the prisoner and supporting documents and assisting the superintendent in formulating his or her recommendation to the Commissioner. The MRT's review shall include, but not be limited to:

...

“(f) the prisoner's suitability for medical parole, utilizing standardized assessment tools such as the LS/CMI assessment tool and/or COMPAS, as well as the prisoner's risk level for classification evaluation purposes” (emphasis added).

 501 Code Mass. Regs § 17.04(f) (2019). “Where, as here, a statute authorizes the secretary of an executive department to ‘promulgate rules and regulations necessary for the enforcement and administration’ of the statute,  G. L. c. 127, § 119A (h), and where, as here, the regulations are duly promulgated, they are presumptively valid” (quotation omitted). Buckman, 484 Mass. at 23.

The language of the regulation is mandatory. See Emma v. Massachusetts Parole Board, 488 Mass. 449, 454 (2021) (“The word ‘shall’ indicates the absence of discretion”). However, the multidisciplinary review team did not provide a risk assessment to

the superintendent. According to the superintendent, the assessment was not conducted “[d]ue to Mr. Rodriguez's conviction of first-degree murder and sentence of life without possibility parole.”

*3 Such may be the case in the usual course, but the medical parole statute applies to all prisoners, regardless of offense. See  [G. L. c. 127, § 119A \(b\)](#). Once the application for medical parole was made, the obligation to conduct a risk assessment was triggered. The regulation “requires” that the multidisciplinary review team conduct the assessment and provide it to the superintendent for consideration in his recommendation to the commissioner. [Emma](#), 488 Mass. at 454, citing  [Hashimi v. Kalil](#), 388 Mass. 607, 609 (1983) (“The word ‘shall’ is ordinarily interpreted as having a mandatory or imperative obligation”). The commissioner's exercise of discretionary judgment, uninformed by the mandated risk assessment, is not a substitute for an evaluation that takes into consideration a risk assessment based on standardized assessment tools, as required by the regulation. Cf. [Tartarini v. Department of Mental Retardation](#), 82 Mass. App. Ct. 217, 222-224 (2012) (department failed to follow statutory mandate to specify clinical authorities upon which eligibility decisions were made; clinician's judgment not grounded in clinical authorities was deficient). Accordingly, we reverse and remand for further consideration by the commissioner.

2. Appeal and postconviction relief. Because the issue could arise again on remand, we briefly address the other argument raised by Rodriguez, namely the commissioner's reliance on the fact that he appealed his conviction and sought postconviction relief, to deny medical parole. “[W]hile an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.”  [U.S. v. Goodwin](#), 457 U.S. 368, 372 (1982). See  [Bordenkircher v. Hayes](#), 434 U.S. 357, 363 (1978);  [North Carolina v. Pearce](#), 395 U.S. 711, 724 (1969). All criminal defendants in the Commonwealth have a statutory right to appeal a conviction in the Superior Court. See [G. L. c. 231, § 113](#). Those convicted of first degree murder have a statutory right to enhanced review under [G. L. c. 278, § 33E](#). The executive's powers of pardon and clemency derive from art. 73 of the declaration of rights, and the right to petition is statutory. See [G. L. c. 127, § 152](#). “To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort....” [AIDS Support Group of Cape Cod, Inc., v. Barnstable](#), 477 Mass. 296, 306 (2017), quoting [Bordenkircher](#), *supra* at 363.

Consideration of the bare fact that a prisoner exercised statutory rights to appeal and postconviction relief to deny medical parole has a tenuous connection to the provisions of the medical parole statute and runs the risk of “impermissibly burden[ing]” the right to appeal and to pursue postconviction relief. [Commonwealth v. Souza](#), 390 Mass. 813, 818 (1984).⁷ See  [Goodwin](#), 457 U.S. at 372, n.4 (“[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional” [quotation omitted]); [AIDS Support Group](#), 477 Mass. at 306. We anticipate that the commissioner will consider the petition anew, based on the updated risk assessment and any additional information that may come before her, and therefore need not decide whether, in this circumstance, the commissioner's consideration of Rodriguez's exercise of statutorily protected rights violated these precepts.

Accordingly, the judgment is vacated, and a new judgment shall enter remanding the matter to the commissioner for further proceedings consistent with this memorandum and order.

So ordered.

vacated

All Citations

102 Mass.App.Ct. 1104, 200 N.E.3d 529 (Table), 2022 WL 17587566

Footnotes

- 1 The Commissioner of Correction and Superintendent of Massachusetts Correctional Institution-Norfolk.
- 2 The panelists are listed in order of seniority.
- 3 The superintendent's recommendation was written before the medical director revised his opinion and removed Rodriguez from general population.
- 4 In view of our ultimate disposition, we do not reach the parties' arguments regarding the appropriate standard of review. However, to the extent that either the substantial evidence test or the arbitrary and capricious standard may apply in this kind of certiorari action, judicial review of the commissioner's decision would be aided by clarity as to the facts credited by and relied upon by the commissioner.
- 5 The letter from the district attorney to the commissioner stated, "Each of Rodriguez's repeated attacks on his convictions and petitions for clemency represent his lack of acceptance of the jury's verdict and indicate a lack of remorse and sorrow for the trauma caused to the victim, her family, and friends.... Rodriguez's more recent conduct, including his repeated challenges to his conviction and sentence, further demonstrate that his rehabilitation is far from complete."
- 6 The correctional facility did conduct a classification review and gave Rodriguez a score of 1, but Rodriguez was both undocumented and serving time for first degree murder, which rendered him ineligible for classification to minimum security or below. He argues that this classification score should be considered for purposes of medical parole. Whether this classification should be considered is for the commissioner to determine on the basis of a complete record on remand.
- 7 In contrast, the content of such a petition, such as Rodriguez's acknowledgement of a history of alcohol abuse, may be properly considered to the extent that the contents bear on risk.