

DO D. FAYED
v.
NEW JERSEY PAROLE BOARD.

A-97-4321-T4

Superior Court, Appellate Division

Submitted August 5, 1997 -- Decided September 2, 1997

Before Judges GRIM, REAPER and MERCY.

Charles Windsor, Windsor, Saxe-Hohenburg & Brittonia, P.C., attorney for the petitioner-appellant (*Charles Windsor*, of counsel and on the brief).

Elizabeth Rex, Attorney General of the State of New Jersey, attorney for the New Jersey State Parole Board (*Elizabeth Rex*, of counsel and on the brief).

REAPER, J.A.D., joined by GRIM, J.A.D.

This case arises from an inmate's appeal of the April 1997 decision of the Parole Board to deny him parole and establish a ten-year future parole eligibility term (FET). We conclude that the Parole Board's decision to deny parole was not arbitrary or capricious and, therefore, must be affirmed.

The Facts

1. The Murder

On the evening of July 3, 1963, the petitioner-appellant, Do D. Fayed, was on parole for an armed robbery he had committed in 1960. He had just been released from prison in April 1963. His parole officer was attempting to get Fayed employment as a dishwasher in a local restaurant.

Instead of having learned from his earlier mistake, however, Fayed committed a robbery at a convenience store in Queens, New York, and afterward traveled to East Orange, New Jersey in his friend's car. During the drive to East Orange, Fayed twice shot himself up with heroin. Once in East Orange, he went to the Happy Times Pub, where he remained for several hours, consuming large amounts of alcohol.

At approximately 3 a.m., Fayed became very agitated when he was refused service. He pulled a gun out from underneath his sweatshirt and fired two shots into the ceiling. The police were called and Officer Spenser Diana, a rookie police officer, just married with

a newborn at the hospital that he had yet to even see¹, responded to the Happy Times Pub. Officer Diana, who did not have a backup officer, entered the pub and attempted to ascertain the identities of the patrons. Before the Officer reached him, Fayed pulled out his .38 Smith & Wesson and ordered the Officer to remove his clothes. While holding Officer Diana at gunpoint, Fayed screamed relentlessly that the Officer was going to die. As Officer Diana undressed, Fayed fired numerous shots at the floor, and took his gun and struck him across the face and back. Officer Diana fell to the floor and Fayed shot him, killing him instantly.

Fayed fled in a taxi, leaving his friend's car behind. He hid in various flop-houses in Harlem and elsewhere. Fayed was arrested and taken into custody two weeks later, while jumping over the turnstile at the PATH train station in Newark, New Jersey.

2. Conviction and sentence history

In 1964, Fayed was convicted of first degree murder in connection with the death of Officer Diana. Pursuant to N.J.S.A. 2A:113-4 (now repealed), he was sentenced to die. He appealed both his conviction and the sentence, and both were ultimately affirmed in an unreported opinion. *State v. Fayed*, A65-117 (Supreme Ct., Mar. 10, 1965).

Habeas corpus and other post conviction relief procedures were pursued for a number of years before the United States District Court for the District of New Jersey, the United States Court of Appeals for the Third Circuit and ultimately before the United States Supreme Court. Before Fayed's last appeal could be considered by the High Court, however, the U.S. Supreme Court decided a number of cases which effectively invalidated the death penalty statutes of both the states and the federal government. See *e.g. United States v. Jackson*, 390 U.S. 570 (1968); *Witherspoon v. Illinois*, 391 U.S. 510 (1968). New Jersey's statute was specifically addressed in a memorandum opinion in *Funicello v. New Jersey*, 403 U.S. 948 (1971).

Acting on the High Court's mandate, the New Jersey Supreme Court invalidated the statute under which Fayed had been sentenced. *State v. Funicello*, 60 N.J. 60, *cert. denied sub nom. New Jersey v. Presha*, 408 U.S. 942 (1972). Therefore, the death penalty sentences of all prisoners on Death Row at that time were converted to sentences of life imprisonment. *Id.* at 67. As one of the affected prisoners, Fayed was sentenced to life imprisonment, *nunc pro tunc*, and was entitled to the same parole, work and other credits as if initially sentenced to life imprisonment. *Id.* at 67-68.

3. History of Parole Board actions

A person sentenced to life imprisonment under N.J.S. 2A:113-4 was eligible for parole after 25 years less commutation time and work credits. N.J.S. 2A:113-4 (repealed). Fayed thus became eligible for parole in 1979 and made his first application for parole that year.

The Parole Board granted Fayed parole with restitution imposed as a special condition in 1980, but problems arose when the Law Division refused to fix an amount of restitution

1. Officer Diana's young wife had given birth to a baby the night her husband was murdered. The officer, on duty at the time of the birth, never saw his son, who has himself grown up to be an East Orange police officer.

because it was a murder case. The issue was ultimately decided in a companion case, where the Supreme Court agreed that restitution was an inappropriate condition of parole in a homicide. *In re Parole Application of Trantino*, 89 N.J. 347 (1982). The Supreme Court in *Trantino* also concluded that the Parole Board had the right to reconsider its parole determinations in such cases because its decision that there was no substantial likelihood that an inmate under such a condition would commit future criminal acts if released was dependent on that condition being attached to parole. *Id.*

In Fayed's case, the Parole Board reconsidered its 1980 decision in 1983 and determined that without restitution as a condition, Fayed had not achieved his rehabilitative potential nor satisfied the punitive aspects of his sentence. It particularly highlighted the fact that, while Fayed admitted that he was responsible for Officer Diana's murder, he claimed not to remember any details of the night in question. The board set a 60-month FET.

In 1988, at the end of that FET term, Fayed applied again for parole. The Parole Board denied parole because it concluded that Fayed had not achieved his rehabilitative potential nor satisfied the punitive aspects of his sentence because he had refused to participate in substance abuse counseling and long-term psychotherapy. The recommendation for counselling was in part based on the fact that Fayed continued to claim an inability to remember most details of the murder. The board set a 48-month FET.

Then in September, 1992, the board denied parole and set another 48-month FET, recommending that Fayed continue substance abuse counseling. In addition, the board also proposed that Fayed be placed in a special minimum security status which would allow him to participate in work details in the community, and act as a counselor for juveniles outside the confines of the institution. The board's final recommendation was that Fayed receive further psychological counseling from the institutional psychologist, Dr. C. Jung. Its counseling recommendation was based on the fact that Fayed continued to claim that he only remembered certain details of the murder.

4. The current decision

The Parole Board's final decision in April, 1997 denying Fayed parole and imposing a 10-year future parole eligibility term (FET) is at issue here. That decision resulted from Fayed's last parole consideration which began in the fall of 1996.

In September, 1996, the board recommended that an extended FET be imposed, beyond the guidelines, based on psychological considerations. Fayed asked for a hearing and the matter was referred to a three-member panel. N.J.A.C. 10A:71-3.21(d). After extensive consideration and testimony from Fayed and two psychologists in a hearing on December 23, 1996, the panel could not decide unanimously for or against parole, and, therefore, the matter was referred to the full board. N.J.A.C. 10A:71-3.21(d). On April 4, 1997, the full board denied parole and set a 10-year FET, relying in large measure on a psychological evaluation of Fayed by Dr. S. Freud and on Fayed's own answers to questions regarding an earlier unrelated crime.

Dr. Freud testified that he could not recommend parole because he was deeply concerned about Fayed's claimed inability to recall details of the night of the murder. He agreed that "over the years, Fayed has made great strides and has consistently provided additional facts supporting what happened that evening," but added that "Fayed has yet

to admit to a complete recollection of the event.” Dr. Freud suggested that such inability could be overcome with additional psychotherapy. He concluded that “additional, intensive, psychotherapy is required for at least 36 months and will be aimed at giving Fayed a deeper understanding of the wrong he committed, to take responsibility for the murder, which would maximize his rehabilitation and allow the public to feel more secure and less outraged because, for the first time, Fayed will have done more than merely accept responsibility for the crime.”

Although the testimony of the institutional psychologist, Dr. Jung, was to the contrary, the Parole Board rejected Dr. Jung’s views because of Fayed’s own responses to the board’s questioning as to his participation in another criminal episode unrelated to the murder. In those responses, he similarly refused to admit that he was armed with a gun during a robbery of Turano’s Italian Deli, in North Arlington, New Jersey in September 1960. The cashier testified that Fayed entered the deli, purchased a bag of Grandma Agnes’ B.B.Q. Pork Rinds and then said, “You need to eat, and so do I. So you understand.” The cashier never saw a weapon, but said she feared for her life when Fayed patted his waist and said, “I have a gun here.” He demanded money and the cashier gave him what was in the register drawer.

Fayed was arrested in Newark in connection with the deli hold-up within hours of the hold-up itself. The cashier was brought to the Newark Police Station where she identified him as the robber. Fayed had \$492.00 in small denominations on his person when arrested. Although no weapon was found, he was charged with and convicted at trial of armed robbery.

Fayed was questioned by the board during the December 1995 hearing regarding the incident. He admitted responsibility for the armed robbery in much the same words as he has admitted responsibility for the murder. However, he repeatedly denied having been armed with a gun, despite having been convicted of armed robbery.

The Board therefore concluded, in a decision reached April 4, 1997, that:

Even though you have participated in numerous programs while at the institution, you still have not gained sufficient insight into your role in the crimes you have committed. In particular, you refuse to face the truth of the exact events of the murder and you refuse to acknowledge that you had prior criminal involvement with a weapon in an earlier armed robbery. Therefore, you have not achieved your rehabilitative potential and the punitive aspects of your sentence have not been satisfied, and there is a substantial likelihood that you would commit a crime if released on parole. Thus, the Parole Board believes the ten year FET is necessary in order to provide you with the opportunity to participate in appropriate psychological counseling to address your lack of responsibility and insight.

Based on these conclusions, the Board denied parole and imposed a 10-year future eligibility term. Fayed will not be eligible for parole reconsideration until 2007.

On April 17, 1997, Fayed filed a notice of appeal of the board’s decision.

Discussion

The standard to be applied by the Parole Board for purposes of making parole decisions for this inmate was computed pursuant to the 1948 Parole Act, N.J.S.A. 30:4-13.14 et seq. (repealed). However, as of September 1, 1979, the Parole Act of 1979 was adopted. L. 1979, c. 441, N.J.S. 30:4-13.45 et seq.

Also, consideration must be made regarding the differing of sentencing and parole of inmates under Title 2A and 2C, the latter effective September 1, 1979, also known as the Code of Criminal Justice. N.J.S. 2C:98-4.

Under Title 2C, the judicial determination embodies the punitive aspects of the sentence and the parole decision must be confined solely to whether there is a substantial likelihood for a repetition of criminal behavior.

The Parole Board is not exempt from the principle that a court may review the actions of an administrative agency to determine if its power is being exercised arbitrarily or capriciously. See *N.J. Const.*, Art. VI § 5, ¶ 4; R. 2:2-3(a)(2); *Johnson v. State Parole Bd.*, 131 N.J. Super. 513 (App. Div. 1974), certif. denied, 67 N.J. 94 (1975). However, the only relevant standard for our review of a Parole Board decision is the arbitrariness standard. *In re Hawley*, 98 N.J. 108 (1984); *In re Senior Appeals Examiners*, 60 N.J. 356 (1972); *Monks v. N.J. State Parole Board*, 58 N.J. 238 (1971).

The Parole Board's findings are factual in nature. *Close v. Krodulak Bros.*, 44 N.J. 589 (9165). A reviewing court must determine whether these factual findings could reasonably have been reached on sufficient credible evidence in the whole record. *Mayflower Securities v. Bureau of Securities*, 64 N.J. 85 (1973). In particular, the issue of whether there is a substantial likelihood that Fayed will commit another crime if released is essentially factual in nature. As noted by the Third Circuit, the Parole Board must "consider both the likelihood of recidivism and whether the punitive aspects of [a defendant's] sentence have been satisfied." *Royster v. Fauver*, 775 F.2d 527 (3rd Cir. 1985).

We have the power to set the board's decision aside if only if we find that its conclusion has been mistakenly made. *613 Corp. v. State of N.J., Div. of State Lottery*, 210 N.J. Super. 485 (App. Div. 1986). Our review convinces us that the Parole Board was not arbitrary or capricious and did not abuse its discretion in denying Do D. Fayed parole. That decision was properly based on the testimony of Dr. Freud, the evidence that Fayed continues to claim that he cannot remember the details of the murder, and his continual denial of responsibility for his actions. On its face, the action of the Parole Board is far from arbitrary.

The Parole Board was entitled to give whatever weight to the testimony of the experts that it chose to give, and even was entitled to accept some evidence from one and some from another. *Todd v. Sheridan*, 268 N.J. Super. 387, 401 (App. Div. 1993). Its reliance on Dr. Freud in his concerns that Fayed has not fully accepted responsibility for his crimes was reasonable.

Moreover, Fayed's refusal to concede that he had a gun in the unrelated robbery also supports the conclusion of the Parole Board. Despite his denials now, the jury convicted him of armed robbery in 1960. That jury then, as well as the Parole Board today, was entitled to rely on his own statement during the robbery that he was carrying a gun. See

State v. Huff, 292 N.J. Super 185 (1996).

Taken together, the facts that he refuses to admit that he was armed with a gun in his first criminal offense, that he was on parole for that armed robbery when he murdered Officer Diana, and that he claims an inability to fully remember the details of the murder, all create a reasonable basis for the Parole Board to decide that he has not yet achieved his full rehabilitative potential.

For these reasons, we affirm the Parole Board in its conclusion that the denial of parole and the establishment of a ten year future parole eligibility (FET) was an appropriate disposition of Fayed's hopes for parole at this time.

AFFIRMED

MERCY, J.A.D., dissenting

I respectfully disagree with my colleagues and would reverse the decision of the Parole Board and direct the Board to parole Do D. Fayed. The evidence overwhelmingly demonstrates that the Parole Board is acting arbitrarily, capriciously and has abused its discretion with its decisions. I say to the Parole Board, and also to my colleagues, enough is enough. Fayed has spent the last 33 years in jail and is a different human being. He has served his time. He has been a model prisoner. Time and again, he has complied with all of the reasonable conditions set by the Parole Board. I say again: Enough is enough.

There is no question but that, years ago, Fayed was a dangerous man. At his murder trial, Fayed was expertly diagnosed with sociopathic-personality disturbance, drug and alcohol addiction with emotional instability, and depressive reaction, situational in character. Fayed was expelled from high school at 14; he was a heroin addict at 16; he turned to robberies to sustain his habit. In 1960 he was convicted of armed robbery and served 32 months. He had been on parole for barely three months when he committed another robbery and this murder, and he was high on heroin and alcohol at the time of the murder.

There is also no question but that this was a particularly heinous crime with tragic consequences. Much has been said and written over the years of the brutality of Fayed's actions towards Office Diana, the torture the young officer endured before his death and the enormity of his loss to his young family.

However, the man who murdered Officer Diana is a different man from the man the Parole Board was called upon to judge. Since he has been incarcerated, Fayed has been drug and alcohol free, has married, is very active in his chosen religion, and is a model prisoner. He is a leader in group therapy programs for juveniles, and has participated in drug and alcohol counseling, peer counseling, and self-help counseling. He has become a prison counselor for the younger inmates, and has participated in work details in the community, going outside the confines of the prison to accompany juveniles on over 75 recreational trips. In addition, he has almost attained his bachelor's degree.

Following his last parole denial, Fayed achieved the special minimum security status the board had insisted upon, and he participated in numerous programs outside the confines of the institution while he continued to be a model prisoner with no new problems.

He concluded the drug and alcohol counseling program the prison's staff set up for him and was discharged from it with glowing references. Moreover, he has done extremely well in the counseling with Dr. Jung that the board recommended.

Indeed, Dr. Jung testified at length at the parole hearing and contradicted Dr. Freud in every significant respect. He said he had concluded that Fayed's inability to recall the details of the murder is legitimate and that no amount of additional psychotherapy will help him regain his recall. The psychologist stated flatly: "Fayed's incomplete recollection is consistent with his childhood upbringing, drug and alcohol abuse at the time of the incident, patterns of results on memory testing and his juvenile record. No further psychological treatment would benefit Fayed in regaining his memory about this murder or other events in his life. Fayed has reached his full rehabilitative potential and there is no reason why he should not be released. With all the work that Fayed has done while on minimum custody, and after 33 years of incarceration, there should be no other barriers to parole. Once on parole, Fayed can fully regain a sense of identity, dignity and responsibility as a member of the community."

It is ironic that the Parole Board insisted, in 1992, that Fayed receive counseling with Dr. Jung and then rejected Dr. Jung's conclusions when he finished his course of therapy with Fayed. In my view, the Parole Board is clearly being arbitrary in weighing the testimony of Dr. Freud over Dr. Jung when Dr. Jung is more familiar with Fayed, was his individual therapist for more than three years, and has examined Fayed frequently over the years. Dr. Freud testified that he had met Fayed once and interviewed him for a total of one hour. His views are therefore no more than guess or conjecture. See *Pelose v. Green*, 222 N.J. Super. 545, 549-551 (App. Div.), certif. den. 111 N.J. 610 (1988). Dr. Jung testified that Fayed will never recall the details of the murder in large measure because he was intoxicated and on heroin when the murder occurred. Once again, the Parole Board is unreasonable in requiring long-term psychological treatment to try to elicit memories of details which will never be regained.

I am also appalled at the majority's blithe acceptance of the Parole Board's views on Fayed's statements that he was not armed with a weapon during the 1960 robbery for which he was convicted of armed robbery. It is clear to me that statements like the one Fayed made during the course of that crime can not be used against him. See *State v. Hutson*, 107 N.J. 222 (1987); *State v. Butler*, 89 N.J. 220 (1982).

Furthermore, only during this most recent Parole Board hearing did the Board question Fayed about his prior criminal history. With respect to the concern of the Board as to the nature and circumstances of the offenses for which Fayed was serving, and his prior criminal history, nothing has changed regarding these offenses. When recommending parole in September, 1991, the board was fully aware of these offenses. The action of the Board in questioning Fayed about his prior robbery and the statements he made is completely arbitrary. See *Mallamaci v. Dietz*, 146 N.J. Super 15 (1976). This is a "fishing expedition" that the Parole Board has engaged in to bolster its prejudices.

In my view, Fayed is entitled to parole. Indeed, having jumped through the hoops the board set for him in its 1991 parole recommendations, Fayed has a reasonable expectation of parole release and a consequent liberty interest. See *N.J. Parole Bd. v. Byrne*, 93 N.J. 192 (1983). Fayed is already serving more time than if he were convicted today and was not given the death penalty. Under the current statute, Fayed would have been presumptively paroled after 30 years of incarceration. N.J.S. 2C:43-6. The punitive

aspect of his sentence would have been fulfilled by the time parole eligibility occurred.

The reasons that the Parole Board has asserted for its decision to deny Fayed parole are just a pretext for succumbing to public outrage and political pressure. This 30-year-old crime received enormous publicity then and continues to do so today, fanning the flames of public outrage each time parole is considered.² Fayed is overwhelmingly suitable for release on parole. Yet public outrage over an imminent parole determination, such as that which has occurred in this case, has no place in a parole proceeding and is to be given no weight in a parole decision. *In re Parole Application of Trantino*, 89 N.J. 347 (1982).

The better Fayed does in the institutional setting, the more he acts like a model prisoner, and the more that he complies with the requests of the Parole Board, the worse he does with the board in its final parole decisions. As his own progress towards rehabilitation is acknowledged to have advanced, his opportunity for release has concomitantly declined. This phenomenon cannot be rationalized by any standard of reasonableness and fair play that exists. The only explanation is that the Parole Board's decision was primarily based upon adverse public reaction, not upon the factors that it cited. *See id.* at 376; *State v. Humphreys*, 89 N.J. 4 (1982).

It is clear to me that the only thing in the way of Fayed's freedom is public outrage. The board's acquiescence in public outrage is grossly arbitrary and unreasonable. The Parole Board is obliged to exercise a fair, reasonable, and above all, independent judgment as to whether the punitive aspects of defendant's life sentence in rehabilitation terms, have been fulfilled. *N.J. State Parole Bd. v. Cestari*, 224 N.J. Super. 534 (App. Div.), certif. denied 111 N.J. 649 (1988). It has not done so in this case.

I would reverse and direct the Parole Board to grant parole.

2. News coverage of the murder was extremely widespread when it occurred and stories focusing on it continue to be published every time there is any possibility of Fayed's parole. Indeed, the day before we heard arguments in this case, the local newspaper ran a front-page story entitled, "East Orange Can't Forget." The subheading was: "1963 murder rocked community." The day after arguments were heard, the newspaper carried another front-page article showing the large numbers of police cars that ringed our courthouse during the arguments and the police officers who sat in the courtroom briefly holding up small signs reading, "No chair, no justice."

**IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY**

A-97-522

DO D. FAYED,	:	
	:	
v.	:	ORDER
	:	
NEW JERSEY STATE	:	
PAROLE BOARD,	:	
_____	:	

The appeal of this matter by the petitioner-appellant is, on this 12th day of September, 1997, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both defendant and the State are to file briefs with this Court on or before December 6, 1997.

STEPHEN W. TOWNSEND, Clerk
For the Court