

FILED
Court of Appeals
Division I
State of Washington
11/20/2017 8:00 AM

No. 96695-8

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

In Re the Personal Restraint Petition of

GAIL BRAHSEAR,

Petitioner.

REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION

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A. INTRODUCTION

RCW 9.94A.730(3) establishes a presumption of release (“shall order the person released”) which can only be overcome only by facts supporting the conclusion that the prospective-parolee “will commit new criminal law violations if released” on “conditions set by the board,” a determination that must be made “incorporating methodologies that are recognized by experts in the prediction of dangerousness.” The only prediction of future risk presented at Ms. Brashear’s parole hearing established that she is an exceptionally low risk to commit future crimes.

Rather than follow the statutory command, the ISRB stripped Brashear of her liberty interest based on a jumble of vague conclusions that (1) ignored its own risk assessment; (2) at best, bear a tenuous relationship to the risk of re-offense; and (3) are simply unsupported by the facts. The ISRB’s written decision reveals the true reason that parole was denied when it states that Brashear (1) committed “horrible crimes” with “lasting impacts” on the victims; (2) has “served a relatively small portion” of her total sentence; and (3) because “the Board has received a strong recommendation from the Snohomish Prosecutor that requests the Board to not release Ms. Brashear.”

Decision and Reasons, p. 6.

Whether or not these things are true, none justify the denial of parole. This Court should not accept the ISRB's invitation to depart from the law. This Court should instead enforce the statute and conclude that the ISRB abused its discretion when it denied Brashear parole.

B. ARGUMENT

Introduction

This Court reviews parole eligibility decisions to ensure the ISRB exercises its discretion in accordance with the applicable statutes and rules. "Where the ISRB disregards the evidence presented and supports its decision with speculation and conjecture, it abuses its discretion." *In re Dyer*, 157 Wash. 2d 358, 369, 139 P.3d 320, 325 (2006). See also *State v. Graciano*, 176 Wash. 2d 531, 533, 295 P.3d 219, 220 (2013) (reviewing courts consider abuse of discretion and/or misapplication of the law).

The ISRB also abuses its discretion when it fails to follow its governing rules or acts without consideration of and in disregard of the facts. *Dyer*, 157 Wash.2d at 363; *In re Pers. Restraint of Addleman*, 151 Wash.2d 769, 776–77, 92 P.3d 221 (2004).

In this case, the ISRB abused its discretion because it denied parole for a reason not statutorily authorized and because it ignored the evidence relevant to the statutorily designated factor.

The Presumption of Parole Is Not Negated by the Crime or Sentence Previously Imposed. The ISRB Is Not Entitled to Determine the Appropriate Minimum Sentence.

The length of Ms. Brashear's maximum sentence has no bearing on her parolability and the ISRB does not have the authority to determine whether 20 years is or is not an appropriate minimum term for her. Yet, many of the letters sent to the ISRB, including the letter sent by the Snohomish County Prosecutor, urge the Board to deny parole on those grounds. None reference the statutory criteria or the evidence relevant to that determination.

The statutory command is clear and is not subject to modification by the ISRB. Every juvenile defendant convicted in adult court of a crime (other than aggravated murder) is eligible for a parole hearing after serving 20 years. It makes no difference if the sentence was 20 years or 100 years. The Legislature did not create any exception for "horrible crimes" or instances where the prosecutor makes a "strong recommendation" against release. The ISRB is not permitted to question the wisdom of this legislative judgment.

Not only are those reasons—proffered in support of the denial—not reasons to deny parole, the Legislature created a presumption of release after a defendant serves 20 years. The ISRB “*shall* order the person released under such affirmative and other conditions as the board determines appropriate, *unless* the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released.” RCW 9.94A.730(3). In other words, (1) there is a presumption of release; (2) the presumption is overcome only by a showing of a likelihood of committing future crimes; (3) the likelihood of committing future crimes must be measured in light of the availability of conditions of parole.

In *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979), the United States Supreme Court held that a similar parole statute, which mandated that the Board of Parole shall order an inmate’s release unless it found one of four designated reasons for deferring parole, created a legitimate expectation of release. *Id.* at 11-12. The same is true, here.

The ISRB’s decision notes that the DOC psychologist concluded that Brashear was a “low” risk to reoffend and “made a complete shift in her behavior” approximately 10 years ago, but then concludes those

factors are negated by the crime, its impact on the victims, her original sentence, and the prosecutor's objection. *Decision*, p. 6.

The ISRB does not possess the authority to determine what minimum sentence Brashear should serve before she is parole eligible. However, that is exactly what the ISRB did.

The State Employed Psychologist Conducted a Risk Assessment Incorporating an Accepted Methodology and Concluded that Ms. Brashear was a Low to Very Low Risk of Reoffense. The ISRB was not Free to Reject the Conclusion Based on the Desire that Brashear Serve More Time.

The ISRB possesses broad discretion in determining parolability, but this discretion is "not without limits." "The ISRB cannot ignore the evidence presented at the hearing nor rely on mere conjecture in making its decisions. Where the ISRB disregards the evidence presented and supports its decision with speculation and conjecture, it abuses its discretion." *Dyer*, 157 Wash. 2d at 369.

After improperly noting that 20 years was an insufficient sentence, the ISRB commended Brashear for her "good work since 2008," but then stated they "would like to see Ms. Brashear continue to demonstrate that her past behaviors are truly in her past and continue to participate in any programming available to her that will prepare her for a future step down to lower levels of custody and eventually release to the community." *Decision*, p. 6. Consistent with its view that

20 years was an insufficient minimum term, the ISRB did not explain why nearly a decade of “good work” was insufficient to lower her risk of re-offense below the “likely” threshold or what she needed to accomplish in the next five years. Instead, the ISRB simply concluded that Brashear needed to serve more time before they would extend consideration consistent with the statutory command.

The ISRB also ignored its own evidence regarding Brashear’s risk if released. Ms. Brashear’s risk of committing future crimes was evaluated by a Department of Corrections psychologist. That evaluation unequivocally and unmistakably concluded that Brashear presented the lowest risk of committing future crimes—a risk that could be further reduced by conditions of supervision. Yet, it is barely mentioned in the ISRB’s reasons for denying her parole. Washington courts have made it clear that when the ISRB ignored favorable evidence from psychological evaluations—even in cases where an evaluation is not required—constitutes an abuse of discretion. *Dyer*, 157 Wash. 2d at 368.

The DOC risk evaluation of Brashear included a variety of instruments, including the use of a risk assessment instrument specific to female offenders. On those, Brashear’s “total score is judged to be low risk to reoffend.” Ms. Brashear scored in the “lowest quartile” of

the PCL-R “which means there is no sign of psychopathy and little evidence of an Antisocial Personality disorder at this time.”

Psychological Evaluation, p. 7-8.

The DOC evaluation added Ms. Brashear has participated in “every program and educational opportunity available to her.” “Ms. Brashear has a strong family support network,” is “receiving a mentor from the IF project in the community,” has “good friends inside the prison, but is careful to not be involved in prison drama,” and “participates in Extended Family Visits regularly for which she pays the fees.” *Id.* at 5-7. The evaluation notes that Brashear is “bright, motivated to achieve her educational goals and is making significant progress. She has learned important pro-social coping skills. She has no current medical or mental health concerns that would impede her ability to succeed in the community and has demonstrated excellent help seeking skills if she were to need assistance in the future. She is highly motivated and prepared with good work skills.” *Id.* at 6. The only noted weaknesses were “never having worked or lived in the community as an adult.” *Id.* Her release “plans appear sensible and achievable.” *Id.*

Considering only historical factors, *including her infraction history*, the DOC evaluator concluded that Ms. Brashear is in the “low”

range for risk of reoffending after release. However, after taking into consideration of “dynamic factors such as eight years of no serious infractions and the lack of current biological/neurological development risk factors that were present as an adolescent and young adult,” Brashear’s risk of future offenses can “best be seen as in the ‘low to very low’ range.” *Id.* at 10.

The ISRB’s decision simply side-steps this well-founded conclusion. The ISRB does not explain why 15 years of good behavior (as opposed to 10) is significant other than its objection to Brashear’s parole eligibility at 20 years. The ISRB does not explain what Brashear has failed to accomplish that makes her a risk to reoffend.

The ISRB also does not explain why the conditions of parole set forth in the DOC psychological evaluation were not sufficient to reduce her risk of reoffense to an acceptable level. The psychological evaluation concluded that “Ms. Brashear appears to be a reasonable candidate for transitioning to a less restrictive setting,” noting that she would benefit from continued therapy for stress associated with the process of “transitioning to life outside of prison.” *Id.* at 11. The ISRB’s desire that Brashear continue programming could have easily been accomplished in the community.

The complete failure to address Brashear’s risk level in light of possible parole conditions further illuminates the fact that Brashear was denied parole for non-statutory reasons.

The ISRB “must base its decision on the evidence presented at the hearing.” *Dyer*, 157 Wash. 2d at 365. In *Dyer*, the ISRB disregarded the evidence presented, including Dyer’s most recent psychological evaluation. The Washington Supreme Court reversed because “the ISRB’s decision gives no indication that the evidence in the file supported its decision or that the evidence was used to refute any new evidence presented at the hearing. Instead, the ISRB’s decision is primarily supported by speculation and conjecture suggesting that Dyer is manipulative, poses a high risk to reoffend, and had the ability to learn how to take psychological tests. The ISRB also relied on the unchangeable circumstances of Dyer’s crimes, the same facts that justified the imposition of Dyer’s original exceptional sentence.” *Id.*

This case is a near carbon copy of *Dyer*.

Brashear Made a Lasting Transformative Behavioral Change

The ISRB attempts to defend its decision denying parole by citing to Brashear’s infraction history from her first decade in prison.

Brashear’s behavior was admittedly awful. But, looking at this history

in isolation fails to consider: (1) the science about brain development—the same science that underpins the instant parole statute—which reveals that most people don't reach full maturity until the age 25; (2) the fact that Ms. Brashear has been almost entirely infraction free for the last decade since turning 25; (3) the environmental reasons underpinning Brashear's past behavior and what contributed to Brashear's transformation.

Gail Brashear was not an adult when she was sent to prison. She was 15 when she was sentenced to 51 years in prison. Brashear acknowledges that her first decade in prison was “replete with serious infractions.” But, beginning in 2008, she had a “shift in thinking.” Since that shift nearly a decade ago, she has not had a major infraction. In other words, her behavior changed at and around the time her brain was fully mature. The DOC psychological report specifically notes:

Brashear turned her behavioral difficulties around with the benefit of intensive therapy at the time of her return from out of state placement. It has been more than eight years since she incurred a serious infraction which places her achievement of self-regulation at around age 26 which is on target for achieving brain maturity as determined by developmental specialists...

Id. at 8.

In other words, her behavior changed at and around the time her brain was fully mature. The ISRB's response fails to either recognize or acknowledge that fact.

Since reaching full maturity and due to hours of hard work, Brashear made a remarkable transformation. There is no reason to believe that this transformation is temporary. The person at the parole hearing who knew Brashear best was Classification Counselor Poston, who "has known and or worked with Ms. Brashear for many years at WCCW." Ms. Poston provided a "very favorable" report on Ms. Brashear. "She stated she has been a model inmate since she made her turnaround in 2008 at which time she had her last serious infraction." As the DOC psychologist noted Brashear's therapy was "helpful in giving her significant insight and she desisted after her treatment." "She has also had intensive therapy with another psychologist that she reports as being very helpful." *Decision*, p. 4.

Also undiscussed by the ISRB is the fact that Brashear's behavioral problems were related to a number of childhood traumatic events both prior to the instant murder and during her first years of imprisonment. Ms. Brashear was sexually abused by several family members. Her parents were aware of the abuse, but failed to protect her. Instead, she was shuttled between family members. Eventually,

she returned to Washington State where she “fell in with a small group” including a man twice her age.

Shortly after she was imprisoned, her parents moved out of state and, feeling abandoned, Brashear acted out eventually attempting suicide. But, things got better. Brashear reconciled with her parents. And, through counseling she began to address her trauma. When she did so, her behavior changed.

Given this history, there is no reason to speculate that Brashear’s transformation is only temporary. No person presented that viewpoint to the ISRB. When the ISRB reasons that Brashear must “continue to demonstrate that her past behaviors are truly in her past,” the ISRB gives no reason why Brashear’s near-decade of good behavior after reaching maturity and engaging in counseling is insufficient to make this showing. The ISRB fails to point to any recent evidence suggesting that Brashear will revert to past behaviors. Instead, this reason is nothing more than the repudiation of the statutory mandate that Brashear should be presumptively released after serving 20 years. The ISRB could defend a decision to deny parole in every case because the individual should serve more time to demonstrate that the past is truly in the past--even where past behaviors had not reoccurred for 10, 15, 20

or even 30 years. This Court should not uphold a decision based on speculation that is contrary to the evidence and the law.

The Claim that Brashear Has “Limited Insight” is Unsupported by the Record

The ISRB also attempts to defend its decision by arguing that “Brashear seemed to have limited insight into her thinking or emotions at the time of the murder as well as the violent offense she committed just prior to the murder.” *Decision*, p. 4.

The evidence before the ISRB was completely contrary to that conclusion. The psychological evaluation states that “Ms. Brashear acknowledges her role in her crimes and has participated in a variety of programs to assist her in understanding the ‘why’ of her behavior so that she does not commit another crime if back in the community. Moreover, “Ms. Brashear was open and transparently described the index offense with no distortions or denials about her role in killing the victim.” *Evaluation*, p. 4. Moreover, the aforementioned mental health therapy was “helpful in giving her significant insight” into the crime. Dr. Wentworth further “noted Ms. Brashear has been stable, and has not required mental health treatment since September 2013.” *Id.* at 4.

A fellow prisoner who knows Brashear well summarized:

She was actively pursuing her short comings. She wanted to know what made her allow herself to become so lost. I don’t know

what all happened in her sessions but she learned how to set healthy boundaries and stick with them. And the amazing thing about it is she was not any less of a friend but a better one. She has changed probably more than any other person I have met in my life time. The way she carries herself and interacts with other people is almost unbelievable from the girl I met 17 years ago. She is now the girl that people go to for advice, when they need mediation with another individual.

Letter of Terri Fox provided to ISRB and attached to PRP. Of course, the ISRB's decision makes no mention of Ms. Fox's insights, preferring to speculate instead.

C. CONCLUSION

This Court need not search the record in vain for support for the ISRB's conclusion that Brashear is likely to commit future crimes if paroled, even on the strictest parole conditions. To borrow from Gertrude Stein's famous quote: "There is no there there." Gertrude Stein *Everybody's Autobiography*, p. 237 (Random House 1937).

What this Court will find in the record instead are numerous letters urging the ISRB to deny parole because they believe 20 years is not a sufficient term of imprisonment. Indeed, Prosecutor Roe's letter urging such a result completely fails to discuss any evidence relevant to the degree of risk that Brashear will offend on parole. Instead, his entire argument to deny parole is an affront to the statute. While he is certainly free to question the wisdom of the statutory provision before

the Legislature, his letter can only be described as an emotional appeal that the ISRB ignore its statutory directive.

When the ISRB disregards current psychological reports and evaluations and gives significant weight only to the nature of the crime and the sentence imposed, the ISRB fails to follow the procedures dictated by the Legislature. *Dyer*, 157 Wash. 2d at 366.

Based on the above, this Court should reverse and remand with directions to the ISRB to either grant parole or schedule a new hearing immediately.

DATED this 18th day of November 2017.

Respectfully Submitted:

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November 18, 2017 - 8:40 AM

Transmittal Information

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Appellate Court Case Number: 77047-1
Appellate Court Case Title: Personal Restraint Petition of: Gail Ann Brashear
Superior Court Case Number: 96-1-01273-9

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