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STATE OF NEW YORK – BOARD OF PAROLE

Administrative Appeal Decision Notice

Inmate Name: LUDWICK, SEAN

Facility: Gowanda Correctional Facility

NYSID No [REDACTED]

Appeal Control #: 09-107-18 B

Dept. DIN#: 17A4448

Appearances:

For the Board, the Appeals Unit
For Appellant:

Sean Ludwick (17A4448)
Gowanda Correctional Facility
South Road, P.O. Box 311
Gowanda, New York 14070

Board Member(s) who participated in appealed from decision: Alexander, Coppola.

Decision appealed from: 9/2018 Denial of Discretionary Release; 18-month hold.


Pleadings considered:

Briefs on behalf of the Appellant submitted on: October 17 and 26, 2018.
Statement of the Appeals Unit's Findings and Recommendation.

Documents relied upon:

Pre-Sentence Investigation Report, Parole Board Report, Interview Transcript, Parole Board Release Decision Notice (Form 9026), COMPAS instrument, Offender Case Plan.

Final Determination: The undersigned have determined that the decision from which this appeal was taken be and the same is hereby

 Affirmed Reversed for De Novo Interview Modified to _____
Commissioner

 Affirmed Reversed for De Novo Interview Modified to _____
Commissioner

 Affirmed Reversed for De Novo Interview Modified to _____
Commissioner

If the Final Determination is at variance with Findings and Recommendation of Appeals Unit, written reasons for the Parole Board's determination must be annexed hereto.

This Final Determination, the related Statement of the Appeals Unit's Findings and the separate findings of the Parole Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 12/28/18.
LB

Distribution: Appeals Unit – Inmate - Inmate's Counsel - Inst. Parole File - Central File
P-2002(B) (5/2011)

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STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant raises various issues in the brief he submitted in support of the administrative appeal he initiated following the Board of Parole's decision to deny his immediate release to community supervision following an interview held on or about September 4, 2018. The Appeals Unit has reviewed each of the issues raised by Appellant and finds that the issues have no merit.

The issues raised by Appellant in his brief are as follows: (1) the Board failed to properly consider Appellant's "apologies, remorse and taking responsibility for his actions."; (2) the Board failed to provide proper weight to Appellant's receipt of an Earned Eligibility Certificate (EEC); (3) the Board did not provide sufficient weight to certain "Low" scores contained in his COMPAS instrument; and (4) the Board should not have considered Appellant's failure to apologize to the victim's family for the harm he caused to the family.

As a preliminary matter, the Appeals Unit notes that Appellant's statements made during the interview are quite remarkable – extraordinarily so - as revealed by a careful review of the transcript of the lengthy Board interview. Appellant's Porsche had crashed into a telephone pole while he was driving. His airbag deployed and he survived, but his passenger was ejected (see discussion below) from the vehicle and hit a telephone pole causing his death. Appellant had consumed a significant amount of alcohol (.18 BAC) and had used marijuana during the time leading up to the accident.

Appellant continually attempts to mitigate his role in causing the death of the victim. Appellant initially states during the interview that the car crash was such that it ejected Appellant from the car. Appellant later states during the interview that the victim may have only been partially ejected from the vehicle. Appellant then adds that his Porsche had "minimal damage" following the accident in an effort to downplay that it hit a pole with such force that it ejected the victim and caused the victim's death.

Returning to the issue of whether the victim was ejected from the vehicle, Appellant states during the interview "I pulled him out of the car" and then in the very next sentence "When I woke, he was ejected from the car or partially out of the car." He states that "there was a bit of confusion about how that circumstance happened." Again, Appellant's inconsistent account of the facts surrounding the accident causing the death of his passenger certainly raises questions as to the veracity of statements he made during the interview.

Appellant states that the events causing the victim's death were not intended to happen, but on the other hand he expressed forethought of whether to take a taxi prior to his night out drinking, that the drinking outing was intended to console the victim due to the victim's marital separation, and that he considered that he had an alcohol-related driving conviction in the past. Despite these concerns, he proceeded to drive his high performance Porsche that night. During the course of

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that evening, he operated his car while consuming significant amounts of alcohol and using marijuana. He also stated during the interview: "I knew I shouldn't be driving." So, on the one hand he states he knew he should not be driving, while on the other hand, he states that he had no intention for the accident to happen. Appellant's vacillating remarks occurred throughout the interview and, again, raise questions as to the veracity of his statements.

Appellant stated during the interview that the victim was not a close friend, but on the other hand he stated that their kids were "close friends", that they lived close by, and he had invited the victim over to his house for a barbecue "several times", and he also decided to take the victim out for a night of drinking because he was going through a separation with his wife. Again, on the one hand he describes a close family relationship with the victim, while on the other hand he maintains that he barely knew the victim and that they were not close.

Appellant downplays his receipt of a Tier 2 disciplinary ticket for fighting that he received just a few months prior to his Board interview. He states that it was primarily the fault of a member of the bloods gang, and that the alleged gang member was the "aggressor". However, we note that despite Appellant's claim that the fight was the fault of someone else, Appellant appealed this ticket, and the ticket was affirmed on appeal, and Appellant received institutional sanctions as a result of his receipt of this ticket.

Asked if he fled the scene of the car accident, Appellant stated during the interview that he did not "flee". He then acknowledged that he was "charged" with leaving the scene of an accident. In point of fact, he was *convicted* of the crime of leaving the scene of an accident which resulted in a death.

Appellant states that the sentencing minutes were "harsh." The Appeals Unit agrees with Appellant that the statements made about Appellant at the sentencing were indeed harsh. The sentencing judge stated at Appellant's sentencing: "...if it was a crime to be coward [sic] and a horrible human being, you would be guilty in all counts and deserve a sentence of life imprisonment." Appellant apologizes for the multiple crimes of his conviction on the one hand, but on the other hand he is essentially saying, "Why the harsh words, Judge?"

There was discussion at the interview relating to Appellant's possible investigation by the Federal Bureau of Investigation, and the high seven-figure amount of bail that was set, which Appellant attributed to a belief by law enforcement and the court that he may leave the country and become a fugitive from the law. Appellant himself raised these issues during the interview.

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The Board also had Appellant's criminal history before it at the time of the interview. Appellant's criminal history includes arrests for crimes involving criminal mischief, malicious destruction of property, stalking, harassment, and domestic assault and battery.

As to issues one and four, the Board had the benefit of conducting the interview with Appellant and is in the best position to weigh his credibility as to the extent of any empathy and remorse he expressed for the multiple crimes of conviction. The Appeals Unit notes once again the diverse responses given by Appellant during the interview which certainly may reflect on the true extent of his empathy and remorse for the crimes committed.

It has been held that the Board's consideration of an inmate's lack of remorse for his criminal acts is entirely appropriate when denying parole. Matter of Silmon v. Travis, 95 N.Y.2d 470 (2000). The Board may consider the inmate's lack of remorse, even if he has maintained his innocence since the beginning. Jones v. New York State Division of Parole, 24 A.D.3d 827 (3d Dept. 2005). Moreover, the Board is obligated to consider the inmate's lack of remorse. Khatib v. New York State Board of Parole, 118 A.D.3d 1207 (3d Dept. 2014).

The Appeals Unit finds no errors committed by the Board in regard to its assessment of Appellant's empathy and remorse for the crimes of conviction.

As to issue two, Appellant's receipt of an EEC does not automatically entitle him to release to community supervision. Matter of Dorman v. New York State Board of Parole, 30 A.D.3d 880 (3d Dept. 2006); Matter of Pearl v. New York State Division of Parole, 25 A.D.3d 1058 (3d Dept. 2006). The Parole Board may deny release to community supervision on a finding that "there is a reasonable probability that if released, the inmate will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." Matter of Cornejo v. New York State Div. of Parole, 269 A.D.2d 713 (3d Dept. 2000); Matter of Dorato v. New York State Division of Parole, 264 A.D.2d 885 (3d Dept. 1999); Matter of Huber v. Travis, 264 A.D.2d 887 (3d Dept. 1999). Moreover, receipt of an EEC does not preclude consideration of the instant offense or Appellant's criminal history. Matter of Richards v. Travis, 288 A.D.2d 604 (3d Dept. 2001). The serious nature of the crime may also be considered by the Board. Fuller v. New York State Board of Parole, 284 A.D.2d 853 (3d Dept. 2001). While Correction Law §805 uses mandatory language to create a presumption in favor of release, the due process clause only requires that the inmate be afforded an opportunity to be heard, and that upon the denial of release to community supervision, the Board inform him of the reasons for the denial of release to community supervision. The Board still possesses the discretion to determine whether the community supervision candidate has met the statutory criteria and deserves release. Matter of Rhoden v. New York State Div. of Parole, 270 A.D.2d 550 (3d Dept. 2000), leave dismissed, 95

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NY2d 898; Matter of Howard v. New York State Div. of Parole, 270 A.D.2d 539 (3d Dept. 2000); Matter of Heitman v. New York State Board of Parole, 214 A.D.2d 673 (2d Dept. 1995). The facts set forth in the Board's decision rebut the presumption and permit a denial of early release.

As to issue three, in determining an inmate's suitability for possible release to community supervision, the Board must consider the institutional record of the inmate. See §259-i(2)(c)(A)(i); 9 N.Y.C.R.R. §8002.2(d)(1). One of the institutional records the Board must consider in making its determination as to the suitability of an inmate's possible release to community supervision is a risk and needs assessment designed to measure the inmate's rehabilitation. See Executive Law §259-c(4). In strict compliance with statutory and regulatory requirements, the Department of Corrections and Community Supervision promulgated Directive 8500 which provides comprehensive operating procedures governing the Correctional Offender Management Profiling for Alternative Sanctions instrument, commonly referred to as the COMPAS instrument, a research based clinical assessment instrument used to assist staff in assessing an inmate's risks and needs by gathering quality and consistent information to support decisions about supervision, treatment and other interventions. "By adopting the COMPAS risk assessment and utilizing it in considering an inmate's release, the Board has effectively complied with the minimal requirements of the amendments to the Executive Law." Matter of Steven Diaz v. New York State Bd. of Parole, 42 Misc. 3d 532 (Sup. Ct.; Cayuga Co. 2013).

The information contained in the COMPAS instrument is used to assist the Board of Parole in making its decision, but the quantified results contained in the COMPAS instrument are not alone determinative factors in the decision-making process. See Executive Law §§259-c(4), 259-i(2)(c)(A); Matter of Leung v. Evans, 120 A.D.3d (3d Dept. 2014), lv. denied 24 N.Y.3d 914 (2015); Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107 (3d Dept. 2014); accord, Matter of Dawes v. Annucci, 122 A.D.3d 1059 (3d Dept. 2014). Moreover, uniformly low COMPAS scores and other evidence of an inmate's rehabilitation do not undermine the broader questions of public safety, public perceptions of the seriousness of a crime, and whether an inmate's release to parole would undermine respect for the law. Thus, the COMPAS instrument cannot mandate a particular result, and the Board determines the weight to be ascribed to the information contained therein. Matter of King v. Stanford, 137 A.D.3d 1396 (3d Dept. 2016).

The COMPAS instrument is used to develop the inmate's Offender Case Plan (formerly called the "Transitional Accountability Plan" or "TAP"), which is created for, and in cooperation with, an inmate by an Offender Rehabilitation Coordinator (ORC). The Case Plan serves to prioritize the inmate's needs and establish goals to address these needs, and further provides tasks designed to achieve these goals. Case Plans are reviewed with the inmate quarterly unless the inmate is more than four years from the earliest release date in which instance it is reviewed less

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frequently. A Case Plan was prepared for Appellant and made available to the Board at the time of the interview.

Appellant limits his remarks with respect to the COMPAS instrument to certain “Low” scores contained therein. However, he did score “High” for Prison Misconduct”, and “Probable” for Re-Entry Substance Abuse. Also, there are several more pages of narrative and scales contained in the COMPAS instrument that the Board also reviewed and considered in making its decision to deny parole release. The Board in deviating from the low COMPAS scores looked at all of these factors as well as all of the other records before it at the time of the interview, and of course considered what was discussed during the interview.

Finally, we note that there is a presumption of honesty and integrity that attaches to judges and administrative fact-finders. See People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914 (3d Dept. 1992). The Board is presumed to have followed applicable statutory requirements and internal policies when making decisions regarding the suitability of an inmate’s possible release to parole supervision. See Garner v. Jones, 529 U.S. 244 (2000). There is no evidence that the Board’s decision was predetermined. See Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899 (3d Dept. 2000).

Recommendation:

It is the recommendation of the Appeals Unit that the Board’s decision be affirmed.