

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

In re Parole of PETER NOEL CUSHING.

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MACOMB COUNTY PROSECUTOR,

Appellee,

v

PETER NOEL CUSHING,

Defendant,

and

PAROLE BOARD,

Appellant

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UNPUBLISHED

June 12, 2014

No. 319893

Macomb Circuit Court

LC No. 2013-003495-AP

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

The Michigan Parole Board (“the Board”) appeals by leave granted<sup>1</sup> an opinion and order of the circuit court reversing the Board’s decision to grant parole to Peter Noel Cushing. On appeal, the Board contends that the trial court erred when it concluded that the Board had abused its discretion by granting Cushing parole. We reverse.

**I. PERTINENT FACTS AND PROCEDURAL HISTORY**

Cushing, now age 63, pleaded guilty to two counts of armed robbery, and was sentenced to concurrent terms of six and one half to 37 and one half years in prison for each count on January 20, 1994. He was released on parole on August 19, 1999. On November 11, 1999, Cushing committed another armed robbery. On June 6, 2000, Cushing pleaded guilty to armed robbery, and on July 25, 2000, he was sentenced to 110 months to 30 years in prison. At the time he was sentenced, Cushing admitted to a 30-year substance abuse history, including the use

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<sup>1</sup> *In re Parole of Peter Noel Cushing*, unpublished order of the Court of Appeals, entered February 13, 2014 (Docket No. 319893).

of heroin and cocaine. In 1999, Cushing was diagnosed with schizoaffective poly-substance abuse and anti-social personality disorders, and was prescribed psychotropic medication. Cushing was deemed a middle assault risk, and was placed in “level V” security. He was recommended for drug and alcohol counseling, vocational counseling, a work assignment, and an assessment for the prison’s assaultive offender therapy program. Cushing’s security level was reduced to “level IV” in early 2001, to “level II” in early 2005, and to “level I” on October 22, 2006.

According to a therapy termination report dated December 10, 2009, Cushing completed 54 sessions of an assaultive offender program (“AOP”) between May 26, 2009 and November 25, 2009. This report rated his performance in the program as “excellent” in 26 categories, and “good” in the remaining two categories. According to the report, Cushing completed every goal of the AOP, had a high level of participation in the program, was able to identify his behavioral problems, including those leading to his substance abuse, and identified methods to alter his behavior and unhealthy beliefs. Cushing took responsibility for his crimes, admitted to his drug addiction, and agreed that continued substance abuse therapy would be prudent. The report also noted that Cushing had developed realistic goals, values, and principles that would reduce his recidivism risk if released on parole. According to the report, Cushing was evaluated for mental illness in 2000, but was found not mentally ill at that time. The report noted that Cushing presented no signs of mental illness upon his intake into the AOP program, and that observations made while the program was ongoing did not indicate the presence of any mental illness.

A COMPAS<sup>2</sup> assessment was completed on April 28, 2009. This assessment found that Cushing’s violence risk was high, but his recidivism risk was low. A TAP<sup>3</sup> report prepared the same day stated that Cushing’s risk of violence was high, and his risk of recidivism was low. A parole eligibility report stated that Cushing had only one major misconduct while in prison, in 1996, and that he completed a vocational program on February 6, 2001, completed a substance abuse program on August 17, 2005, completed a life skills program on November 22, 2005, and completed a cognitive restructuring program on January 1, 2006. The report listed a potential

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<sup>2</sup> As this Court explained in *In re Elias*, 294 Mich App 507, 520; 811 NW2d 541 (2011) (quotation marks and citations omitted):

COMPAS . . . stands for the correctional offender management profiling for alternative sanctions program. COMPAS is a comprehensive risk and needs assessment system, which takes into account both static information (such as the prisoner’s past criminal offenses) and dynamic data (such as the prisoner’s evolving attitudes and mental condition). COMPAS is designed to support treatment, programming and case management decisions. The various COMPAS reports describe the offender’s risk and criminogenic needs.

<sup>3</sup> TAP stands for the transition accountability plan. *Id.* at 519. The purpose of the TAP is largely to assist with the prisoner’s transition into society, but the Board also uses the TAP as a part of the parole-decision process. *Id.* at 519-520.

placement with Cushing's wife. Cushing's parole guidelines score was +3, which corresponded to a high probability of parole.

On January 6, 2010, the Board granted Cushing parole, effective April 21, 2010. The prosecutor applied for leave to appeal the Board's decision to the circuit court, which granted leave on April 19, 2009. The circuit court reversed the parole board's decision in an opinion and order dated July 26, 2010. The Board appealed the circuit court's decision to this Court, and this Court ultimately vacated the circuit court's decision and remanded the case.<sup>4</sup> This Court determined that the circuit court erred by finding that Cushing was not eligible for parole as determined by the MDOC's calculation of his parole eligibility date, and remanded to allow the circuit court to determine whether the Board abused its discretion by granting parole.

On remand, the circuit court again reversed the Board's decision to parole Cushing. The circuit court voiced its disagreement with this Court's order vacating the circuit court's prior order, and ultimately determined that, "when the entire record is viewed as a whole, a rational decisionmaker could not conclude reasonable assurances exist that [Cushing] will not again become a menace to society or public safety." Cushing filed an application for leave to appeal this decision, but this Court denied leave.<sup>5</sup>

A subsequent COMPAS report prepared on October 25, 2010 found that Cushing's risk of violence was high, but his risk of recidivism was low. A further COMPAS report prepared on April 11, 2012 found that his risk of violence was high, and his risk of recidivism was medium. This report noted that Cushing suffered from a variety of medical ailments. The Board granted Cushing parole on April 20, 2012. However, the prosecutor again appealed this decision to the circuit court, and the circuit court reversed the Board's decision on December 12, 2012. The circuit court denied reconsideration of its order on April 2, 2013.

Cushing's parole guidelines score was calculated as +3 on June 11, 2013. A COMPAS report dated July 2, 2013 found that his risk of violence was high, but his risk of recidivism was low. A TAP case plan attached to the report also found that Cushing's risk of violence was high and his risk of recidivism was low. The Board granted Cushing parole on July 15, 2013, with a projected parole date of August 8, 2013. As conditions of his parole, Cushing was required to refrain from possessing alcohol or other intoxicants, not enter places of business that primarily serve alcohol, and complete outpatient or residential substance abuse therapy. A subsequent notice of parole stated that Cushing would be paroled on September 4, 2013. This notice stated that Cushing would be placed at the MORE House<sup>6</sup> in Clinton Township upon his release. The prosecutor again appealed the Board's decision to the circuit court, and on December 19, 2013,

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<sup>4</sup> *In re Parole of Peter Noel Cushing*, unpublished order of the Court of Appeals, entered November 8, 2010 (Docket No. 300198).

<sup>5</sup> *In re Parole of Peter Noel Cushing*, unpublished order of the Court of Appeals, entered December 20, 2011 (Docket No. 302993).

<sup>6</sup> The MORE House is a transitional housing program for recently released inmates that provides substance abuse therapy.

the circuit court again reversed the Board's decision, finding that the decision to parole Cushing was an abuse of discretion.

On January 9, 2014, the Board filed an application for leave to appeal in this Court, arguing that the circuit court erred by finding that the Board's decision to parole Cushing was an abuse of discretion. On February 13, 2014, this Court granted leave to appeal.<sup>7</sup>

## II. STANDARD OF REVIEW

As this Court stated in *In re Elias*, 294 Mich App 507, 538-539; 811 NW2d 541 (2011):

Judicial review of the Board's decision to grant parole is limited to the abuse-of-discretion standard. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 153; 532 NW2d 899 (1995). Either the prosecutor or the victim of an offense may appeal in the circuit court when the Board grants a prisoner parole. MCL 791.234(11); *Morales v Parole Bd*, 260 Mich App 29, 35; 676 NW2d 221 (2003). Under MCR 7.104(D)(5) the challenging party has the burden to show either that the Board's decision was "a clear abuse of discretion" or was "in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation." An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Importantly, a reviewing court may not substitute its judgment for that of the Board. *Morales*, 260 Mich App at 48.

In reviewing the circuit court's ruling on the Board's decision to grant parole, we review de novo whether the Board's decision was a clear abuse of discretion or in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation. See *In re Parole of Glover (After Remand)*, 241 Mich App 127, 129; 614 NW2d 714 (2000), *In re Parole of Johnson*, 235 Mich App 21, 22-23; 596 NW2d 202 (1999).<sup>8</sup>

We review the application of legal doctrines, such as collateral estoppel, de novo. See *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

## III. PAROLE BOARD DECISION

The Board argues that the circuit court erred when it determined that the Board's decision to parole Cushing was an abuse of discretion. We agree.

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<sup>7</sup> *In re Parole of Peter Noel Cushing*, unpublished order of the Court of Appeals, entered February 13, 2014 (Docket No. 319893).

<sup>8</sup> Appellee argues that the trial court did not abuse its discretion by reversing the Board's determination. Appellee's framing of the issue is entirely incorrect, as it is the Board's decision that is reviewed for an abuse of discretion, not the trial court's decision to reverse the Board. See *Elias*, 294 Mich App at 538.

Ultimately, the Board has broad, sole discretion over matters of parole. *Elias*, 294 Mich App at 549. “Notwithstanding, the Legislature has clearly imposed certain statutory restrictions on the Board’s exercise of its discretion.” *Id.* Pursuant to MCL 791.233(1)(a), the Board may not grant parole to a prisoner unless the Board determines that, “after consideration of all of the facts and circumstances, including the prisoner’s mental and social attitude, that the prisoner will not become a menace to society or to the public safety.” Our Legislature also tasked the Michigan Department of Corrections (“MDOC”) with developing guidelines to implement MCL 791.233(1)(a). See MCL 791.233e (“The department shall develop parole guidelines that are consistent with [MCL 791.233(1)(a)] and that shall govern the exercise of the parole board’s discretion pursuant to [MCL 791.234 and MCL 791.235] as to the release of prisoners on parole under this act. The purpose of the parole guidelines shall be to assist the parole board in making release decisions that enhance the public safety.”). These “[s]tatutorily mandated parole guidelines form the backbone of the parole-decision process.” *Elias*, 294 Mich App at 512.

The Board has created a lengthy list of guideline factors, which are scored numerically. See Mich Admin Code, R 791.7716(3). “Much like the legislative sentencing guidelines, each parole-guideline section includes a list of factors to be scored and instructions on the point value to be assigned, which include both positive and negative points.” *Elias*, 294 Mich App at 517. These scores are aggregated to reach a “Final Parole Guidelines Score.” *Id.* at 518. Based on this final score, prisoners are placed in one of three categories: high probability of parole, average probability of parole, or low probability of parole. *Id.* “A prisoner with a score of +3 or greater merits placement in the high-probability category, a score of -13 or less warrants assignment to the low-probability category, and a score between those figures falls within the average-probability category.” *Id.* If a prisoner’s guidelines score places him or her in the high-probability category, the Board is “required to grant parole absent substantial and compelling reasons to depart from that decision.” *Id.* at 539; see also MCL 791.233e(6); Mich Admin Code, R 791.7716(5).

Cushing’s parole guidelines score was +3, placing him in the high probability of parole category. Although the circuit court never specifically found that the Board erred in calculating Cushing’s guidelines score, the circuit court did discuss Cushing’s guidelines score. The circuit court believed that Cushing’s guidelines score was “skewed by the four points assessed as an age variable, but for which he would have had a final score of -1.” However, our Legislature specifically allows for age to be included in the guidelines scoring system. MCL 791.233e(3)(b). Cushing’s age was appropriately considered by the Board when calculating his guidelines score, and the circuit court was not at liberty to decide that the Legislature’s directive was erroneous or should be disregarded. The circuit court also took issue with Cushing’s mental health score of zero points. The scoring of the mental health element of the guidelines is defined in MDOC Policy Directive 06.05.100A, and requires the scoring of negative points under this element only where there is “[a] history of sexual offense related to [a] compulsive, deviant, or psychotic mental state . . . .” MDOC Policy Directive 06.05.100A, effective November 1, 2008. Cushing’s record demonstrates no such history. Thus, Cushing’s mental health factor was appropriately scored at zero.

Because Cushing scored in the high probability of parole category, the Board was required to grant parole, absent substantial and compelling reasons to deny parole. See MCL 791.233e(6); Mich Admin Code, R 791.7716(5); *Elias*, 294 Mich App at 539. In a written

opinion accompanying its notice of decision, the Board explicitly stated that it “ha[d] not found substantial and compelling reasons to deny parole.” In its opinion and order, the circuit court failed entirely to acknowledge the fact that, because Cushing’s guidelines score placed him in the high probability range, the Board was required to grant parole, absent substantial and compelling reasons to deviate from the guidelines recommendation. *Elias*, 294 Mich App at 539. The circuit court erred by ignoring this requirement, and instead opting for its own determination of whether parole was appropriate.

The various reasons for reversing the Board’s decision contained within the circuit court’s opinion do not demonstrate that the Board’s decision was an abuse of discretion, but rather reflect the substitution of the circuit court’s judgment for that of the Board. *Elias*, 294 Mich App at 538-539. First, the circuit court erred by finding that the Board’s reliance on Cushing’s participation in various therapeutic programs while he was incarcerated was misplaced. Under MCL 791.233e(2)(b), the Board was required to consider “the prisoner’s institutional program performance[,]” and under Mich Admin Code, R 791.7716(f), the Board was required to consider Cushing’s “performance in institution programs and community programs during the date of initial confinement on the sentence for which parole is available and parole eligibility, including, but not limited to, participation in work, school, and therapeutic programs.” As the circuit court acknowledged in its opinion, Cushing’s performance in the 2009 AOP resulted in 26 “excellent” ratings and two “good” ratings. In its opinion accompanying its July 15, 2013 decision, the Board stated that it was aware of Cushing’s completion of an assaultive offender therapy program in 1998 and of his subsequent parole failure. Regardless, the Board found no substantial and compelling reasons to deny parole, and found that Cushing would not be a menace to society upon his release. Given Cushing’s performance in the 2009 program, and the fact that his prior parole failure occurred well over 10 years ago, the Board’s conclusion fell within the range of reasonable and principled outcomes. *Babcock*, 469 Mich at 269.

The circuit court next noted what it believed were “incongruities” in Cushing’s April 29, 2009 COMPAS report, his July 2, 2013 COMPAS report, and his July 3, 2013 TAP report. However, this Court has refused to find “the presence of conflicting information in the reports to be dispositive. In other contexts, this Court has repeatedly determined that there is no abuse of discretion when a court or a fact-finder is faced with conflicting information and makes a reasonable and principled decision regarding which side to believe.” *Id.* at 546. Further, there are no significant incongruities in the reports. That two COMPAS reports, prepared four years apart, reach slightly different conclusions regarding Cushing’s risk of general recidivism should be expected. Further, his recidivism risk was rated as low in 2009 and 2010, and although the rating rose to medium in 2012, it returned to low in 2013. Cushing’s July 2, 2013 COMPAS report and July 3, 2013 TAP report reached the same conclusions: that Cushing presents a high risk of violence, but a low risk of general recidivism.

The circuit court also found that the July 2, 2013 COMPAS report was illogical, in that it concluded that defendant presented a low risk of recidivism, despite the presence of several risk factors. The COMPAS system is a software program that calculates risk based on the factors entered into the program. See *id.* at 521. The purpose of the COMPAS system is to assist the MDOC in making decisions regarding treatment, programming, and case management. *Id.* at 520. The circuit court did not dispute the accuracy of the information entered into the software

program. The circuit court's belief that the COMPAS assessment reached the incorrect conclusion regarding Cushing's recidivism risk is based simply on the circuit court's interpretation of the information contained in the report. In essence, the circuit court's disagreement with the results of the COMPAS assessment questions the judgment of the Board in utilizing the COMPAS assessment as a part of the parole-decision process.<sup>9</sup> In this regard, the circuit court improperly substituted its judgment for that of the Board. See *Elias*, 294 Mich App at 538-539. Further, even if an internal inconsistency existed, the Board was entitled to resolve any conflict. See *In re Parole of Haeger*, 294 Mich App 549, 578-579; 813 NW2d 313 (2011) (finding no abuse of discretion where an internal inconsistency existed in the prisoner's COMPAS report; the Board was entitled to resolve the conflict, and thus, did not abuse its discretion).

The circuit court also placed great weight on Cushing's criminal history. This Court has cautioned against placing undue weight on static factors. See *Elias*, 294 Mich App at 544-545. "Rather, the Board must also look to the prisoner's rehabilitation and evolution throughout his or her incarceration. Giving the various static and dynamic factors similar weight allows the Board to effectuate both the punitive and rehabilitative features of the corrections system." *Id.* at 544. Through the parole guidelines, the Board accounted for Cushing's criminal history. Cushing's preliminary parole guidelines score was reduced by one point due to his prior convictions. Despite a preliminary total score of 12 points, the Board reduced Cushing's final score by an additional nine points solely because of his criminal history. And, as the Board explained in a written opinion accompanying its notice of decision, it was well aware of Cushing's criminal history when it found that no substantial and compelling reasons existed to deny Cushing parole, and that he would not become a menace to society. That the circuit court believed Cushing's prior history warranted denying parole was another example of the circuit court improperly substituting its judgment for that of the Board. *Elias*, 294 Mich App at 538-539.

The circuit court's conclusion that "[Cushing's] completion of substance abuse programming does not . . . suggest any actual rehabilitation[]" is simply another example of the circuit court making its own determination, without giving due deference to the Board. *Elias*, 294 Mich App at 538-539. The circuit court also did not acknowledge that, as a condition of parole, the Board would require Cushing to participate in an outpatient or residential substance abuse program, and that upon his release, Cushing was to be placed in a residential program specifically designed for recently released prisoners that provides substance abuse therapy. We find no clear abuse of discretion in the Board's determination that Cushing's substance abuse history was not a substantial and compelling reason to deny parole, and that he would not become a menace to society, even in light of his past drug use.

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<sup>9</sup> "In 2005, the DOC began implementing the Michigan Prisoner ReEntry Initiative (MPRI) in various stages. The MPRI is a multiagency, multicomunity project designed to promote public safety and reduce the likelihood of parolee recidivism." *Elias*, 294 Mich App at 519. "Under the MPRI, the Board is also now required to conduct a [COMPAS] evaluation." *In re Parole of Haeger*, 294 Mich App 549, 555; 813 NW2d 313 (2011).

On the whole, the record demonstrates that Cushing has made significant improvements since his return to prison in 2000. Cushing is now 63 years old. He had only a single major misconduct while in prison, which occurred in 1996. He has successfully completed a wide variety of programs, including substance abuse therapy and assaultive offender therapy programs. Cushing's performance in the 2009 AOP was nearly perfect. Cushing's last parole interview demonstrated that he accepted responsibility for his actions, had developed insight into his behavior and substance abuse problems, and recognizes the need for further treatment. Although Cushing was diagnosed with mental illness in 1999, the record shows that he was found to have no mental illness in 2000, and has not been diagnosed with mental illness since that time. Arrangements were made for Cushing's housing upon his release, including substance abuse therapy, and this therapy is also a condition of his parole. Cushing's latest COMPAS and TAP reports found that he presented a low risk of recidivism. With this record in mind, the Board's decision was well within the range of reasonable, principled outcomes, and was not an abuse of discretion.

Appellee argues that the Board abused its discretion when it granted Cushing parole because there is no reason to believe that he has made any meaningful, positive changes since the last time appellee successfully appealed a parole decision. Specifically, appellee argues that there is no evidence of new programming or therapy since the circuit court's prior orders reversing the Board's decisions to parole Cushing. However, there are no reports of any recent misconduct in Cushing's record, or any other indications that additional programming is necessary. As Cushing has successfully completed a wide variety of therapeutic programs in the past, the fact that Cushing has not participated in similar programs recently is not a substantial or compelling reason to deny parole. Thus, Cushing's recent programming history (or lack thereof) does not demonstrate that the Board's decision fell outside the range of reasonable and principled outcomes.

Regardless, Cushing's latest interview, as discussed in his July case summary report, demonstrates that he has made improvements over time, leading to the Board's decision to grant parole. Cushing acknowledged that his prior parole was unsuccessful because he had not embraced his problems. However, Cushing reported that he now understood "the difference between needs and wants[.]" and that he does not "have to have [his] wants." Cushing acknowledged that he had a "thinking problem" and that he had used drugs as an excuse, but stated that he "had learned a great deal about [his] thinking patterns and that [his] previous thinking errors have led [him] to use drugs and commit crime[s]." Cushing admitted that his past was "dismal," that he had previously been reluctant to seek help, and that he used to believe that he had everything under control. However, Cushing went on to explain that he had been wrong, and admitted responsibility for his actions and for wasting his life. The interviewer noted that the interview was positive, and that Cushing "appears to have matured and developed new skills." Regardless of whether Cushing participated in any recent programming or other therapy while incarcerated, the Board's decision to grant parole is supported by Cushing's interview.

Appellee also claims that it was improper for the Board to consider any programming history completed by Cushing before the trial court's decisions to reverse the Board's previous decisions to grant Cushing parole. However, under MCL 791.233e(2)(b) and Rule 791.7716(f), the Board was affirmatively required to consider Cushing's programming history when deciding whether to grant parole. That the Board did so does not demonstrate an abuse of discretion.

Rather, had the Board ignored this information, it would have been in violation of MCL 791.233e(2)(b) and Rule 791.7716(f), and its decision could have been subject to reversal on that basis. See *Elias*, 294 Mich App at 538 (where an appellant demonstrates that a parole decision was in violation of a statute or administrative rule, that decision must be reversed).

Appellee notes a number of statements included in the July 2013 case summary report, including that Cushing reported hearing voices, and Cushing's substance abuse history. Appellee also claims that Cushing has no suitable housing or financial arrangements in place. Cushing's report of "hearing voices" occurred in 2000; however, his mental health evaluation that year did not result in a mentally ill diagnosis. Further, Cushing has never been found to be using illegal drugs while incarcerated. Cushing will be required to participate in substance abuse therapy upon his release, and arrangements for Cushing's housing, which includes substance abuse therapy, are already in place. The existence of these facts does not demonstrate that the Board reached a result falling outside the range of reasonable and principled outcomes. Appellee's reference to these facts merely demonstrates disagreement with the Board's decision. A reviewing court may not substitute its judgment for that of the Board. *Id.* at 539. Appellee also cites the same "incongruities" in the COMPAS and TAP reports that were cited by the trial court. However, the Board was entitled to resolve any such incongruities, if they exist, and the Board does not abuse its discretion in doing so. *Id.* at 546.

#### IV. COLLATERAL ESTOPPEL

Appellee argues that the doctrine of collateral estoppel bars the Board from litigating issues decided by the trial court in its prior decisions. This Court explained the doctrine of collateral estoppel in *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006):

Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. The doctrine bars relitigation of issues when the parties had a full and fair opportunity to litigate those issues in an earlier action. A decision is final when all appeals have been exhausted or when the time available for an appeal has passed.

Collateral estoppel "is a flexible judge-made rule generally said to have three purposes: To 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" *Detroit v Qualls*, 434 Mich 340, 357 n 30; 454 NW2d 374 (1990), quoting *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411; 66 L Ed 2d 308 (1980).

In this case, Appellee identifies only a single issue to which it believes collateral estoppel should apply, that being whether the Board could properly rely on Cushing's successful completion of the AOP in 2009 in making its decision. It is true that, in its December 20, 2012 opinion and order reversing the Board's decision to grant parole, the circuit court found that Cushing's completion of the AOP in 2009 was not sufficient to support the Board's decision to grant parole. However, appellee has not shown that this issue was actually litigated by the parties. "In analyzing whether an issue was 'actually litigated' in the prior proceeding, the Court

must look at more than what has been pled and argued. We must also consider whether the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue.” *People v Gates*, 434 Mich 146, 156-157; 452 NW2d 627 (1990). There is no evidence in the record that this particular issue, i.e., whether the Board could rely upon Cushing’s completion of the 2009 AOP in rendering its decision, was ever argued by either party before the trial court issued its December 20, 2010 opinion. Thus, appellee has not demonstrated that collateral estoppel would bar litigation of this issue, even if the doctrine were applied. *Id.*, see also *Leahy*, 269 Mich App at 530.

We reverse the decision of the circuit court and reinstate the order of the Parole Board granting Cushing parole. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ Christopher M. Murray  
/s/ Mark T. Boonstra