September 2019

Decision in Art. 78 proceeding - Bottom, Anthony (2017-11-02)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of ANTHONY BOTTOM,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

DEPARTMENT OF CORRECTIONAL SERVICES AND COMMUNITY SUPERVISION, BOARD OF PAROLE,
Respondent.

DECISION and ORDER
Index No.: 902448-17
RJI No.: 01-17-ST8666

(Supreme Court, Albany County, Article 78 Term)

APPEARANCES:

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HON. W. BROOKS DeBOW, Acting Justice:

Petitioner has commenced this proceeding pursuant to CPLR article 78, seeking review of respondent's denial of parole release following petitioner's eighth appearance before a panel of the Board of Parole ("Board").

The following facts are set forth in the documents that were before the Board, including petitioner's sentence and commitment papers, Pre-Sentence Investigation Report, COMPAS Reentry Risk Assessment, sentencing minutes and Parole Board transcripts (see Answer, Exhibits B-C, E-G;

Petition, Exhibit 5). Petitioner is serving two concurrent terms of incarceration of 25 years to life, imposed upon his conviction of two counts of murder in the first degree for the murder by ambush of two New York City Police Officers on May 21, 1971. The crime involved petitioner and co-defendant Herman Bell, who approached the two police officers from behind as they were walking to their car. Petitioner fired four shots from a pistol at Police Officer Waverly Jones, hitting him four times in the back of his head, neck, back and left buttock, and Bell fired a number of shots at Police Officer Joseph Piagentini, who petitioner then fired upon after he had fallen to the ground. Petitioner was born in 1951, and has a criminal history beginning in 1969, when he was adjudicated as a juvenile for a burglary in the State of California. In 1970, petitioner was convicted of burglary and conspiracy to transfer marijuana as an adult in California, and was sentenced to probation, which was terminated in 1970 for failure to report and comply with the terms of his probation. Following the May 1971 murders of Officers Jones and Piagentini, petitioner was twice convicted in 1972 in California, first in state court of assault with a deadly weapon against a police officer and possession of a gun, and second in federal district court of armed robbery. Petitioner's sixth reappearance before the Board on his instant offenses in June 2014 resulted in a denial of parole and a 24-month hold, with one commissioner dissenting. At the June 2014 reappearance, it was noted that petitioner's COMPAS Reentry Risk Assessment gave him a score of 8 out of 10 in two categories, history of violence and prison misconduct (due to disciplinary infractions), with the majority of the Board concluding that his release would deprecate the seriousness of his offense and instructing him to improve his behavior.

During his seventh reappearance before the Board on June 21, 2016, petitioner acknowledged that he had shot Police Officer Jones from behind, but took issue with that portion of the Pre-

Sentence Investigation Report that indicated that he had shot Jones four times in the back of the head. While not seeking to excuse his commission of the instant offenses, petitioner explained that he was influenced by the Black Panther Party and at that time black revolutionary groups were at war with law enforcement. Petitioner's other criminal history was discussed, and he explained that the armed robbery was committed to access funds to get other Back Panther Party members out of jail. Petitioner stated that although he engaged in social militancy as a young man, he no longer is that person as "[t]hat era in time and history is long past" (Petition, Exhibit 1, at 9). The lead commissioner read from petitioner's sentencing minutes, briefly questioned petitioner about a comment the sentencing judge made, that petitioner could not recall, and indicated that the panel would further review the sentencing minutes.

Petitioner's COMPAS Reentry Risk Assessment was discussed, and it was noted that petitioner's risk was noted as low for all categories except for history of violence, and petitioner stated that his risk for prison misconduct was reassessed from high to low following his last reappearance before the board in response to the board's instruction to improve his behavior. It was acknowledged that Petitioner's last disciplinary infraction was in 2013, which petitioner noted was a non-violent possession of two stamps. The lead commissioner noted that a psychological evaluation was submitted, with petitioner clarifying that there were two evaluations submitted that indicate that he is at low risk for reoffending in any type of criminal activity upon release. The lead commissioner noted that petitioner had satisfied all programming and inquired whether he intended to undertake any more, to which he replied that "I have done them all . . . I am done. I am done" (id.,

at 13).[1] Petitioner stated that if released he would live with friends in either Rochester of Buffalo, and that while he had a couple of job opportunities, he intended to establish a computer lab in the community to help the neglected and impoverished learn computer sciences.

The lead commissioner noted that there were a number of letters in support of his release on parole, that a parole packet from the National Lawyers Guild was submitted on his behalf containing a number of letters in support, including one from one of the victim's sons, as well as letters from elected officials, family, friends and supporters, and that there is a petition for his release. The lead commissioner further noted that there was a fair amount of community opposition to his release, to which petitioner replied that the Police Benevolent Association (PBA) has a policy to oppose release of any inmate incarcerated for killing a police officer, and that "[t]hey have no personal relationship with me" (id., at 16), followed by a lengthy discussion between another commissioner and petitioner as to whether all of the persons who supported petitioner's release have a personal relationship with petitioner (id., at 17-20). When asked whether he believed that justice had been served by his sentence, petitioner replied, "45 years in prison, yes ma'am" (id., at 16).

After deliberation, the panel announced its decision to deny parole release and to hold petitioner for 24 months:

> "After review of the record and interview, the panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society (and would so deprecate the serious nature of the crime as to undermine respect for law.)
>
> The panel has considered your institutional adjustment including

[1] The record reflects that petitioner receive a Bachelor of Arts and Bachelor of Science while incarcerated, as well as a number of certificates of achievement and appreciation, but that was not discussed during his interveiw.

> discipline and program participation. Required statutory factors have been considered, including your risk to society, rehabilitation efforts, and your needs for successful reentry into the community. Your release plans have also been considered, as well as your COMPAS Risk and Needs Assessment, Case Plan, and Sentencing Minutes which are in the file.
>
> Your instant offense murder (two counts) involved you acting in concert shooting and killing two police officers. You admitted firing a weapon during the crime. You have engaged in other unlawful actions which resulted in probation and serving state time in California state prison. You are a multistate offender with offenses committed in California as well as New York. You also have a juvenile history and a conviction in the Federal System.
>
> Due consideration was given to your document submissions, program accomplishments and letters of support from defense attorneys and official sources and program completions. Due consideration was given to a packet of the National Lawyers Guild.
>
> This panel remains concerned about your history of unlawful and violent conduct and your COMPAS risk assessment of high for history of violence. Your conduct which could be viewed as an assassination of two unsuspecting police officers who are [sic] merely walking toward their cars reflects a depraved indifference to human life. There is significant community opposition to your release. You also expressed limited remorse for the death of two police officers who are [sic] merely doing their jobs. Accordingly, discretionary [sic] at this time is not warranted"

(id. at 21-22). This determination was set forth in a written decision (Answer, Exhibit I). Petitioner, who was represented by counsel, appealed the determination (id., Exhibit J). Respondent affirmed the determination to deny parole (id., Exhibit K), prompting petitioner to commence this judicial proceeding.

The petition alleges that respondent "arbitrarily, capriciously, and improperly relied upon non-statutory factors and PBA lobbying under the euphemism of 'community opposition' to release when making its determination," and denied petitioner release "solely on the seriousness of the

underlying offense" (see Petition, CLAIMS, I, II). Petitioner argues that respondent failed to give sufficient consideration to factors other than his instant offense and criminal history, that the panel's questioning was argumentative, badgering and biased, and that the panel's reliance on community opposition to petitioner's release constituted consideration of prohibited factors (Petitioner's Memorandum of Law, p. 3-11). Respondent argues that any issues that are raised in petition and papers that were not raised in petitioner's administrative appeal were not preserved and not properly before the Court, and it disputes each of the remaining issues. Petitioner's reply memorandum of law addresses respondent's preservation argument and argues in further support of the petition.

Respondent correctly contends that only the issues that were raised in petitioner's administrative appeal are preserved for judicial review (see Answer, Exhibit J; Matter of Tafari v Evans, 102 AD3d 1053, 1054 [3d Dept 2013], lv denied 21 NY3d 852 [2013]). The bases for judicial review that are asserted in the petition are that (1) the Board acted in an arbitrary and capricious manner by considering non-statutory factors in making its determination, and (2) the Board denied release solely on the seriousness of petitioner's crime (see Petition, CLAIMS, I, II). Of the several arguments raised in petitioner's administrative appeal, only two are addressed to those contentions, namely that the Board (a) did not properly consider petitioner's COMPAS Reentry Risk Assessment and failed to explain its conclusion that there was a reasonable probability that he would re-offend (see Answer, Exhibit J, at 9-10), and (b) that it relied on non-statutory factors, specifically community opposition, in making its determination (id., at 11). Thus, those are the only issues that are properly before the Court notwithstanding petitioner's inclusion of other issues of law.

Judicial review of a denial of parole by the Board of Parole begins with the well-settled principle that "parole release decisions are discretionary and will not be disturbed so long as the

Board complied with the statutory requirements of Executive Law § 259-i" (Matter of Tafari v Evans, 102 AD3d 1053, 1053 [3d Dept 2013], lv denied 21 NY3d 852 [2013]).

> "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law."

(Executive Law § 259-i [2] [c] [A]). Procedures to be utilized in making parole release decisions must "incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, [and] the likelihood of success of such persons upon release" (Executive Law § 259-c [4]). As relevant here, the Board was required to consider:

> "(i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates; . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate; . . . (v) any current or prior statement made to the board by the crime victim or the victim's representative where the crime victim is deceased . . . (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement"

(Executive Law § 259-i [2] [c] [A]). Where the Board complies with the requirements of Executive Law § 259-i, its determination to deny parole release may be set aside only if it is so flawed that it exhibits "irrationality bordering on impropriety" (Matter of Silmon v Travis, 95 NY2d 470, 476

[2000] quoting Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 77 [1980]). Further, "[i]n the absence of a convincing demonstration to the contrary, it is presumed that the New York State Division of Parole acted properly in accordance with statutory requirements" (Matter of Putland v Herbert, 231 AD2d 893, 893 [4th Dept 1996], lv denied 89 NY2d 806 [1997] quoting Matter of McLain v New York State Div. of Parole, 204 AD2d 456 [2d Dept 1994]; see also Matter of Hardwick v Dennison, 43 AD3d 406, 407 [2d Dept 2007]).

Petitioner's assertion that respondent based its determination solely on the instant offenses and failed to give genuine consideration to the other factors is unpersuasive in light of the record. The Board's decision acknowledges its consideration of petitioner's limited remorse for the deaths of the two police officers, and the record before the Board contains petitioner's expression of remorse at his previous parole reappearance in 2014 (see Answer, Exhibit C) and his written statement to the Board in support of his instant reappearance stated that he was "deeply remorseful" about the deaths of the officers (Petition, Exhibit 2, at p.1). At his interview, petitioner stated that he did not want to "justify or rationalize [his] actions" (Petition, Exhibit 1, at 6-7), but at no point during the interview did petitioner expressly state any remorse, regret or sorrow over his actions or the deaths of the officers. Further, during colloquy between petitioner and commissioners about petitioner's crime and his explanation of the historical context for his actions, the panel personally observed petitioner and his demeanor, which provided them with an opportunity to consider whether petitioner was remorseful. Thus, the conclusion that petitioner had limited remorse for his crimes is not irrational. Respondent also based its denial upon its consideration of community opposition to petitioner's parole release, which will be discussed in greater detail below.

Even had the Board denied release solely on the nature or seriousness of petitioner's crimes,

the Appellate Division, Third Department, where this matter is venued, has held that such is not a basis to annul Board's determination provided that the remaining statutory factors were considered by the panel (see Matter of Hamilton v New York State Div. of Parole, 119 AD3d 1268, 1271-1272 [3d Dept 2014] [majority, concurring and dissenting opinions demonstrating the limited scope of judicial review]). The record is clear that in addition to his instant offenses and his criminal history, the Board considered petitioner's COMPAS Reentry Risk Assessment, his institutional records and his plans upon release, and support from the community for petitioner's release, and petitioner has not demonstrated that respondent failed to consider any factor that it was required to consider. To the extent that petitioner asserts that insufficient weight was given to factors other than his instant offense and criminal history "the Board is not required to give equal weight to each statutory factor" (Matter of Wan Zhang v Travis, 10 AD3d 828, 829 [3d Dept 2004]; see Matter of Vigliotti v State of New York Executive Div. of Parole; Matter of Defino v Travis, 18 AD3d 1079, 1080 [3d Dept 2005]). Thus, the fact that the Board may have placed greater weight on petitioner's criminal history than upon other factors, does not amount to irrationality bordering on impropriety (see Matter of Davis v Evans, 105 AD3d 1305, 1306 [3d Dept 2013]). Even where, as here, "petitioner's institutional behavior and accomplishments are 'exemplary,' the Board may place 'particular emphasis' on the violent nature or gravity of the crime in denying parole, as long as the relevant statutory factors are considered" (Matter of Hamilton v New York State Div. of Parole, 119 AD3d at 1272).

Petitioner asserts that the panel acted in an arbitrary and capricious manner by improperly considering community opposition, a non-statutory factor. Respondent argues that the Executive Law § 259-i and the Board's regulations authorize the Board to receive and consider written

communications from individuals other than those specifically identified in the statute with regard to an inmate's release.

As noted above, Executive Law § 259-i (2)(c)(A) expressly requires the Board to consider statements made by crime victims or their representatives, as well as any recommendations made by the sentencing court, the district attorney and the attorney for the inmate. The Executive Law further provides that when "a crime victim or victim's representative as defined in subparagraph (A) of this paragraph, or other person submits to the parole board a written statement concerning the release of an inmate, the parole board shall keep that individual's name and address confidential" (Executive Law § 259-i [2] [c] [B] [emphasis added]). This highlighted language makes clear that the Board may receive, and therefore consider, statements not just from the crime victim or their representative, but any other person in addition to the sentencing court, the district attorney and the attorney for the inmate whose identities would be known, and Division of Parole regulations recognize that private citizens may express opinions about parole decisions (see 8 NYCRR § 8000.5 [c] [2]). These provisions suggest that the Board may receive, and therefore consider, written statements from private citizens.

Nor does petitioner cite appellate authority specifically holding that the Board may not consider communications from private citizens and indeed, while the Executive Law requires the Board to consider the statements of certain specified persons, it "does not purport to define the exclusive universe of all information which may be considered" (Matter of Grigger v New York State Div. of Parole 11 AD3d 850, 852 [3d Dept 2004] [emphasis in original], lv denied 4 NY3d 704 [2005]). Indeed, if the list of individuals set forth in Executive Law § 259-i (2) (c) (A), was exclusive, the Board would not be authorized to receive and consider the statements made by private

citizens and public officials that were submitted in support of petitioner's release (see Petition, Exhibit 4). Thus, petitioner has not persuaded the Court that the Board is prohibited from considering statements from individuals who are not expressly recited in Executive Law § 259-i (2) (c) (a).

Nevertheless, the Board may not consider certain factors that are outside the scope of Executive Law § 259-i (2) (c) (A) such as "penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society" (Matter of King v New York State Div. of Parole, 83 NY 2d 788, 791 [1994]), and a non-individualized objection to the parole release of an individual because his or her crime falls within a class of crimes would appear to be improper. Petitioner contends that the Board's consideration of letters in opposition from individuals affiliated with the PBA was improper inasmuch as those individuals did not know petitioner and his efforts at rehabilitation and that they opposed his release solely on the ground that he had killed a police officer. Although the Board stated that "[t]here is significant community opposition to your release" (Answer, Exhibit I), the administrative record submitted by respondent does not contain any letters by members of the community other than the letters of the district attorney (see Answer, Exhibit M), which are distinct from community opposition (cf. In re Rossakis v New York State Board of Parole, 146 AD3d 22, 28 [1st Dept 2016] ["victim impact statements" incorrectly referred to as "community opposition"]). Therefore, the record is imcomplete and the Court cannot render a decision in the absence of those letters. To the extent that petitioner relies on Matter of Mackenzie v Stanford (Sup Ct, Dutchess County, Oct. 2, 2015, Rosa, J.S.C., Index No. 2789/15) for the proposition that respondent's determination to deny parole release lacks a rational basis in part because such letters would presumably offer opposition

to parole release based solely upon penal philosophy, a court is not bound by a decision of a court of parallel jurisdiction, and in any event, the parole applications of inmate Mackenzie and petitioner are factually distinguishable.

Accordingly, to enable a full review of the petition based upon the facts that were before the Board, this Court chooses to exercise its discretionary authority to allow respondent to cure the insufficient record (see CPLR 7804 [e]; Matter of Kurtz v Krone, 22 AD2d 988 [3d Dept 1964]; Matter of Occhino v Hostetter, 21 AD2d 744 [4th Dept 1964]; see also Matter of Collins v Hammock, 96 AD2d 733, 734 [3d Dept 1983]), and will order respondent to transmit to the Court, for in camera review, letters or other documents evidencing community opposition that were submitted to the Board and considered by the panel in June 2016 in rendering its determination to deny petitioner parole release. The in camera submission of documents, if any, shall be accompanied by an affidavit of an individual with personal knowledge that any such documents were presented to the panel.

Accordingly, it is

ORDERED, that this Court's decision on the petition is HELD IN ABEYANCE; and it is further

ORDERED, that respondent is directed to transmit to the Court for in camera review, within fourteen (14) days of the filing of this Decision and Order, the letters in opposition that the panel considered in rendering its determination to deny petitioner parole release with an affidavit as set forth above.

This constitutes the Decision and Order of the Court, the original of which is being sent to the attorney for respondent. The signing of this Decision and Order, and delivery of a copy thereof

shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated: Saratoga Springs, New York
November 2, 2017

W. Brooks DeBow
Acting Supreme Court Justice

11/15/17

Papers Considered:

1. Notice of Petition, dated April 10, 2017;
2. Verified Petition, April 10, 2017, with Exhibits 1-9;
3. Petitioner's Memorandum of Law in Support of petition, dated April 10, 2017;
4. Verified Answer, dated June 9, 2017, with Exhibits A-M (including Exhibits B, D F and M, submitted for in camera review only);
5. Respondent's Memorandum of Law, dated June 9, 2017;
6. Petitioner's Reply Memorandum of aw, dated June 15, 2017, with Exhibit 1.