October 2019

Decision in CPLR Article 78 proceedings - Butler, Sidney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

In the Matter of the Application of
SIDNEY BUTLER,

Petitioner,

DECISION, ORDER
AND JUDGMENT

-against-

Index # 2703/17

NYS BOARD OF PAROLE,

Respondent.

The following papers were read on this Article 78 petition:

ORDER TO SHOW CAUSE
VERIFIED PETITION
EXHIBITS A - C

ANSWER AND RETURNS
EXHIBITS 1 - 12

REPLY

Petitioner brought this proceeding pursuant to CPLR Article 78 to review a determination of the Board of Parole denying his request for parole release. Petitioner was convicted in 1991 after trial of murder in the second degree and criminal possession of a weapon in the third degree and sentenced to an indeterminate term of twenty-five years to life. His convictions stemmed from the incident that occurred on or about April 21, 1990 where he met a woman, went back to her apartment and ultimately stabbed her thirty-four times with a kitchen knife. Petitioner fled the scene and was arrested three days later. At the time he had one prior misdemeanor assault conviction for which he was sentenced to a term of probation. Petitioner violated the terms of his probation and was incarcerated for six months. He was on probation at the time he committed the offense for which he is presently incarcerated. Petitioner first became eligible for parole release in 2015 and reappeared before the Parole Board for an interview on February 1, 2017. He was 51 years old and had been incarcerated for twenty-seven years. Following a brief interview the Board denied parole and ordered petitioner held for twenty-four months. Petitioner's administrative appeal was denied and this proceeding followed.

Pursuant to Executive Law §259-i(2)(c), the New York State Board of Parole is required to consider a number of statutory factors in determining whether an inmate should be released to parole. See Matter of Miller v. NYS Div. of Parole, 72 AD3d 690 (2nd Dept. 2010). The parole board must also consider whether "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 the law." 9 NYCRR 8002.1. A parole board is not required to give equal weight to each statutory factor, nor is it required specifically to articulate every factor considered. See Matter of Huntley v. Evans, 77 AD3d 945 (2nd Dept. 2010). It is further permitted to place a greater emphasis on the gravity of offense committed. See Matter of Serrano v. Alexander, 70 AD3d 1099, 1100 (3rd Dept. 2010). However, in the absence of aggravating circumstances, a parole board may not deny release solely on the basis of the seriousness of the offense. Huntley v. Evans, 77 AD3d at 947; King v. New York State Div. of Parole, 190 A.D.2d 423 (1st Dept. 1993). Moreover, while the board need not consider each guideline separately and has broad discretion to consider the importance of each factor, the board must still consider the guidelines. Executive Law § 259–i(2)(a). Finally, the board must inform the inmate in writing of the factors and reasons for denial of parole and "[s]uch reasons shall be given in detail and not in conclusory terms." Executive Law §259-i(2)(a); Malone v. Evans, 83 AD3d 719 (2nd Dept. 2011). A determination by a parole board whether or not to grant parole is discretionary, and if made in accordance with the relevant statutory factors, is not subject to judicial review absent "a showing of irrationality bordering on impropriety." Matter of Russo v. NYS Bd. of Parole, 50 NY2d 69, 77 (1980).

Executive Law §259-c(4) was amended in 2011 to require the board to establish new procedures to use in making parole determinations. The statutory amendment was intended to have parole boards focus on an applicant's rehabilitation and future rather than giving undue weight to the crime of conviction and the inmate's pre-incarceration behavior. To assist the members of the board in taking this approach when making parole determinations, the amendment required the establishment of written guidelines incorporating risk and needs principles to measure an inmate's rehabilitation and likelihood of success upon release. See Ramirez v. Evans, 118 AD3d 707 (2nd Dept. 2014). In response, the board of parole adopted the COMPAS (Correctional Offender Management Profiling for Alternative Sanction) assessment tool. A COMPAS assessment was prepared in connection with petitioner's February 1, 2017 appearance before the Parole Board.

At petitioner's parole hearing the Board questioned him about his crime of conviction placing particular emphasis on the fact that he stabbed his victim, a 29 year old female, more than thirty-four times. The Board noted that he had completed all of his required programming and including ART and ASAT and all phases of transitional services. It further referenced that he had remained "ticket free for just a little over a year and that his last ticket was a Tier II infraction from January 2016 but that he had a significant Tier II disciplinary history." The Board stated that petitioner's COMPAS risk assessment found him a low risk for felony violence, rearrest and reflected no concerns about drug or alcohol use upon release. The Board further acknowledged petitioner completing his goals to work in the custodial maintenance program, to continue progress in school and work on his self

study and that he had completed substance abuse and violence programming. It was discussed that upon release he could either go to his mother's or sister's but he wanted to participate in a program called Ready, Willing & Able. The Board further mentioned that it had a certificate of achievement for academic recognition that petitioner received and that their records reflected that he did not need any mental health services. Towards the end of the interview petitioner expressed his regret for the events leading to his conviction and stated that he is trying to change his life and upon release would take advantage of programs and become a better person in society.

At the conclusion of the hearing the Board issued a short decision denying parole. The decision was based upon petitioner's crimes of conviction and that petitioner repeatedly stabbed his victim more than thirty-four times which showed extreme violence and a callus disregard for human life. The decision further noted that petitioner was on probation at the time of his offenses and that his crimes of conviction represented an escalation in his behavior. The Board thus determined that if petitioner was released there was a reasonable probability that he would not live at liberty again without violating the law and that such release would be incompatible with the welfare of society and deprecate the serious nature of his crimes as to undermine respect for the law.

This court's role is not to usurp the decision making authority statutorily vested in the Board of Parole. It only has the authority to determine whether the Board considered the relevant statutory factors in making its final determination. See Matter of Russo, supra. In conducting such review, the court considers the parole interview and entire record before it but ultimately must assess whether the Parole Board has articulated a rational basis for its written determination. Here, the only facts set forth in the Board's written decision supporting its denial of parole are a recitation of petitioner's crime of conviction, the violent nature of such crime and his prior misdemeanor conviction. The Board mentioned that it considered sentencing minutes, COMPAS case plan and risk assessment, rehabilitative efforts, letters of support, disciplinary record and all other factors. An action is arbitrary and capricious when it is taken without sound basis in reason nor regard to the facts. See Matter of Wooley v. NYS Dept. of Corr. Servs., 15 NY3d 275 (2010). Put otherwise, when an action is not based on an application of facts to a relevant standard but reflects a will to rule without due regard to facts, it is arbitrary.

In this proceeding, as in so many of the Article 78 petitions challenging determinations of the Parole Board, the Board's written determination fails to set forth the facts sufficient to justify its final determination. It is not the function of this court to review the record to determine whether or not it, taken as a whole, would lend rational support to the Board's final determination. Instead, it is the Board's obligation to articulate the facts that provide the basis for its determination. This enables a reviewing court to determine whether the Board rationally applied those facts to the requisite statutory factors in making its final determination. While the Parole Board is permitted to place a greater emphasis on the gravity of the offense committed, it may not deny release solely on the basis of the seriousness of the offense. See Huntley v. Evans, supra. Moreover, the fact that petitioner had a prior misdemeanor conviction and violated his probation is not something the petitioner has the ability to change. If these factors provided a sufficient basis for denying parole, the Board could perpetually deny parole and petitioner would have no recourse. This would

undoubtedly constitute an impermissible resentencing of petitioner. However, the Board's review of the record reflects consideration of the petitioner's institutional disciplinary record including a disciplinary proceeding as recent as 2016. The Board's failure to articulate in its written decision any facts other than the recitation of petitioner's crimes of conviction and prior criminal record require this court to remand the matter. Therefore, it is

ORDERED that the petition is granted to the extent that the matter is remanded to the Board of Parole to make a *de novo* determination in accordance with CPLR Article 78 and Executive Law §259-i.

The foregoing constitutes the decision, order and judgment of the Court.

Dated: February 15, 2018
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.