November 2019

Decision in Art. 78 proceeding - Velasquez, Newlly (2012-01-26)

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
PRESENT: HON. LAWRENCE H. ECKER, J.S.C.

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In the Matter of NEWLLY VELASQUEZ,

Petitioner,

-against-

Index No. 6271/2011

DECISION, ORDER & JUDGMENT

NEW YORK STATE BOARD OF PAROLE,

Respondent.

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The following papers numbered 1 to 13 were read on petitioner's application pursuant to CPLR Article 78 seeking an order annulling and vacating his denial of parole and granting a new parole release hearing:

	PAPERS NUMBERED
Order to Show Cause /Petition/ Exhibits 1-2	1-4
Answer and Return/Exhibits 1-9	5-13

Upon the foregoing papers, the decision, order, and judgment of the court is as follows:

Petitioner Newlly Velasquez ("Petitioner") seeks an order and judgment pursuant to CPLR Article 78 seeking the following relief: 1) annulling and vacating the

September 15, 2010 determination of respondent New York State Board of Parole denying him parole; and 2) directing petitioner's release to parole supervision, or alternatively, granting a new parole hearing. Respondent opposes the petition and seeks its dismissal.

On October 13, 1993, petitioner was convicted, upon his guilty plea, of murder in the second degree in Supreme Court, Kings County and sentenced to an indeterminate term of 17 years to life imprisonment. Additionally, on October 19, 1993, he was re-sentenced, upon his admission to a violation of probation, upon a youthful offender adjudication for attempted robbery in the first degree, to an indeterminate term of imprisonment of one and one-third to four (1/3 - 4) years, said sentences to run consecutively.

Facts

In 1992, petitioner committed an attempted armed robbery with two others. He pleaded guilty and was sentenced as a youthful offender to five years probation with six months imprisonment. Later that year, while on probation, petitioner was involved in a street fight and shot another man to death who was interceding to stop the fight.

After serving 18 years, petitioner became eligible for parole in January. 2011. He appeared before the Board of Parole on September 15, 2010 at Otisville Correctional Facility in Orange County. At this initial parole hearing, the Board primarily questioned petitioner about his crimes and past criminal history. Petitioner admitted to the crimes and expressed his remorse. Respond. Answer and Return, Exhibit 4.

Petitioner was denied parole and held for 24 months to September, 2012.

The Board's decision stated:

> Parole is denied for the following reasons: After a careful review of your record and this interview, it is the determination of this panel that if released at this time there is a reasonable probability that you would not live and remain at liberty without violating the law and your release at this time is incompatible with the welfare and safety of the community. This decision is based upon the following factors: the seriousness nature of the instant offense of Murder 2 and YO Attempted Robbery involved you shooting the victim several times causing his death. In a separate incident you acting in concert pulled guns and demanded money from the victim. Your actions clearly displayed a propensity for extreme violence and a total disregard for human life. You've incurred multiple disciplinary infractions while incarcerated. Your positive programming is also noted. However, all relevant factors considered, discretionary release is inappropriate at this time for the panel to hold otherwise would so deprecate the seriousness of your crime as to undermine respect for the law.

Petitioner took an administrative appeal from the Board's decision. On or about May 26, 2011, the Board of Parole affirmed its decision denying parole.

Discussion

It is well settled that parole release is a discretionary function of the Parole Board and its determination should not be disturbed by the court unless it is shown that the Board's decision is irrational "bordering on impropriety" and that the determination was, thus, arbitrary and capricious. *Matter of Salmon v. Travis, 95 N.Y.2d 470 (2000); Matter of King v. N.S. Division of Parole, 190 A.D.2d 423 (1st Dept., 1993), aff'd 83 N.Y.2d 788 (1994); Matter of Duffy v. N.S. Div. Of Parole, 74 AD3d 965 (2d Dept 2010); Matter of Rios v. N.S. Division of Parole, 15 Misc. 3d 1107(A) (Sup. Ct., Kings Co., 2007).* In reviewing the Board's decision, the court must also examine whether the Board's discretion was properly exercised in accordance with the parole statute.

Executive Law §259-c[4] was recently amended to require the Board to promulgate new procedures in making parole release decisions. Such new procedures "shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision." See, Laws of 2011, ch. 62, Part C, Subpart A, §38-b.

The amendments to the parole statutes are remedial in nature and designed to modernize decision-making in the area of parole release. As one commentator noted:

> The 2011 amendments.....modernize the work of the Parole Board by requiring the board to adopt procedures that incorporate a growing body of social science research about assessing post-release needs and recidivism risks.
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> * * * * *
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> [T]he most important change is the replacement of static, past focused "guidelines" with more dynamic present and future-focused risk assessment "procedures" to guide the Parole Board...This addition of an explicit requirement that the Parole Board adopt and be guided by procedures that require it to evaluate "rehabilitation" and the likelihood of success...upon release" signals a critical reform and modernization of parole practices. Such procedures....will rationalize parole decision-making by placing the focus primarily on who the person appearing before the Parole Board is today and on whether that person can succeed in the community after release, rather than - as under the previous "guidelines" – on who the person was many years earlier when she or he committed the crime. This is a shift of potentially sweeping significance.

Professor Phillip M. Genty, Columbia Law School, "Changes to Parole Laws Signal Potentially Sweeping Policy Shift," NYLJ, September 1, 2011.

In *Matter of Thwaites v. N.S. Bd. Of Parole, ___ Misc3d ___, 2011 WL 6413855, 2011 NY Slip Op. 21453 (2011)*, this court held the above remedial amendment should

apply in a pending proceeding, and petitioner was entitled to a new parole hearing consistent with the new risk assessment procedures.

It is axiomatic that remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose. *Gleason v. Vee, 96 NY2d 117, 122 (2001); Majewski v. Broadalbin-Perth Cent. School District, 91 NY2d 577 (1998); Becker v. Huss Co., 43 NY2d 527, 540 (1978); see also, People ex rel. Forshey v. John, 75 AD3d 1100 (4th Dept 2010); Aguaiza v. Vantage Properties, LLC, 69 AD3d 422 (1st Dept 2010).* Remedial statutes have been regarded as an exception to any general rule against retroactivity. McKinney's Cons. Laws of N.Y., Book 1, Statutes, §54.

Here, as in *Thwaites*, respondent relied almost entirely on the nature of petitioner's crimes in denying parole. While his institutional and program accomplishments were noted, the Board focused on the circumstances of the crime committed eighteen years ago. When the Board reasoned that petitioner's discretionary release was inappropriate and incompatible with the welfare of the community so as to deprecate the seriousness of the crime as to undermine the respect for the law, it was employing past-focused rhetoric, not future-focused risk assessment analysis. Such reasons fail to sustain a rational determination on the inquiry at hand: 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 deprecate the seriousness of his crime as to undermine respect for the law. Executive Law §259-i[2][c].

In *Matter of King v. N.S. Div. of Parole, supra*, the court, in finding the Parole Board's determination fundamentally flawed, stated, "The role of the Parole Board is not to resentence petitioner, according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether, *as of this moment*, given all of the relevant statutory factors, he should be released." (emphasis added)

Similarly, in *Matter of Rios v. N.S. Division of Parole, 15 Misc. 3d 1107 (A), 2007 WL 846561 (Sup. Ct., Kings Co., 2007),* the court stated:

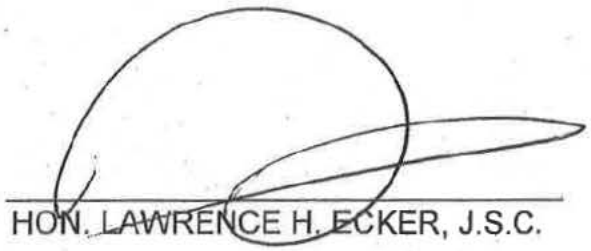
> "[t]his court, of course, does not mean to minimize the seriousness of petitioner's offense, nor the tragedy of the death of petitioner's victim[s], however in affording the possibility of parole to those convicted of murder, the Legislature has made a determination that, despite the seriousness of that crime, rehabilitation is possible and desirable.....certainly every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of a human life. Since, however, the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself, *quoting Matter of King, supra, 190 A.D.2d at 433.*"

The court finds the Board's decision denying parole in this case to be arbitrary and capricious, irrational, and improper based upon the Parole Board's failure to articulate any rational, nonconclusory basis, other than its reliance on the seriousness of the crime as to why the Board could not believe "there is a reasonable probability that if petitioner is released, he would 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]. It is undisputed the Board's decision was not made in accordance with the subsequent 2011 Amendments to the Executive Law which require a new parole hearing utilizing risk assessment principles and procedures.

Accordingly, the court grants the petition, annuls the Board of Parole's determination of September 15, 2010, vacates the denial of parole release to petitioner, and remands to the Board of Parole which, within 30 days of the service of a copy of this order with notice of entry, shall hold a new parole hearing consistent with this decision and the mandates of Executive Law §259-c and §259-l, as amended by Laws of 2011, ch. 62. The new hearing shall be held before a different panel of the Parole Board.

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

Dated: Goshen, New York
January 26, 2012



HON. LAWRENCE H. ECKER, J.S.C.

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