November 2019

Decision in Art. 78 proceeding - Winchell, Craig (2011-07-19)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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IN THE MATTER OF THE APPLICATION OF
CRAIG WINCHELL, 82-B-0809,

Petitioner,

DECISION and ORDER
Index #325-11

FOR A JUDGMENT UNDER ARTICLE 78 OF THE
CIVIL PRACTICE LAW AND RULES

-against-

ANDREA W. EVANS, CHAIRMAN OF THE NEW
YORK STATE DIVISION OF PAROLE, STATE
DIVISION OF PAROLE and STATE BOARD OF
PAROLE.

Respondents.

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APPEARANCES: David Lenefsky, Esq.
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By: J. Gardner Ryan, AAG, of counsel
Attorney for Respondents

LaBuda, J.

This matter comes before the Court based on the within Petitioner's request for a judgment pursuant to CPLR Article 78.

Respondents submit an Affirmation.

Petitioner submits a Reply Affirmation.

This Court held oral argument wherein respondents conceded that a *de novo* hearing was required and consented to same. Respondents argued, however, that while the court has authority to order a *de novo* hearing it does not have authority to grant parole no matter how grievous the instant parole hearing, or other prior hearings, may have been.

Petitioner previously filed an Article 78 regarding the same issues as herein pursuant to a prior parole denial. This Court granted Petitioner's prior Article 78 Petition for a new Parole Board hearing by Decision and Order dated June 9, 2010. Prior to granting of that last hearing the Petitioner had appeared before the Parole Board nine times, and was consistently denied parole. After this Court granted a new parole hearing, the Petitioner appeared before the Parole Board at Woodbourne Correctional Facility on September 7, 2010. The petitioner was again denied parole on this most recent appearance, his tenth.[1]

Notice of Appeal was sent to the Division of Parole Administrative Appeals Unit by certified mail, return receipt requested, and acknowledged by the Appeals Unit as received on September 30, 2010.

An Administrative Appeal was timely perfected by the Petitioner on October 5, 2010, on the grounds that the determination of the Parole Board was arbitrary and capricious or was otherwise unlawful and that the determination was excessive.

A Final Determination of the Administrative Appeal had not been received by Petitioner's counsel within the statutory time period for the Board of Parole to make such a determination. See, 9 NYCRR 8006.4(c).

Petitioner, now 46 years of age, is presently incarcerated at Woodbourne Correctional Facility in Sullivan County. He has been imprisoned for twenty-nine years pursuant to an 18 to life sentence following his conviction for murder in the second degree.[2]

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[1] This was petitioner's tenth appearance before the Parole Board. Petitioner appeared before the Parole Board for his eighth time on August 10, 2010, but this hearing was postponed because one of the two Commissioners had sat at his 2009 hearing. At his ninth appearance on August 17, 2010, only two Commissioners were present and consensus was not achieved.

[2] On August 8, 1981, the petitioner, then a 16 years old youth, strangled his 16 year old girlfriend and hid her body under a garage where it remained for ten days until discovered by police. Petitioner was sentenced to 18 to life on April 20, 1982 a conviction for murder in the second degree.

The petitioner herein alleges that the respondents failed to comply with their obligations under Section 259-i of the Executive Law with respect to their determination of Petitioner's application for parole.

Petitioner now seeks an order from this Court for immediate release from custody, or in the alternative, an order for a *de novo* parole hearing to be held before a panel consisting of completely different Commissioners, none of which have ever sat on any prior Parole Board involving the within petitioner.

Specifically, the Parole Board failed to comply with the requirements set forth under Executive Law §259-i by denying the Petitioner's application for parole in a contrived manner, and unjustifiably denying the Petitioner a fair hearing. The Board's determination must not be the product of speculation or caprice, and must consider, *inter alia*, the inmate's institutional record; the inmate's release plans; any statement made to the Board by the victim's representative; the seriousness of the offense, with consideration of the sentence and the recommendation of the sentencing court; and the inmate's prior criminal record. **See, Executive Law §259-i.**

Moreover, Executive Law §259-i(2)(a) requires the parole board, upon a denial of parole, to issue a written determination of the factors and reasons for such denial **"in detail and in non-conclusory terms" (emphasis added).**

Thus, where the Parole Board "focuses, as here, almost entirely on the nature of petitioner's crime, there is a strong indication that the denial of parole is a 'foregone conclusion' and does not comport with the statutory scheme." **Stanley v. New York State Bd of Parole, 2011 NY Slip Op 21136 (Sup. Ct., Orange Cty., 2011) (quoting King v New York State Division of Parole, supra at 431-32).**

The Parole Board failed to follow its obligation under Executive Law §259-i(2)(c)(A). Its parole denial seems, to this Court, to have been predetermined, based on their failure to articulate **any** basis why the Parole Board could not believe "there is a reasonable probability that, if [petitioner] 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).**

The Parole Board's determination was couched only on the "senseless and violent nature" of the crime, and "confidential materials" allegedly known only to the Board. **See, transcript, parole hearing, September 7, 2010.** This outburst by Commissioner Ferguson during the September 7, 2010 parole hearing is without support in the transcript nor referenced anywhere else as justification for the Board's denial of parole. Accordingly, this Court submits that Commissioner Ferguson's rash utterance amounts merely to a conclusory statement based on his own personal disdain for the petitioner's criminal act nearly three decades ago.

Parole may not be denied solely based on the offense itself. **Wallman v. Travis, 18 AD3d 304, 307-08 (1st Dept., 2005).**

Similarly, in **Almonor v. New York State Board of Parole, 16 Misc3d 1126A (Sup. Ct., N.Y. Cty., 2007)**, the rule was reaffirmed that the main limitation of the Parole Board's discretion is that "the Board cannot base its determination solely on the serious nature of the crime."

Re-sentencing is not the purview of the Parole Board. **King v New York State Division of Parole, 190 AD2d 423 (1st Dept., 1993).** In the instant matter, the Parole Board has de facto sentenced the petitioner to 30 years to life by its persistent denials of parole.

It cannot be disputed that petitioner is well trusted by the Department of Corrections. After petitioner was transferred from Eastern Annex to the Woodbourne Correctional Facility in October 2007, he was approved for Outside Passes. Since then, the petitioner has worked outside doing sanitation-environmental work for over three years. The petitioner's family lives in close proximity to the correctional institution in which petition is housed. That the petitioner was given an Outside Pass to work in the community where his family resides is highly unusual, given the institutional fear that the inmate will be tempted to escape, given the proximity of his family. Petitioner has had passes for an extended period of time[3] and has a devoted family. Nonetheless, petitioner has overcome these temptations and has complied with the DOC requirements for Outside (work) Passes.

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[3] Petitioner's first Pass was approved on December 9, 2008.

During his nearly three decades of imprisonment, it is not disputed by the State that the within petitioner has been a "model prisoner," and has achieved numerous educational accomplishments, as well as earning the respect and praise of many officers within the correctional system. This includes a two year college degree along with numerous certificates of achievement and appreciation as well as letters of support.[4]

Moreover, petitioner has been offered a full-time position at a local construction company and a part time position in a financial service company, to which he would start immediately upon release.[5] Accordingly, it cannot be denied that these above mentioned factors, among many more, demonstrate the petitioner's strong willingness, ability, and determination to return as a productive, law-abiding member of our society.

Directly on point is **In the Matter of Coaxum v. New York State Board of Parole**, **14 Misc3d 661 (Sup. Ct., Bronx Cty., 2006)**, which established that while parole is not to be granted merely as a reward for positive conduct and rehabilitative achievements, these factors **must** be considered.

In **Coaxum**, the petitioner had been incarcerated twenty-one years for murder in the second degree and robbery in the first degree. Her institutional record was exemplary. So too were her psychological insights of her guilt and shame as well as her remorse for her criminal actions. The court took note of the petitioner's devoted family, her elderly mother, children and grandchildren. Yet, petitioner was denied parole four times after her minimum 15 year sentence had elapsed. The parole board's decision cited the brutality of the murder including

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[4] Petitioners accomplishments in prison include the following: outside passes, full-time employment upon release, part-time employment upon release, three Certificates of Achievement and Certificate of Appreciation, eleven letters of support including one from a former Commissioner of Corrections, Institutional Program accomplishments, academic achievements and degrees, vocational education, eighteen honors, certificates or letters regarding positive educational and training assignments, nine institutional work assignments including team leader, coordinator or positions of responsibility in various prison activities or programs, letters regarding interpersonal relationships with prison staff and inmates and detailed release plans.

[5] [redacted]

tying the hands and feet of an 80 year old victim. Petitioner was 28 years old at the time. The Board concluded that her criminal act was so brutal and heinous, that to release the petitioner at this time would deprecate the seriousness of her crime and undermine respect for the law. The court granted the petition, holding that, while parole is not to be granted merely as a reward for positive conduct and rehabilitative achievements, these factors must be considered. In granting a de novo hearing, the court found that the Board's decision "accorded no weight and no emphasis whatsoever to any factor apart from the seriousness of the petitioner's offense" **(emphasis added)**.

In **Rios v. New York State Division of Parole, 15 Misc3d 1107A (Sup. Ct., Kings Cty., 2007)**, the Petitioner pled guilty to two counts of murder in the second degree and was sentenced to two terms of 18 years to life, to run concurrently. After parole was twice denied, petitioner filed an administrative appeal which affirmed the Board's decision. The petitioner then filed an Article 78 proceeding in court. With respect to the Article 78 claim, the court noted that "almost" all of the statutory factors the Parole Board must consider weighed in petitioner's favor.

Consequently, the **Rios** court expected a "rational explanation" why parole was denied. However, "[i]nstead, the Parole Board focused almost exclusively on the serious nature of petitioner's crime" as its reason to deny parole.

The **Rios**, court cited **King v New York State Division of Parole, 190 AD2d 423 (1st Dept., 1993)** in stating: "It is unquestionably the duty of the Parole Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the Parole Board did in fact fail to consider the proper standards, the courts must intervene."

The Parole Board's decision in the instant matter is inconsistent with **Coaxum**, **Rios**, **Almonor** and **King**, as the Board has consistently ignored the legal guidelines through a plethora of parole denials.

As reflected in the transcript of Petitioner's September 7, 2010 Parole Board hearing, the Commissioners conducting the hearing focused exclusively on the Petitioner's commission of a violent and serious crime. Sadly, Commissioner Ferguson was unable to fully assume his professional duty in acting as a Commissioner of the Parole Board, as he was verbally agitated by this Court's granting of Petitioner's Article 78 motion.[6]

Beyond Commissioner Ferguson's open contempt for this Court's decision in granting the Article 78 order itself, which the Commissioner stated as "erroneous," there is an even greater factual bias in the method which Petitioner's application for parole was denied.

Based on the record before this Court, we conclude that the Parole Board in this matter consciously refused to comply with the law in granting this Petitioner a proper hearing under the law. From the outset, the Commissioners at the September 7, 2010 hearing, acted in a hostile manner towards the Petitioner, and this Court's own decision with respect to Petitioner's claim. **See, transcript, parole hearing, September 7, 2010.**

Further, this Court's Article 78 Decision and Order granting a *de novo* hearing was de facto disobeyed by those Commissioners in the September 7, 2010 Parole Board hearing when they actively avoided gathering the necessary information to make a proper determination as to whether there presently exists a reasonable probability that the Petitioner will be a law abiding citizen upon release. Moreover, the Board did not produce any evidence that the petitioner would not be a law abiding citizen upon release.

What occurred on September 7, 2010 was an attack on this Court's record, and willful disobedience to the law. Through its own conduct, as reflected in the transcript, it is obvious that before the petitioner even appeared, the members of this Parole Board had no intention of entertaining even the slightest thought of his parole. (See footnote 6 below).

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[6] Commissioner Ferguson stated at the September 7, 2010 hearing that he "don't know whether or not [this Court] was fully informed as to the facts ... nonetheless we cannot ignore a judge ordering of an Article 78 regardless of whether or not the basis for it is erroneous." (Page 5 lines 12-18). At another time, Commissioner Ferguson accused this Court of being "unaware" of "confidential materials" that allegedly show "a fair amount of opposition to [the Petitioner's] release." (Page 18 lines 14-19).

While the Executive Law lists guidelines to consider in granting parole,[7] the Parole Board has broad discretion in deciding what weight should be given to each of the factors listed. But, the reasons for denying parole must "be given in detail and not in conclusory terms" Executive Law § 259-i(2)(a) and denial may not focus exclusively on the seriousness of the crime. See, In re William R. Phillips v. Dennison, 41 AD3d 17 (1st Dept., 2007); Matter of Walker v. Travis, 252 AD2d 360, 362 (App. Div., 1st. Dept., 1998).

The Board's discretion is not, however, unlimited. There are two prohibitions on the Board's discretion. First, the Board cannot base its determination solely on the serious nature of the crime. Guzman v. Dennison, 32 AD3d 798 (1st Dept, 2006); Almonor v. New York State Board of Parole, supra. Second, the Board cannot deny parole merely repeating the statutory criteria. The reasons for denying parole must "be given in detail and not in conclusory terms." Executive Law § 259-i(2)(a).

However, in the instant matter, the Parole Board failed to consider any of the Petitioner's extensive rehabilitative progress, instead passing their own, unilateral judgments on the Petitioner's current character, based on his actions as a sixteen-year-old boy.

The mere mention that petitioner did participate in rehabilitative progress, is itself insufficient to satisfy the strict requirements of Executive Law §259-i. Our courts have so held that "[t]he passing mention in the Parole Board's decision of petitioner's rehabilitative achievements cannot serve to demonstrate that the Parole Board weighed or fairly considered the statutory factors where, as here, it appears that such achievements were mentioned only to dismiss them in light of the seriousness of petitioner's crime." Matter of Phillips v. Dennison, NYLJ, Oct. 12, 2006, at 23, col 1; quoting Matter of King, 190 AD2d at 434.

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[7] Guidelines are listed in the Executive Law that the Parole Board must consider, i.e., the petitioner's institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates, and his post release plans.

Based on the Parole Board's previous dealings with the petitioner, one is left with the impression that the State's position is that because of this man's past crimes, there would, in essence, never be a time that he would be suitable for release, even though the lengthy confinement and punishment are not in accord with cases of similar seriousness.

Pursuant to Article 78, Section 7803, respondents have again failed to perform the duties required of them by law as to Petitioner Craig Winchell. They have made their determinations in violation of lawful procedure, and their determination has been arbitrary and capricious. This Board has abused their discretion. Consequently, the Petitioner has been deprived of his entitlement, under the Constitution of this State, and the United States, to due process of law in the instant parole hearing.

King v New York State Division of Parole, supra is a case eerily similar to the instant matter. In **King**, the inmate was imprisoned at the age of twenty two for the crime of murder. The instant matter involves the imprisonment of a sixteen year old for the crime of murder. In **King** the victim was a police officer, while herein the victim was the defendant's girlfriend. In **King** the inmate had an exemplary institutional record, including the receipt of a four-year college degree while incarcerated. The defendant herein was likewise exemplary and garnered a two-year college degree while incarcerated.

The within matter involves an inmate who has been denied parole ten times and this Article 78 proceeding is the second time he has appealed his parole denial. In **King**, the inmate was twice denied parole but only sought, and was granted, Article 78 relief once.

In **King** the Supreme Court, New York County, overturned the Parole Board's denial, and ordered release to parole supervision. On appeal, the Appellate Division reversed the release to parole and ordered a *de novo* hearing, **King v New York State Division of Parole**, 190 AD2d 423 (1st Dept., 1993) and the Court of Appeals affirmed 83 NY2d 1277 (1994).

In King, the Appellate Division, First Department, in finding the Parole Board's determination fundamentally flawed, stated: "while the courts remain reluctant to second-guess the decisions of the Board, it is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the Board did in fact fail to consider the proper standards, the court must intervene" **(emphasis added)**.

The Appellate Division in King continued by stating: "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. In that regard, the statute expressly mandates that the prisoner's educational and other achievements affirmatively be taken into consideration in determining whether he meets the general criteria relevant to parole release under section 259-i(2)(c)" **(emphasis added)**.

Lastly, but by no means least, the Appellate Division in King stated: "...we find that the decision of the Board was fatally tainted by its abdication of its responsibility to fairly consider all relevant factors and that, as a result, its determination to deny petitioner's application for parole release must be set aside. **While we find it difficult to believe that petitioner would be denied parole after a hearing at which the statutory factors are fairly and properly applied, the Parole Board should have the opportunity to make that determination using the appropriate standard" (emphasis added)**.

While this Court agrees with the Appellate Division in King that the first parole appeal should be remanded to the Parole Board for a *de novo* hearing, the instant matter, however, involves returning the matter to the parole board for a second *de novo* hearing following the Board's abdication of its responsibilities for a second time.

This Court believes that if this matter is again returned upon an Article 78 proceeding, involving the same circumstances, a different remedy may be warranted.

Based upon the above, it is

ORDERED, that the Petition is granted to the extent that the Parole Board shall afford the petitioner herein a *de novo* Parole hearing within sixty (60) days and a decision thereon not more than thirty (30) days thereafter, and it is further.

ORDERED, that the *de novo* hearing herein shall consist of Parole Board members who have not previously sat on any prior parole hearing involving the above captioned inmate, and it is further

ORDERED, that failure to comply with the time restraints as ordered will involve other remedies by this Court.

This shall constitute the Decision and Order of this Court.

Dated: July 19, 2011
Monticello, N.Y.

Hon. Frank J. LaBuda
Acting Supreme Court Justice