November 2019

Decision in Art. 78 proceeding - Waugh, Dean (2017-09-12)

At a Special Term of the Sullivan County Supreme Court, held in and for the County of Sullivan, in the Village of Monticello, New York, on the 12th day of August, 2017 September

PRESENT: HON. STEPHAN SCHICK
JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF SULLIVAN

In the Matter of the Application of
DEAN WAUGH, # 90-A-1597

062802604

Petitioner,

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

DECISION AND ORDER
INDEX NO. 52-2017

-against-

TINA M. STANFORD, CHAIRWOMAN DIVISION OF PAROLE,

Respondent.

APPEARANCES: DEAN WAUGH
Woodbourne Correctional Facility
P.O. Box 1000
Woodbourne, New York 12788
Pro Se Petitioner

HON. ERIC T. SCHNEIDER MAN
Attorney General for the State of New York
(Jeane L. Strickland Smith, Esq., AAG of Counsel)
One Civic Center Plaza, Suite 401
Poughkeepsie, New York 12224
Attorneys for the Respondent

SCHICK, J.:

Petitioner commenced the instant CPLR Article 78 proceeding challenging respondent's

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determination which denied his application for parole release and held him for an additional 18 month period.

Petitioner is in the custody of the New York State Department of Corrections and Community Services (DOCCS) serving an indeterminate term of imprisonment. After a trial, petitioner was found guilty of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree. Petitioner was sentenced to a term of 25 years to life.

The petitioner appeared before the Parole Board for his third parole hearing on June 14, 2016. After the interview, the Board issued its decision denying petitioner's release and ordered petitioner held for 18 months. The Panel concluded that:

> This Panel notes your personal growth and productive use of time. However, discretionary release shall not be granted merely as a reward for good conduct or efficient performance of duties while confined. After carefully reviewing your record and conducting a personal interview, parole is denied. You stand convicted of both Murder 2nd and Criminal Possession of a Weapon 2nd in connection with your actions shooting the mother of your child. The panel makes note of your program goals and accomplishments including your achievement of your BA, Risk and Needs Assessment, Case Plan and your disciplinary record which has been clean since 2010. Also, your parole packet, official opposition, your presentation to the panel and sentencing minutes, which included statements from the Judge, have been reviewed and considered. After deliberating, reviewing your overall record and statutory factors, discretionary release is not presently warranted as your release would trivialize the tragic loss of life that you caused and furthermore would be incompatible with the welfare of society and would so deprecate the serious nature of your crimes as to undermine respect for the law.

Petitioner filed a Notice of Appeal with the Division of Parole Appeals Unit on October 7, 2016. On November 23, 2016, the appeal was denied by the respondent. Petitioner now brings this CPLR Article 78 proceeding.

Initially, the petitioner alleges the Board failed to comply with Executive Law § 259-c(4) which requires the Board to use procedures to measure an inmate's rehabilitation and the likelihood of success upon release. The petitioner maintains his parole denial should be vacated.

In 2011, Executive Law § 259-c(4) was amended to require the Board to "establish written procedures for its use in making parole decisions" and to consider the person's likelihood of success upon release to parole supervision. Executive Law § 259-i(2)(c) was amended to consolidate into one section the complete list of factors the Board is required to consider in evaluating applications for parole release. The amendments to Executive Law § 259-i(2)(c) became effective in administrative hearings conducted on or after October 1, 2011.

Petitioner's parole release interview was subject to the requirements of Executive Law § 259-c(4). The petitioner alleges the decision of the Board was irrational and did not consider all of the requirements of Executive Law § 259-i(2)(c). (Matter of Thwaites v. NYS Board of Parole, 34 Misc3d 694 [Sup. Ct. 2011]).

A review of the record indicates the Board considered the requirements of the Executive Law relating to parole release. The amendments to Executive Law 259-i(2)(c) did not result in a substantiative change in the criteria which the Parole Board should consider in rendering its decisions. (Montane v. Evans, 116 AD3d 197 [3rd Dept. 2014]).). This Court finds the factors that must be considered for release on parole were adequately considered here. The record does not demonstrate that the Parole Board failed to consider the statutory factors set forth in Executive Law § 259-i(2)(c). (Goldberg v. New York State Bd. of Parole, 103 AD3d 634 [2nd Dept. 2013)].

As stated in Executive Law §259-i (2) (c)(A):

"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. In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate; (v) any statement made to the board by the crime victim or the victim's representative..."

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, will not be disturbed. (Matter of Neal v. Stanford, 131 AD3d 1320 [3d Dept. 2015]). If the Parole Board's decision is made in accordance with the statutory requirements, the Board's determination is not subject to judicial review. (Matter of Hamilton v. New York State Div. of Parole, 119 AD3d 1268 [3rd Dept. 2014]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention. (Matter of Silmon v. Travis, 95 NY2d 470 [2000]; Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board. (Delacruz v. Annucci, 122 AD3d 1413 [4th Dept. 2014]). With these principles in mind, the Court turns to the merits of petitioner's case.

Petitioner argues the decision to deny him parole was irrational, arbitrary and capricious, and resulted in a gross abuse of discretion. A Board's determination denying parole release will not be disturbed unless there is a "showing of irrationality bordering on impropriety" (Matter of Silmon v. Travis, 95 NY2d at 476). The Court finds the Parole Board considered the relevant factors in making its decision and its determination was supported by the record. The decision was sufficient

to apprise petitioner of the reasons for the denial of discretionary release. A review of the transcript of the parole interview reveals that, in addition to the instant offenses, attention was paid to such factors as petitioner's institutional programming and his plans upon release. He was given an opportunity to make a statement in support of his release. The Board also had petitioner's sentencing minutes, Inmate Status Report, Pre-Sentence Investigation Report, a COMPAS Reentry Risk Assessment and a COMPAS Case Plan which details petitioner's institutional adjustment, programming, disciplinary record, proposed release plans, criminal history, risk factors and the facts of the current offense. The Board also acknowledged receipt of letters written in 1989 from the victim's sisters prior to his conviction and sentencing.

Petitioner claims his COMPAS risks levels were low. Contrary to petitioner's claim, the COMPAS assessment is but one of many documents the Board now considers when making its parole release decisions. (Matter of Thomas v. Evans, 109 AD3d 1069 [3rd Dept. 2013]). While the Board must consider the conclusion reached through use of the COMPAS assessment, it may draw a different conclusion regarding the risks posed by the petitioner's release. (Matter of Rivera v. New York State Div. of Parole, 119 AD3d 1107 [3rd Dept. 2014]).

The Court notes the Board was free to place emphasis on the seriousness of petitioner's instant offenses. (Matter of Montalvo v. New York State Bd. of Parole, 50 AD3d 1438 [3d Dept. 2008]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one. (Matter of Vigliotti v. State of New York Executive Div. of Parole, 98 AD3d 789 [3rd Dept. 2012]; (Matter of Wise v New York State Division of Parole, 54 AD3d 463 [3d Dept. 2008]). The determination is not rendered improper by the Parole Board's failure to "expressly discuss each of

these guidelines in its determination" (Matter of King v. New York State Div. of Parole, 83 NY2d 788 [1994]). In addition, Executive Law § 259-i(2) does not grant parole release merely as a reward for petitioner's good conduct or achievements while incarcerated. (Matter of Mentor v. New York State Division of Parole, 87 AD3d 1245 [3rd Dept. 2011]). The Court finds it was not irrational for the Board to place more weight on instant offenses than petitioner's institutional accomplishments and plans for release. (Matter of Hamilton v. New York State Division of Parole, 119 AD3d at 1273-1274). Petitioner has failed to meet his burden showing the Board did not consider the relevant statutory factors or that the decision was irrational, arbitrary, capricious or contrary to law.

Petitioners conclusionary allegation that the Board's decision was predisposed to denying him release is without merit. (Matter of Connelly v. New York State Division of Parole, 286 AD2d 792 [3rd Dept. 2001], appeal dismissed 97 NY2d 677 [2001]). In addition, petitioner's allegations of bias on the part of the Board are not supported by the record and petitioner failed to offer proof that the outcome of this case flowed from the alleged bias. (Matter of Hernandez v. McSherry, 271 AD2d 777 [3rd Dept. 2000], lv denied 95 NY2d 769 [2001]). The Parole Board is required to consider the same factors each time the petitioner appears for a parole release hearing. (Matter of Williams v. New York State Division of Parole, 70 AD3d 1106 [3rd Dept. 2010[, lv denied 17 NY3d 709 [2010]). The record discloses the Board rendered its determination after considering the full record, including the hearing testimony, the petitioner's institutional background, his achievements, his criminal history and release plans. (Matter of Marziak v. Alexander, 62 AD3d 1227 [3rd Dept. 2009]; Matter of Salahuddin v. Dennison, 34 AD3d 1082 [3rd Dept. 2006]).

Petitioner's claim that he was denied due process has been examined and found to be without

merit. Executive Law § 259-i, does not create an entitlement to release on parole and therefore does not create interests entitled to due process. (Paunetto v. Hammock, 516 F. Supp 1367 [US Dist. Ct., SDNY, 1981]). There is no due process right to parole. (Russo v. New York State Board of Parole, 50 NY2d at 73). Also, there is no due process right to an inmate obtaining a statement as to what he should do to improve his chances for parole in the future. (Matter of Francis v. New York State Division of Parole, 89 AD3d 1312 [3rd Dept. 2005]). Nor does the denial of parole constitute double jeopardy. (Matter of Patterson v. Goord, 1 AD3d 845 [3rd Dept. 2003]). Petitioner's allegation that the denial of parole was akin to re-sentencing is without merit. (Matter of Murray v. Evans, 83 AD3d 1320 [3rd Dept. 2011]).

The Court has reviewed petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds the decision of the Parole Board was in accordance with the statutory requirements and was not excessive, irrational, arbitrary, capricious or in violation of lawful procedure. (Matter of Russo v. NYS Board of Parole, 50 NY2d at 77). The Petition is therefore dismissed.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is being returned to the attorneys for respondent. All original supporting documentation is being filed with the Sullivan County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED AND ADJUDGED.

ENTER.

Dated: ~~August~~ Sept. 12, 2017
Monticello, New York

STEPHAN SCHICK
Supreme Court Justice

Papers Considered:

1. Order to Show Cause dated March 23, 2017; Verified Petition dated December 23, 2016; Memorandum of Law undated;.
2. Verified Answer and Return dated May 18, 2017 with annexed exhibits 1-13;
3. Reply Affidavit of Dean Waugh undated.