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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

COPY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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In the Matter of the Application of

MICHAEL HOPPS, 93-A-9618,

Petitioner,

- against -

NEW YORK STATE BOARD OF PAROLE,

Respondent.

----------X

To commence the statutory time period 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.

Index No. 2553/18

DECISION AND ORDER

Motion Date: May 9, 2018

The following papers numbered 1 to 8 were read and considered on a proceeding pursuant to CPLR article 78 to review a determination of the New York State Board of Parole, dated August 2, 2017, which, after a hearing, denied the Petitioner's request to be released to parole, and upon such review, to annul and set aside the determination and order a new hearing.

Notice of Petition- Verified Petition- Hopps Affidavit- Exhibits A-H	1-4
Answer and Return- Exhibits 1-11	5-6
Reply Affirmation- Hopps- Exhibits 1-2	7-8

Upon the foregoing papers, it is hereby,

ORDERED, ADJUDGED and DECREED, that the petition is granted.

Factual/Procedural Background

In 1993, the Petitioner Michael Hopps pleaded guilty to Murder in the Second Degree arising from an incident in which he repeatedly struck his girlfriend in the face with a heavy rum bottle, cut her neck and wrists with the broken edges, and strangled her (Return, Exhibit 9). He then dumped her and her car in a desolate area, after wiping the bottle and the car for fingerprints. The Petitioner was 18 years old at the time. He was sentenced to 15 years to life

imprisonment.

On July 25, 2017, the Petitioner appeared for the parole hearing at issue, his eighth.

The hearing was the result of an order from the Supreme Court, Orange County (Slobod, J.), dated April 25, 2017, which set aside what was then the Petitioner's most recent denial of parole (Reply, Exhibit 2). The Court noted that the sole reason stated for the denial was the seriousness of the underlying offense.

In the COMPAS (Correctional Offender Management Profiling for Alternative Sanction) assessment prepared for the hearing at bar, the Petitioner was rated as at a "low" risk in every category except reentry into substance abuse, for which he was rated "probable" (Petition, Exhibit 9). The report noted that the Petitioner had stated that he committed the crime at issue while intoxicated.

At his interview, the Petitioner testified that he was then 43 years old, and had been incarcerated for around 25 years (Return, Exhibit 4). His criminal history included two felonies (grand larceny and the offense at bar) and two misdemeanors (unauthorized use of a vehicle and attempted unauthorized use of a vehicle). He also had two youthful offender offenses.

The Petitioner expressed remorse for his crime. Further, he testified, he had been sober since 2002 and was attending Narcotics Anonymous; he was deeply involved with the Catholic community; he was saving money for his release; he had participated in a reconciliation program and several volunteer and therapeutic programs while in prison; and he had obtained job skills, including as a carpenter's helper (T-6-7). In addition, he had not received any disciplinary tickets since February 2013 (T-8). If released, he testified, he had secured housing at Anthony House in Roosevelt, New York, and intended on seeking a job.

By determination dated August 18, 2017, the Board denied parole (Return, Exibit 4).

The Board noted that the Petitioner's institutional programming indicated that he had made progress and achieved goals, which was to his credit (T-10). Further, that his disciplinary record appeared clean, and his COMPAS risk score was low.

However, the Board held, parole was denied in light of the nature of the crime at bar, the Petitioner's criminal history, and the "official opposition and significant and persuasive community opposition on file" (T-10).

On administrative appeal, the Board's denial of parole was affirmed (Return, Exhibit 8).

The Proceeding at Bar

The Petitioner commenced this proceeding to review the determination of the Board.

First, the Petitioner argues, the Board's "boilerplate" denial of parole, after reciting his various accomplishments and positive reports, demonstrates that the decision was "pre-determined" and a "foregone conclusion."

Indeed, he notes, in support of his application, he had submitted (1) seven letters of support from the staff of his prison facility; (2) six letters of support from his family; and (3) proof that, while in prison, he had obtained a G.E.D, completed 18 vocational and eight therapeutic programs; and been awarded six certificates and awards of achievement. In addition, he notes, he provided letters of reasonable assurance from several persons, and had sought out follow-up treatment from eleven sources (Exhibit F).

Further, he asserts, the Board failed to consider all of the factors mandated by Executive Law § 259-i, and its decision violated the same because it lacked sufficient detail and a reasonable explanation for the determination.

Finally, the Petitioner argues, the Board failed to give proper weight to the COMPAS report, and to provide him with guidance as to how he might obtain release upon his next appearance.

In sum, he argues, the matter should be remitted for a *de novo* hearing.

Discussion/Legal Analysis

In determining whether to grant parole to an inmate, the Board is required to consider a number of statutory factors, set forth in the Executive Law § 259–i(2)(c)(A). The statute provides that 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 procedures 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 interactions 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 while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law; (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.

The Board's decisions are discretionary and, if made in accordance with statutory requirements, are not subject to judicial review. *Executive Law § 259–i[5]; Banks v. Stanford*, 159 A.D.3d 134 [2nd Dept. 2018]. For this reason, judicial review of parole board determinations is narrowly circumscribed. A parole determination may be set aside only where the Board's determination to deny an early release evinces "irrationality bordering on impropriety." *Matter of Russo v. New York State Bd. of Parole*, 50 N.Y.2d 69; see also *Banks v. Stanford*, 159 A.D.3d 134 [2nd Dept. 2018].

If parole is not granted, "the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms." *Executive Law § 259–i(2)(a).*

The Board need not expressly discuss each of the statutory guidelines in its determination, and is not required specifically to articulate every factor considered. Rather, whether the Board considered the proper factors and followed the proper guidelines are questions that should be assessed based on the written determination, as evaluated in the context of the parole hearing transcript. *Siao-Pao v Dennison*, 11 N.Y.3d 777 (2008); *Jackson v. Evans*, 118 A.D.3d 701 [2nd Dept. 2014]; *Fraser v Evans*, 109 A.D.3d 913, 971 N.Y.S.2d 332 [2nd Dept. 2013].

In general, it is impermissible for the Board to deny parole based solely on the seriousness of the underlying offense. *Silmon v Travis*, 266 A.D.2d 296 [2nd Dept. 1999]. However, a Board may permissibly find that an inmate's institutional and educational achievements are outweighed by the serious and brutal nature of the underlying crime, and a lack of remorse and insight. *Silmon v Travis*, 266 A.D.2d 296 [2nd Dept. 1999].

Absent a convincing demonstration to the contrary, the Board is presumed to have acted

properly in accordance with statutory requirements, and judicial intervention is warranted only where there is a showing of irrationality bordering on impropriety. *Jackson v. Evans*, 118 A.D.3d 701 [2nd Dept. 2014].

Here, the determination at issue arose because the prior determination of the Board was set aside as having been improperly based solely on the nature of the underlying offense. Thus, consistent with that determination, and with the Board's obligations under the relevant statutes and case law, any further denial of parole needed to be based on more than solely the nature of the underlying offense.

Here, the Board noted that the Petitioner's institutional record was favorable, that his disciplinary record appeared clean, and that his COMPAS risk score was low. Further, it did not conclude that he lacked insight into or remorse for his crime.

Rather, the Board denied parole based on the nature of the underlying offense, the Petitioner's criminal history, and the "official opposition and significant and persuasive community opposition on file."

However, significantly, the Board did not identify, and the Court cannot otherwise determine, what materials the Board read or reviewed in determining that there was "official opposition and significant and persuasive community opposition on file" to the Petitioner's release. Thus, the Board's determination cannot be reviewed.

Indeed, although speculative, the only evidence in the record or otherwise submitted to the Court that might be argued to constitute such materials are statements made by the victim's sister at the time of sentencing (some 25 years ago), and documents generated around the same time. That is, the Court finds no even relatively current information that would support a finding

that there was "official opposition and significant and persuasive community opposition on file." Given the Board must determine the Petitioner's suitability for release at this time, it is irrationality bordering on impropriety for the Board to deny parole based on statements about the Petitioner's suitability for release at or around the time of the underlying offense, some 25 years ago.

Similarly, it would be irrationality bordering on impropriety for the Board to deny parole at this time based on the Petitioner's remaining criminal record, which concerns only non-violent, theft-related offenses, all of which are now more than 26 years old.

Accordingly, and for the reasons cited herein, it is hereby

ORDERED, ADJUDGED and DECREED, that the petition is granted, the determination, dated August 2, 2017, is vacated and annulled, and the matter remitted to the Respondent for a *de novo* hearing consistent herewith within 45 days.

The foregoing constitutes the decision and order of the court.

Dated: June 25, 2018
Goshen, New York

ENTER

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