November 2019

Decision in Art. 78 proceeding - Chan, Dennie (2003-02-07)

THE STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALBANY

In the Matter of the Application of

[redacted] Petitioner,

-against- Chan

BRION TRAVIS, Chairman, New York State Division of Parole,

Respondent.

Index #3045-02
RJI #01-02-ST2753

Decision, Order and Judgment

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

(Supreme Court, Albany County, Special Term, August 30, 2002)

(Justice Edward A. Sheridan, Presiding)

APPEARANCES:

[redacted] Pro se

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(Nelson R. Sheingold, of Counsel)
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SHERIDAN, J.:

Petitioner, an inmate at Arthur Kill Correctional Facility, brings this special proceeding pursuant to Article 78 of the CPLR, seeking review of respondent's denial of his application for parole.

Petitioner is serving a term of six to eighteen years and two terms of nine to eighteen years, having been sentenced after his conviction upon his plea of guilty to one count of

manslaughter in the first degree and two counts of robbery in the first degree. Petitioner's crimes, committed when he was seventeen years old, were an outgrowth of his membership in a Chinese street gang. On January 6, 1992, petitioner and other gang members robbed the staff of a restaurant at gunpoint. On January 22, 1992, petitioner and others robbed and kidnapped the driver of a hired Lincoln automobile, then forced the driver to the home of the car's owner, where they ransacked the home, threatened and assaulted its occupants, and departed with a second stolen Lincoln automobile. On January 27, 1992, petitioner and fellow gang members had a meeting with rival gang members in a restaurant, after which petitioner and his fellow gang members fired numerous weapons at their rivals resulting in one death of a rival and injury to three other members of the rival gang.

Petitioner came before the Parole Board for his initial interview on March 20, 2001. He appears to have taken every advantage of rehabilitative opportunities while incarcerated, having obtained his GED, enrolled in Russell Sage Community College, Ulster County Community College (Dean's list) and attained a Bachelor of Science degree in Business Management from Maryland State University, with Dean's list placement and a final year grade point average of 3.75, and admission to Alpha Sigma Lambda, a national academic honor society. He was certified by the New York State Department of Labor as a computer programmer/analyst after a 2 ½ year program of training and apprenticeship. He served as a trainer in an inmate Aggression Replacement Program and was commended for his guidance and diligence and as a "great asset to this program." Petitioner has successfully completed a number of other institutional programs, including A.S.A.T. and courses in Nonviolent Conflict Resolution. Petitioner has been employed by DOCS in a number of institutional positions and his record is unblemished by disciplinary infractions. He has served variously as a teacher's aid, industrial worker, carpentry apprentice, laundry laborer, pre-release

counselor, administrative runner and group leader, masonry apprentice and horticulture student, consistently receiving "good" to "excellent" ratings for overall performance, attitude, interest and interaction with peers and supervisors alike. Petitioner completed DOCS' Inmate Program Associate program, a parenting skills program and earned a certificate in AIDS education. The petition further alleges, and it is not denied, that at the time of this appearance before the Board he had received outside clearance and worked in the community outside the prison at Tallman State Park. Petitioner contends that because he was convicted of a homicide and because he has a college education, he is among a class of inmates most unlikely to recidivate, and is therefore an ideal candidate for parole release.

During his hearing, petitioner answered questions relating to his involvement with a gang and his instant crimes. While petitioner admitted a gang affiliation of two years in duration, his lack of any prior contact with the criminal justice system was noted. Petitioner's therapeutic, educational and vocational programming were briefly addressed, as was his renewed and supportive relationship with his family. Petitioner reported that if released, he would be living with his parents in Scarsdale, and that he had a letter of reasonable assurance of employment from a jewelry company owned by family friends, at which he would work with computers. He expressed deep remorse for the hurt and suffering he had caused, and acknowledged the extreme wrongfulness of his conduct. It was noted that his file contained several letters from community members.[1] A commissioner stated that "it sounds like you've done some soul-searching and you've done some positive programming. So we will consider that along with the crimes."

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[1]Included in the record are two favorable letters of recommendation for work release filed by the sentencing Judge, Hon. Robert J. Hanophy, AJSC.

Denying parole release, the Board stated:

> After careful consideration of your case and personal interview, parole is denied. The instant offenses represent a pattern of violent acts in which you chose to associate yourself with gang members, who put the community in jeopardy. As a result of the extremely anti-social behavior, one victim lost his life. Note is made of your positive adjustment to incarceration. However, the serious nature of the instant offenses precludes early release.

Petitioner was ordered held for 24 months. His administrative appeal was not decided by respondent, who concedes that petitioner has exhausted his administrative remedies, and he has commenced this judicial proceeding seeking review of respondent's determination.

Petitioner asserts four causes of action: (1) that he was denied constitutional due process and respondent's determination was arbitrary and capricious because respondent relied exclusively upon the serious nature of his crime in denying parole; (2) that respondent failed to provide an adequate explanation for its determination and failed to provide petitioner with guidance as to what he may do to earn parole release; (3) that petitioner was denied constitutional equal protection inasmuch as other inmates similarly situated to him have been granted parole release; and (4) that he was denied constitutional due process and respondent's determination was arbitrary and capricious because political pressure and public opinion entered into its decision making process, specifically that, contrary to law, the Board denied him parole release because it was adhering to an Executive policy initiative to curtail parole for violent felons. Respondent answers that the denial of parole and the 24 month hold was based on a hearing and review of petitioner's file that was conducted in accordance with all statutory, constitutional and regulatory requirements, and that the determination must therefore be affirmed.

Turning briefly to petitioner's claim of a constitutional equal protection violation, a

cause of action is not stated in that the allegation that other inmates with prior criminal histories who committed homicide or violent felonies have been granted parole release is insufficient to establish "(1) that [he], compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person" (LeClair v. Saunders, 627 F2d 606, 609-610, cert. denied, 450 US 959). Given the inadequacy of his allegations, petitioner's request for an additional opportunity to conduct discovery is not warranted (compare, Matter of Town of Pleasant Valley v New York State Board of Real Property Services, 253 AD2d 8 [modifying an order of Supreme Court resolving a discovery dispute]).

In support of his first and second causes of action, petitioner contends, inter alia, that, contrary to state law and constitutional due process, respondent failed to articulate a detailed, non-conclusory and rational basis for denying parole and impermissibly relied, to the exclusion of other factors, upon the "serious nature of the instant offenses [as] preclud[ing] early release. [emphasis added]."

Undoubtedly, the Board of Parole performs an important and integral function in determining time to be served under an indeterminate sentence of incarceration. Indeed its function is deemed judicial and its action unreviewable if done in accordance with law (Executive Law §259-i[5]; see also, Penal Law §70.40). Thus the Legislature has declared, as the public policy of this State, that "[t]he parole system is a vital element of the indeterminate sentencing process. . ." and has recognized the Board's "critical role" in the administration of justice in this State (L 1977, ch 904, §1).

In this State's penological and sentencing scheme as applicable to this petitioner, the

sentencing judge sets the minimum and maximum terms of an indeterminate sentence within legislative prescriptions, presumptively reflecting the judge's view of what minimally and maximally would satisfy the ends of justice given all the facts and circumstances of the particular case. Generally, the minimum aspect of an indeterminate sentence reflects an acceptable period of confinement and punishment in the event of satisfactory rehabilitation, while the maximum imposed represents the lawful period of incarceration absent satisfactory institutional adjustment and rehabilitative effort.[2] The Board of Parole then determines the maximum expiration or release date of an indeterminate sentence within that judicially imposed range and in accordance with statutory guidelines for the exercise of its quasi-judicial function. In a proper implementation of this sentencing model, the Board assumes and performs the additional and essential function of "leveling" sentences and correcting unjustified sentencing disparity across or from within jurisdictions, an aspect of sentencing that the appellate courts have generally declined to superintend.

In guidance of the Board's substantial discretionary parole release powers, the Executive Law provides:

> 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.

(Executive Law §259-i[2][c][A]).

[2] In this case, where the petitioner was convicted upon his plea to lesser crimes than those charged, the sentence reflects the concurring views of the sentencing judge and the district attorney.

The statute further delineates the criteria that must be considered by the Board in a parole release application:

> (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 federal government * * * and (v) any statement made to the board by the crime victim or the victim's representative * * *.

(id.). Additionally, where as here, the sentencing court, not the Board, has set the minimum term of imprisonment, the Board must also consider:

> (I) 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 pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest and prior to confinement; and (ii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement

(Executive Law §259-i[2][c][A]; Executive Law §259-i[1][a]). Finally, it is required when parole release is denied " ... the inmate shall be informed in writing ... of the factors and reasons for such denial of parole ..." and that "[s]uch reasons shall be given in detail and not in conclusory terms." (Executive Law §259-i[2][a]).

It is true that when deciding a parole release application, the Board must consider the circumstances, nature and seriousness of an inmate's offense(s) (see, Matter of Geames v Travis, 284 AD2d 843, appeal dismissed 97 NY2d 639). And the weight to be accorded the various statutory factors is generally within the Board's broad discretion (Matter of Johnson v Travis, 284 AD2d 686).

While in its determination the Board need not expressly discuss each statutory factor, it must provide the inmate with a proper hearing and consider only the statutorily defined criteria (Matter of King v New York State Div. Of Parole, 83 NY2d 788, 791). It has been said that in applying the statutory guidelines to the circumstances of an inmate's case in the exercise of a sound discretion, the Board performs a classically judicial task (Tarter v State of New York, 68 NY2d 511, 517-19).

But the Board's reliance on the "seriousness of the offense" is not beyond all review. While the Board may place heavy emphasis upon the serious nature of petitioner's crimes (see, Matter of Lue-Shing v Pataki, ___ AD2d ___, ___ NYS2d ___, 2002 WL 31947878, citing, Matter of Henderson v New York State Div. of Parole, 295 AD2d 678, 679; Matter of Killeen v Travis, 291 AD2d 600, 600-601; Matter of Collado v. New York State Div. of Parole, 287 AD2d 921), it is error for the Board to conclude, as it did here, that the "serious nature of the instant offense precludes early release [emphasis added]." By legislative prescription, petitioner's crimes and indeterminate sentences are parole eligible (see, Penal Law, §70.40), and "it is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors to every person who comes before it"(Matter of King v New York State Div. of Parole, 190 AD2d 423, 431, affd 83 NY2d 788). There is no exception for persons convicted of manslaughter, gang related crimes, weapons or other violent crimes. To deny parole exclusively on the seriousness of petitioner's crimes there must have been "some significantly aggravating or egregious circumstances surrounding commission of the particular crime" (id., at 433). Neither the record in this case nor the Board's written decision reveal a factual basis indicating the presence of "significantly aggravating or egregious circumstances" surrounding petitioner's commission of the instant crimes. Indeed, the record is wholly silent with respect to petitioner's personal conduct. It is not even clear whether petitioner was an active

aggressor in the gang-related crimes, or whether he was convicted upon accessorial or accomplice liability. Thus, respondent's reliance on the "seriousness" of his crimes can be attributed only to the fact that he was convicted of crimes that are categorized as violent felonies. Notably absent from the record and from the Board's decision is any indicia that it considered whether this petitioner 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," as required by Executive Law §259-i(2)(c)(A).

Moreover, on this record, the Board's decision lacks the detail of factors and reasons required by Executive Law §259-i(2)(a), as it is insufficient for the Board to do no more than merely "note" this petitioner's "positive adjustment to incarceration." Petitioner's exemplary institutional record — not a single misbehavior report, academic achievements with honors, excellent work record and institutional adjustment, coupled with petitioner's repeated expressions of remorse — exemplifies the "strong rehabilitative component" (Matter of Salmon v Travis, 95 NY2d 470, 477) underlying the statutory scheme and inherent in an indeterminate sentencing structure.

To hold that the Board's statement of the factors and reasons for denial in this case is sufficient would condone the Board's apparent disregard of the rehabilitative component of the indeterminate sentencing and parole statutes. "Noting"an inmate's positive institutional adjustment or achievements in the written decision is not tantamount to considering them in a fair, reasoned and individualized manner. Indeed, such cursory treatment turns on its head the reformative or rehabilitative principle underlying an indeterminate sentence. This can only serve as a gross disincentive to inmates contrary to the overall ends of a sound penal and corrections policy. Equally troubling on the facts and circumstances of this case is the Board's failure to address or to

acknowledge, contrary to statute, the favorable comments of the sentencing Judge commending petitioner's sincere remorse, and expressing the Judge's expectation that petitioner would be released at about age twenty seven, i.e., at expiration of his minimum sentence, to assume a productive and repentant life.[3]

The Board's exclusive reliance on the seriousness of petitioner's crimes is not supported by this record, and the Board's failure to adequately explain its denial of parole, particularly in light of petitioner's most remarkable institutional and rehabilitative record, is improper. Thus, the determination bears the hallmarks of arbitrary decision making.

Overarching this case are the contentions underlying petitioner's fourth cause of action — that the Parole Board is following an Executive policy initiative to curtail parole for all violent felons. The petition avers that annually since 1995 the Governor has called for the elimination of parole (see, L 1995, at 2274 ["We must end parole for violent felons."]; L 1996, at 1835-36 ["(W)e will continue to strengthen our criminal justice laws ... Under our plan, criminals who commit one violent felony will not and cannot ever be released on parole."]; L1997, at 1887 ["This year we must end parole for all violent felons."]; L1998, at 1443 ["And, it's time to end parole for all violent felons."]; L1999, at 1441 ["Now we must take the next and last step in reforming our system of parole. We must end it."]; L 2000, at A-10 ["Last year, I asked for your support in ending parole for all felons ... Today, I renew that call."]).

In addition, the petition and accompanying exhibits outline a series of statements, denied generally but not specifically addressed or disputed in the answering papers, attributed to

[3] Like sentiment was expressed by the sentencing Judge during petitioner's incarceration in two favorable recommendations for work release.

various Executive branch policy makers and officials. Without regard to the truth of such statements and the innuendo therein, at the very least the making of them raises a concern that such sentiments have invaded parole release decision making. For example, Governor Pataki "told the parole board to carefully review inmates with violent histories, and ... don't worry about prison capacity..." (Attributed to K. Lapp, Director of Criminal Justice, in M. Pfeiffer, "Parole Denials Negate Crime Drop", Poughkeepsie Journal, November 6, 2000, at 1A); "the board has come to appreciate a fundamental principle of this administration: Violent offenders should not be released early and allowed back on the streets." (Attributed to M. Weiss, Division of Criminal Justice Services in "Easy Parole Goes By the Board, New York Post, March 4, 1996, at 12); the Division "has gotten the message" (Attributed to M. Hayden, Assistant Director of Operations, Board of Parole, id.).

Against the backdrop of these statements, it is not seriously disputed that since 1995 there has been a sharp decline in parole release for violent felons, from about fifty one percent in 1994 to thirty percent in 1997. In the same period, there was an even sharper decline for homicide offenders from twenty eight percent to nine percent. The petition further alleges, and it is not specifically denied, that parole release for homicide offenders has now declined to less than five percent. Clearly, something has changed at the Parole Board. From this record there is an undeniable inference that the Board has "gotten the message"; that violent offenders are not being granted release before the expiration of their maximum terms; and that the Board is de facto implementing Executive policy by curtailing parole for violent felons.

If that is as it appears, the Board has clearly acted ultra vires in this case That is not to say that parole release philosophy as a component of the State's penal and corrections policy may not change or adapt to changed circumstances over time. But in the guise of a for-the-moment

emphasis on the "seriousness of the offense," the Board may not abrogate the statutory right of an inmate serving an indeterminate sentence for manslaughter to a fair, reasoned and individualized parole release determination reached in accordance with applicable law. This State may be in transition to determinate sentencing and the abolition of traditional parole for all felons, but that may not be imposed by administrative fiat on this inmate and the class of inmates similarly situated. Parole release consideration in accordance with legislatively prescribed guidelines remains a statutory obligation imposed on the Board. And it is still the public policy of this State that parole constitutes a "vital element in the indeterminate sentencing process..." (L 1977, c. 904, §1, supra). The Board may not ignore that extant policy and its obligation to this petitioner even if current law and Executive policy have taken a different direction. Nor may the Board read the "strong rehabilitative component" (Matter of Salmon v Travis, supra) out of the statutes, thereby converting an indeterminate sentence to a determinate one, irrationally enlarging a minimum sentence, and skewing the entire indeterminate sentencing process.

In sum, there may be a rational basis for denying this petitioner's application for parole release, but the instant decision does not set it forth, nor may facts supplying a rational basis be found in the instant record. Rather, it appears on this record that petitioner was denied parole in furtherance of an Executive policy to deny him release because he is among the class of persons convicted of violent felony offenses and without due regard, as statutorily required, to petitioner's rehabilitation and the other factors set forth in Executive Law §259-i. On this record, the Board erroneously determined that the nature of petitioner's crime precluded parole release, the written reasons for denial of parole are insufficient, the determination was not reached in accordance with law, and the decision is so irrational as to border on impropriety. Accordingly, and for all of these

reasons, it is

ORDERED, that the petition is GRANTED, the determination denying parole is annulled, and the matter is remanded to the Board of Parole for a prompt re-hearing before a new panel and a decision not inconsistent with this Court's decision.

This memorandum shall constitute the Decision, Order and Judgment of this Court. All papers including the original of this Decision are being sent to respondent's attorney. The signing of this Decision does not constitute entry or filing. Respondent's attorney shall comply with the applicable provisions of the CPLR respecting filing, entry and notice of entry.

SO ORDERED.

ENTER JUDGMENT.

Dated: Albany, New York
February 7, 2003

Edward A. Sheridan, A.J.S.C.

2-13-03

PAPERS CONSIDERED:
(1) Order to Show Cause, signed May 10, 2002;
(2) Verified Petition, sworn to April 23, 2002;
(3) Petitioner's Memorandum of Law, dated April12, 2002, with exhibits;
(4) Verified Answer, dated August 20, 2002, with exhibits A-H;
(5) Affirmation of Nelson R. Sheingold, Esq., dated August 20, 2002;
(6) Petitioner's Reply, dated September 9, 2002.