November 2019

Decision in CPLR Article 78 proceedings - Kelly, Michael P. (2017-07-28)

To commence the 30 day 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of

MICHAEL P. KELLY - 86C0222,

Petitioner,

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

NEW YORK STATE BOARD OF PAROLE,

Respondent.

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DECISION & ORDER

Index No. 580/2017

Sequence No. 1
Motion Date: 5/26/17

GROSSMAN, J.S.C.

The following papers, numbered 1 to 23, were considered in connection with Petitioner's Order to Show Cause, dated March 20, 2017, seeking an Order, inter alia, annulling the Parole Board's denial of his parole application, and ordering a de novo hearing.

PAPERS	**NUMBERED**
Verified Petition/Exh. 1/Exhs. A-F/Exh. 2	1-9
Respondents' Answer and Return/Exhs. 1-13[1]	9-22
Petitioner's Reply	23

On February 5, 1986, Petitioner Michael P. Kelly was convicted of murder in the second degree for smothering his four-year-old son to death as he slept. The Court sentenced Petitioner

[1]The Court also reviewed, *in camera*, confidential documents submitted by Respondent, as part of these exhibits.

to an indeterminate term of imprisonment of 25 years to life. Petitioner had plead guilty. At the time of his plea, Petitioner was 27 years old and it was his first conviction.

On May 17, 2016, Petitioner appeared before a 2-member Parole Board for a de novo hearing of his October 2015 hearing. By then, he had served 31 years of his sentence, and this was his 5th review. The Board denied Petitioner parole, stating (Answer, Exh. 5):

> Denied – Hold for 24 months
> 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 your release at this time is incompatible with the welfare of society. To release at this time would so deprecate the seriousness of the offense, as to undermine respect for the law. This decision is based on all required statutory factors including your risk to the community, rehabilitative efforts, needs for a successful reintegration, institutional adjustment and release case plans, sentencing minutes, community support and opposition to your release. The serious, heinous nature of the instant offense of murder 2 involved your causing the death of your four year old when you smothered him with a pillow while he was sleeping. You were convicted of murder: intention and criminal possession weapon 4th degree in regards to the instant offense. This is your only crime of conviction. Your actions clearly displayed a total disregard for the sanctity of human life when you intentionally took the life of this young, vulnerable victim, who was entrusted in your care and you viciously violated that trust. Your positive efforts, parole packet, and disciplinary history is also duly noted. However, all statutory factors considered, discretionary release is not appropriate at this time for the panel to release would trivialize the tragic, senseless loss of life which you caused.

On October 17, 2016, Petitioner appealed the denial. In that appeal, Petitioner argued that: (1) the Board's decision was pre-determined; (2) the Parole Board improperly based its decision to deny parole release solely on the nature of the instant offense; (3) the Board made no finding of reasonable probability; (4) the Board erred in basing its determination on Petitioner's mens rea from over 31 years ago; and (5) the Parole Board failed to provide Petitioner with future guidance in its determination as required by law (Answer, Exh. 6). The Appeals Unit affirmed the Parole Board's determination (Answer, Exh. 7).

Petitioner now brings the following application, arguing that pursuant to CPLR §7803(3), the action taken by Respondent of denying Petitioner release to parole was irrational, bordering on impropriety, as well as being arbitrary and capricious. Petitioner argues, inter alia, that Respondent's decision was pre-determined, which is apparent by Respondent's use of boiler-plate language in its decision, and merely gave lip service to Petitioner's rehabilitative efforts. Petitioner states that Respondent's decision to deny parole was based only on the nature of the instant offense, and gave only cursory reference to the other statutory factors.

According to CPLR §7803(3), "[p]arole release determinations are discretionary and will not be disturbed as long as they meet the statutory requirements of Executive Law §259-i." Matter of Friedgood v. New York State Bd. of Parole, 22 A.D.3d 950 (3d Dept. 2005). "While all relevant statutory factors must be considered, respondent is not required to give them equal weight or to articulate each and every factor that was considered in making its decision." Friedgood, supra. However, "decisions of the Board require flexibility and discretion, and the guidelines used to arrive at these decisions are not meant to establish a rigid, numerical policy invariably applied across-the-board to all [inmates] without regard to individualized circumstances or mitigating factors." Matter of Montane v. Evans, 116 A.D.3d 197, 202 (3d Dept. 2014)(internal quotations omitted).

Upon review, this Court's finds that Respondent's decision to deny parole to Petitioner was arbitrary and capricious. Despite inter alia, Petitioner's no history of violence, no prior contact with the criminal justice system, his accomplishments while in prison, and his planned employment and relocation upon release, the Board summarily denied his application without any explanation other than by off-handedly reiterating some of the statutory factors, and focusing

on the instant offense. The minimal attention, barely lip service, given to these factors cannot be justified given the amount of time already served. The "Parole Board denied petitioner's request to be released on parole solely on the basis of the seriousness of the offense," and its "explanation for doing so was set forth in conclusory terms, which is contrary to law." Matter of Perfetto v. Evans, 112 A.D.3d 640, 641 (2d Dept. 2013), citing Matter of Gelsomino v. New York State Bd. of Parole, 82 A.D.3d 1097, 1098 (2d Dept. 2011); see also Matter of Thwaites v. New York State Bd. of Parole, 34 Misc.3d 694, 701 (Sup.Ct. [Orange] 2011); see generally Matter of Silmon v. Travis, 95 N.Y.2d 470, 476 (2000). Moreover, the fact that the Board did not even address Petitioner's rehabilitative efforts and education while incarcerated in its determination, as well as a comparison of the similar, yet almost verbatim, language used in Petitioner's four previous denials of parole (Petition, Exh. F), lends the Court to conclude that denial of parole was an inevitable event.

The Court acknowledges, and does not minimize, that this case involved the death of a young child. However, as the Legislature determined that a murder conviction per se should not preclude parole, the Court finds that there must be a showing of some aggravating circumstances beyond the seriousness of the crime at hand. See Matter of Platten v. NYS Bd. of Parole, 47 Misc.3d 1059, 1065 (Sup. Ct. Sullivan Co. 2015) (murder conviction per se does not preclude parole). Therefore, this Court finds that a denial of parole is not a foregone conclusion. And, on the record before it, the Court finds that the record is devoid of aggravating circumstances beyond the crime itself to justify a denial of parole.

As a final note, this Court cannot keep silent, finding once again, that despite the growing body of decisions that have been issued from the courts over the recent years, Respondent

continues to generate boilerplate rulings that fail to address the specific details of each case when determining parole. This Court is unsure why the Parole Board cannot individualize each determination in a way to assist the courts and the petitioners to understand the reasons for a parole denial, and the steps an inmate would have to take in order to ensure the possibility of parole upon his or her next appearance before the Board. Matter of Stokes v. Stanford, 43 Misc.3d 1231(A), *1 (Sup. Ct. [Albany] June 9, 2014) ("Absent any discussion of what petitioner needs to do to improve his chances of release at the next parole hearing, the determination lacks a rational basis in the record."); Matter of McBride v. Evans, 42 Misc.3d 1230(A), *3 (Sup. Ct. [Dutchess] January 13, 2014)(Posner, J.) (Board left Petitioner with no guidance as to what he can do to improve his chances of being released at his next parole hearing). The Court hopes that in the future, it will not be presented with the typical "cut and paste" decisions it has been seeing.

In light of the above, the Court need not address any of Petitioner's other assertions.

As such, it is hereby

ORDERED that the petition is granted and the determination is annulled; and it is hereby

ORDERED that the matter is remitted to Respondent for a de novo hearing on the matter of Petitioner's release to parole supervision, focusing on Petitioner's rehabilitative efforts while incarcerated; and it is further

ORDERED that said hearing is to be conducted within sixty (60) days of the date of this Court's Decision and Order, and a decision is to be issued within thirty (30) days of the date of such hearing.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
July 28, 2017

HON. VICTOR G. GROSSMAN, J.S.C.

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