Decision in CPLR Article 78 proceedings - Kinard, Lamont

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

In the Matter of the Application of

LAMONT KINARD, - 93A0552,

Petitioner,

DECISION, ORDER AND JUDGMENT

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

Index No. 2174/17

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

The following papers were read and considered on this Article 78 petition:

ORDER TO SHOW CAUSE
PETITION
EXHIBITS 1 - 2

ANSWER AND RETURN
EXHIBITS 1 - 12

REPLY

Petitioner brought this proceeding pursuant to CPLR Article 78 to review a determination of the Board of Parole denying his request for parole release. Petitioner was convicted in 1993 after pleading guilty to manslaughter in the first degree and two counts of assault in the first degree. He was sentenced to an aggregate indeterminate term of fourteen to forty years. The offenses stemmed from a 1991 incident when petitioner, who was 17 years old at the time, got into a dispute with three other teenage boys while walking to school. Petitioner ultimately fired a semiautomatic pistol at the boys killing one and injuring the other two. Petitioner had no prior criminal history. On February 1, 2017 petitioner appeared for either his seventh or eighth appearance before the Parole Board. He was 43 years old. He had been incarcerated for over twenty-five years, eleven years beyond the minimum sentence imposed. In a decision dated February 6, 2017, the Board denied release and

ordered petitioner held for an additional nineteen months. Petitioner's administrative appeal was denied and this proceeding followed.

Petitioner maintains that the Board erred in not considering his age and attendant circumstances at the time he committed his offenses, focusing exclusively on his crimes of conviction to the exclusion of other requisite statutory factors, failing to appropriately consider his COMPAS assessment and improperly considered community opposition to his release.

Pursuant to Executive Law §259-i(2)(c), the New York State Board of Parole is required to consider a number of statutory factors in determining whether an inmate should be released to parole. See Matter of Miller v. NYS Div. of Parole, 72 AD3d 690 (2nd Dept. 2010). The parole board must also consider whether "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 the law." 9 NYCRR 8002.1. A parole board is not required to give equal weight to each statutory factor, nor is it required specifically to articulate every factor considered. See Matter of Huntley v. Evans, 77 AD3d 945 (2nd Dept. 2010). It is further permitted to place a greater emphasis on the gravity of offense committed. See Matter of Serrano v. Alexander, 70 AD3d 1099, 1100 (3rd Dept. 2010). However, in the absence of aggravating circumstances, a parole board may not deny release solely on the basis of the seriousness of the offense. Huntley v. Evans, 77 AD3d at 947; King v. New York State Div. of Parole, 190 A.D.2d 423 (1st Dept. 1993). Moreover, while the board need not consider each guideline separately and has broad discretion to consider the importance of each factor, the board must still consider the guidelines. Executive Law § 259–i(2)(a). Finally, the board must inform the inmate in writing of the factors and reasons for denial of parole and "[s]uch reasons shall be given in detail and not in conclusory terms." Executive Law §259-i(2)(a); Malone v. Evans, 83 AD3d 719 (2nd Dept. 2011). A determination by a parole board whether or not to grant parole is discretionary, and if made in accordance with the relevant statutory factors, is not subject to judicial review absent "a showing of irrationality bordering on impropriety." Matter of Russo v. NYS Bd. of Parole, 50 NY2d 69, 77 (1980).

Executive Law §259-c(4) was amended in 2011 to require the board to establish new procedures to use in making parole determinations. The statutory amendment was intended to have parole boards focus on an applicant's rehabilitation and future rather than giving undue weight to the crime of conviction and the inmate's pre-incarceration behavior. To assist the members of the board in taking this approach when making parole determinations, the amendment required the establishment of written guidelines incorporating risk and needs principles to measure an inmate's rehabilitation and likelihood of success upon release. See Ramirez v. Evans, 118 AD3d 707 (2nd Dept. 2014). In response, the board of parole adopted the COMPAS (Correctional Offender Management Profiling for Alternative Sanction) assessment tool. A COMPAS assessment was prepared in connection with petitioner's February 1, 2017 appearance before the parole board.

The Board questioned petitioner at his parole hearing about his crimes of conviction. Within the context of that discussion they inquired about his family life at that time, his lifestyle and his decision to carry a loaded weapon to school. Petitioner gave a full account of the events that led to the shootings and the juvenile mindset that he had at the time. The Board further inquired about

petitioner's marriage of thirteen years, a 2015 Tier II infraction, his COMPAS risk assessment which found him at low risk for felony violence, arrest or absconding, his plans and employment prospects upon release, his institutional achievements and letters sent to the Parole Board on his behalf. Petitioner became emotional when discussing his crimes of conviction, explaining that he had matured considerably and was no longer the same 17 year old who committed those crimes. He further expressed remorse for his actions.

The Board's two page decision denying parole referenced petitioner's efforts towards rehabilitation, his COMPAS risk assessment, "strong release plans" and acknowledged petitioner's growth and productive use of his time while incarcerated. The Board further noted, however, that his record included a Tier II infraction in which he was charged with challenging the authority of a Correction officer and that it was concerned about petitioner's ability to effectively deal with rules. The Board also noted community opposition and opposition by the Staten Island District Attorney. The Board ultimately concluded that discretionary release was not warranted because it would be incompatible with the welfare of society and deprecate the serious nature of petitioner's crimes so as to undermine respect for the law.

Petitioner claims that the Board erred as a matter of law by not considering the significance of his youth and its attendant circumstances at the time of the commission of his crimes. The Supreme Court has held that the Eighth Amendment's prohibition on cruel and unusual punishment bars the imposition of a sentence of life without parole on a juvenile. See Graham v. Florida , 562 US 48 (2010); Montgomery v. Louisiana , 136 S.CT. 718 (2016). This prohibition requires such consideration at a parole hearing for a person serving a life sentence for a crime committed as a juvenile. Hawkins v. NYS DOCCS, 140 AD3d 34 (3rd Dep't 2016). Petitioner is not serving a life sentence. For the reasons set forth in Montgomery v. Louisiana, supra, a Parole Board should consider the significance of an inmate's youth and its attendant circumstances at the time of the commission of a crime where such crime was committed when the inmate was a juvenile. Petitioner fails to demonstrate in this proceeding that his Eighth Amendment rights under the United States Constitution were violated. Such rights are not implicated here because petitioner is not serving a life sentence. Moreover, there was ample discussion of petitioner's youth at the time he committed the instant offenses.

However, the Board acknowledged that it reached its determination, in part, based upon letters of community and other opposition. It was error for the Board to rely on that opposition. It is well established that a Parole Board is not allowed to employ its own penal philosophy in making determinations as such factor is not encompassed in Executive Law §259-i(2)(c); King v. NYS Division of Parole, 83 NY2d 788 (1994). The content of the community opposition that the Board references is not before this court as it was not provided as part of the respondent's answer and return. However, the Board expressly stated that it considered community opposition as a basis for its decision. The consideration of opposition submitted by individuals not referenced in Executive Law 259-i(2)(c)(A) is not permitted. As members of the Parole Board are not permitted to apply their own penal philosophy in making release determinations, the Parole Board may not deny parole based on opposition from unknown third parties expressing their penal philosophies. Presumably, such individuals have no first hand knowledge of facts relevant to the Parole Board unlike those individuals expressly set forth in Executive Law §259-i(2)(c)(A). The court rejects respondent's

contention that such consideration is authorized under Executive Law §259-i(B). That section does not address or govern the individuals who are authorized to provide information to a Parole Board with respect to a release application. It addresses the confidentiality of identifying information provided to the Parole Board. As the Parole Board's determination was affected by an error of law, it is

ORDERED that the petition is granted. The February 6, 2017 determination of the Parole Board denying parole release is vacated and the matter is remanded to the Parole Board to make a *de novo* determination on petitioner's request for parole release and to give ample consideration to petitioner's positive and productive accomplishments during incarceration and to what the Board itself called petitioner's "strong release plans." Such determination shall be made within sixty days of the date of this decision and order.

The foregoing constitutes the decision, order and judgment of the Court.

Dated: January 19, 2018
Poughkeepsie, New York

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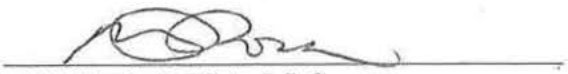

MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.