November 2019

Decision in CPLR Article 78 proceedings - Gordon, John (2016-06-17)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
JOHN GORDON, #75-B-0127,

03753985Z

Petitioner,

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

NOTICE OF ENTRY

-against-

Index No. 788-16

TINA M. STANFORD, CHAIRPERSON BOARD OF PAROLE, NEW YORK STATE DEPARTMENT OF CORRECTIONS & COMMUNITY SUPERVISION,

May 27, 2016

Judge McGrath

Respondent.

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order in this action entered in the Office of the County Clerk of Albany County on June 29, 2016.

Dated: Albany, New York
July 18, 2016

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At a Special Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 27th day of May 2016

PRESENT: HON. PATRICK J. McGRATH
Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
JOHN GORDON, 75-B-0127,

Petitioner,

DECISION AND ORDER
INDEX NO. 788-16

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

-against-

TINA M. STANFORD, CHAIRPERSON BOARD OF PAROLE, NEW YORK STATE DEPARTMENT OF CORRECTIONS & COMMUNITY SUPERVISION,

Respondent.

APPEARANCES: JOHN GORDON
Self Represented Petitioner

HON. ERIC T. SCHNEIDERMAN
Attorney General for the State of New York
(Denise P. Buckley, of Counsel)
For the Respondent

McGRATH, PATRICK J., J.S.C.

Petitioner, an inmate at the Shawangunk Correctional Facility, is challenging the respondent's April 21, 2015 determination denying him parole and directing that he be held for an additional 24 months. Respondent opposes the petitioner.

On September 1, 1974, two New York City police officers stopped a car driven by

petitioner's co-defendant, where petitioner was a passenger. Examination of the driver's papers revealed a violation of the vehicular code, and the driver was ordered out of the car, handcuffed, and arrested. Petitioner, who was eighteen years old, got out of the car and started firing at the officers over the roof of the car. One officer was killed by what a subsequent ballistics report indicated was a bullet shot from petitioner's gun, which punctured the victim's lung and main artery. The other officer returned fire, but the petitioner and his co-defendant ran from the scene. They were apprehended a short time later. On January 2, 1975, petitioner was found guilty after a jury trial of Murder[1], Attempted Murder and Possession of a Weapon. He was sentenced to twenty-five years to life on the top count, and concurrent time on the lesser charges.

Petitioner had no criminal history prior to the instant offense.

Petitioner appeared for his ninth parole board appearance on April 21, 2015, after serving approximately 40 years of his sentence. The hearing officer asked the petitioner why a traffic stop escalated to murder, and petitioner stated that he was not trying to kill the officer, but only wanted his friend to escape. The hearing officer, who stated that he thought the officer had been shot in the head, indicated that firing a gun at people always carries the risk of killing them. Petitioner acknowledged this, but claims he was thinking irrationally at the time, because he was young, homeless and abusing drugs. The hearing officer indicated that while petitioner had a poor disciplinary record up to 1985, which included violence on staff on other inmates, petitioner had a Tier I in 2001 and a Tier II in 2007, and a clean record thereafter. The hearing officers indicated that petitioner completed ASAT twice, as well as RSAT, and obtained his Associates Degree. Petitioner indicated that he is now completely computer literate, and could obtain an entry level position. The board noted that petitioner, a Jamaican citizen, would be deported if released. The hearing officer indicated that there was "significant community opposition" to his release. When asked if there was anything he wanted to address, petitioner expressed his remorse and apologies to the victim's family and the New York City Police Department.

In the decision denying parole, the board indicated that it had considered petitioner's institutional adjustment, risks and needs assessment, his clean disciplinary record since his last appearance, positive programming, as well as petitioner's need for successful re-entry to society. The board found "more compelling" that the instant offense involved the murder and attempted murder of police officers, the "serious and senseless loss of life" and the "callous disregard for human life and respect for the law."

Petitioner now claims 1) there is no record support for the board's decision that petitioner's release is not compatible with the welfare an safety of society, and would so deprecate the serious nature of the crime as to undermine respect for the law; 2) the board failed to consider whether release to deportation with mandatory removal was appropriate, in violation of Executive Law 259-(1)(c)(a); 3) the board only gave a cursory review to the COMPAS risk assessment, and did not explain how it was utilized; 4) the board did not mention community opposition to petitioner's

1. At the time of the crime, Murder and Attempted Murder were degreeless crimes.

release in the interview or the decision denying parole, which is error if the board relied upon it; 5) parole board focused solely on the instant offense and failed to consider his institutional achievement and other statutory factors; and 6) the board relied on errroneous information, specifically, that the officer had been shot in the head.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, provides, in relevant part, as follows:

> "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 the 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 . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate . . . (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 . . ."

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5)) unless there has been a showing of irrationality bordering on impropriety. *See* Silmon v. Travis, 95 NY2d 470; Vasquez v. Dennison, 28 AD3d 908; Webb v. Travis, 26 AD3d 614; Coombs v. New York State Division of Parole, 25 AD3d 1051. Unless the petitioner makes a "convincing demonstration to the contrary" the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See* Nankervis v. Dennison, 30 AD3d 521; Zane v. New York State Division of Parole, 231 AD2d 848; Mc Lain v. Division of Parole, 204 AD2d 456.

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law § 259-I. *See* Matter of Siao-Pao, 11 NY3d 777 (2008); Matter of Whitehead v. Russi, 201 AD2d 825 (3d Dept. 1994); Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3d Dept. 1993). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (Matter of Matos v New York State Board of Parole, 87 AD3d 1193 (3d Dept. 2011); Matter of Dudley v Travis, 227 AD2d 863 (3d Dept. 1996). 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 Davis v Evans, 105 AD3d 1305 (3d Dept. 2013); Matter of MacKenzie v Evans, 95 AD3d 1613 (3d Dept. 2012); Matter of Matos v New York State Board of Parole, *supra*; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-82 (3d Dept. 2010). In this case, the board considered the proper statutory factors, including petitioner's improved disciplinary conduct and his programming, but placed more weight on the murder and attempted murder of two police officers, which the board is entitled to do. Further, the Court finds that the record, on a whole, supports respondent's position that petitioner's release is not compatible with the welfare and safety of society, and would so deprecate the serious nature of the crime as to undermine respect for the law, and therefore, the decision to deny parole was not irrational bordering on impropriety.

Contrary to petitioner's contention, the Board did note that there was a deportation order on file here, however, "[a] deportation order is only one factor to consider in determining parole release and the existence of such order does not require an inmate's release." Matter of Kelly v Hagler, 94 AD3d 1301, 1302 (2012). Rather, the decision of the Board to deny parole release is discretionary, based upon its evaluation of several statutory guidelines, including the existence of deportation orders. Executive Law § 259-i [2] [c] [A] [iv]; [d]; Matter of Hamilton v New York State Div. of Parole, 119 AD3d 1268, 1270 (2014).

Next, petitioner states that if the board relied upon community opposition to his release, respondent should have stated this in the interview and in the decision in order to facilitate judicial review. Petitioner indicates that he was made aware in past interviews that there is a victim impact statement, as well as a letter from ex-Police Commissioner Ray Kelly opposing petitioner's release. In this case, the hearing officer did mention the "significant community opposition" to petitioner's release during the interview and stated that it would be a consideration for the board, in addition to the other statutory factors. This Court notes that the Board is required to consider victim impact statements and that such statements "shall be maintained in confidence." 9 NYCRR § 8002.4(e). To the extent that petitioner is referencing Commissioner Kelly's letter, it appears that he was already made aware of the letter in a prior appearance, and was aware that it appeared in his file. While community opposition is not specifically mentioned in the board's decision, the Court notes that 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 Davis v Evans, *supra*; Matter of MacKenzie v Evans,supra; Matter of Matos v New York State Board of Parole, *supra*; Matter of Young v New York Division of Parole, *supra*.

Although petitioner contends that the hearing officer was incorrrect when he stated that petitioner shot the officer in the head, rather than the torso, there is nothing in the record to indicate that this alleged erroneous information served as a basis for the denial of his parole release. *See* Matter of Richburg v New York State Bd. of Parole, 284 AD2d 685, 686 (2001), appeal dismissed and lv denied 97 NY2d 636 (2001); Matter of Morel v Travis, 278 AD2d 580, 581 (2000), appeal dismissed and lv denied 96 NY2d 752. Further, petitioner "voiced no objection at that time. It was not until his administrative appeal that he raised this objection and it was therefore waived." Shaffer

v. Leonardo, 179 AD2d 980 (3d Dept. 1992).

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit. The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: June 17, 2016
Albany, New York

PATRICK J. McGRATH
Supreme Court Justice

Papers Considered:

1. Verified Petition, dated February 17, 2016, with annexed Exhibits.
2. Answer, dated May 18, 2016, with annexed Exhibits A-K; Memorandum of Law, dated May 18, 2016.