December 2019

Decision in Art. 78 proceeding - Ortiz, Gilberto (2012-12-03)

STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of
GILBERTO ORTIZ, #94-A-7357,

Petitioner,

-against-

DECISION
AND
JUDGMENT

ANDREA W. EVANS, CHAIRWOMAN OF THE
NEW YORK STATE DIVISION OF PAROLE,

Respondent.

For a Judgment Pursuant to Article 78 of the
Civil Practice Law & Rules of the State of New York.

Index No. 3933-12
(RJI No. 01-12-ST3874)

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

GILBERTO ORTIZ, #94-A-7357
Self Represented Petitioner
Auburn Correctional Facility
135 State Street - P.O. Box 618
Auburn, New York 13024

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL
Attorney for Respondent
(Brian J. O'Donnell, of counsel)
The Capitol
Albany, New York 12224

Hon. Richard M. Platkin, A.J.S.C.

Petitioner is an inmate at the Auburn Correctional Facility serving an indeterminate sentence of 15 years to Life upon a conviction for Murder in the 2nd Degree. Petitioner commenced this CPLR article 78 proceeding challenging respondent's determination of October 24, 2011, which denied him release to parole and ordered him held for reappearance in 24 months. Respondent opposes the petition through an answer.[1]

The verified petition raises approximately one dozen claims: (1) the Parole Board failed to consider the required statutory factors; (2) the Parole Board failed to utilize a risk and needs assessment; (3) the decision was conclusory; (4) the Board failed to consider the favorable statements made by the sentencing judge, district attorney and defense attorney; (5) the Board failed to review the sentencing minutes; (6) the Board failed to consider mitigating factors; (7) the Board's decision contained erroneous information; (8) the Board failed to use a Transitional Accountability Plan; (9) the Board failed to solicit a letter of recommendation from petitioner's attorney; (10) the Board improperly focused on the instant offense; (11) the Board did not adequately interview petitioner; and (12) the Board's decision effectively re-sentenced petitioner.

The claim concerning the risk assessment criteria and the Transitional Accountability Plan ("TAP") arise out of 2011 amendments to Executive Law § 259-c (4). Specifically, Executive Law § 259-c (4) was amended to require the Parole Board to "establish written procedures for its use in making parole decisions as required by law." These procedures "shall

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[1] As petitioner's administrative appeal was not processed within the statutory time frame, petitioner may deem his administrative remedy to be exhausted and may obtain immediate judicial review of the underlying determination (*Graham v New York State Div. of Parole*, 269 AD2d 628 [3d Dept 2000]; *leave to appeal denied* 95 NY2d 753 [2000]; *see* 9 NYCRR § 8006.4 [c]).

incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision" (*id.*). Additionally, Executive Law § 259-i(2)(c) was amended to consolidate into a single statute all of the factors that the Parole Board must consider in evaluating requests for discretionary release on parole.

In a memorandum dated October 5, 2011, the Chairwoman of the Board of Parole, Andrea W. Evans, set forth the following written guidance regarding the 2011 amendments:

> As you know, members of the Board have been working with staff of the Department of Corrections and Community Supervision in the development of a transition accountability plan ("TAP"). . .This instrument which incorporates risk and needs principles, will provide a meaningful measurement of an inmate's rehabilitation. With respect to the practices of the Board, the TAP instrument will replace the inmate status report that you have utilized in the past when assessing the appropriateness of an inmate's release to parole supervision. To this end, members of the Board were afforded training in the use of the TAP instrument where it exists. Accordingly, as we proceed, when staff have prepared a TAP instrument for a parole eligible inmate, you are to use that document when making your parole release decisions. In instances where a TAP instrument has not been prepared, you are to continue to utilize the inmate status report. It is also important to note that the Board was afforded training in September 2011 in the usage of the Compas Risk and Needs Assessment tool to understand the interplay between the instrument and the TAP instrument, as well as understanding what each of the risk levels mean.
>
> Please know that the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider has not changed through the aforementioned legislation. . . . Therefore, in your consideration of the statutory criteria set forth in Executive Law § 259-i (2) (c) (A) (i) through (viii), you must ascertain what steps an inmate has taken toward their rehabilitation and the likelihood of their success once released to parole

> supervision. In this regard, any steps taken by an inmate toward effecting their rehabilitation, in addition to all aspects of their proposed release plan, are to be discussed with the inmate during the course of their interview and considered in your deliberations.

In this case, there was no transition accountability plan ("TAP") or formal risk-assessment instrument prepared for petitioner.[2] Nonetheless, the administrative record does reflect that the Parole Board, through its review of petitioner's inmate status report, other institutional records and the personal interview, considered the steps taken by petitioner towards his rehabilitation and evaluated his likelihood of success if released to the community on parole supervision.

Thus, in denying parole, respondent permissibly relied upon the violent nature of petitioner's crime of conviction, Murder in the 2nd Degree, which involved petitioner shooting an innocent female victim to death in the presence of her 10-month-old child and wounding another bystander. Additionally, the Board's decision references petitioner's lack of past success on community release. Indeed, petitioner committed the crime of conviction while on release to parole for the violent felony offense of attempted robbery. And with respect to the steps taken by petitioner toward effecting his rehabilitation, the Board recognized petitioner's positive accomplishments, but still found discretionary release incompatible with the welfare and safety of the community. Under the circumstances, the Court is satisfied that the Board of Parole sufficiently incorporated risk and needs principles in measuring petitioner's rehabilitation and

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[2] Pursuant to Corrections Law § 71-a, which became effective on September 30, 2011, a TAP shall be developed "[u]pon admission of an inmate committed to the custody of the department". However, petitioner was received into State custody well before that date, and petitioner has failed to identify any other positive provision of law that requires the development or consideration of such a plan in connection with his review before the Parole Board.

assessing his likelihood of success if released to the community, in accordance with the written procedures distributed by the Chair of the Parole Board.

Also in 2011, Executive Law § 259-i (2) (c) was amended to set forth in a single section of law all of the factors that must be considered by the Parole Board in evaluating requests for discretionary release. These factors generally consist of: the inmate's institutional record; release plans; performance in any temporary release program; deportation orders; statements of the crime victim (or family members); the length of determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to Penal Law §§ 70.70 or 70.11 for certain enumerated felonies; the seriousness of the offense, including consideration of the pre-sentence report; any recommendations of the sentencing court; and the inmate's criminal record, including the nature and pattern of offenses and any previous probation or parole supervision.

Here, the record demonstrates that the Parole Board considered the required statutory factors in rendering its determination. For example, the Parole Board reviewed and discussed, *inter alia*, petitioner's instant offense, criminal history, institutional programming, plans upon release, family support and letters of support. Contrary to petitioner's arguments, the record demonstrates that the sentencing minutes were before the Board as well as all of the various recommendations, and petitioner has failed to demonstrate that the documents were not considered. Further, the Board had for its review the Inmate Status Report, as well as a parole package put together and submitted by the petitioner. Thus, the record demonstrates that the Parole Board complied with Executive Law § 259-i in all respects (*see Matter of Cox v New York State Division of Parole*, 11 AD3d 766, 767, *lv denied* 4 NY3d 703 [2005]).

Further, the Parole Board "is not required to give equal weight to each statutory factor" (*Matter of Zhang*, 10 AD3d at 829; *Matter of Collado v New York State Div. Of Parole*, 287 AD2d 921, 921 [3d Dept 2001]). Thus, while petitioner has endeavored to participate in institutional programing and keep a relatively clean disciplinary record, the Parole Board, in its discretion, must also weigh factors such as the gravity of the underlying crime. And, there is nothing in the record that supports petitioner's claim that the Board failed to consider the alleged "mitigating factors" involved in petitioner's brutal murder of a young mother while on parole release for another violent felony offense. Further, the Court declines to substitute its judgment for that of responsible parole officials as to whether petitioner's "release is compatible with the welfare of society" (*Matter of Richards v Travis*, 288 AD2d 504, 605 [2001]).

The Court also rejects petitioner's contention that respondent relied on inaccurate information. Petitioner claims that the respondent mistakenly believed that he was unsuccessful in community supervision in the past. While petitioner correctly notes that his parole supervision was not revoked, the fact of the matter is that petitioner committed the instant offense while upon release to parole.

Further, petitioner's contention that the Board failed to solicit a statement from his trial counsel is contradicted by the evidence of such solicitation set forth in the record.

To the extent that petitioner claims his constitutional right to parole has been violated, the Court concludes that petitioner has no protected liberty interest in obtaining release on parole (*see Matter of Warren v New York State Div. of Parole*, 307 AD2d 493, 493 [3d Dept 2003]; *Matter of Vineski v Travis*, 244 AD2d 737, 738 [3d Dept 1997], *lv denied* 91 NY2d 809 [1998]).

Further, the record demonstrates that petitioner was given meaningful notice and an opportunity

to be heard, along with a decision that "was sufficiently detailed to inform petitioner of the reasons for the denial of parole." (*Matter of Whitehead v Russi*, 201AD2d 825, 825-826 [3d Dept 1994].* Also, petitioner's argument that the Board's decision amounted to a re-sentencing is without merit (*Matter of Marsh v New York State Div. of Parole*, 31 AD3d 898 [3d Dept 2006]).

As petitioner has failed to demonstrate that the Parole Board's determination as a whole demonstrates irrationality bordering on impropriety, this Court declines to intervene (*see Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000]; *Matter of Cox*, 11 AD3d at 767).

Accordingly,[3] the petition is dismissed.

This constitutes the Decision and Judgment of the Court. The original Decision and Judgment and the materials submitted by respondent for *in camera* inspection are being returned to counsel for the respondent; all other papers are being transmitted to the County Clerk. The signing of this Decision and Judgment shall not constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and notice of entry.

Albany, New York
Dated: December 3, 2012

Richard M. Platkin, A.J.S.C.

Papers Considered:

Verified Petition, sworn to July 5, 2012, with attached exhibits A-E;
Verified Answer, dated September 27, 2012;
Affirmation of Brian J. O'Donnell, Esq., dated September 27, 2012, with attached exhibits A-L.

[3] The Court has considered petitioner's remaining arguments and claims and finds them all to be without merit.