December 2019

Decision in CPLR Article 78 proceedings - Pagillo, Joseph

STATE OF NEW YORK

SUPREME COURT COUNTY OF ALBANY

ORIGINAL

In the Matter of the Application of
JOSEPH PAGILLO, 91-A-3375,

Petitioner,

DECISION AND JUDGMENT
RJI No. 01-00-ST0557
Index No. 69-00

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

THE NEW YORK STATE BOARD OF PAROLE,

Respondent.

PRESENT: **HON. THOMAS D. NOLAN, JR.**
Supreme Court Justice

APPEARANCES: JOSEPH PAGILLO, 91-A-3375
Self-Represented Petitioner
Woodbourne Correctional Facility
Riverside Drive, Pouch No. 1
Woodbourne, New York 12788

ELIOT SPITZER
Attorney General of the State of New York
Attorney for Respondent
(Mirriam Z. Seddiq
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Petitioner was convicted in April 1991 in Suffolk County upon a guilty plea to first degree manslaughter and sentenced to a term of 8 ⅓ to 25 years in satisfaction of an indictment charging him with murder in the second degree. The charge against petitioner arose from the August 1990 shooting death of his father with whom petitioner resided. Petitioner was then 21 years old. By

all accounts, the victim was physically and emotionally abusive for years towards his nuclear family. Petitioner and his father had a particularly stormy relationship. The shooting took place after, what the record discloses, was a day of confrontational conduct by the deceased toward his son. Petitioner shot his father with a shotgun while the victim was in bed. The negotiated plea was based, in part, upon consistent psychological evaluations completed on behalf of the People and the defense which concluded that petitioner acted while in a state of extreme emotional disturbance stemming from the victim's constant abusive conduct towards petitioner which peaked as the consequence of the specific events which preceded the shooting.

Since his incarceration, petitioner has been a model inmate with a clean disciplinary history and a record of solid work and academic achievements. In March 1999 petitioner was afforded his initial hearing by the Parole Board. Petitioner's request to be released on parole was denied. An administrative appeal was unsuccessful.

This CPLR Article 78 proceeding was initiated in a timely fashion following affirmation of the Parole Board's determination. Petitioner avers that the determination should be vacated and set aside based upon the Parole Board's failure to apply the standard of review set in Executive Law § 259-i (2)(c)(A) and that the court should therefore order petitioner's immediate release to parole supervision or, in the alternative, direct that a new hearing be held. Respondent opposes the petition.

The law is firmly settled that actions of the Parole Board are discretionary and not subject to judicial review if made according to law. Matter of Briguglio v New York State Bd. of Parole, 24 NY2d 21 (1969); Matter of Anthony v New York State Div. of Parole, 252 AD2d 704 (3rd Dept., 1998). The courts will set aside a Parole Board's determination only in instances where

the process was flawed, Matter of King v New York State Div. of Parole, 83 NY2d 788 (1994) aff'g 190 AD2d 423 (1st Dept., 1993); Matter of Harris v New York State Div. of Parole, 211 AD2d 205 (3rd Dept., 1995) and not in cases which merely hinge on factual assessments even if the court disagrees with the outcome. Matter of Walker v Travis, 252 AD2d 360 (1st Dept., 1998); Matter of Garcia v New York State Div. of Parole, 239 AD2d 235 (1st Dept., 1997).

Executive Law § 259-i (2)(c)(A) 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 law.

The Parole Board reasoned , in denying petitioner's application, that:

> While we note your positive institutional adjustment, this is not an assurance of your ability to abide by the rules, standards and mores of society and, coupled with the severity of the instant offense wherein, after an argument, you shot your father, causing his death, leads the panel to determine that discretionary release does not serve the interests of society. We note your discipline and program records.

In evaluating parole applications the Board must consider two core issues: namely, whether there is a reasonable probability that an inmate, if released, will remain law abiding and if so, whether the release of the inmate will not be incompatible with society's welfare and undermine respect for law. Here petitioner astutely notes the Board held that it was not "assured" that petitioner would be law-abiding if released. The Board, whether intentionally or by careless language appeared to have held the respondent to a higher standard than the law requires. The determination is erroneous as a matter of law. In such instance, the court is required to remand

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the proceeding to the Parole Board for a new hearing. Matter of King v New York State Div. of Parole, 83 NY2d 788 (1994), aff'g 190 AD2d 423 (1st Dept., 1993); Matter of Harris v New York State Div. of Parole, 211 AD2d 205 (3rd Dept., 1995).

The determination of the Parole Board dated March 2, 1999 is annulled without costs, and the petition is granted to the extent that petitioner shall be afforded a de novo hearing by the Parole Board.

This constitutes the judgment of the court.

The original hereof together with all original pleadings are forwarded to the Attorney General for entry.

So adjudged.

DATED: May 31, 2000
Ballston Spa, New York

HON. THOMAS D. NOLAN, JR.
Supreme Court Justice