Decision in CPLR Article 78 proceedings - Patterson, Emmanuel

L.L. II

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of the Application of
EMMANUEL PATTERSON,

Petitioner,

v. **Index No. I-2011-4748**

MALCOLM R. CULLY, Superintendent,
Collins Correctional Facility, et al,

Respondents.

MEMORANDUM & ORDER

Michalski, J.

Petitioner brought this Civil Practice Law and Rules (CPLR) Article 78 action seeking, *inter alia*, an Order vacating Respondents' decision denying his release to the supervision of the Division of Parole. For the reasons set forth below, Petitioner's request is ***granted***.

PROCEDURAL HISTORY

Petitioner pleaded guilty to one count of Murder in the Second Degree[1] in Supreme Court, Erie County on August 27, 1979. On September 24, 1979 Petitioner was sentenced to an indeterminate term of twenty years to life. Upon completion of the minimum term of incarceration, Petitioner appeared before Respondent Parole Board, and was denied release. Over the course of the next eleven years, he appeared before the Board on six further occasions; and was continuously denied release. On the last of those occasions (October 26, 2010), the Board held that:

[1] The indictment charged the Defendant with the killing of two men, and the attempted murder of a third.

> "After review of the record, personal interview and due deliberation it's the determination of this panel that if released at this time there's a reasonable probability that you would not live and remain at liberty without violating the law. Your release at this time would be incompatible with the welfare and safety of the community and would so deprecate the serious nature of the crime as to undermine respect for the law.
>
> This decision is based upon the following factors: The serious instant offense of murder in the second degree. Your criminal behavior was extreme and violent, with a total disregard for human life. Your criminal history reflects no prior felony convictions, however, it does not minimize the serious nature of your instant offense.
>
> The panel notes your positive programming, release plans, letters of support, educational achievements and good disciplinary record. However, despite these accomplishments discretionary release is not warranted."

Petitioner then filed an administrative appeal of the Board's decision. Subsequent to their denial of that appeal, Petitioner commenced this Article 78 action.

ANALYSIS

The criteria to be considered in determining whether an inmate, after serving the mandatory minimum term of his sentence, should be released to parole supervision are set forth in Executive Law (EL) § 259-i. Specifically, EL § 259-i(2)(c)(A) reads:

> 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. In making the parole release decision, the guidelines 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 interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate. . . . etc.

In those instances where the Court has imposed a minimum term of incarceration, the Board must also consider:

> "(i) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations fo the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest and prior to confinement; and (ii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement" (EL § 259-i (1)(a); (2)(c)).

Where it appears that the Parole Board has denied an inmate release subsequent to considering these criteria, that decision is generally beyond the reach of judicial review, *Borda v. N.Y. State Division of Parole* (219 A.D.2d 843). Indeed, judicial intervention in such matters is warranted only where the Board's decision is seen to be "irrational, bordering or impropriety", *Russo v. N.Y. State Division of Parole* (50 N.Y.2d 69); *Silmon v. Travis* (95 N.Y.2d 470). Conversely, the Board may not deny release based solely upon the "seriousness of the inmate's offense," unless there are "some significantly aggravating or egregious circumstances surrounding the commission of the crime," *Johnson v. N.Y. State Division of Parole* (65 A.D.3d 838); *King v. N.Y. State Division of Parole* (190 A.D.2d 423, *afd* 83 N.Y.2d 786); *Wallman v. Travis* (18 A.D.3d 304). Upon such denial, EL § 259-i (2)(a) requires the Board to inform the inmate "in writing . . . of the factors and reasons for such denial. Such reasons shall be given in detail and not in conclusory terms," (see also *Cummings v. Regan*; 45 A.D.2d 222, rev'd on other grounds, 36 N.Y.2d 969; *Green v. Smith*, 52

A.D.2d 292; United States v. Johnson, 363 F. Supp 416, *afd* 500 F2d 925).

Here, Respondents noted several of the statutory factors in denying Petitioner's release. However, the record clearly reveals that "these factors[2], all of which weighed in favor of Petitioner's application, were mentioned only to dismiss them in light" of the circumstances encompassing his conviction, King (supra). Indeed, Respondents' written decision appears to be little more than a perfunctory regurgitation of the statute, as there was absolutely no basis provided to indicate why Petitioner could not remain at liberty without re-offending. Without such a basis, Respondents' decision is "irrational bordering on impropriety" (Marino v. Travis, 289 A.D.2d 493), and leads this Court to conclude that it was based exclusively on the severity of the underlying conviction, King, (supra).

As noted above, Respondents could not deny release solely on "seriousness of the offense" grounds unless they found some aggravating or egregious circumstances attached to the crime, Johnson (supra); King (supra). While this Court is acutely aware of the inherent gravity of any offense involving the loss of life, the Board's findings – that Petitioner's "behavior was extreme and violent with a total disregard for human life" – can easily be said of any homicide. Moreover, this conclusion does not rise to the high threshold contemplated in Johnson (supra) or King (supra) that would otherwise countenance a denial based exclusively upon the seriousness of Petitioner's offense, Id. Where "the Parole Board's . . . determination (denying release) was based almost exclusively on the nature and seriousness of the offense," it is irrational and improper, Wallman (supra); Johnson

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[2] While incarcerated, Petitioner, *inter alia*,earned a General Equivalency Diploma, earned a Bachelor of Arts Degree through Canisius College, was cleared for an outside work detail, completed all recommended programming, maintained excellent inmate progress reports and disciplinary records, earned a Limited Credit Time Allowance Certificate and a Commendable Behavior Report, and has participated in the CEPHAS program for twelve years running.

(*supra*). "The Parole Board's exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by statute, but also effectively constitutes an unauthorized re-sentencing," *King* (*supra*); *Tillman* (*supra*).

Accordingly, Petitioner's request for Article 78 relief is ***granted***[3].

WHEREFORE it is hereby ORDERED that Respondents' decision denying Petitioner's release is vacated; and it is further ORDERED that Petitioner shall have a *de novo* hearing before a different panel within sixty days of the granting of this ORDER.

Dated: Buffalo, New York
February 29, 2012

Hon. John L. Michalski

GRANTED
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COURT CLERK

[3] We do not touch upon Petitioner's contention that certain documentary and evidentiary items were omitted from his file, as the record warrants the relief sought on other grounds.