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12/16

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

REGINALD PETERSON, X

Petitioner,

-against-

DECISION, ORDER &
JUDGMENT

Index No: 1732/2017

NEW YORK STATE BOARD OF PAROLE,

Respondent.

X

The following papers were read on this Article 78 proceeding:

ORDER TO SHOW CAUSE
PETITION
EXHIBITS 1 & 2

ANSWER AND RETURN
EXHIBITS 1-13

REPLY AFFIDAVIT

This is an Article 78 proceeding in which petitioner challenges the respondent New York State Board of Parole's ("board") March 1, 2017 determination denying him parole release. Petitioner was convicted after trial in 1993 of Manslaughter in the 1st Degree, Criminal Possession of a Weapon in the 2nd Degree and Criminal Possession of a Weapon in the 3rd Degree. He was sentenced to a term of eight and a third to 25 years on the manslaughter charge, 5-15 years on one weapons charge and two and a third to seven years on the other weapon charge. The sentences were ordered to run consecutively resulting in an aggregate term of imprisonment of 15 and two third years to 47 years. His crimes of conviction stem from an incident in which he returned to the scene of an altercation with a nine millimeter semi-automatic pistol and in an ensuing gun battle shot and killed his victim. It was petitioner's first felony conviction but he had a prior juvenile adjudication from an incident in which he stabbed and killed a 62 year old woman during a burglary and a 1989 misdemeanor assault conviction. Petitioner made his fifth appearance before the parole board on

March 1, 2017. He appealed the board's denial of release and the appeals unit affirmed. This proceeding followed.

Petitioner claims that in denying parole release the board failed to consider all applicable statutory factors, gave undue weight to the crime of conviction, considered factors it was not permitted to consider under the Executive Law, relied on erroneous information in his COMPAS report, failed to consider his youth as a mitigating factor and failed to state the reasons for denial in detail.

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, -AD3d-, 2014 WL 2504724 (2nd Dept., June 4, 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 March 1, 2017 appearance before the parole board.

At petitioner's parole hearing, the board questioned him about his crimes of conviction, his juvenile adjudication, how his upbringing impacted his criminal history, his marriage, a positive behavioral change while incarcerated as well as discussed his plans for release, institutional achievements and prison disciplinary history. Petitioner spoke at length about how his disadvantaged childhood resulted in him engaging in criminal behavior. Petitioner further acknowledged that he had a significant disciplinary record while incarcerated but that at some point made a conscious decision to change his behavior. The board acknowledged that petitioner had "turned a corner" and that his COMPAS assessment found him to be a low risk of felony violence, re-arrest or absconding. The board further acknowledged that petitioner had made productive use of his leisure time, pursued educational and employment opportunities while incarcerated and petitioner's family ties but denied parole release finding that elements of petitioner's youth continued to plague him. The board recommended that he avail himself of resources available to him. The board's decision further stated that it considered the requisite statutory factors including his institutional adjustment, discipline and program participation, risk needs assessment and needs for successful re-entry into the community. Ultimately, however, the board found more compelling his crimes of incarceration and determined that if released there was a reasonable probability that petitioner would not live and remain at liberty and that his release would be incompatible with the welfare and safety of society.

Based on the above, the court is without a basis to find that the board failed to consider the requisite statutory factors or gave undue weight to petitioner's crimes of conviction. The minutes of the parole hearing make clear that the board adequately considered the relevant statutory factors including his COMPAS re-entry risk assessment. While there may have been minor errors in the COMPAS assessment that erroneously stated petitioner had two prior felony assault offenses and one prior adult weapons offense, the court does not find these errors warrant vacatur of the parole board's determination. The parole board expressly acknowledged that petitioner's COMPAS assessment overall did not find him to be a high risk for a recidivism. Moreover, the board's comments at the hearing reflect that it was aware that petitioner is currently incarcerated for his first felony conviction and that he had a prior juvenile adjudication, not a felony conviction. The erroneous information as to petitioner's age when he was first arrested was not prejudicial to petitioner. The record further supports the indication that petitioner had a notable disciplinary record while incarcerated as the board expressly referenced an array of Tier III infractions while noting that petitioner's last disciplinary infraction was in 2013. The court further rejects petitioner's claim that comments of board members demonstrate that it improperly considered factors outside of the Executive Law. The court has reviewed such comments and found that they were part of a dialogue with petitioner and an attempt to provide guidance as to a behavior that could benefit his chances for parole release. Nothing therein indicates that the board imposed a higher standard for petitioner's release than authorized by law.

Petitioner's reliance upon the constitutional requirement that a parol board consider the significance of an inmate's youth and attendant circumstances at the time of the commission of a crime before making a parole determination is misplaced. See generally, Hawkins v NYS Department of Corrections and Community Supervision, 140 AD3d 34 (3rd Dep't 2016). This

requirement applies to parole considerations for juvenile offenders sentenced to life without parole for the purpose of ensuring compliance with the Eighth Amendment's prohibition on cruel and unusual punishment. See Montgomery v Louisiana, 136 S.Ct. 718 (2016). Petitioner is not currently incarcerated for a crime committed when he was a juvenile and thus his current sentence does not implicate the Eighth Amendment. Finally, the parole board's written decision adequately sets forth the reasons for the denial of parole and thus complies with Executive Law §259-i (2)(a).

Based on the foregoing, it is hereby

ORDERED that the petition is denied.

This constitutes the decision, order and judgment of the court.

Dated: October 17, 2017
Poughkeepsie, New York

ENTER:



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.