December 2019

Decision in Art. 78 proceeding - Prince, Errol (2016-11-30)

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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In the Matter of the Application of
ERROL PRINCE,

Petitioner,

-against-

TINA STANFORD, CHAIRWOMAN,
NEW YORK STATE BOARD OF PAROLE,

Respondent.

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

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 5330/2016

Motion Date: November 9, 2016

The following papers numbered 1 to 5 were read on this CPLR Article 78 proceeding for a judgment vacating Respondent's January 27, 2016 decision denying parole for Petitioner, and ordering a *de novo* parole hearing:

Order to Show Cause - Verified Petition / Exhibits 1-2

Answer and Return / Exhibits 3

Reply / Exhibits 4

Letters of Opposition 5

Upon the foregoing papers the petition is disposed of as follows:

Petitioner seeks a judgment pursuant to CPLR §7804 vacating the January 27, 2016 decision of the Respondent New York State Board of Parole (hereinafter "Parole Board") which denied Petitioner release on parole, and an order directing a *de novo* parole hearing. Petitioner contends, and the Court agrees, that the Parole Board's determination rests exclusively on (1) his claim of innocence of the offense for which he was convicted, which he has maintained from the outset and over the course of more than 38 years' incarceration, and (2) his consequent lack of expression of remorse for his alleged victim.[1] Under the circumstances of this case, Petitioner contends, the Board's denial on this ground of this, his eighth (8th) application for parole release, evinces irrationality bordering on impropriety.

According to the prosecuting authority, Petitioner in 1977 killed one Gregory Boyer, 21 years of age, in revenge for a drug transaction gone bad. Petitioner was then 34 years of age. He resided with his wife and two children. He had no criminal record. It was alleged that Petitioner contracted to sell marijuana to Mr. Boyer, who instead took the marijuana from Petitioner at gunpoint and fled. Petitioner was further alleged to have visited Mr. Boyer's grandmother's house looking for him. When an unrelated individual named Julius Plaintier answered the door, Petitioner is alleged to have fired several shots, striking Mr. Plantier in the chest (but not killing him), and saying, "this is for Boyer." Approximately three weeks later,

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[1]The Parole Board also cited "recent letters of opposition to your release." The said letters were, upon this court's order, forwarded for *in camera* review. Due to their confidential nature, the court can discuss their contents only in veiled terms. These letters (a) parrot the basic facts of Petitioner's conviction, and (b) proffer recommendations so absurdly contradictory as to bespeak either a mindless vindictiveness or, more charitably, utter thoughtlessness. As such, the letters add nothing of value or substance to the material contained in Respondent's Answer and Return.

Petitioner was alleged to have sited Mr. Boyer on the street near Liberty Park in Queens, whereupon he fired several shots and killed him.

Petitioner was subsequently arrested and charged with murdering Mr. Boyer and with assaulting Mr. Plaintier. One and the same gun was used in both incidents, but never found. Petitioner acknowledges that he knew Mr. Boyer through their respective sons, but adamantly denied any involvement with the alleged drug transaction or with the shootings. On the murder case, Petitioner was offered, but declined, a plea with a sentence of 7 ½ to 15 years in prison. He was convicted after trial and sentenced to 25 years to life in prison. He was thereafter convicted on the assault charge and sentenced to 5 to 15 years' imprisonment.

Upon sentencing in the murder case, defense counsel complained somewhat cryptically that the trial was "more a trial of legal issues as opposed to factual issues." The reason for this complaint is apparent from the decision upon appeal of Petitioner's conviction. *See, People v. Errol Prince,* 106 AD2d 521 (2d Dept. 1984), *aff'd* 66 NY2d 935 (1985). It is evident from review of the Second Department's opinion that Petitioner was convicted by a jury of Mr. Boyer's murder based not on the testimony of a live witness but instead upon a transcript of former testimony that was read to the jury notwithstanding the People's failure to satisfy the prerequisites to its admissibility set forth in CPL §670.10. *See id.,* 106 AD2d at 522. While the Second Department found that former testimony "highly probative on the issues of identity and intent" (*id.*), the fact remains that the jury never had the opportunity to assess first hand the demeanor and credibility of a key witness against Petitioner.

Executive Law §259-i(2)(c)(A) provides that "[d]iscretionary 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."

The statute directs that the Parole Board, in making its parole release decision, consider (as applicable here):

- "(I) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interaction with staff and inmates;

- (iii) release plans including community resources, employment, education and training and support services available to the inmate;

- (iv) any deportation order issued by the federal government against the inmate while in the custody of the department....

- (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."

The Executive Law further provides that the Board's determination to deny parole "shall be deemed a judicial function and shall not be reviewable if done in accordance with law." Executive Law §259-i(5). As the Third Department observed in *Matter of Hamilton v. NYS Division of Parole,* 119 AD3d 1268 (3d Dept. 2014), "[t]he Court of Appeals has long

interpreted that language – in both current and prior statutes – to mean that 'so long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts' (*Matter of Hines v. State Bd. of Parole,* 293 N.Y. 254, 257... [1944]; *see Matter of Silmon v. Travis,* 95 N.Y.2d 470, 476-478 ... [2000])." *Hamilton, supra,* 119 AD3d at 1269. Thus, barring a violation of statutory requirements, "[a] parole determination may be set aside only when the determination to deny the petitioner release on parole evinced 'irrationality bordering on impropriety.'" *Matter of Goldberg v. NYS Board of Parole,* 103 AD3d 634, 634-635 (2d Dept. 2013). *See, Matter of Silmon v. Travis, supra,* 95 NY2d at 476; *Matter of Russo v. NYS Board of Parole,* 50 NY2d 69, 77 (1980).

Here, Petitioner's minimum 25 year sentence expired in 2002. At the time of his most recent parole interview on January 27, 2016, Petitioner was 72 years of age, and had been denied parole on seven (7) occasions. In consequence, he has been incarcerated for a period in excess of 38 years. His COMPAS risk assessment scores are low across the board. He has only six (6) prison disciplinary infractions over the course of 38 years' imprisonment, and none in the last ten (10) years. He has positive programming accomplishments in prison. Upon his release he is subject to deportation to Jamaica, where his sister can provide him a place to live and to work. Most importantly, however, for present purposes, Petitioner has maintained his innocence from arrest through conviction, sentencing, 38 years' incarceration and multiple denials of parole.

After Petitioner's eighth parole interview on January 27, 2016, the Parole Board ruled:

> Parole is denied for the following reasons. After a careful review of your record and this interview, it is the determination of this panel that <u>your release at this time is incompatible with the welfare of society</u>. This decision is based on all required statutory factors including your risk to the community, rehabilitative efforts, needs for a successful reintegration, institutional adjustment, case / release plans,

> sentencing minutes and recent letters of opposition to your release. The panel also notes your affiliation with the Caribbean African Unity Support of Prisoners and the Gun Buy Back program, positive programming accomplishments, however discretionary release shall not be granted merely because of good conduct or program completion while confined. Despite your positive efforts, your release would greatly undermine respect for the law and would trivialize the tragic loss of life which you caused. During interview you denied involvement and expressed little remorse for the victims.

The Parole Board made no finding, per Executive Law §259-i(2)(c)(A), that Petitioner if released would not likely live and remain at liberty without violating the law. This is fully consonant with Petitioner's advanced age, favorable COMPAS risk assessment, good prison disciplinary record and prospects for living and working with his sister in Jamaica upon his release and deportation. The Board's conclusion that Petitioner's release would nevertheless be incompatible with the welfare of society and undermine respect for law is quite evidently and indeed explicitly based on Petitioner's denial of involvement in the crimes for which he was convicted and his consequent lack of remorse.

In *Matter of Silmon v. Travis, supra*, the Court of Appeals held that the Parole Board may properly consider an inmate's lack of remorse and insight into the offense of conviction in making parole release determinations despite the petitioner's claim of innocence:

> We conclude that it was neither arbitrary nor capricious for the Board to consider remorse and insight into the offense following petitioner's *Alford* plea. These factors, we recognize, are not enumerated in the statute. However, the Board is empowered to deny parole where it concludes that release is incompatible with the welfare of society. Thus, there is a strong rehabilitative component in the statute that may be given effect by considering remorse and insight [cit.om.]. Additionally, once an individual has been convicted of a crime, it is generally not the Board's role to reevaluate a claim of innocence, either by someone who maintains innocence in the face of a guilty verdict, or by someone who allocutes to the facts but later claims to be innocent.

Id., 95 NY2d at 477.

However, two additional aspects of the Court of Appeals' decision in *Matter of Silmon v. Travis* require discussion in the context of Petitioner's case.

First, *Matter of Silmon v. Travis* involved an *Alford* plea which, the Court explicitly noted, must be founded on "strong evidence of actual guilt" which is not present here. *See id.*, 95 NY2d at 474-475. In *Silmon*, the record before the Parole Board reflected strong evidence of the petitioner's actual guilt in the form of a letter from his own trial counsel "stating that petitioner had maintained his innocence but faced the admission of evidence at trial that could have been dispositive of guilt and that, due to the nature of this evidence, there was a strong likelihood that a jury would convict him." *Id.*, at 473, 476. Here, in contrast, Petitioner has consistently maintained his innocence at the expense of (a) a favorable plea deal, and (b) the opportunity for parole release. Moreover, the record before the Parole Board here does not contain strong evidence of Petitioner's actual guilt; and while a jury found him guilty beyond a reasonable doubt, it did so, as noted above, based on a transcript of testimony and without any opportunity to assess the demeanor and credibility of a key witness against Petitioner. In the circumstances of this case, then, a lack of remorse and insight cannot with confidence be inferred from Petitioner's simply maintaining his innocence.

Second, the Court in *Matter of Silmon v. Travis* upheld the Parole Board's determination because it properly considered the petitioner's lack of remorse and insight into his crime in determining whether there was a reasonable probability that he could live at liberty without violating the law, *i.e.*, in making a determination which the Parole Board glaringly omitted to make in this case. The *Silmon* Court wrote:

> At petitioner's parole hearing, the Board was required to assess whether he presented a danger to the community, or whether there was a reasonable probability that he could live at liberty without repeating his offense....Since discretionary release may not be granted merely as a reward for exemplary conduct, the Board evaluated petitioner's rehabilitative progress to determine if he still posed a danger, and in that connection properly considered remorse and insight into the criminal act.
>
> We conclude that petitioner's personal refusal to admit the specific facts of the crime at the time of the *Alford* plea did not constrain the Parole Board's ensuing responsibility to confirm, within a reasonable probability, that petitioner is ready to rejoin the community. That is so for a convicted defendant who maintains his innocence at and after trial, for a defendant who allocutes to the facts but later declares his innocence, and it is also the case here....

Id., 95 NY2d at 477-478 (emphasis added). Here, in contrast, the Parole Board did not consider Petitioner's remorse and insight into the crime in "evaluat[ing] petitioner's rehabilitative progress to determine if he still posed a danger." As noted above, the Board did not (and frankly could not) find at this juncture that Petitioner still poses a danger to the community. Instead, the Board improperly cited Petitioner's denial of involvement in the crimes of conviction and consequent failure to express remorse as the sole justification for the very different conclusion that his release "would greatly undermine respect for the law and would trivialize the tragic loss of life which you caused." Whether or not that conclusion is correct, it is not justified by *Silmon* and does not logically follow from the cited premises.

By reason of the foregoing, the Parole Board's January 27, 2016 determination denying Petitioner release on parole evinces irrationality bordering on impropriety. This court is left with the profoundly unsettling conviction that an elderly man who is otherwise a good candidate for parole after 38 years' incarceration has been, is being, and will perpetually be denied parole release only because he continues to assert a not-facially-implausible claim of innocence that he has consistently maintained at personal cost right from the beginning.

It is therefore

ORDERED, ADJUDGED AND DECREED, that the Petition is granted, and it is further

ORDERED, ADJUDGED AND DECREED, that the New York State Board of Parole is directed to grant Petitioner a *de novo* parole release interview and determination, before a different panel, within forty-five (45) days of the date hereof.

The foregoing constitutes the decision, order and judgment of the court.

Dated: November 30, 2016
Goshen, New York

ENTER

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE