Decision in CPLR Article 78 proceedings - Cotto, Roberto

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
ROBERTO COTTO,#91-A-6350,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2012-0655.27
INDEX #139796
ORI # NY044015J

-against-

ANDREA EVANS, Chairwoman,
NYS Division of Parole,

Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Roberto Cotto, verified on September 6, 2012 and filed in the St. Lawrence County Clerk's office on September 11, 2012. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging the December 2011 decision denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on September 17, 2012 and has received an reviewed respondent's Answer/Return, including Confidential Exhibits B and C, verified on November 1, 2012, as well as petitioner's Reply thereto, verified on November 15, 2012 and filed in the Franklin County Clerk's office on November 26, 2012.

On July 1, 1991 petitioner was sentenced in Supreme Court, New York County, as a second violent felony offender, to an indeterminate sentence of 3 to 6 years upon his conviction of the crime of Criminal Possession of a Weapon 3°. On June 19, 1992 petitioner was sentenced in the same court to a controlling indeterminate sentence of 17 years to life upon his convictions of the crimes of Murder 2°, Criminal Possession of a Weapon 2°, Robbery 1°, Attempted Murder 2° and Assault 2°.

After having been denied discretionary parole release on one prior occasion, petitioner made his second appearance before a Parole Board on December 13, 2011. Following that appearance a decision was rendered again denying him discretionary release and directing that he be held for an additional 24 months. The December 2011 denial determination reads as follows:

> "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 IF RELEASED AT THIS TIME THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY W/O VIOLATING THE LAW AND YOUR RELEASE AT THIS TIME IS INCOMPATIBLE W/THE WELFARE AND SAFETY OF THE COMMUNITY. THIS DECISION IS BASED ON THE FOLLOWING FACTORS: THE SERIOUS, BRUTAL NATURE OF THE I.O. OF CPW 3RD, MURDER 2ND, CPW 2ND, ROBBERY 1ST, ATT. MURDER 2ND AND ASSAULT 2ND INVOLVED YOU ACTING IN CONCERT UNLAWFULLY ENTERING THE VICTIMS RESIDENCE TO STEAL PROPERTY ONE VICTIM WAS SHOT AND SUSTAINED SERIOUS PHYSICAL INJURY, A 2nd VICTIM WAS SHOT AND KILLED. DURING INTERVIEW YOU LACK [sic] INSIGHT AND REMORSE FOR YOUR ACTIONS. THI[S] IS A CONTINUATION OF YOUR CRIMINAL HISTORY WITH A PROPENSITY FOR EXTREME VIOLENCE. YOUR ACTIONS CLEARLY DEMONSTRATED A CALLOUS DISREGARD FOR THE SANCTITY OF HUMAN LIFE. NOTE IS ALSO MADE OF YOUR POSITIVE PROGRAMING AND DISCIPLINARY RECORD. HOWEVER, DISCRETIONARY RELEASE IS INAPPROPRIATE AT THIS TIME FOR THE PANEL TO HOLD OTHERWISE WOULD SO DEPRECATE THE SEVERITY OF THE OFFENSES AS TO UNDERMINE RESPECT FOR THE LAW."

The document perfecting petitioner's administrative appeal from the parole denial determination was received by the DOCCS Parole Appeals Unit on April 30, 2012. Although the Appeals Unit failed to issue its findings and recommendation within the 4-month time frame set forth in 9 NYCRR §8006.4(c), a belated decision on administrative appeal was, in fact, issued on or about October 11, 2012, after the commencement of this proceeding.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, 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 the law. In making the parole release decision, the procedures 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 interactions with staff and inmates . . .(iii) release plans including community resources, employment, education and training and support services available to the inmate . . . (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 . . ."

Executive Law §259-c(4), as amended by L 2011, ch 62, part C, subpart A, §38-b, effective September 30, 2011[1], provides that the New York State Board of Parole shall " . . .establish written procedures for its use in making parole decisions as required by law. Such written procedures shall 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 . . ." (Emphasis added).

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[1] L 2011, ch 62, part C, subpart A, section 49(f) provides that ". . . the amendments to subdivision 4 of section 259-c of the executive law made by section thirty-eight-b of this act shall take effect six months after it shall have become a law . . ." Since the underlying legislation was enacted on March 31, 2011, the amendment to Executive Law §259-c(4) became effective as of September 30, 2011 (or October 1, 2011).

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5) unless there has been a showing of irrationality bordering on impropriety. *See Silmon v. Travis*, 95 NY2d 470, *Vasquez v. Dennison*, 28 AD3d 908, *Webb v. Travis*, 26 AD3d 614 and *Coombs v. New York State Division of Parole*, 25 AD3d 1051. Unless the petitioner makes a "convincing demonstration to the contrary" the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Nankervis v. Dennison*, 30 AD3d 521, *Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

Among the various arguments advanced in this proceeding, petitioner, citing the amended version of Executive Law §259-c(4), asserts that parole authorities failed to establish and/or implement " . . . written procedures . . . [incorporating] risk and needs principals 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 . . ." The respondent's answering papers failed to address the Executive Law §259-c(4) issue and this Court finds nothing in the record to suggest that the written procedures mandated by the amended version of Executive Law §259-c(4) were established, much less implemented and considered in the context of determining whether or not petitioner should be released to parole supervision. Accordingly, the Court finds that the December 2011 parole denial determination was not rendered in accordance with law and must be overturned, with the matter remitted to the Board of Parole for *de novo* discretionary parole release consideration. *See Thwaites v. New York State Board of Parole*, 34 Misc 3d 694. *See also Lichtel v. Travis*, 287 AD2d 83.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the December 2011 parole denial determination is vacated and the matter remanded to the respondent who is directed to forthwith provide petitioner with a *de novo* parole release interview/parole release consideration not inconsistent with this Decision and Judgment and the mandates of Executive Law §259-c(4).

Dated: January 22, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court