Decision in CPLR Article 78 proceedings - Cox, Rico

THE STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALBANY

In the Matter of the Application of

RICO COX, #97-A-2559

Petitioner,

-against-

N.Y.S. DIVISION OF PAROLE,

Respondent.

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

Index #3151-03
RJI #01-03-ST3677

Decision, Order and
Judgment

(Supreme Court, Albany County, Special Term, August 22, 2003)

(Justice Edward A. Sheridan, Presiding)

APPEARANCES:

RICO COX, Pro se
Otisville Correctional Facility
P.O. Box 8
Otisville, New York 10963

HON. ELIOT SPITZER
Attorney General of the State of New York
(Steven H. Schwartz, of Counsel)
Attorney for Respondent
The Capitol
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SHERIDAN, J.:

Petitioner, currently an inmate at Otisville Correctional Facility, brings this special proceeding pursuant to Article 78 of the CPLR, seeking review of respondent's denial of his application for parole after his initial appearance before a panel of the Board of Parole on October 22, 2002 at Fishkill Correctional Facility.

Petitioner is serving a controlling sentence of eight and one third to twenty five years,

imposed following a guilty verdict upon charges of manslaughter in the first degree and attempted murder in the second degree. As pertinent to the disposition of this petition, petitioner contends that respondent relied on erroneous information in his pre-sentence report and the inmate status report prepared for his appearance before respondent. The information of which he complains is that he "fatally shot one male victim and fired in the direction of one additional male victim" (Respondent's Exhibit B, at page 2; [similar information is related in the pre-sentence report, which is submitted as a confidential exhibit to the Court]). Specifically, petitioner contends that he did not possess a weapon during the incident that led to his conviction, and that he was not the shooter, but that he was convicted for accessorial conduct. He brought this alleged error to the Parole Officer who prepared his inmate status report (see Petition, Exhibit G) and he sought to bring this information to the attention of the panel before which he was interviewed (see Transcript, at 4-8). The Commissioner stated, however, that "we are bound by the facts as appearing in the court record" (id. at 8).

Following the interview, parole release was denied, for the following reasons:

> The violent nature and circumstance of the instant offense wherein you shot your victim causing his death, and fired in the direction of another; your anti-social and dangerous behavior prior to the instant offense demonstrated a violent person in need of a redirection in life. We note your [positive] program and disciplinary records, interview and discharge plan and have determined that release does not serve the communities [sic] interests at this time.

Petitioner was ordered held for 24 months. Petitioner commenced this proceeding pursuant to Article 78 of the CPLR on May 3, 2003, after the time within which his administrative appeal should have been decided expired without a decision. An administrative affirmance of the decision was subsequently rendered on or about June 20, 2003.

Executive Law §259-i(5) provides that "any action by the Board [of Parole] ... pursuant to this article shall be deemed a judicial function and shall not be reviewable if done in accordance with law," and it is well established that the Parole Board has wide discretion in deciding whether to grant parole release. "So long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the Courts" (Matter of Briguglio v Board of Parole, 24 NY2d 21, 29, quoting Matter of Hines v State Board of Parole, 293 NY 254, 257). However, a determination of the Parole Board may be annulled upon a showing of error (cf. Matter of Saunders v Travis, 238 AD2d 688, lv denied 90 NY2d 805, citing Matter of Russo v N.Y.S. Bd. of Parole, 50 NY2d 69, 77; Matter of Ristau v Hammock, 103 AD2d 944, lv denied 63 NY2d 608; see Matter of Brazill v New York State Board of Parole, 76 AD2d 864 [Board erroneously stated that petitioner had been convicted of rape in the first degree rather than attempted rape]; Matter of Edge v Hammock, 80 AD2d 953 [Board erroneously determined petitioner's MPI upon crimes of which he had not been convicted]; People ex rel. Johnson v New York State Board of Parole, 180 AD2d 914 [Hearing Officer at parole revocation proceeding erroneously concluded that relator did not submit to DNA testing until after indictment been dismissed]).

Here, petitioner has made such a showing. Although documents upon which respondent relied indicate that petitioner was the shooter in the instant offense, petitioner has established that this information is erroneous (see Petition, Exhibit F; see also People v Cox 297 AD2d 589, lv denied 99 NY2d 557 [Considering whether the evidence was sufficient and whether the verdict was against the weight of the evidence, the Appellate Division stated "[t]he credible evidence clearly warranted an inference of accessorial conduct"]). Not only is the error in the

documents upon which respondent relied evident, respondent's decision clearly reveals that reliance upon that erroneous information provided a primary basis for the denial of parole (compare Cardona v New York State Bd. of Parole, 284 AD2d 843, 844; Matter of Morel v Travis, 278 AD2d 580, lv dismissed, lv denied 96 NY2d 752; Howard v. New York State Bd. of Parole, 272 AD2d 731).

Nor is it an adequate answer for respondent to state that it is entitled to rely upon the information in petitioner's record (see Schwartz Affirmation, at ¶¶30, 31). It is true that complaints of error in the presentence report must be brought to the attention of the sentencing court, and alleged errors cannot be corrected by other agencies with which potential parolees may be involved (see Matter of Salerno v Murphy, 292 AD2d 837, lv denied 98 NY2d 607; Matter of Hughes v New York City Department of Probation, 281 AD2d 229; Matter of Sciaraffo v New York City Department of Probation, 248 AD2d 477; Matter of Salahuddin v Mitchell, 232 AD2d 903; see also People v Campo, ___ AD2d ___, 764 NYS2d 826 [CPL 440.20 does not provide a remedy for inaccurate information in a presentence report]). However, respondent cites no authority for its contention that its decision may stand when based upon erroneous information, and indeed, such a contention is contrary to established law (see Matter of Brazill v New York State Board of Parole, supra).

In light of the foregoing, petitioner's remaining arguments, as set forth in his administrative appeal and incorporated by reference into his petition, need not be addressed.

Accordingly, it is

ORDERED, that the petition is GRANTED, the determination denying parole is annulled, and the matter is remanded to the Board of Parole for a prompt re-hearing before a new panel and a decision not inconsistent with this Court's decision.

This memorandum shall constitute the Decision, Order and Judgment of this Court.

All papers, including this Decision, are being returned to respondent's attorney. The signing of this Decision shall not constitute entry or filing. Counsel is not relieved from the applicable provisions of the CPLR respecting filing, entry and notice of entry.

SO ORDERED.

ENTER JUDGMENT.

Dated: Albany, New York
October 30, 2003

Edward A. Sheridan, A.J.S.C.

PAPERS CONSIDERED:

(1) Order to Show Cause, signed June 5, 2003;
(2) Verified Petition, sworn to May 15, 2003, with exhibits A-G;
(3) Verified Answer, dated August 15, 2003, with exhibits A-H;
(4) Affirmation of Steven H. Schwartz, Esq., dated August 15, 2003;
(5) Petitioner's Reply, dated August 21, 2003, with attachment.