December 2019

Decision in Art. 78 proceeding - Rios, Ivan (2007-03-12)

At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of March, 2007.

PRESENT:

HON. MARK I. PARTNOW,

Justice.

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IN THE MATTER OF THE APPLICATION OF
IVAN RIOS,

Petitioner,

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

- against -

Index No. 31731/06

NEW YORK STATE DIVISION OF PAROLE,

Respondent.

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The following papers numbered 1 to 3 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers documents submitted by respondent in camera review	3

Upon the foregoing papers, petitioner Ivan Rios moves for a judgment pursuant to CPLR article 78, reversing and vacating the May 8, 2006 determination of respondent New York State Division of Parole (Parole Board) withholding petitioner's release to parole supervision, and directing the Parole Board to grant petitioner another parole hearing to reconsider whether petitioner should be released to parole supervision.

On August 16, 1986, petitioner, then 19 years of age and armed with a .22 caliber revolver, and five others went to a planned location for a confrontation with another group of people. There, one of the members of the rival group charged petitioner and one of his companions; in response, petitioner pointed the gun in front of himself, fired two shots and then fled. Two men were fatally wounded by petitioner's shots and petitioner was later charged, under Kings County Indictment Number 6089/86, with two counts of murder in the second degree. After pleading guilty to those charges, by judgment dated November 5, 1987, petitioner was sentenced to two aggregate prison terms of eighteen years to life, those sentences to run concurrently.

Petitioner first became eligible for discretionary parole in 2004 and appeared before the Parole Board that year. Following a hearing, the Parole Board denied petitioner's parole request and ordered him held for a period of twenty-four months, after which period, the Parole Board would reconvene to reconsider his parole request.

Petitioner appeared before the Parole Board for a second time on May 8, 2006, and again was denied parole; the Parole Board again ordered that parole would not be

reconsidered for twenty-four months. It is this denial that petitioner seeks to vacate on the grounds that it was arbitrary and capricious and violated his constitutional rights to due process and equal protection of the law. Petitioner further claims that the Parole Board was improperly constituted.

The court first turns to that branch of petitioner's motion in which he contends that the decision of the Parole Board denying him release on parole was arbitrary and capricious and gave undue weight to the nature of the crime committed.

Parole release is a discretionary function of the parole board and its determination should not be disturbed by the court unless it is shown that the Board's decision is irrational "bordering on impropriety" and that the determination was, thus arbitrary and capricious (*see Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000]; *Matter of King v New York State Div. of Parole*, 190 AD2d 423 [1993]; *Matter of Weinstein v Dennison*, 7 Misc3d 1009(a) [2005]; *Matter of Coaxum v New York State Div. of Parole*, 14 Misc 3d 661 [2006]). In reviewing the Board's decision, the court must also examine whether the Board's discretion was properly exercised in accordance with the Executive Law. Section 259-I [2][c] of that statute provides:

> 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.

The statute provides the Board with the following specific factors to be considered in determining whether the above general criteria has been met:

> (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; (iv) any deportation order issued by the federal government ... and (v) the written statement of the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated.

(Executive Law § 259-I [2] [c]).

Additionally, where, as here, the sentencing court has set the minimum period of incarceration, the Parole Board must also take into account:

> (I) 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 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 (Executive Law § 259-I [1] [a]; [2]]c]).

Here, after a review of the record before the Parole Board, the court concludes that the denial of petitioner's application was a result of the Parole Board's failure to weigh all

of the relevant statutory factors. Instead, the Parole Board focused almost entirely upon the nature of petitioner's crime and, indeed, "there is a strong indication that the denial of petitioner's application was a foregone conclusion" (*Matter of King*, 190 AD2d at 431-432).

The thirty-nine year-old petitioner stood before the Parole Board having already once before been denied parole after serving the minimum sentence for the crime he had committed 20 years earlier when he was 19 years of age. At the parole hearing, petitioner admitted his guilt in the shooting, stating:

> What I did was a cowardly act. At this point I don't try to take that away. I can't express to you exactly what emotion I was feeling on that day except for fear, but I know now it was a cowardly act. It takes [more] bravery not to use violence than to use violence.

When asked how he had changed since the day he had committed the crime, petitioner stated:

> I have thought about that over the years also, and basically I'd like to think of myself as more mature. I'm also sadder inside because I have done something I can't take back. I have to live with that, and some day I'm going to face my creator, and I'm going to have to make accounts for what I did, and that's a day I fear.

Petitioner also advised the Parole Board that he had obtained two degrees while incarcerated - a bachelor's degree in business administration and an associate's degree in small business management with a major in marketing.

The record before the Parole Board included a letter dated February 4, 2004 which was written by Robert Mahoney, a retired lieutenant with the New York State Department of Correctional Services who, since his retirement has worked as a volunteer at Arthur Kill Correctional Facility, where petitioner is an inmate. In that letter Mahoney states that he met petitioner, an ex-marine, some three years earlier when petitioner became a member of the American Legion Post which Mahoney had founded in the prison in 1989. According to Mahoney, petitioner is an active member of the post and has volunteered a great deal of his time to working on a number of fundraisers. Further, states Mahoney, petitioner is the coordinator of the family day events which are held each year at the prison and is both a tutor and a counselor to inmates assigned to the "Special Needs Unit."

Mahoney states that as petitioner's interest in providing services to inmates grew, he became the Post's "service officer" and, in that capacity worked with his fellow veterans who were preparing for release with housing needs, getting into community drug programs, and with any other medical needs. Finally, Mahoney states that, in 2003, petitioner was elected to Post's highest position, that of Commander, and that he has been doing a good job at keeping up the morale of the other members of the Post. Mahoney expressed his belief that petitioner has "accomplished [sic] a new meaning in his life" and that he would "be able to carry this with him while leading a productive life."

Sergeants A. Jorge and D. Blankinship also submitted letters to the Parole Board attesting to petitioner's positive adjustment to prison and his work with the veteran's group.

The parole file also reveals that petitioner has worked at the Department of Motor Vehicles (Motor Vehicles) in Richmond County since 2001 through a work program set up between the Department of Corrections and Motor Vehicles. In a letter a Mrs. Rodriguez, who has supervised petitioner at Motor Vehicles since 2003, states that petitioner is "extremely helpful and knowledgeable" about the procedures at Motor Vehicles. According to Rodriguez, petitioner is a team leader whose responsibilities include teaching new procedures to his fellow workers, and he "does so efficiently and thoroughly" and is "extremely cooperative and respectful." Janice Salvatore, also from Motor Vehicles, states in her letter to the Parole Board that petitioner's "ability to interact respectively with a wide range of people and personalities has often turned difficult situations into positive ones." Salvatore concluded that petitioner's "excellent customer service skills and work efforts . . . will surely [be an asset] in whatever position he might hold." Similarly applauding petitioner's participation in the work program were written by Theodora Humphry and Ingrid Nurse.

As the above recitation of parts of the record before the Parole Board demonstrates, it appears that petitioner has used his time in prison well and that almost all of the statutory factors to be considered by the Parole Board in determining whether parole should be granted weigh in petitioner's favor. In light of this fact, the court would expect a rational explanation by the Parole Board for its decision as to why parole was nonetheless denied. Instead, the Parole Board focused almost exclusively on the serious nature of petitioner's crime as a

reason its denial parole. After noting the bare facts of the crime, the decision states:

> when we weigh the fact that you took two lives against your achievements, we believe release at this time is not in the public interest.

While making a passing reference to his "clean disciplinary record and positive programmatic efforts," the Parole Board made clear that those factors no matter how impressive, could not justify his release from prison when weighed against the seriousness of his crime. Thus, "t]he passing mention in the Parole Board's decision of petitioner's rehabilitative achievements cannot serve to demonstrate that the Parole Board weighed or fairly considered the statutory factors where, as here, it appears that such achievements 'were mentioned only to dismiss them' in light of the seriousness of petitioner's crime (*see Matter of Phillips v Dennison,* NYLJ, Oct. 12, 2006, at 23, col 1; *quoting Matter of King,* 190 AD2d at 434).

In concluding that the Parole Board's determination was arbitrary and capricious, the Court recognizes that it is not necessary for the Parole Board, in its decision, to specifically refer to each and every one of the statutory factors it considered in its decision granting or denying parole release (*Matter of King,* 190 AD2d at 431; *see Matter of Davis v New York State Div. Of Parole,* 97 AD2d 412 [1985]; *People ex rel. Harderxhanji v New York State Bd. of Parole,* 97 AD2d 368 [1983]), or afford those factors equal weight (*see People ex rel. Herbert v New York State Bd. of Parole,* 97 AD2d 128, 133 [1983]). However, "it is unquestionably the duty of the Parole Board to give fair consideration to each of the

applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the Parole Board did in fact fail to consider the proper standards, the courts must intervene" (*Matter of King,* 190 AD2d at 431).

Here, the Parole Board, in essence, revealed in its decision its belief that the sentence which petitioner received, which provided him with the possibility of parole, was inappropriate. In so doing the Parole Board exceeded its powers; it is the role of the legislature to determine the appropriate sentences for particular crimes, and of the judiciary to determine the appropriate sentence for the particular defendant before the court.

Indeed, in focusing exclusively on the petitioner's crime as a reason for denying parole the Parole Board was, in effect, re-sentencing petitioner to a sentence that excluded any possibility of parole since petitioner is powerless to change his past conduct. And, as the Appellate Division has admonished, under similar circumstances, such "re-sentencing" by the Parole Board "reveal[s] a fundamental misunderstanding of the limitations of administrative power" *(Matter of King,* 190 AD2d at 432).

This court, of course, does not mean to minimize the seriousness of petitioner's offense, nor the tragedy of the death of petitioner's victims, however in affording the possibility of parole to those convicted of murder, the legislature has made a determination that, despite the seriousness of that crime, rehabilitation is possible and desirable. In this vein, the Appellate Division stated in *Matter of King, supra:*

> Certainly every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of a human life..Since, however, the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself

(*Matter of King,* 190 AD2d at 433).

In short, the court concludes that the Parole Board, in effect, abdicated its responsibility to fairly consider all the relevant statutory factors in determining whether parole should be granted to petitioner and its resulting decision was arbitrary and capricious.

The court rejects the petitioner's remaining contentions, including that the Parole Board violated his constitutional right to equal protection of the law and that the Parole Board was improperly constituted.

Accordingly, the court grants the petition, annuls respondent's decision denying petitioner's release to parole supervision, and remands petitioner's request for parole to respondent, which, within 30 days of the service of a copy of this order with notice of entry, shall hold a new hearing before a different panel. That panel shall consider the statutorily required factors, as well as the sentencing minutes from petitioner's murder conviction.

Within 14 days after the hearing respondent shall issue a decision, in non-conclusory terms, on the appropriateness of petitioner's release to parole supervision.

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

ENTER,

J. S. C.

HON. MARK I. PARTNOW