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December 2019

### Decision in CPLR Article 78 proceedings - Rodriguez, Wilson (2018-01-22)

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

In the Matter of WILSON RODRIGUEZ,

Petitioner,

DECISION, ORDER  
AND JUDGMENT

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

Index #52384/17

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

The following papers were read and considered on this Article 78 petition:

NOTICE OF PETITION  
VERIFIED PETITION  
MEMORANDUM OF LAW IN SUPPORT  
EXHIBITS A - M

ANSWER AND RETURN  
EXHIBITS ANNEXED THERETO

REPLY MEMORANDUM OF LAW

Petitioner brought this proceeding pursuant to CPLR Article 78 to review a determination of the Board of Parole denying his request for parole release. In 1994 petitioner was convicted after trial of murder in the second degree and criminal possession of a weapon in the second degree and sentenced to an aggregate indeterminate term of twenty-five years to life. The convictions stemmed from a 1992 incident in which petitioner fired a hand gun into the rear window of a vehicle that resulted in the death of a passenger. Petitioner was 18 years old on the date of the shooting. He had been convicted in 1989 for two felony robbery offenses for which he was sentenced in 1990 to an aggregate indeterminate sentence of eighteen to fifty-four months. Petitioner was incarcerated on that sentence for over one year and released to parole supervision in March 1991. He committed the instant offense for which he is incarcerated while on parole.

On November 29, 2016, petitioner appeared before the Parole Board for the first time. He had been incarcerated for twenty-five years. Prior to the hearing he submitted to the Board a one hundred eighty-page parole packet documenting his outside clearance status, release plans, institutional record, letters of support and an extensive nonprofit funding proposal he drafted for building a counseling center to support youths in his home community. Following a brief hearing the Board denied parole and this proceeding followed.

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 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (3<sup>rd</sup> 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 (1<sup>st</sup> 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 (2<sup>nd</sup> 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, 118 AD3d 707 (2<sup>nd</sup> Dept. 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 November 29, 2016 appearance before the parole board.

At petitioner’s parole hearing, the Board questioned him about his crimes of conviction, length of incarceration, acceptance of responsibility and remorse for his offenses, institutional achievements and prospects for employment and housing upon release. The Board recognized that petitioner’s COMPAS assessment found him to be a low risk “across the board” for felony violence, arrest or absconding. It acknowledged that petitioner had made an extensive submission but there

is little in the transcript to indicate that the Board reviewed that submission. The Board expressly noted that over the past 24 plus years petitioner had incurred sixteen Tier II and four Tier III disciplinary citations.

At the conclusion of the hearing the Parole Board issued a short decision denying parole. The decision states that the Board found discretionary release not warranted due to concern for the public safety and welfare, stating that release would not be compatible with the welfare of society at large and would deprecate the seriousness of his offenses and undermine respect for the law. The decision cites petitioner's criminal history, that he was on parole at the time he committed the offenses for which he was incarcerated and that his disciplinary record reflected multiple Tier II and Tier III reports and was of "particular concern." It acknowledged his low COMPAS risk scores, that his institutional programming indicated progress and achievement and states that the Board considered the requisite statutory factors including petitioner's risk to the community, rehabilitation efforts and needs for successful community re-entry.

Reviewing the record as a whole compels the court to find that the Parole Board's determination to deny parole had a rational basis. This court is cognizant that board's interview and decision suggest that it focused primarily on petitioner's crimes of conviction. The Board's questioning further inferred its belief that petitioner had a gang affiliation, a charge petitioner denied at the hearing. An intra-agency confidential report before the parole board states that petitioner is believed to be a Latin King member. As noted in his reply papers, petitioner had no meaningful opportunity to refute this charge as it was within a document alleged to be exempt from disclosure. See generally Public Officers Law § 87(2)(g)(iii). The Board's decision, however, does not directly reference gang affiliation as a basis for denying parole.

Nor does it appear that the Parole Board reviewed at any length petitioner's parole packet. The submission reflects significant institutional achievements and includes strong letters of support from a wide variety of individuals that suggest petitioner would be a good candidate for parole release. Petitioner's letter to his victim's mother, personal statement to the Board and comments at the hearing suggest he is truly remorseful about the actions which led to his conviction and the death of another individual. He has obtained forty-two college credits while incarcerated, has significant program achievements and has taken a leading role in various prison initiatives. Petitioner also was granted outside work clearance in which he worked beyond the security perimeter of the prison with minimal supervision.

This court does not have the authority to make a *de novo* determination as to the propriety of granting petitioner parole release. Its function is limited to reviewing whether the Parole Board had a rational basis for its decision. The Board cited two factors in denying parole; that petitioner was on parole at the time he was convicted and his multiple Tier II and Tier III infractions. The fact that petitioner committed the instant offenses while on parole is not something that petitioner has the ability to change. If this and his crimes of convictions were a sufficient basis to deny parole, he would never have the ability to obtain parole release. However, his significant record of disciplinary infractions provides a rational basis supporting the Board's decision to deny parole, particularly as the most recent Tier II infraction occurred just over two years prior to the hearing. The court notes, however, that this infraction appears to be his only infraction since January 2010

and his accomplishments while incarcerated appear extraordinary. As the more recent infraction in conjunction with his disciplinary history provides a rational basis supporting the denial of parole, it is

ORDERED that the petition is denied, without prejudice and with the court's expectation that at petitioner's next parole release hearing due time will be spent and due consideration will be given to petitioner's extensive parole packet and significant institutional achievements.

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

Dated: January 22, 2018  
Poughkeepsie, New York

ENTER:

  
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MARIA G. ROSA, J.S.C.

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