December 2019

Decision in Art. 78 proceeding - Gass, Melvin (2013-02-08)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

In the Matter of the Application of
MELVIN GASS, 07-R-4182

Petitioner,

DECISION AND ORDER

Index No. 12-3199
RJI No. 55-12-01873

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

-against-

THE NEW YORK STATE BOARD OF PAROLE,

Respondent.

(Supreme Court, Ulster County, Special Term)

APPEARANCES:

Melvin Gass, 07-R-4182
Wallkill Correctional Facility
50 McKendrick Road
P. O. Box G
Wallkill, New York 12589

Hon. Eric T. Schneiderman
Attorney General of New York State
Attorney for Respondent
(Laura A. Sprague, Assistant Attorney General,
of Counsel)
Department of Law
The Capitol
Albany, New York 12224

Connolly, J.:

This is an Article 78 proceeding brought by petitioner challenging respondent's November 9, 2011 denial of parole release. Petitioner plead guilty to the following crimes: (i) Attempted Murder in the Second Degree, (ii) Assault in the First Degree; (iii) Assault in the Second Degree, (iv) Criminal Possession of a Weapon in the Second Degree, (v) Criminal Possession of a Weapon in the Third Degree, (vi) Reckless Endangerment in the First Degree, (vii) Criminal Contempt in the First Degree, (viii) Criminal Contempt in the Second Degree, and (ix) Endangering the Welfare of a

Child. The sentences upon such convictions are to run concurrently with the lengthiest sentence consisting of a minimum of 6 and a maximum of 12 years. The convictions arose from an incident involving petitioner shooting the victim four times striking her in her right shoulder, left shoulder, upper neck and behind her ear. Petitioner asserted that he was upset because the victim, the mother of his daughter, had not let him see his daughter. The victim had a valid Order of Protection against petitioner at the time of the incident. Petitioner subsequently fled to Indiana where he remained for 10 years until he was arrested in 2006.

In its decision denying Petitioner parole release, the Board stated:

> 24 months, denied. Next appearance 11/2013.
>
> Parole denied. After a personal interview, record review, and deliberation, this panel finds your release is incompatible with the public safety and welfare.
> Your instant offenses involved your attempted murder of a known female by shooting her multiple times, despite the prior issuance of an order of protection.
> Consideration has been given to your receipt of an earned eligibility certificate, good behavior and programming, however, due to your course of conduct, that includes, carrying and ultimately using a handgun, your release at this time is denied. There is a reasonable probability you would not live and remain at liberty without violating the law.

Petitioner's administrative appeal was received by the Appeals Unit on January 9, 2012. The Appeals Unit affirmed the Board of Parole's decision, mailing such decision to petitioner's attorney on August 6, 2012, though it did not file a determination within four months of receipt of petitioner's appeal. This article 78 proceeding was filed September 11, 2012.

Petitioner advances the following arguments in this proceeding, incorporating the arguments made in his appeal[1]: 1) that the Board of Parole ("Board") did not consider the required statutory factors; 2) that the Board based its decision solely on the petitioner's instant offense and his criminal

[1]The Appeal was provided to the Court by respondent.

record; 3) that the Board commissioners were not fair and impartial; 4) that the Board's decision did not provide adequate detail; 5) that the Board did not consider the imprisonment guidelines; 6) that the Board did not consider the petitioner's institutional achievements; 7) that the Board did not give adequate consideration to petitioner's earned eligibility certificate; 8) that the hold of 24 months constituted a resentencing; 9) that the Board's decision denied petitioner due process of law and his right to Equal Protection; and 10) the Board did not properly consider and apply the 2011 amendments to the Executive Law to his parole hearing.

The Board's actions are judicial in nature and may not be reviewed if done in accordance with the law (*see* Executive Law §259-i[5] *see also Matter of Valderrama v. Travis*, 19 AD3d 904, 905 [3rd Dept., 2005]). Executive Law § 259-i(2)(c)(A) provides that discretionary release to parole supervision is not to be granted to an inmate merely as a reward for good behavior while in prison, but after considering whether "there is a reasonable probability that, if such an 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" (*Matter of King v. New York State Division of Parole*, 83 NY2d 788, 790 [1994], affg 190 AD2d 423 [1st Dept., 1993]). Decisions regarding release on parole are discretionary and will not be disturbed if they satisfy the statutory requirements (Executive Law § 259-i; *Matter of Walker v. New York State Div. of Parole*, 203 AD2d 757 [3rd Dept., 1994]) and there is no showing of "irrationality bordering on impropriety" (*Matter of Russo v. New York State Bd. of Parole*, 50 NY2d 69, 77 [1980]; *Matter of Silmon v. Travis*, 95 NY2d 470, 476 [2000]; *Matter of Saunders v. Travis*, 238 AD2d 688 [3rd Dept., 1997]; *Matter of Felder v. Travis*, 278 AD2d 570 [3rd Dept., 2000]).

Initially, respondent asserts that certain of petitioner's arguments were waived as they were not raised in his administrative appeal, namely: 1) that the Board was not fair and impartial, 2) the Board did not properly consider and apply the 2011 amendments to the Executive Law to his parole hearing, and 3) that the Board violated petitioner's right to Equal Protection. Such new arguments are not preserved for review as they were not raised in petitioner's administrative appeal (*see Matter of Cruz v Travis* , 273 AD2d 648, 649 [2000]). The Court notes, however, that even considering such assertions, as discussed below, such assertions are without merit.

Executive Law §259-c (4) was amended and requires the Board to

> 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.

In addition, Executive Law §259-i (2)(c) was amended to list all of the factors the Board is required to consider in making parole release determinations in the same provision. Such amendment did not add new factors for consideration but list all factors in the same paragraph.

As petitioner was committed to the custody of the department in 2007, a transition accountability plan ("TAP") has not been prepared for petitioner (*see* Corrections Law §71-a), however, the record includes a copy of the inmate status report. The record reflects that the Board considered, *inter alia*, petitioner's institutional records including his institutional achievements, disciplinary record and release plans. The Board, in its Decision stated its consideration of petitioner's earned eligibility certificate, good behavior and programming. During the interview, the Board discussed the steps petitioner had taken toward rehabilitation including his receipt of an earned eligibility certificate, his participation in air condition/refrigeration and builder/maintenance programs; his work as a teacher's aide and industries worker, discussed petitioner's plans to live with

his parents and assist in taking care of his sick mother, acknowledged receipt of letters from petitioner's sister and a cousin, noted petitioner's lack of any Tier II's or III's and noted that petitioner had fled the state after the incident and remained in Indiana for ten years.

The record reflects that the Board, in its consideration of the statutory criteria set forth in Executive Law §259-I (2)(c)(A)(i) through (viii), ascertained the steps petitioner had taken towards his rehabilitation and the likelihood of his success if released to parole supervision. Accordingly, petitioner's contention that the Board did not properly consider and apply the 2011 amendments to Executive Law § 259–c (4) is without merit.

Further, the Court rejects any claim that the Board violated Executive Law § 259-I (2)(c)(A)'s requirements. The record demonstrates that the Board considered the relevant statutory factors, such as petitioner's receipt of an earned eligibility certificate, institutional programming and achievements, disciplinary record, and release plans (*see* Executive Law § 259-I; *Matter of Marcus v. Alexander*, 54 AD3d 476, 476-477 [3rd Dept., 2008]; *Matter of Gutkaiss v. New York State Div. of Parole*, 50 AD3d 1418, 1418-1419 [3rd Dept., 2008]). Though petitioner received an earned eligibility certificate, the Parole Board determined that there was a reasonable probability that the petitioner could not remain at liberty without violating the law. "[W]hile the relevant statutory factors must be considered, it is well-settled that the weight to be accorded to each of the factors lies solely within the discretion of the Parole Board. Moreover, the Board is not required to expressly discuss each of the guidelines in its determination." (*Matter of Phillips v. Dennison*, 41 AD3d 17, 21-22 [1st Dept., 2007], *lv appl dismissed* 9 NY3d 956 [2007], *quoting Matter of Walker v. Travis*, 252 AD2d 360, 362 [1st Dept., 1998]). While petitioner's institutional record is to be considered, there is no requirement that the Board place an equal or greater weight on petitioner's institutional record than on the gravity of the instant offense, that is, shooting his child's mother four times while under an

active order of protection, and a determination that such record is outweighed by the severity of the instant offense is within the Board's discretion (*see Anthony v. New York State Division of Parole*, 17 AD3d 301 [1st Dept., 2005]; *Herbert v. New York State Board of Parole*, 97 AD2d 128 [1st Dept., 1983]). Further, the Board's denial of parole does not constitute a re-sentencing (*see Matter of Marsh v NYS Division of Parole*, 31 AD3d 898 [3rd Dept., 2006]); *Murray v Evans*, 83 AD3d 1320[3rd Dept., 2011]. Moreover, petitioner's due process argument is without merit. Petitioner has no due process right to parole (*see Matter of Russo v. New York State Board of Parole*, 50 NY2d 69 [1988]). Further, under our sentencing system the court initially sets a minimum and a maximum period of incarceration, but the Board makes the ultimate determination whether to release an inmate prior to his or her completion of the maximum sentence (*Matter of Silmon v. Travis*, 95 NY2d 470, 476 [2000]).

Even considering petitioner's equal protection claim, such claim is without merit. Petitioner alleges that he was denied equal protection of the law as the Board allegedly continued to use his "past criminal history" to deny his release. In analyzing an equal protection claim, "[s]trict scrutiny is applied in only two instances, where the statutory or regulatory classification impinges on fundamental rights or discriminates against a suspect class." (*see Jimenez v. Coughlin*, 117 A.D.2d 1,4 [3rd Dept., 1986]). Petitioner has no fundamental right to be "prematurely released from confinement" nor has he demonstrated that he was treated differently from others similarly situated. Accordingly, the rational basis standard applies to petitioner's claim (*Id.*). The record reflects, however, that the Board considered the relevant statutory factors, petitioner has not demonstrated he was treated differently from any other inmate appearing before the Board and, additionally, the Board provided a rational basis for their denial of petitioner's release to parole supervision. Accordingly, such claim is without merit.

Additionally, even were the Court to consider petitioner's claim that he was denied a fair and impartial hearing as he alleges his receipt of an Earned Eligibility Certificate was not properly considered, as noted above, and as acknowledged by petitioner, receipt of such certificate does not preclude the Board from concluding that petitioner should not be released to parole supervision (*see Matter of Cornejo v. New York State Division of Parole*, 269 AD2d 713 [3d Dept., 2000]).

Petitioner's remaining contentions have been reviewed and found to be without merit. Petitioner has failed to meet his burden of presenting evidence demonstrating that the Board violated any positive statutory requirement in determining not to release him. The record supports the rationality of the Board's determination, and it certainly cannot be held that the determination is so irrational as to border on impropriety (*Matter of Russo v. New York State Board of Parole*, 50 NY2d 69, 77 [1980]; *Matter of Wright v. Parole Division*, 132 AD2d 821, 822 [3rd Dept., 1987]). Accordingly, the Court finds that petitioner has failed to meet his burden of proof in this proceeding.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for in camera review.

Therefore, it is hereby

ORDERED, that the petition is hereby dismissed and the relief requested in this proceeding is in all respects denied, and it is further

ORDERED, that the confidential records submitted to the Court for *in camera* review are sealed.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order and confidential records are being returned to the attorney for the respondent. The below referenced original papers are being mailed to the Ulster County Clerk. **The signing of this**

Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry or notice of entry the Ulster County Clerk.

SO ORDERED.
ENTER.
Dated: February 8, 2013
Kingston, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Order to Show Cause dated October 12, 2012; Notice of Petition; Verified Petition dated August 27, 2012 with memorandum of law.
2. Verified Answer dated December 11, 2012; Affirmation of Laura A. Sprague, Esq. dated December 11, 2012 with accompanying exhibits.