December 2019

Decision in Art. 78 proceeding - Galan-Martinez, Daniel (2010-09-03)

SCANNED ON 9/9/2010

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16

Justice

In re: Daniel Galon Martinez

-v-

NY State Division of Parole

INDEX NO. 400882/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 petition is granted in accordance with the accompanying memorandum decision

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: SEP 03 2010

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

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In the Matter of the Application of

DANIEL GALAN-MARTINEZ,

Petitioner,

- against -

NEW YORK STATE DIVISION OF PAROLE,

Respondent.

Index No. 400882/10
Motion Seq. No. 001

SCHLESINGER, J.:

On September 3, 1998, petitioner Daniel Galan-Martinez was arrested and charged with a variety of serious crimes. They included Attempted Criminal Possession of Drugs in the First Degree, Kidnapping in the Second Degree, Criminal Possession of a Weapon (a loaded firearm) and Attempted Robbery in the First Degree. He was held without bail and was later indicted for these crimes. He entered into a plea of guilty to Criminal Possession of Drugs in the Second Degree, a Class A Felony, and to the weapons charge on March 16, 1999, pursuant to a plea bargain wherein the judge promised to sentence Mr. Galan-Martinez to 9 years to life on the drug charge and 5 years as a definite term on the Gun Charge, to run concurrently. On April 20, 1999, petitioner was sentenced as promised.

From a reading of the Criminal Court file which was requisitioned by this Court, and similarly could have been, at least in part, by the Parole Board, one can discern the events that led up to the arrest. Pursuant to the three-page complaint sworn to by Detective John Loney on September 4, 1998, Galan-Martinez and one other person negotiated to buy $2M worth of cocaine from an individual who is unnamed in the complaint but appears to have

been either a "confidential informant" "CI" or an undercover police officer. These negotiations took place over several days at different diners in Queens. The plan was first to exchange cars. Then the "seller" was to place the cocaine in defendant's Pathfinder while the defendants "buyers" were to put $2M into the seller's Lincoln Continental. This exchange of cars did occur on September 2, 1998. The re-exchange was supposed to occur the following day. However, it never did because it is important to understand that all of this was a scam or sting set up by the Authorities. The "seller" appears never to have had the cocaine, and it was clear in the aftermath of the arrest that Galan-Martinez and his co-defendant Jose Cruz never had any money.[1]

What happened was that on September 3 there was a first meeting between the CI and Cruz where the former postponed the transaction, and then a second meeting took place according to the complaint, where the following occurred. The CI met the petitioner on a Queens Street and the latter told the CI to come to his house, but the individual refused and the two walked on where they met up with Cruz who was driving a Maxima. Galan-Martinez said the $2M was in the rear seat of this car, and both defendants asked the "seller" to enter the vehicle to check out the money. But the CI refused. So petitioner removed a suitcase (contents unknown) from the rear seat and placed it in the trunk. Again the seller was asked to inspect the money which was allegedly in the suitcase.

> At that point, Galan-Martinez and Cruz each held a semi-automatic handgun, each defendant pulled back the slide of his handgun in order to load a bullet into the chamber, and each

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[1]This Court did not requisition the co-defendant's file. While it is possible cocaine was recovered from him and vouchered, there is absolutely no reference to any such recovery or vouchering in petitioner's file.

> defendant then pressed the nuzzle of his handgun against the rib area of the other individual, and Galan-Martinez stated, in substance, "Get in the car, or I'll put one in your side." (Quoted from Detective Loney's criminal court complaint).

That was the entirety of the crime because the police immediately stepped in. The Detective recovered a loaded semi-automatic handgun from the ground where he saw petitioner throw it. Other members of his team recovered a similar weapon from the trunk of the car, which had remained open, where they had seen Cruz throw it.

From the above scenario, certain facts must be assumed. There was, in all probability, no cocaine. At least, according to the complaint against petitioner, he never saw any. There was no money received or vouchered. There were two guns recovered. Clearly there was an attempted robbery with these guns. It is hard to discern the crime of Kidnapping from these facts. Therefore, one could fathom why Attempted Possession of Drugs was charged, but it is more difficult to understand why this defendant pled guilty to actual Possession of drugs under these circumstances. This issue, in fact briefly arose during the plea process.

Why have I laboriously set out the actual events leading to the arrest here? I have done so because it reflects on the lack of care, as well as other omissions and mistakes, made by the Parole Board that petitioner appeared before on April 21, 2009. This was his second appearance before a Board and by a vote of 2-1, parole was denied and petitioner was told to reappear in 24 months. Petitioner appealed this denial with an assigned counsel, but the appeals unit never acted on his appeal, despite a letter from Galan-Martinez asking for its status. Since no response either to his appeal nor to his letter was

received, he petitioned the Court via an Article 78 proceeding.

The denial by the Parole Board, in two paragraphs, was predicated on the following factors: seriousness of the instant crimes together with an earlier history of a Kidnapping and a deportation, followed by an illegal re-entry, showing "a well established pattern of criminal behavior" and the Board's determination that, since there was "a reasonable probability that you [petitioner] would not live at liberty without violating the law, your release at this time is incompatible with the welfare and safety of the community." (A copy of the determination is attached as Exh. B to respondent's Answer).

Such were the conclusions reached. As counsel for respondent urges, the Parole Board's decisions are discretionary, and as long as they are exercised within statutory requirements, they must be respected and not subject to judicial review. But here, such statutory requirements were not, in fact, met. Nor did the majority of members of the Board carefully and accurately review the relevant material. This is evidenced by what was said during the proceedings themselves and in the decision.

On page 3 of the hearing (Exh. C to Answer), petitioner was incorrectly told that he was charged with having been involved with 500 pounds of cocaine and having attempted to kidnap, murder or rob someone. Despite Mr. Galan-Martinez answering through an interpreter that such was so, in fact there was never anything about 500 pounds of cocaine in the papers and he was never charged with trying to murder anyone. As to the cocaine, he was charged with attempted possession of an amount in excess of 4 oz. He pled guilty to possession of 2 oz. But as noted earlier, it appears he was never actually in the vicinity of any cocaine.

Then on page 4, he was asked about his intent to sell these drugs. This was improper as there was never such a charge made against him. But despite that the following questioning began on page 8 by Commissioner Smith.

Q. This was 500 pounds of cocaine?
A. (The Interpreter at all times). Yes
Q. That's over 225 kilos. $10 million. You've a big fish.
A. That's what the Feds had offered me.
(The Complaint refers to negotiations of $2M worth of cocaine at the price of $15,000 per kilogram - This operation appeared to be by a Joint Task Force between New York Police and Federal Authorities).
Q. You're a big fish, though, right? Good skills, you have good skills, you have lots of money?
A. I don't have anything. (The defendant was represented by an attorney with the New York County Defender Services).
Q. No money?
A. It was a year and four months after they deported me I came back.
Q. $10 million in cocaine. How many people have $10 million worth value? How did you manage that?
A. Tell him in case it was ... someone presented and some people ... someone introduced me to some people and the Feds were the ones who offered me the 500 kilos to get me, and they got me. I never touched the drugs.
Q. Did you agree to give them $10 million, but you were going to hold them up.
A. Yes.
Q. You were going to kill him?
A. No.
Q. No? Do you think they would show up with $10 million with cocaine, with no weapons, you think that's what was going to happen?
A. At that moment, I was going to steal from them.

Q. Sure you were.
A. It says it in the papers.

As noted earlier, Commissioner Smith simply concocted his own, scenario with its own version of the facts. But much of it was simply false. There was nothing about $10 million or attempting to kill anyone. This was a sting operation, successfully concluded with an arrest of petitioner and his co-defendant. No money was recovered, no cocaine was ever said to be present, and no one was hurt. (See earlier footnote regarding co-defendant's possible actual possession of cocaine).

But perhaps even more important here was the Board's complete failure to consider, in violation of Executive Law §259-i subd. 2(c)(A)(iv), petitioner's deportation status. Beginning on page 4 of the Hearing Transcript, the following exchange took place.

Q. Did you get deported?
A. Yes.
Q. Why did you come back to this country?
A. My situation in my country (the Dominican Republic) was very difficult, the poverty.
Q. Now, because of that I'm assuming you owe some federal time?
A. Yes.
Q. And what about the drug conviction, is that coupled with the federal conviction?
A. They gave me - - no, they gave me 5 years and 11 months for coming back into the country. (He later testified that he had used someone else's passport to illegally reenter the country).
Q. So if we were to release you, you'd have to report to the federal government?
A. Yeah, they come to get me.

But despite this exchange, and seeming to ignore its meaning, the following question is asked on page 7:

Q. Okay. Where are you going to live if we were to release you? You're going back to the Dominican Republic, or do you have a place to live here?
A. They're going to deport me. It's in the papers.

Therefore, assuming petitioner's testimony was accurate concerning the 5 years and 11 months additional federal sentence facing him upon release (and the Board certainly could have easily verified this, if they had doubts), then for the Board to base its denial of parole on its belief that Mr. Galan-Martinez "would not live at liberty without violating the law" and that his release was "incompatible with the welfare and safety of the community" is not only wrong, but it has absolutely no basis in fact . Rather, the release of Mr. Galan-Martinez would lead to almost 6 more years in a federal prison and then deportation to his home country.

This Court is well aware of the enormous discretion the Parole Board has in making its decisions and the amount of judicial deference that must be given those decisions. However, the Board still has to rely on an accurate set of facts and properly apply the law. Here they did not. Pursuant to Executive Law §259-i, the Board must consider relevant factors. The degree of weight to be given to each of these factors is largely within such discretion as well, but the statutory factors must be considered.

In *Samuel v. Alexander*, 69 AD3d 861 (2nd Dep't 2010), the Court affirmed the denial of parole but found that the Parole Board did consider the relevant factors, including the fact that the inmate was subject to a final order of deportation issued by a federal immigration judge. Similarly, in *Abbas v. New York State Div. of Parole*, 61 AD3d 1228 (3rd Dep't 2009), the Court affirmed the Board's denial of parole, finding that although the

Board's determination did not specifically reference the deportation order, "the Board plainly was aware of its existence."

Here, one could say that the Board was "plainly aware" of the additional 5 years and 11 months of time that petitioner had to serve in federal prison after his release, but not only did the Board fail to allude to it in its decision, but it suggested instead that it was imprudent to release him into the community, when such was not going to happen. That conclusion was plainly wrong and made no sense in light of the information presented.

Further, with regard to the severity of the crime, the Board certainly has the right and obligation to consider that as well. But again, it cannot distort the facts of a crime that an individual was actually convicted of. Here I took great pains to describe the actual events leading up to the arrest, in contrast to the prejudicial spin that the Board, via Commissioner's Smith's questioning, put on it. And whether purposely or not, he got it wrong. There was never an Attempted Murder Charge, never even a reference to it. Rather, there was a legitimate Attempted Robbery Charge. Neither ten million dollars of cocaine, nor 500 pounds was ever involved. Rather it was clear that this was a sting operation with guys who pretended to be big shots, but ultimately were just out to rob. The Board seems to have believed the sting part of the tale rather than its reality.

To the extent this misunderstanding of the facts influenced the Board's decision, and it clearly seems to have, that was wrong. In *Lewis v. Travis,* 9 AD3d 800, (3rd Dep't 2004), the Court noted that the Board placed particular emphasis on the instant offense, as was the case here, but it reversed the Board's denial of parole and remanded the matter, stating:

> Although the Board may consider the instant offense in denying parole release, ... here, the Board incorrectly referred to petitioner's conviction as murder in the first degree, when, in fact, petitioner was convicted of murder in the second degree ... Inasmuch as the Board relied on incorrect information in denying petitioner's request for parole release, the judgment must be reversed and a new hearing granted.

9 AD3d at 801 (citations omitted).

In other situations as well, reversals of denials were found when the petitioner could show the likelihood that the Board relied on incorrect information. For example, in *Henry v. Dennison*, 40 AD3d 1175, (3rd Dep't 2007), the Board referred to petitioner's underlying criminal acts as intentional, but in fact he had been convicted of depraved indifference murder.

Similarly, in this matter, I am also finding that a reversal and remand is necessary. The Board clearly, in its decision did not consider petitioner's deportation order or federal sentence and it also improperly relied on incorrect information as to the underlying acts as a predicate to his conviction. Petitioner is entitled to a new hearing as soon as possible, particularly since significant delay occurred due to respondent's failure to act on Mr. Galan-Martinez's administrative appeal or respond to his letter in that regard.

Accordingly, it is hereby

ADJUDGED that the petition is granted, the April 27, 2009 decision by the Division of Parole denying parole to Daniel Galan-Martinez is hereby vacated, and the matter is remanded for a new parole hearing forthwith consistent with the terms of this decision.

Dated: September 3, 2010

ALICE SCHLESINGER J.S.C.