December 2019

Decision in Art. 78 proceeding - Felton, Jose (2000-12-06)

STATE OF NEW YORK : COUNTY OF DUTCHESS
SUPREME COURT

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JOSE FELTON,

Petitioner,

-against-

BRION D. TRAVIS, CHAIRMAN
NEW YORK STATE DIVISION OF PAROLE,

Respondent.

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DECISION & ORDER

Index No. 5708/99

The following submissions were considered:

Petitioner's order to show cause;
Respondent's answer and return;
Petitioner's letter of February 4, 2000;
Petitioner's letter of April 10, 2000;
Respondent's affirmation;
Petitioner's reply

Petitioner, Jose Felton, is currently serving an eighteen year to life sentence for murder in the second degree after he was found guilty of participating in a robbery which escalated into the murder of the victim. Petitioner appeared before the parole board on January 27, 1999, after which parole was denied with a twenty-four month hold imposed. In reaching its determination, the parole board stated:

> Parole is denied due to the serious nature and circumstances of the instant offense -- murder second wherein records indicate you in concert beat an individual to death. This offense is an escalation of your criminal conduct and demonstrates a propensity for extreme violence. At interview you displayed little or no remorse for the victim of this offense. All factors considered lead

this panel to believe that you [sic] release is incompatible with the welfare and safety of the community.

That determination was affirmed on administrative appeal on October 4, 1999.

Petitioner thereafter commenced this Article 78 proceeding to challenge respondent's denial of his parole application on the ground that it was arbitrary and capricious and against the weight of the evidence. In response to the petition, respondent submitted an answer and return which contains two exhibits that were submitted for in camera review only. The first is a pre-sentence investigation report which respondent claims is confidential pursuant to CPL 390.50. The second are the second and third parts of an inmate status report prepared for petitioner's initial parole board appearance. Respondent did not indicate why portions of the inmate status report are confidential. By letter dated April 10, 2000, petitioner argued that he cannot adequately respond to respondent's answer and return without obtaining copies of the exhibits submitted by respondent for in camera review. By decision and order dated June 16, 2000, this Court directed respondent to submit a supplemental affirmation detailing the legal basis for denying petitioner access to the two exhibits sought. Petitioner was also afforded an opportunity to respond to that supplemental affirmation.

Respondent correctly argues that Criminal Procedure Law § 390.50 exempts pre-sentence investigation reports from disclosure except where such disclosure is "specifically required or permitted by statute or upon specific authorization of the court" (CPL 390.50[1]). Criminal Procedure Law § 390.50(2)(a) provides that a pre-sentence investigation report shall be made available to a criminal defendant not less than one day prior to sentencing

and/or in connection with any appeal in a criminal case. However, this section does not authorize release of a pre-sentence report for an administrative appeal of parole board decisions (Matter of Allen v. People, 243 AD2d 1039, 1039-1040 [3d Dept.]) and, by analogy, is not applicable to petitioner's Article 78 proceeding challenging the parole board's decision. Moreover, even if § 390.50(2)(a) were applicable in this instance, the "court" which is authorized to release such a report under Criminal Procedure Law § 390.50(1) is the court that sentenced petitioner after his conviction (Matter of Thomas v. Scully, 131 AD2d 488, 490 [2d Dept.]; Holmes v. State of New York, 140 AD2d 854, 855 [3d Dept.]; Matter of Legal Aid Bur. of Buffalo v. Armer, 74 AD2d 337 [4th Dept.]). Thus, this Court does not have the authority to order the disclosure of petitioner's pre-sentence investigation report and petitioner's request for that document is denied.

Respondent also correctly argues that parts two and three of petitioner's inmate status report, which was prepared in anticipation of petitioner's initial parole board appearance, are exempt from disclosure. First, the proper procedure for obtaining the release of administrative records is to utilize the Freedom of Information Law (Public Officers Law § 84 et seq.). Only after a FOIL request has been made and denied may an individual seek court review of that denial by way of an Article 78 proceeding. Secondly, the nature of the documents sought by petitioner exempts them from disclosure. Specifically, parts two and three of petitioner's inmate status report are intra-agency materials containing evaluative information (Public Officers Law § 87[2][g]; Matter of Di Rose v. New York State Dept. of Corrections, 223 AD2d 878 [3d Dept.]; see also Matter of Mingo v. New York State Div. of

Parole, 244 AD2d 781, 782 [3d Dept.]). Accordingly, petitioner's request for copies of parts two and three of his inmate status report is denied.

With respect to the merits of petitioner's application, the New York State Division of Parole may not grant discretionary release merely as a reward for good conduct or efficient performance of duties while confined. Instead, it must consider whether "there is a reasonable probability that, if such inmate was 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" (Executive Law § 259-i[2][c][A]). The parole board must also consider the following factors: (1) the institutional record of the inmate, including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with the staff and inmates, (2) performance, if any, as a participant in the temporary release program, (3) release plans, including community resources, employment, education, training and support services available to the inmate, (4) any deportation order issued against the inmate, and (5) any written statement of the crime victim or the victim's representative (id.).

A review of the record reveals that the parole board made its determination based on a mistake of fact with respect to petitioner's commission of the underlying crime for which he is incarcerated. Specifically, the supplemental report prepared by the probation department prior to petitioner's sentencing states that the arresting officer was contacted and stated that defendant is less culpable than his co-defendants because, although he went along

with the robbery, he did not actually inflict any injuries on the deceased. The arresting officer also stated that petitioner cooperated fully with police, leading to the arrest of the other two perpetrators. In addition, petitioner contends and respondent does not dispute, that the judge who sentenced petitioner stated "[t]he Court has taken into consideration the fact that you cooperated and you did not physically assist in the homicide itself."[1] However, in its determination, respondent stated that petitioner "in concert beat an individual to death" and that such conduct "demonstrates a propensity for extreme violence." Given respondent's heavy reliance on erroneous facts with respect to the underlying crime, this Court concludes that the determination was arbitrary and capricious. Therefore, the petition is granted to the extent of vacating respondent's determination and directing that petitioner be granted a new hearing.

This constitutes the decision and order of this Court.

So ordered.

Dated: December 6, 2000
Poughkeepsie, New York

HON. JUDITH A. HILLERY
Justice Supreme Court

[1]Petitioner quotes from, but does not provide, the transcript of his criminal court sentencing.

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