January 2020

Decision in CPLR Article 78 proceedings - Lamphere, Jerry (2012-04-27)

STATE OF NEW YORK
SUPREME COURT COUNTY OF CAYUGA

In the Matter of the Application of
JERRY LAMPHERE (#07-B-1440),
Petitioner,

INDEX NO. 2011-1010

-vs-

NYS DIVISION OF PAROLE,
Respondent.

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

BEFORE: HON. MARK H. FANDRICH
Acting Supreme Court Justice
Cayuga County

APPEARANCES: HON. ERIC T. SCHNEIDERMAN, ESQ.
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JERRY LAMPHERE (#07-B-1440), Petitioner, Pro Se
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Moravia, New York 13118

MEMORANDUM DECISION AND ORDER

Fandrich, Mark H., Acting J.

Petitioner, who is presently an inmate at Cayuga Correctional Facility, is challenging the New York State Division of Parole's determination denying his request for release on parole and directing that he be held for an additional 24 months. Petitioner commenced this proceeding pursuant to CPLR Article 78 requesting that the Court reverse and set aside Respondent's determination of March 23, 2011. He argues, among other things, that the decision was improperly based on the nature of the crime and was made without consideration of Petitioner's receipt of an earned eligibility certificate.

Petitioner was convicted, following a plea of guilty, of Manslaughter in the Second Degree, Driving While Intoxicated and Endangering the Welfare of a Child. He was sentenced on April 24, 2007, to a term of incarceration of five to ten years for the Manslaughter in the Second Degree charge and one year each for the Driving While Intoxicated and Endangering the Welfare of a Child charges, to run concurrently with the Manslaughter charge. Petitioner's arrest and subsequent conviction stemmed from the death of his four-year-old daughter in a motor vehicle crash in which Petitioner was the driver. At the time of the incident, Petitioner was driving under the influence of alcohol and traveling at an excessive rate of speed for conditions (see Respondent's Verified Answer and Return, Exhibit B). Petitioner was also on probation at the time of his arrest for this incident.

This was Petitioner's first appearance before the Parole Board. On March 23, 2011, the Board denied Petitioner parole and ordered him held for another 24 months. The Parole Board decision stated as follows:

"Denied - hold for 24 months. Next appearance date: 03/2013. Notwithstanding the EEC, after a review of the record and interview, the panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society. This decision is based on the following factors: your instant offense Manslaughter 2nd for which you are serving 5-10 years.

Your crime involved you causing the death of your 4 year old daughter. You also endangered the life of your 7 year old child. Your crime occurred while you were driving in an intoxicated condition. You were under parole supervision at the time for criminal contempt of court. These crimes are a severe escalation and continuation of a past pattern of out of control conduct. You were undeterred by prior court intervention and have done poorly under community supervision. The Board notes your positive programming accomplishments. All factors considered, your release at this time is not warranted."

Petitioner filed and perfected an administrative appeal. While the actual date is unclear to the Court, it appears that the Administrative Appeal Decision Notice was issued on or about August 15, 2011, affirming the Parole Board's decision.

Initially, subsequent to the filing of his petition, Petitioner raised the issue that the recent changes to the Executive Law should be applied retroactively to him. In 2011, Executive Law §259-c(4) was amended to include language that the Parole Board is to establish written procedures for its use in making parole decisions (*see* L2011, c. 62, pt. C, subpt. A, §38-b). As part of the same bill, Executive Law §259-i was also amended to repeal Executive Law §259-i(1) and to place all of the factors that the Parole Board is required to consider in Executive Law §259-i (2)(c). Previously, two of the factors that the Board was to consider were listed under Executive Law §259-i(1), while the others were listed under Executive Law §259-i (2)(c). Under the 2011 amendments, all of the factors are now listed under Executive Law §259-i (2)(c).

Petitioner's parole hearing was held prior to October 1, 2011, the effective date of the amendments to Executive Law §259-c(4). This Court has previously held that the amendments to Executive Law §259-c(4) should not be applied retroactively and sees no reason to disturb its prior holding (*see Matter of Sattan v. Evans*, Sup Ct, Cayuga County, January 23, 2012, Fandrich, J., index No. 2011-0594). As a result, the amendments to Executive Law §259-c(4) do not apply to the instant proceeding. With regard to the amendments to Executive Law §259-i(2)(c), the amendments

do not add any new factors to be considered, but merely reorganize the factors, making them easier to follow. As a result, the factors for the Board to consider in determining whether Petitioner should be released to parole are the same whether under the former version of Executive Law §259-i or the current one.

It is well settled that there is no inherent constitutional right to parole (*see Matter of Russo v. New York State Board of Parole,* 50 NY2d 69 (1980)). "[T]he Board of Parole is vested with an extraordinary degree of responsibility in determining who will go free and who will remain in prison" such that decisions regarding release on parole are clearly discretionary (*Matter of Garcia v. New York State Division of Parole,* 239 AD2d 235 (1st Dept 1997)). As a result, the parole system holds out no more than the possibility of parole (*see Russo,* 50 NY2d at 75).

Pursuant to statute, the actions of the Parole Board are deemed a judicial function and are not reviewable if done in accordance with law (Executive Law §259-i(5)). Judicial intervention is warranted only when there is a showing of "irrationality bordering on impropriety" (*Matter of Silmon v. Travis,* 95 NY2d 470 (2000), quoting *Russo,* 50 NY2d at 77 (1980)). In the absence of a "convincing demonstration to the contrary," the Board is presumed to have acted properly in accordance with statutory requirements (*see Matter of Zane v. Travis,* 231 AD2d 848 (4th Dept 1996); *Matter of McLain v. New York State Division of Parole,* 204 AD2d 456 (2d Dept 1994)).

In determining whether the Board acted properly, the Court must look at the statutory standards governing discretionary release to parole supervision. Such standards are set forth in Executive Law 259-i[2][c], which states, in pertinent part:

> 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.

In every case, the Board must consider, in sum, the inmate's institutional record, performance, if any, as a participant in a temporary release program, release plans, any deportation order issued by the federal government, any written statements of the crime victim or his or her representative, the seriousness of the offense and the inmate's prior criminal record (Executive Law 259-i[2][c](A)).

The burden is on the Petitioner to convince the Court that he is entitled to relief (*see Matter of Galbreith v. New York State Board of Parole*, 58 AD3d 731 (2d Dept 2009)). Petitioner in the instant case has not done so. Contrary to Petitioner's claim, the record reveals that the Parole Board properly considered the relevant statutory factors in making its decision. The Board discussed Petitioner's positive accomplishments, good disciplinary record and other achievements with him, including his receipt of an earned eligibility certificate (*see eg Matter of Reed v. Evans*, __AD3d ___, 2012 NY Slip Op 2936 [3d Dept 2012]; *Matter of Hall v. New York State Division of Parole*, 66 AD3d 1322 (3d Dept 2009)). The decision was sufficiently detailed to inform the Petitioner of the reasons for the denial of parole and it satisfied the requirements of Exec. Law 259-i[2][a] (*see Whitehead v. Russi*, 201 AD2d 825 (3d Dept 1994)).

The Parole Board need not articulate or expressly discuss each factor it considered in rendering its determination (*see Ek v. New York State Board of Parole*, 307 AD2d 433 (3rd Dept. 2003)). That the Parole Board may have given greater weight to the nature of the offense than to Petitioner's achievements while incarcerated does not render the decision to deny parole arbitrary and capricious (*see eg Matter of Garofolo v. Dennison*, 53 AD3d 734 (3d Dept 2008); *Matter of Gaston v. Barbary*, 16 AD3d 1158 (4th Dept 2005)). The Parole Board is not required to give all of

the statutory factors equal weight in considering an inmate's application for parole (*see eg Matter of Barnes v. New York State Division of Parole*, 53 AD3d 1012 (3d Dept 2008)). While Petitioner insists that the offense is legally classified as an "accident," this is not merely a civil matter. Petitioner's actions of driving while intoxicated and at an excessive rate of speed, causing the death of his daughter, was a reckless act and one which, as Petitioner is well aware, carried serious criminal ramifications. The Parole Board was required to consider the serious nature of the crimes as well as Petitioner's criminal history in making its determination and properly did so here (*see eg Matter of Hawkins v. Travis*, 259 AD2d 813 (3d Dept 1999), *lv denied* 93 NY2d 1033 (1999)).

In addition, the Court disagrees with Petitioner's contention that because he received an earned eligibility certificate, he must be released to parole. Pursuant to Correction Law §805, an eligible inmate who has been issued an earned eligibility certificate "shall be granted parole release at the expiration of his minimum term . . . *unless the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society*" (Correction Law §805 (emphasis added)). Although Petitioner received an earned eligibility certificate, he is not automatically entitled to discretionary parole release (*see Matter of Dorman v. New York State Board of Parole*, 30 AD3d 880 (3d Dept 2006); *Matter of Pearl v. New York State Division of Parole*, 25 AD3d 1058 (3d Dept 2006)). It was within the Board's purview to conclude that release of Petitioner would be incompatible with the welfare of society, despite Petitioners receipt of an earned eligibility certificate (*see eg Matter of Vineski v. Travis*, 244 AD2d 737 (3d Dept 1997), *lv denied* 91 NY2d 809 (1998)).

Finally, Respondent has submitted for the Court's *in-camera* review Petitioner's pre-sentence

report and parts II and III of the inmate status report. The Court has reviewed said documents and has considered them in making its determination here. The Court agrees with Respondent that Petitioner is not entitled to copies of said documents.

The Court has considered Petitioner's remaining contentions and finds them to be without merit. As a result of the above, the Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, or arbitrary or capricious. The petition must therefore be denied.

Accordingly, based upon the foregoing, it is hereby

ORDERED that the petition is denied on its merits and the proceeding is dismissed.

All documents submitted to the Court for *in camera* review are to be returned to counsel for Respondent; all other papers are to be filed by the Court with the County Clerk.

This constitutes the Decision and Order of the Court.

Dated: Apr. 27, 2012

Hon. Mark H. Fandrich
Acting Supreme Court Justice, Cayuga Co.