January 2020

# Decision in CPLR Article 78 proceedings - Ludlow, Robert (2012-11-28)

COP



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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IN THE MATTER OF THE APPLICATION OF
ROBERT LUDLOW, 84 A 2527,

Petitioner,

FOR A JUDGMENT UNDER ARTICLE 78 OF THE
CIVIL PRACTICE LAW AND RULES

-against-

ANDREA D. EVANS, CHAIRWOMAN OF THE
BOARD OF PAROLE, INDIVIDUALLY AND AS A
MEMBER OF THE NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION,

Respondent.

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DECISION and ORDER
Index #2533-12
RJI # 52-33383-12

APPEARANCES: Robert Ludlow, 84 A 2527
Woodbourne Correctional facility
99 Prison Road, PO Box 1000
Woodbourne, NY 12788
Petitioner, *pro se*

Attorney General for the State of New York
One Civic Center Plaza, Suite 401
Poughkeepsie, N.Y. 12601
By: Tracy Steeves, AAG, of counsel
Attorney for Respondent

LaBuda, J.

Petitioner seeks Article 78 relief to overturn his parole denial arguing, *inter alia*, that the parole board's decision was arbitrary and capricious. Petitioner submitted a Verified Petition with exhibits. Respondent submitted an Answer and Return

Petitioner is currently incarcerated in Woodbourne Correctional Facility. He was convicted by guilty plea of robbery in the second degree, and by jury verdict, guilty of Murder in the Second Degree, Attempted Assault in the First Degree (two counts), Criminal Possession of Weapon in the Second Degree, and Criminal Possession of Weapon in the Third Degree. New York County Supreme Court sentenced Petitioner to an aggregate term of 25 years to life in state

prison. The instant offense occurred in 1983, when Petitioner shot a store owner after a dispute regarding marijuana.

Petitioner appeared for his third parole interview on November 1, 2011. By unanimous decision the parole board denied release. Petitioner timely filed an administrative appeal, to which he did not receive a timely reply, and then timely submitted the within petition.

In this proceeding, Petitioner argues that the board's decision was arbitrary and capricious, irrational and bordered on impropriety. Petitioner asserts: (1) the board ignored statutory mandates by failing to apply the mandatory risk and needs assessment; (2) the board failed to consider his rehabilitative efforts and any inquiry was perfunctory; (3) the board erroneously focused on his criminal history and the instant offenses and failed to use a forward-looking analysis regarding his rehabilitation and readiness for release; (4) the board failed to apply the procedures mandated by Executive Law §259-c(4); and (5) the record did not support the board's decision.

Parole Law

Executive Law, Section 259-i(2)(c)(A) states in pertinent part:

> In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate....

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.

In reaching its decision, the board must also consider:

(a) the inmate's institutional record;
(b) the inmate's release plans;
(c) any statement made to the board by the victim's representative;
(d) the seriousness of the offense, with consideration of the sentence and the recommendation of the sentencing court; and
(e) the inmate's prior criminal record.

Parole Boards have very wide discretion to grant or deny parole release; the board decides how much weight to give each of the factors listed above. ***Phillips v. Dennison*, 41 A.D.3d [1st Dept. 2007]**. It is also not necessary that the board expressly discuss each of the factors or any guidelines in its determination. ***Walker v. Travis*, 252 A.D.2d 360 [3rd Dept. 1998]**. An inmate bears the heavy burden of establishing that the determination of a parole board was the result of "irrationality bordering on impropriety." ***Matter of Silmon v. Travis*, 95 N.Y.2d 470 [2000]; *Russo v. New York State Bd. of Parole*, 50 N.Y.2d 69 [1980]**. Nonetheless, the reasons for denying parole must "be given in detail and not in conclusory terms." **Executive Law, Section 259-i(2)(a); *Wallman v. Travis*, 18 A.D.3d 304 [1st Dept. 2005]; *Malone v. Evans*, 83 A.D.3d 719 [2nd Dept. 2011]**.

The standard of review in regard to parole release is whether the decision was so irrational as to border on impropriety. ***Matter of Russo v. New York State Board of Parole*, 50 NY2d 69 [1980]; *Epps v Travis*, 241 AD2d 738 [3rd Dept. 1997]; *Matter of Silmon v. Travis*, 95 NY2d 470 [2000]**. When considering the various factors, the weight accorded to any particular factor is solely within a parole board's discretion. ***Matter of Santos v. Evans*, 81 AD3d 1059 [3rd Dept. 2011]; *Matter of Wise v. New York State Division of Parole*, 54 AD3d 463 [3rd Dept. 2008]**. Included in such factors are the seriousness of the instant offense(s) and an inmate's criminal history. **Executive Law §259-i(2)(A)**.

In 2011, the legislature made changes to **Executive Law, §259**. The changes to **Executive Law, §259-c(4)** became effective on November 1, 2011. In essence, those modifications now require that parole boards (1) consider the seriousness of the underlying crime in conjunction with the other factors enumerated in the statute, **Executive Law, §259-i(2)**, and (2) conduct a risk assessment analysis to determine if an inmate has been rehabilitated and is ready for release. **Executive Law, §259-(c)(4)**. The changes were intended to shift the focus of parole boards to a forward-thinking paradigm, rather than a backward looking approach to evaluating whether an inmate is rehabilitated and ready for release.

Such changes, however, were by no means intended to limit parole boards' historic and well-established authority and independent judgment when considering and applying the statutory factors in parole matters. ***People v. Lankford*, 938 NYS2d 784 [Sup. Ct. Bronx Co. 2012]**. Referring to the 2011 changes to the Executive Law, the *Lankford* court stated, "the legislation makes clear that the board shall continue to exercise its independence when making such decisions. The new agency's provision of administrative support will not undermine the board's independent decision-making authority (see, Laws of 2011, Part C, Sub. A, §1)." *Id.*, at 788, citing *Thwaites v. New York State Board of Parole*, 934 NYS2d 797 [Sup. Ct. Orange Co. 2011]. Parole release has been, and remains, a discretionary function of a parole board. *Thwaites v. New York State Board of Parole*, 934 NYS2d 797 [Sup. Ct. Orange Co. 2011].

Discussion

Petitioner's claim that the parole board's decision was arbitrary and capricious is unsupported by the record. Overall, the record demonstrates the hearing and parole board's decision complied with the statutory provisions of Executive Law, §§259-c and 259-i. ***Matter of Russo v. New York State Board of Parole, supra.*** Petitioner has not met the heavy burden of establishing the parole board failed to follow the statutory guidelines. ***Matter of Silmon v. Travis, supra.*** There is nothing in the record to suggest that the parole board did not consider all of the factors when making its decision.

In Petitioner's case, the serious nature of the instant offenses, his federal probation status at the time of the offenses, and his substantial criminal history were appropriate factors for the parole board to consider and to give much weight. ***Matter of Marcus v. Alexander*, 54 AD3d 476 [3rd Dept. 2008]**; ***Gardiner v. New York State Div. Of Parole*, 48 AD3d 871 [3rd Dept. 2008]**. The record indicates the parole board considered various factors, including the seriousness of the crime, Petitioner's positive programing, completion of all DOCCS programs, overall good disciplinary history and educational/training achievements. Contrary to Petitioner's arguments, the board was well within its discretion to consider Petitioner's past and escalating violent criminal history. ***See, Simmons v. Travis*, 15 AD3d 896 [4th Dept. 2005]**. The parole board was also well within its discretion to afford each factor whatever weight it deemed appropriate; placing more weight on the nature or seriousness of the underlying offenses was not a violation of any case or statutory law, including the 2011 amendments to the parole law. ***Matter of Santos v. Evans, supra*; *Matter of Wise v. New York State Division of Parole, supra*; Executive Law §259-(c)(4).**

The amendments to **Executive Law §259-(c)(4)** became effective in November, 2011. The new requirements address the need for the board to establish written procedures that include a risk and needs analysis to determine when an inmate is ready for release. The amendments do not change the factors considered by the board, nor do they alter the historic discretion parole boards have when considering release. Parole boards are required to inquire of inmates what steps, if any, they have taken toward rehabilitation, but still have discretion as to what will be discussed during a parole interview. ***See, Briguglio v. NYS Bd. of Parole*, 24 NY2d 21 [1969].**

The transcript of the proceedings shows Commissioner Crangle asked questions of and discussed Petitioner's training and programming. Commissioner Crangle asked Petitioner about his plans for release and discussed the reality of changes in society facing Petitioner, who was incarcerated in the state system in 1984. There is nothing to suggest either commissioner failed to allow Petitioner to make any comments he wished; in fact, he was given ample opportunity to make additional comments at the end of the interview, which he did. Overall, there is nothing in the record to suggest the board failed to apply a risk and needs assessment to determine Petitioner's readiness for release, nor does the transcript support Petitioner's position that the inquiry regarding his rehabilitative efforts was "perfunctory." ***See, Coaxum v. New York state Board of Parole*, 14 Misc3d 661 [Sup. Ct. Bronx Co].**

While this Court commends Petitioner on his programming accomplishments and overall good disciplinary history, this Court sees no reason to disturb the parole board's decision. The record does not support Petitioner's arguments.

Based upon the above, it is

**ORDERED**, that the petition seeking Article 78 relief is denied in its entirety and dismissed.

This shall constitute the Decision and Order of this Court.

DATED: November 28, 2012
Monticello, New York

Frank J. LaBuda

Hon. Frank J. LaBuda
Acting Supreme Court Justice