Decision in CPLR Article 78 proceedings - Mackenzie, John

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

JOHN MACKENZIE,

Petitioner,

-against-

TINA M. STANFORD, Chair of the New York State Parole Board,

Respondent.

DECISION AND ORDER AFTER HEARING

Index No: 2789/15

The petitioner has been incarcerated for more than 40 years and has been eligible for parole release since June of 2000. After The New York State Parole Board ("the Board") again denied parole on December 15, 2014 ("the 2014 decision"), petitioner sought review through an Article 78 proceeding. By decision, order and judgment dated October 2, 2015, this court granted the Article 78 petition, vacated the Board's 2014 decision and directed the Board to hold a *de novo* hearing. The Board held another hearing on December 15, 2015, and issued a decision the same day ("the 2015 decision") denying parole release. The 2015 decision was virtually the same as the 2014 decision. It contained the same infirmities as the 2014 decision which this court had determined was not in conformance with the Executive Law and which was contrary to this court's October 2, 2015 decision, order and judgment. Petitioner brought a contempt application and on March 28, 2016 this court issued a decision and order based upon which it held a hearing on May 20, 2016.

Pursuant to Executive Law §259-i(2)(c), the New York State Board of Parole is required to consider a number of statutory factors in determining whether an inmate should be released to parole. The 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." Citing 9 NYCRR §8002.1. While a parole board is not required to give equal weight to each statutory factor, and is permitted to place a greater emphasis of the gravity of the underlying criminal conviction, in the absence of aggravating circumstances, **a parole board may not deny release solely on the basis of the seriousness of the underlying offense.** Huntley v. Evans, 77 AD3d 945 (2nd Dept. 2010) (emphasis added). The board must also inform the inmate in writing of the factors and reasons for denial of parole and must give those reasons in detail, not in conclusory terms. Executive Law §259-i(2)(a); Malone v. Evans, 83 AD3d 719 (2nd Dept. 2011).

Executive Law §259-c(4) was amended in 2011 and requires the parole board to focus on an applicant's rehabilitation and future rather than giving undue weight to the crime of conviction and to the inmate's pre-incarceration behavior. As a result of this, the parole board created an assessment tool referred to as a "COMPAS" assessment. Such an assessment was performed and a written documentation of it was prepared in connection with the petitioner's appearances before the parole board. The 2014 determination of the board was vacated by this court because that determination to deny parole release was issued in the form of a conclusory statement that petitioner's release would not be compatible with the welfare of society and would so deprecate the seriousness of his crimes of conviction as to undermine respect for the law. It was this court's opinion that the parole board reached a conclusion entirely unsupported by the factual record before it, and that it failed to articulate a rational basis for the determination.

At the *de novo* hearing held December 15, 2015, the same thing happened. (It failed to articulate a rational basis). The three commissioners conducting the petitioner's interview questioned him extensively with regard to the underlying offense and his lifestyle at the time of the offense. The petitioner acknowledged shooting a police officer, acknowledged being on drugs, including 21 pills in 24 hours (transcript of Dec. 2015 hearing, pp.10 lines 5-6) including Norgesic Forte, Valium, Darvon and Melhoral (transcript pp.9, lines 19-23). He talked about his remorse, acknowledging ". . . it's my fault, a hundred percent my fault. . ." (pp.14, lines 7-8) and later in the hearing ". . .all my thoughts went with Matthew Giglio, because - -I followed his kids since they are little kids growing up. And everything I did since 1983 was in memory of Matthew. It took me 13 years to get a Victims' Awareness Program started, . . . I did that in memory of Matthew, to show his family that this is the best I can do to make up for it, although I can't . . ." (pp.16, lines 1-10) and later in the hearing "And that was [the] day I changed my life around, 1983, and everything I worked towards to help other people realize the impact their actions have on people. So, many lives were tragically destroyed and it's my fault."(pp.17, lines 2-5)

It wasn't until late in the interview that the Board addressed the petitioner's institutional record (commencing on Page 18 of 22) and then only briefly as to what he would do and where he would go if he were released. The petitioner testified that he had a place to live and he had a job. Commissioner Hallerdin acknowledged that the decision was a very hard decision. "And a life was lost, could be anybody, you know. But you have done well, you have done a lot of work. We will consider everything and get back to you." (pp. 22, lines 13-18).

The 2015 decision reads as follows:

> "Parole denied. Hold 24 months. Next appearance 6/2016. The panel commends your personal growth and productive use of time. However, discretionary release shall not be granted merely as a reward for good conduct or program completion while incarcerated.
>
> After a careful review of your record and personal interview, parole is denied. Your release would be incompatible with the welfare of

society and would so deprecate the serious nature of the offense as to undermine respect for the law. You appear before this panel for the serious instant offense of Murder 2nd, Manslaughter 2nd, Grand Larceny 2nd, Burglary 2nd and Criminal Possession of a Weapon 3rd. The instant offense involves you during the course of a burglary, you shot and killed a police officer. Your behavior during the instant offense demonstrates a serious disregard for the law and disregard of law enforcement and the sanctity of human life. This is clearly an acceleration of your negative behavior. Due consideration has been given to your COMPAS Risk Assessment, rehabilitative efforts, case plan, parole packet risk, needs, letters of support and sentencing minutes.

However, despite these accomplishments, when considering all relevant factors, discretionary release is not appropriate."

Petitioner then brought this contempt application asking the respondent to show why she/the Board should not be held in contempt. The court found in its March 28, 2016 decision and order that it appeared from the papers and the partial record presented, including the parole board minutes and decision of December 15, 2015, that the 2015 decision suffered from the same infirmities as the vacated 2014 decision. Because the petitioner allegedly disobeyed a clear and lawful mandate of this court, which was to hold a *de novo* hearing and issue a decision in compliance with the Executive Law, that is, that any *de novo* determination be based on a "**substantive consideration of the statutory factors set forth in the Executive Law**" (emphasis added), this court scheduled a contempt hearing for May 20, 2016 at 10:30 a.m. In fact, in its opposition papers, **the respondent did not deny that the 2015 determination was not made in conformance with Executive Law** §259-i(2).

HEARING AND DECISION

The only witness to testify at the hearing was the petitioner. Although petitioner called a second witness, Mr. James Murphy, a Chaplain and former Catholic Priest who has devoted much of his life to public service as an advocate for criminal justice, upon respondent's request for an offer of proof as to this witness' testimony, petitioner's counsel was unable to articulate any potential testimony relevant to the contempt application. Mr. Murphy's testimony was discontinued and is not considered.

The petitioner acknowledged his 40 year old crimes of conviction and that it was his only conviction for a violent crime. He testified about the reversal of that conviction, his conviction upon a retrial, his unblemished prison record for the past 35 years since his 1981 incarceration, his positive and productive use of time including obtaining three degrees, two Associate's Degrees, including one in arts and one in business administration, and one Bachelor's Degree in business administration with a major in commerce, his completion of a business course, working as an inmate grievance

resolutions clerk at the Fishkill Correctional Facility, working as a special events clerk and pre-release peer counselor at the Woodbourne Correctional Facility and what he called his "epiphany" in 1983 and his remorse for his victim and their family, and sympathy for other victims. This resulted in his successful efforts over a period of 13 years to establish a victims impact program in memory of his victim, Matthew Giglio, and for which he received a $10,000.00 grant used to start the program. He described the program which worked in 16 week cycles where victims would speak as would clinical psychologists, experts on domestic violence, judges and student interns from Vassar College. He continued to run the program for about one and one-half years until he was transferred resulting in the program being canceled. He tried to resume it at the Woodbourne Correctional Facility but it was not permitted.

The petitioner discussed his relationship with his family including his two daughters and three grandchildren. The petitioner is now 70 years old having been incarcerated for more than 40 years and having been eligible for parole release for the past 16 years.

After petitioner rested, Respondent's counsel moved to dismiss and decision was reserved. Respondent's counsel was asked if he had any witnesses. He did not.

First, it is hereby

ORDERED that respondent's motion to dismiss is denied. The petitioner made a *prima facie* showing of contempt. Petitioner made that showing as set forth in this court's March 28, 2016 decision and order as to (1) the existence of a clear and lawful mandate of the court; (2) that the party alleged to have disobeyed the order was aware of its terms; (3) that the moving party's rights were prejudiced; and (4) that all less drastic remedies have been exhausted or would be ineffectual. See El-Dehdan v El-Dehdan, 114 AD3d 4 (2nd Dept. 2013); Taylor v. Taylor, 83 AD3d 815 (2nd Dept. 2011).

At the hearing on the contempt application, the respondent offered no proof whatsoever. Remarkably, **no one testified on behalf of the respondent.** No new documents were offered into evidence on behalf of the respondent. The documents considered on the underlying motion and upon this hearing are the December 15, 2015 minutes, the 2015 decision and the COMPAS report.

Based on all of the above, it is hereby

ORDERED AND ADJUDGED that the respondent is in contempt of this court's clear directive as set forth in its decision and order of March 28, 2016. See McCain v. Dinkins, 84 NY2d 216 (1994). It is undisputed that it is unlawful for the parole board to deny parole solely on the basis of the underlying conviction. Yet the court can reach no other conclusion but that this is exactly what the parole board did in this case. No other basis has been stated by the parole board for the denial of parole in either of its determinations in December of 2014 or December of 2015. The court cannot gleam from the record before it, the testimony presented or the lack of testimony presented on behalf of the respondent any basis for the parole board to have denied release other than on the basis of the

underlying crime. It is undisputed that this petitioner has a perfect institutional record for the past 35 years. This case begs the question, if parole isn't granted to this petitioner, when and under what circumstances would it be granted? It is further

ORDERED that pursuant to Judiciary Law §753(A)(3) the respondent is held in contempt and fined the sum of $500.00 per day starting June 7, 2016 for each day until an actual *de novo* parole hearing is held and a decision is issued in accordance with Executive Law §259-i(2); and it is further

ORDERED that none of the members of either the 2014 or 2015 parole boards that denied parole shall participate in the *de novo* hearing. It is further

ORDERED that the petitioner is entitled to costs per statute in the sum of $100.00 and disbursements per CPLR §8301(13)(b) which shall be paid within 30 days hereof.

This constitutes the decision and order of this court.

Dated: May 24, 2016
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

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Pursuant to 22 NYCRR 671.5, please be advised that you have the right to appeal, or to apply for permission to appeal, this order to the Appellate Division. Your notice of appeal must be filed at the Dutchess County Clerk's Office, 22 Market Street, Poughkeepsie, New York 12601. Upon proof of your financial inability to retain counsel and pay the cost and expenses of the appeal, you have the right to apply to the appellate court for assignment of counsel and leave to prosecute the appeal as a poor person. CPLR Section 5513 provides that an appeal may be taken, or motion for permission to appeal may be made, within thirty (30) days after the entry and service of any order or judgment from which the appeal is taken, or sought to be taken, and written notice of its entry.