Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Decisions in Art. 78 Proceedings | Article 78 Litigation Documents

January 2020

Decision in Art. 78 proceeding - Marszalek, Mark (2012-12-17)

Follow this and additional works at: https://ir.lawnet.fordham.edu/pdd

Recommended Citation

"Decision in Art. 78 proceeding - Marszalek, Mark (2012-12-17)" (2020). Parole Information Project
https://ir.lawnet.fordham.edu/pdd/107

This Parole Document is brought to you for free and open access by the Article 78 Litigation Documents at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Decisions in Art. 78 Proceedings by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
PRESENT: HON. LAWRENCE H. ECKER, J.S.C.

----------X

In the Matter of the Application of
MARK MARSZALEK, 93-A-0799

Petitioner,

-against-

Index No. 3538/2012

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

DECISION, ORDER & JUDGMENT

Motion date: June 25, 2012

NYS DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, NYS BOARD OF PAROLE,

Respondent.

----------X

The following papers numbered 1 to 17 were read on petitioner's application pursuant to CPLR Article 78 seeking an order annulling and vacating his denial of parole and granting a new parole release hearing:

	PAPERS NUMBERED
Order to Show Cause/Verified Petition/Exhibits A-C	
Memorandum of Law	1-6
Answer and Return/Exhibits 1-11	5-18
Reply Affirmation	19

Upon the foregoing papers, the decision, order, and judgment of the court is as follows:

Petitioner Mark Marszalek ("Marszalek" or "Petitioner") seeks an order and judgment pursuant to CPLR Article 78 granting the following relief: 1) annulling and vacating the March 15, 2011 determination of respondent New York State Board of Parole ("Respondent") denying him parole; and 2) ordering a de novo parole hearing. Respondent opposes the petition and seeks its dismissal.

Facts

On July 18, 1992 at about 2:10 a.m. in Cohoes, New York, petitioner set a fire in a residence where he was staying that resulted in the death of Patricia Walsh, age 19. The petitioner was at the residence as he was watching the house for his friends, Walsh's sister and brother-in-law, Terry and Dan Spano, who were away on vacation. He had previously met the victim and knew her family. He had arrived at the house with a six pack of beer and proceeded to consume the beer before he started the fire. He did not know why he started the fire, but later admitted he knew the building was occupied by others at the time. At the time of the fire, besides the decedent, the house was also occupied by a family of two adults and their 19 year old daughter. Petitioner was arrested two days later and charged with arson and felony murder.

At the time of his crimes, Marszalek was 22 years old and had not previously been arrested. He had received an Associate's Degree from Hudson Valley Community College and was enrolled in Siena College for his bachelor's degree. While attending college, he had worked steadily at various jobs. He reportedly had also been a

volunteer fireman at a local fire department The pre-sentence report indicates that prior to the instant offense, petitioner was being treated for alcohol abuse and mental health issues, including depression and two suicide attempts. He admitted to previously setting fires when he had been drinking and was depressed.

On September 17, 1993, petitioner pleaded guilty to felony murder [PL §125.25(3)] in Albany County Court in a negotiated plea agreement. On October 18, 1993, the court sentenced him to 19 years to life imprisonment. Answer and Return, Exhibit 11.

Petitioner became eligible for parole in 2011 after serving 19 years. At petitioner's initial parole hearing on March 15. 2011 at Mid-Orange Correctional Facility in Orange County, the Board's interview primarily focused on the crime. Petitioner admitted his culpability in his crimes. He said he did not start out that night to set a fire, but was severely depressed, and after drinking the alcohol, he acted impulsively. He had not been angry at Walsh or her family. He acknowledged that the victim had paid for her life for his horrific decisions. In prison, he had received his bachelor's and master's degrees. The Board noted his minimal disciplinary record and program achievements. His release plans included residing with his parents or brother with employment awaiting him. The Board also noted a considerable number of letters from the community opposing his release. Respond. Answer and Return, Exhibit 4.

Petitioner was denied parole and held for 24 months to March, 2013.

The Board's decision stated:

> 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, and would so deprecate the serious nature of your crime as to undermine respect for the law. This decision is based on the following factors: your instant offense is Murder 2 in which you set an occupied home on fire at 2:00 a.m. After leaving the home you were in and setting the fire you did not try to put it out, evacuate the residents, or call for help, but instead went back to sleep leaving the three occupants in dire danger and resulting in the death of a remarkable 19 year old Patricia Walsh. You admit to setting previous fires, Note is made of your sentencing minutes, programs, education, disciplinary record, opposition to your release by the county, and all other required factors. Your senseless and merciless Actions indicate the danger you pose. Parole is denied.

Petitioner took an administrative appeal from the Board's decision. On or about December 29, 2011, the Board of Parole affirmed its decision denying parole. Answer and Return, Exhibits 7 - 9. Two months later, in February, 2012, a memo submitted by petitioner seeking reconsideration was also denied. Answer and Return, Exhibit 10.

The Article 78 Proceeding

The Article 78 proceeding raises nine arguments:

1. The Parole Board failed to obtain an official statement from the defense attorney, failed to review the memo submitted by defense counsel during trial and failed to review the official statement provided by the defense attorney's representative.

The petitioner has not submitted the presentence memorandum. An attorney in charge of closing the defense attorney's office following his death provided an untimely

letter dated June 7, 2011, several months after petitioner's parole hearing. None of these facts provide any basis to annul the parole determination.

2. The Parole Board failed the review the sentencing minutes when making its release decision.

However, the Board specifically referred to the sentencing minutes in its decision denying release, supra. Answer and Return, Exhibit 5.

3. The Parole Board considered erroneous information. Petitioner complains that the Parole Board was under the mistaken belief that he was guilty of intentional murder, not felony murder, i.e. causing the death of Patricia Walsh while committing arson. The nature of the crime is specifically referred to in the sentencing minutes and pre-sentence report. Petitioner also notes that he had served 222 months in prison, not 209 months and 458 days jail time as indicated at page two of the Parole Board Release Decision Notice {Answer and Return, Exhibit 5].

The Parole Board minutes reflect the Board was aware that petitioner was convicted of causing the death of his victim, Patricia Walsh, while committing an arson. The fact that a parole commissioner expressed his opinion that essentially equated the crime as being tantamount to intentional murder is of no moment. Both felony murder and intentional murder are classified as class A-1 felonies. Felony murder is considered the same as intentional murder in our penal statutes carrying the same authorized sentence. There is no indication that the Board mistakenly considered petitioner to have been convicted of intentional murder. Rather, they may have viewed his blameworthiness as being equal to one who murders intentionally. The Board was also aware that as of petitioner's hearing date in March, 2011, he had served nearly 19

years imprisonment, and it was so noted. While petitioner complains about an erroneous calculation, it was correct. In March, 2011, petition had served 209 months plus 458 days jail time 458 days / 30 days per month = 15 months. 15 month + 209 month = 224 months - exactly what petitioner had served from July, 1992 through March, 2011. (Exhibit 4, page 2). Thus, the claim that the Parole Board considered erroneous information in violation of petitioner's due process and statutory rights is without merit.

4. The Parole Board rendered a conclusory decision. This also lacks merit as the factual basis and statutory factors underlying its decision were included in the decision.

5. The Parole Board rendered a decision outside the scope of its duties and usurped the sentencing court. Denied.

6. The Parole Board failed to consider mitigating factors. Information about petitioner's mental health condition was before the Parole Board. The minutes indicate it was discussed at the hearing.

7. The Parole Board failed to answer appeals within a timely manner. Petitioner argues the "standing policy" of the Appeals Unit of the Parole Board is to wait until120 days pass before deciding an appeal. No proof exists to support this argument. In any event, the administrative appeal was decided on December 29, 2011, five months after receipt on July 19, 2011. Moreover, 9 NYCRR 8006.4 (2)(c) provided that should the Appeals Unit fail to issue its finding and recommendations within four months of the date the perfected appeal was received, the appellant may deem this administrative

remedy to have been exhausted....." The court finds no delay in deciding the appeal, and no basis to set aside the Parole Board's decision on such ground.

8. Parole was denied on impermissible grounds based upon discrimination due to petitioner's mental disability. There is no basis in the record to support this claim.

9. The Board did not have a "risk and needs" assessment regarding petitioner when it denied parole. The risk and needs assessment is required by a 2011 amendment to the parole law [Executive Law § 259-c[4] which took effect after the March, 2011 hearing, but prior to the administrative appeal being decided in December, 2011. As set forth, *infra*, the court finds that the Board of Parole should assure compliance with the new requirement by using a COMPAS ReEntry Risk Assessment in the decision-making at petitioner reappearance in March, 2013.

Discussion

It is well settled that parole release is a discretionary function of the Parole Board and its determination should not be disturbed by the court unless it is shown that the Board's decision is irrational "bordering on impropriety" and that the determination was, thus, arbitrary and capricious. *Matter of Salmon v. Travis, 95 NY2d 470 (2000); Matter of King v. NYS. Division of Parole, 190 AD2d 423 (1st Dept., 1993), aff'd 83 N.Y.2d 788 (1994); Matter of Duffy v. NYS. Div. of Parole, 74 AD3d 965 (2d Dept 2010).* In reviewing the Board's decision, the court must also examine whether the Board's discretion was properly exercised in accordance with the parole statute.

Executive Law §259-c[4] was recently amended to require the Board to promulgate new procedures in making parole release decisions. Such new procedures "shall incorporate risk and needs principles to measure the rehabilitation of persons

appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision." See, Laws of 2011, ch. 62, Part C, Subpart A, §38-b.

Since petitioner is scheduled within three months for a reappearance before the Board of Parole, the court grants the petition to the limited extent that the Board of Parole shall assure compliance with the new requirement mandated in Executive Law § 259-c[4] by using a COMPAS ReEntry Risk Assessment in the decision-making at petitioner reappearance hearing in March, 2013. Otherwise, the petition is denied.

The foregoing constitutes the decision, order, and judgment of the court.

Dated: Goshen, New York
December 17, 2012

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Cheryl L. Kates, P.C.
Attorney for Petitioner
P.O. Box 734
Victor, New York 14564

Jeane L. Strickland Smith, Esq.
Assistant Attorney General
New York State Attorney General's Office
Attorney for Respondent
One Civic Center Plaza, Suite 401
Poughkeepsie, New York 12601