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January 2020

Decision in Art. 78 proceeding - Martin, Nicholas (2017-10-18)

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Fandrich, Mark H., Acting J.

Petitioner, who is presently an inmate at Shawangunk Correctional Facility, is challenging the New York State Board of Parole's determination denying him parole release. Petitioner commenced this proceeding pursuant to CPLR Article 78 requesting that the Court reverse and set aside Respondent's determination of September 27, 2016. Petitioner argues that in rendering its decision the Board failed to consider the significance of Petitioner's youth at the time of the commission of the crime for which he is being held.

Petitioner was convicted, following a plea, of murder in the second degree and sentenced on August 10, 1999, to a term of imprisonment of eighteen years to life. Petitioner's arrest and subsequent conviction stemmed from an incident whereby Petitioner stabbed a man who was purchasing drugs from him. At the time of the offense, Petitioner was seventeen years old.

Following a September 27, 2016, Parole Board appearance, the Board denied Petitioner parole. The Board decision reads as follows:

"Denied-hold for 24 months, next appearance date: 09/2018. After a review of the record, interview, and deliberation, the panel has determined that your release would be incompatible with the welfare and safety of society and would so deprecate the serious nature of the crime as to undermine respect for the law. Parole is denied. Required statutory factors have been considered, together with your institutional adjustment including discipline and program participation, your risk and needs assessment, and your needs for successful re-entry into the community. More compelling, however, are the following: your serious instant offense of murder 2nd degree which involved you causing the death of the victim by stabbing him multiple times with a knife. You stated during the interview that the cause of this was a dispute over drugs and that you were selling drugs at the time. The records reflect and you agreed that you had contacts with the legal system in Tennessee as a juvenile and, unfortunately, your move to NY did not change your negative behavior. As a result of you engaging in illegal activity of selling drugs you put yourself in a position that lead to the victim's death. The panel notes your positive programming to date. Also noted, and discussed, is your very poor disciplinary record which demonstrates both violent conduct and drugs and considered together with the instant offense is a concern to this panel. You need to work harder on staying ticket free and continue programs that will benefit you. Therefore, based on all required factors and file considered,

Hawkins relied upon several United States Supreme Court cases involving young defendants in criminal matters (*see id* at 36-41, *citing* *Montgomery v. Louisiana*, 577 US ___, 136 S Ct 718 (2016); *Miller v. Alabama*, 567 US 460 (2012); *Graham v. Florida*, 560 US 48 (2010)). Applying the constitutional protections afforded under these cases, the court held that “a person serving a sentence for a crime committed as a juvenile . . . has a substantive constitutional right not to be punished with a life sentence if the crime reflects transient immaturity . . .” (*Matter of Hawkins*, 140 AD3d at 36). As a result, the Board must consider “the significance of a petitioner’s youth and attendant circumstances at the time of the commission of the crime before making a parole determination” (*id*).

Petitioner argues that in rendering its decision, the Board failed to consider his young age at the time he committed his crime. This case comes at a pivotal time in New York State, where “Raise the Age” legislation was recently enacted to change the way the criminal justice system handles cases involving sixteen- and seventeen-year-old offenders.¹ Although Petitioner’s age may not have been considered when he was sentenced in 1999, he is entitled to have his age at the time of the offense considered now by the Parole Board, the entity responsible for determining whether he will spend life in prison or some lesser time (*see Matter of Hawkins*, 140 AD3d at 36). At least two other lower courts have granted *de novo* hearings in light of the holding in *Hawkins* (*see eg Matter of Hoyer v. Stanford*, Sup Ct, Seneca County, September 14, 2016, Bender, J., index No. 50348; *Dukes v. Stanford*, Sup Ct, Albany County, August 1, 2016, McFonough, J., index No. 210-16). In a third, the court granted a *de novo* hearing after the office of the attorney general sent a letter to the court

¹ The law will raise the age of criminal responsibility to eighteen, taking effect for sixteen year-olds on October 1, 2018, and for seventeen year-olds on October 1, 2019.

consenting thereto (see *Matter of Green v. Stanford*, Sup Ct, Albany County, December 5, 2016, Platkin, J., index No. 4057-16).²

In the instant case, Respondent's answer fails to address *Hawkins* or the substantive issue of age raised by Petitioner (see *Matter of Hawkins*, 140 AD3d at 34). Instead, Respondent only states that "the Board considered the petitioner's maturity and culpability, and those are consistent with other statutory factors." While the Appeals Unit addressed the issue more clearly, it did so minimally, concluding without detail that the transcript "reveals that the Board considered the significance of [Petitioner's] youth and its attendant circumstances at the time of the commission of the crime before making its parole determination."

A careful review of the transcript, however, demonstrates that the Board merely asked Petitioner how old he was at the time of the crime, and was aware of Petitioner's prior criminal history as a juvenile in another state. Beyond that, there is nothing that shows the Board considered Petitioner's youth and its attendant characteristics in relationship to the commission of the instant crime. This limited attention does not satisfy the Eighth Amendment, which requires "inquiry into and careful consideration of whether the 'crime reflects transient immaturity'" (*Hawkins*, 140 AD3d at 39 n7, quoting *Montgomery v. Louisiana*, 577 US at ___, 136 S Ct at 735). Likewise, the Board's decision fails to demonstrate careful consideration of the issue. While the Board looked back at Petitioner's prior juvenile history in Tennessee, it failed to consider Petitioner's young age at the time of the instant offense (compare *Matter of Cobb v. Stanford*, ___ AD3d ___, 2017 NY Slip Op 06580 (3d Dept 2017)). As a result, the determination must be annulled and the matter remitted to

²A copy of the letter referenced in the *Matter of Green* order was submitted to the Court by Petitioner.

the Board for a new hearing.

Accordingly, based upon the foregoing, it is hereby

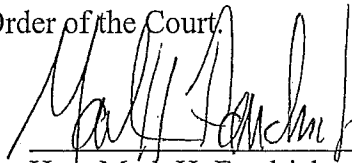
ORDERED, ADJUDGED AND DECREED that the petition is granted, without costs, and Respondent's decision of September 27, 2016, is annulled; and it is further

ORDERED that this matter is remanded to the Board of Parole, which is directed to conduct, within 60 days of service of the Court's decision herein, a *de novo* hearing.

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: October 18, 2017



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

