January 2020

Decision in CPLR Article 78 proceedings - Mercer, James R., Jr. (2013-02-22)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of
JAMES R. MERCER, JR., 87-C-0688,

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE,
APPEALS UNIT

Respondent.

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

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DECISION/ORDER

Index No. 6330-12
R.J.I. No. 01-12-ST4203
Richard Mott, J.S.C.

Motion Return Date: Albany County Special Term, February 8, 2013

APPEARANCES:

Petitioner: James R. Mercer, Jr.
Self Represented Petitioner
Livingston Correctional Facility
P.O. Box 49
Sonyea, NY 14556-0049

Respondent: Eric T. Schneiderman, Esq.
Attorney General of the State of New York
The Capitol
Albany, NY 12224-0341
Laura A. Sprague, Esq., Assistant Attorney General,
of Counsel

Mott, J.

Petitioner filed this Article 78 proceeding to challenge Respondent's May 22, 2012, decision denying him release on parole.

Petitioner is serving an aggregate sentence of 25 to 50 years' imprisonment. He was

convicted in Niagara County in 1987 of Rape in the First Degree (2 counts), Rape in the Second Degree (6 counts), Sodomy in the First Degree (6 counts), Sodomy in the Second Degree (3 counts), Sodomy in the Third Degree, Sex Abuse in the First Degree (2 counts) and Assault in the Second Degree in connection with three separate incidents in June, 1986.

In its decision denying parole, the panel almost exclusively focused on Petitioner's convictions:

> Parole denied, hold 24 months; next appearance 5/2014.
>
> Parole is denied.
>
> This panel concludes that after a careful review of your records and of the interview, there is a reasonable probability that if you were released at this time, there is a reasonable probability that you would not live and remain at liberty without violating the law and that our release would not be compatible with the public safety and welfare of the community.
>
> This Decision was based on the following: You appear before this Panel serving time for multiple counts of sodomy, rape, sexual abuse and assault. In 1986 you abducted three underage females off the streets, took them to a secluded area and forced them to commit sodomy and/or engage in sexual intercourse. One of your victim's fought back and was stabbed by you.
>
> Your criminal history has been considered and includes a prior sexual abuse first degree state bid and an adjudicated YO attempted burglary.
>
> The panel has considered your reentry plans, along with your programs, vocational and educational accomplishments and all matters required by law. However, you are sex offender who remains a threat to the community; parole is denied at this time.

It is well settled that release on parole is a discretionary function of the Parole Board and that 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 Silmon v. Travis*, 95 N.Y.2d 470 (2000); *Matter of King v. NYS Division of Parole*, 190 A.D.2d 423 (1st Dept. 1993), aff'd 83 N.Y.2d 788 (1994). 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. *Matter of Thwaites v. New York State Board of Parole*, 34 Misc.3d 694 (2011).

Executive Law 259-i(2)(c) provides general criteria the Board must consider. And the statute provides the Board with specific factors to consider in determining whether the general criteria has been met. See, Executive Law 259-ii(2)(c)(A)(I - viii).

Executive Law 259-c(4) was amended in 2011 to require the Parole Board to promulgate new procedures in making parole release decisions. These "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."

These statutory changes sought to modernize the work of the Parole Board by requiring the Board to adopt procedures that incorporate social science research in assessing post-release and recidivism risks. *Matter of Thwaites v. New York State Board of Parole*, supra, citing Genty, "Changes To Parole Laws Signal Potentially Sweeping Policy Shift", NYLJ, September 1, 2011.

Here, the Parole Board relied almost entirely on the nature of Petitioner's crime in denying parole. While his institutional accomplishments and release plans were discussed, the Board focused on the circumstances of the crimes committed 25 years ago. When it evaluated Petitioner's release, it employed past-focused rhetoric, not future-focused risk assessment analysis. Such reasons cannot sustain a rational determination of the inquiry at hand: 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. Executive Law 259-i(2)(c); *Matter of Thwaites v. New York State Board of Parole*, supra.

The Court finds the Board's decision denying parole in this case to be arbitrary and capricious, irrational, and improper based upon the Parole Board's failure to articulate any rational, nonconclusory basis, other than its reliance on the seriousness of the crime, why Petitioner's release on parole could not meet the criteria in Executive Law 259-ii(2)(c)(A); *Matter of Thwaites v. New York State Board of Parole*, supra.

Further, presumably in an effort to implement the required, new procedures, Petitioner was interviewed on May 7, 2012, and a "COMPAS ReEntry Risk Assessment" was prepared. Petitioner was informed at his May 22, 2012 interview that the Board had a "risk assessment evaluation," and that it would consider it. However, the record does not show that Petitioner received a copy of the assessment after it was prepared or that he reviewed same before his Board appearance. The Petition strongly implies that Petitioner did not see or review the assessment. Petitioner wrote:

> Appellant believes that in the five to ten minute interview he had with Ms. Walker, where she read him questions 35 - 74 and recorded his answers, he was entitled to read and supply input in regards to the questions on the Risk Assessment. In the alternative, Ms. Walker should have reviewed Appellant's records to ensure that correct responses were made on the Risk Assessment for the purpose of the Board having an error free record before it.

Respondent does not controvert these allegations and has not asserted that Petitioner received or reviewed the Risk Assessment before meeting the Board, nor has Respondent provided any written rules and regulations indicating a policy with regard to providing the inmate with the Assessment and/or a review of the document for errors by the inmate or anyone before the Board considers it. See, *Matter of Cotto v. Evans*, 2013 WL 486508

(N.Y.Sup.)(St. Lawrence County, 2013).

Petitioner has pointed out thirty-four errors he asserts are in the Risk Assessment, many of which, if corrected, would make his risk of re-offense far less likely. For example, and this is not an exhaustive list of the claimed errors, the "Criminogenic Need Scales" section shows that Petitioner is rated 7-Probable for Vocation/Education need even though he has completed six vocational courses and has earned his GED and 72 college credits while imprisoned. For no discernible reason the Assessment is "unsure" about whether Petitioner has "basic educational needs that need to be addressed,"when in fact, Petitioner has no such needs. Further, Petitioner is rated 9-High for Prison Misconduct, but his Disciplinary History indicates that in the previous 24 months Petitioner had no Tier 3 infractions, 2 Tier 2 infractions (moderate offenses) and none of the enumerated infractions. For no discernible reason the Assessment answers "yes" as to whether the Petitioner appears "to have notable disciplinary issues." In addition, Petitioner is rated 9-High for history of violence, but the Assessment asserts incorrectly that Petitioner was on both parole and probation at the time of his offense, that excluding the current case, Petitioner had 3 "prior felony assault offenses (not murder, sex or domestic violence arrests)" when in fact he has none, and that excluding the present case, Petitioner was sentenced to prison twice, when there was one prior commitment. Moreover, Petitioner's need is rated 4-Unlikely with regard to "Low Family Support," and "unsure" with regard to positive family support, when all of the specific items on the Evaluation show that Petitioner plans to stay with his family on release, that family members have visited him during incarceration, and that the inmate believes his relatives are supportive. In sum, the Risk Assessment contains errors that tilt it toward a denial of parole and away from release.

Petitioner argues that the Board's reliance on this incorrect or erroneous information in the Risk Assessment requires vacatur of the Board's determination. See, *Matter of Henry v. Dennison*, 40 A.D.3d 1175 (3d Dept 2007), *Matter of Smith v. New York State Board of Parole*, 34 A.D.3d 1156 (3d Dept. 2006), *Matter Plevy v. Travis*, 17 A.D.3d 879 (3d Dept. 2005).

In response, Respondent asserts that Petitioner waived any objection to the claimed errors. The cases relied upon by Respondent, however, are inapposite. And there is nothing in the record to show that Petitioner knew the contents of the Risk Assessment and was aware of the errors in it at the hearing. Cf. *Matter of Morel v. Travis*, 278 A.D.2d 580 (3d Dept 2000). In these circumstances, having an extended opportunity to talk before the Board is not a basis to impose a waiver or cure errors. Nothing in the record shows Petitioner's knowledge of the errors in the Assessment at the hearing.

Respondent also argues that Petitioner has not demonstrated that the errors in the Risk Assessment affected the Board's decision. In fact, Executive Law 259(c)(4) requires the Parole Board to "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 the Risk Assessment was the sole document before the Board purporting to carry out that evaluation. Serious errors in the Risk Assessment that devalue Petitioner's likelihood of success on release and exaggerate his likelihood of recidivism impermissibly skew the Board's balancing of the mandatory factors in Executive Law 259-i(2)(c)(A)(I - viii) in favor of denial of parole.

Accordingly, the Board of Parole's determination of May 22, 2012 is vacated and the matter is remanded to the Board of Parole which, within 30 days of the receipt of a copy of this Decision/Order, shall hold a new parole hearing and issue a decision thereon within 10 days

of the hearing. The new hearing shall be held before a different panel of the Parole Board.

This constitutes the Decision/Order of the Court.

The Court is forwarding the original Decision and Order directly to the Respondent, who is required to comply with the provisions of CPLR 2220 with regard to the filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. **All original motion papers are being delivered by the Court either to the Supreme Court Clerk for transmission to the County Clerk, or directly to the County Clerk.**

Dated: Claverack, New York
February 22, 2013

ENTER

RICHARD MOTT, J.S.C.

Papers considered:

1. Order to Show Cause dated November 26, 2012;
2. Affidavit in Support (November 5, 2012;
3. Verified Petition dat( )ended Appellant's Parole Release Denial Appeal dated, ages "A" through "U";
4. Answer dated, January 28, 2013, and Affirmation of Laura A. Sprague, Esq. dated, January 28, 2013 with Exhibits A through K