January 2020

Decision in Art. 78 proceeding - Serrano, Fernando (2003-09-22)

THE STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALBANY

In the Matter of the Application of

FERNANDO SERRANO, 88-A-3314,

Petitioner,

-against-

BRION D. TRAVIS, CHAIRMAN
DIVISION OF PAROLE,

Respondent.

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

Index #541-03
RJI #01-03-ST3404

Decision, Order and
Judgment

(Supreme Court, Albany County, Special Term, April 25, 2003)

(Justice Edward A. Sheridan, Presiding)

APPEARANCES:

FERNANDO SERRANO, Pro se
Fishkill Correctional Facility
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Beacon, New York 12508

HON. ELIOT SPITZER
Attorney General of the State of New York
(Gerald J. Rock, of Counsel)
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SHERIDAN, J.:

Petitioner, currently an inmate at Fishkill Correctional Facility, brings this special proceeding pursuant to Article 78 of the CPLR, seeking review of respondent's denial of his application for parole.

Petitioner is serving a sentence of 15 years to life imposed upon his conviction, by

guilty plea, of murder in the second degree. The sentence arose from an incident in July, 1987, during which petitioner, in a fit of jealous rage, stabbed and killed his wife. One week before the tragedy his wife had moved out of their apartment. At her request, petitioner went to see his wife at her new residence, in part, to give her a set of keys to the marital residence for the use of their children. After he gave her the keys, she said to him that now her lover would have a set of keys. She repeated this statement later on, at which time petitioner lost control. He grabbed a kitchen knife from the counter and stabbed her once in the chest, killing her.

Petitioner made his initial appearance before the Board of Parole at Fishkill Correctional Facility on May 22, 2002. At the hearing, the Commissioners specifically asked petitioner why he had committed the crime. Petitioner's institutional programming was discussed, as was his excellent disciplinary record and his significant academic achievements. The Board denied petitioner's application for parole, stating:

> Parole is denied. You currently are serving 15-years-to-life for murder, two, where you stabbed and killed your estranged wife. You allowed your anger and resentment towards your wife to rise to the point of extreme anger and out-of-control jealous rage. In your interview, you minimized the effect of your behavior. Discretionary release at this time would deprecate the seriousness of the instant offense and diminish respect for the law. Unspecified guidelines, involved weapon usage, use of excessive violence against a person, caused the death of the victim, escalation of criminal behavior.

Petitioner was ordered held for 24 months. Petitioner's administrative appeal was not answered by respondent within the time required, and he commenced this judicial proceeding.

Petitioner contends that the Board denied him parole release solely based on the nature of his crime, and that the Board failed to discharge its statutory and regulatory obligations to

conduct a fair review of petitioner's application. Respondent answers that the denial of parole was based on a hearing and review of petitioner's file that were conducted in accordance with all statutory, constitutional and regulatory requirements, and that the determination must therefore be affirmed.

Executive Law §259-i(2)(c) provides in pertinent part as follows:

> Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if 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 law.

Section 259-i(2)(c) goes on to provide that the parole release guidelines shall require consideration, among other things, of the inmate's institutional record, performance in any temporary release program, release plans, any deportation order, and any statement made to the Board by the crime victim. The Board is also required to consider the inmate's instant offense and prior criminal history (see Executive Law §§259-i[1][a], [2][a]). Section 259-i(5) provides that "any action by the Board ... pursuant to this article shall be deemed a judicial function and shall not be reviewable if done in accordance with law."

Within these general statutory guideposts, the Parole Board has wide discretion in deciding whether or not to grant parole release. "So long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the Courts" (*Matter of Briguglio v Board of Parole*, 24 NY2d 21, 29, quoting *Matter of Hines v State Board of Parole*, 293 NY 254, 257). The discretionary determination of the Parole Board, if made in accordance with the statutes,

will not be disturbed absent a showing of error or irrationality bordering on impropriety (*see Matter of Silmon v Travis*, 95 NY2d 470; *Matter of Saunders v Travis*, 238 AD2d 688, *lv denied* 90 NY2d 805, citing *Matter of Russo v N.Y.S. Bd. of Parole*, 50 NY2d 69, 77; *Matter of Ristau v Hammock*, 103 AD2d 944, *lv denied* 63 NY2d 608).

Pursuant to the statutes and regulations that govern the Parole Board's determinations, a candidate's criminality is a valid factor for the Board to consider (Executive Law §§259-i(1)(a), (2)(c); 9 NYCRR §8001.3). Thus, the Board must consider the circumstances, nature, and seriousness of an inmate's instant offense (*see Matter of Geames v Travis*, 284 AD2d 843, *appeal dismissed* 97 NY2d 639; *Matter of Fusco v Chairman, Bd. of Parole of State of New York*, 59 AD2d 973, *lv denied* 43 NY2d 648; *Matter of Consilvio v N.Y.S. Bd. of Parole*, 57 AD2d 955, 956). And ordinarily the weight to be accorded the various factors considered by the Parole Board is a matter within the Board's discretion (*Matter of Johnson v Travis*, 284 AD2d 686; *Matter of Geames v Travis, supra; Matter of Garcia v N.Y.S. Div. of Parole*, 239 AD2d 235; *People ex rel. Herbert v N.Y.S. Bd. of Parole*, 97 AD2d 128).

The determination on its face sets forth sufficient grounds to deny parole. However, a review of the transcript of the parole release interview reveals several serious defects requiring a new hearing. First, the decision states that petitioner minimized the effect of his behavior. However, the Commissioners specifically asked petitioner why he committed the crime and what drove him to the point at which he would commit such a crime. Petitioner stated that it was jealousy and stupidity. He specifically prefaced his explanation of what happened with the statement "I don't want to blame the victim in any kind of way, because I could have walked away. I should have

walked away." Repeatedly expressing remorse, the fact that he then candidly recounted what happened and how it affected him, in direct response to the Commissioner's questions, can not support a finding that he minimized the effect of his actions. There is nothing else in the transcript of the hearing which would support such a finding.

Second, the decision also recites that the instant crime constituted an "escalation of criminal behavior." However, this was petitioner's first offense and could not possibly constitute an "escalation." It is impossible for the Court to determine whether the Board erred with respect to petitioner's criminal history or what was meant by such statement.

Finally, the statements of one of the Commissioners show that she was displeased with the sentence that petitioner received. She stated "[S]ome who have committed the same crime that you have have been given 20-to-life and 25-to-life," and immediately thereafter "[S]o, whose life is worth 20 years, and whose life is worth 25?" Parole was then denied on the ground, inter alia, that release would deprecate the seriousness of the crime and diminish respect for the law. The Commissioner's statements are directly contrary to the determination of the sentencing judge, who clearly had a more extensive opportunity to review all of the circumstances of the crime and who specifically stated that 15 years of prison constituted a sufficient punishment in this case.

"The role of the Parole Board is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether, as of this moment, given all the relevant statutory factors, he should be released." (*Matter of King v New York State Div. of Parole*, 190 AD2d 423, 432, *affd* 83 NY2d 788, *supra*). The Court continued stating "[T]he Legislature, however, has not defined 'seriousness of [the] crime' in terms of specific

categories of either crimes or victims and it is apparent that in order to preclude the granting of parole exclusively on this ground there must have been some significantly aggravating or egregious circumstances surrounding the commission of the particular crime (*see, People ex rel. Thomas v Superintendent*, 124 AD2d 848, 849 [parole properly denied due to '"extraordinarily serious and bizarre nature of the present offenses"']). Certainly every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of a human life. Since, however, the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself." (*id.* at 433).

More recently, this Court has held that the Parole Board is not a resentencing authority; that sentencing is a function of the Court pursuant to legislatively enacted sentence ranges as approved and enacted into law by the Executive; and that the role of the Parole Board is to decide when an inmate may safely and appropriately be returned to society ". . . considering if 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 law." Executive Law § 259-1(2)(c); see, *Matter of Chan v Travis*, NYLJ. 3/27/03, p28, col 4). In an indeterminate sentencing structure, this requires a due regard for the views of the sentencing judge, clearly ignored here, whose minimum sentence presumptively has established a threshold release date assuming appropriate institutional adjustment and rehabilitative effort. [1] Denial of release at the threshold or later must

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[1]. It might be otherwise if the Parole Board was following a policy to "level" indeterminate sentences and to avoid sentencing disparities for similar crimes. However, there is no indication in this record or in any other case that has come before this Court that the Board is pursuing such a policy.

be individualized, reasoned and particularized within statutory guidelines. Merely parroting the statutory language is not statutory compliance. Moreover, unreasoned and pro forma denial undermines the rehabilitative ideal which is the keystone of indeterminate sentencing under which thousands of inmates remain incarcerated in this State.

A review of the statutory factors applicable to petitioner shows that he had an exceptional disciplinary record with only one tier II proceeding in 15 years of incarceration. He obtained his GED and an associates degree (para-legal) and has both participated and worked in alternatives to violence programs and alcoholics anonymous, as well as participating in numerous other betterment programs. He has a suitable housing arrangement if released and apparently has the ability to find gainful employment. All of such factors support release on parole.

Without more, the Board's "seriousness of offense" rationalization cannot stand. Its "minimized the effects" holding is ambiguously flawed and the innuendo of "re-sentencing," if that is what occurred here, is clearly ultra vires.

Accordingly, the petition is GRANTED, the determination denying parole is annulled, and the matter is remanded to the Board of Parole for a prompt re-hearing before a new panel and a decision not inconsistent with this Court's decision.

This memorandum shall constitute the Decision, Order and Judgment of this Court.

All papers, including this Decision, are being returned to respondent's attorney. The signing of this Decision shall not constitute entry or filing. Counsel is not relieved from the applicable provisions of the CPLR respecting filing, entry and notice of entry.

SO ORDERED.

ENTER JUDGMENT.

M/O SERRANO v TRAVIS **INDEX #541-03**

Dated: Albany, New York
September 22, 2003

Edward A. Sheridan, A.J.S.C.

PAPERS CONSIDERED:

(1) Order to Show Cause, signed February 13, 2003;
(2) Petition, sworn to January 20, 2003, with exhibits A-H;
(3) Verified Answer, dated April 14, 2003;
(4) Affirmation of Gerald J. Rock, Esq., dated April 14, 2003, with exhibits A-I;
(5) Reply Affidavit of Fernando Serrano sworn to April 23, 2003.