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Decision in Art. 78 proceeding - Sullivan, Veronica (2019-01-07)

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Carmen St. George
Justice

PART 34

Index Number : 100865/2018
SULLIVAN, VERONICA
vs
NYS BOARD OF PAROLE, TINA
Sequence Number : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ [No(s)] _____

Answering Affidavits — Exhibits _____ [No(s)] _____

Replying Affidavits _____ [No(s)] _____

Upon the foregoing papers, it is ordered that this motion is petition is granted as per the

attached decision and order.

FILED

JAN 10 2019

COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
JAN 09 2019
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/7/2019


J.S.C.

HON. CARMEN VICTORIA ST. GEORGE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34**

-----X
In the Matter of VERONICA SULLIVAN,

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE, Tina
Stanford, Chairwoman,

Respondent.

-----X
Carmen Victoria St. George, J.S.C.:

Index No.
Motion Sequence
Decision, Order
and Judgment

FILED

JAN 10 2019

**COUNTY CLERK'S OFFICE
NEW YORK**

On December 17, 1992, 78-year-old Sophia Seretta was stabbed and strangled in her apartment. Ms. Seretta's neighbor was the mother of petitioner Veronica Sullivan. Petitioner was 25-years-old at the time and a habitual drug user. On the night in question, petitioner purchased crack cocaine on the street. Shortly thereafter, she has stated, she met a man named Joaquim who followed her into the apartment building where petitioner's mother and Ms. Seretta lived. According to petitioner, she entered Ms. Seretta's apartment to pay for some knitting work the woman had done for petitioner's mother. Petitioner has stated that Joaquim then stabbed and strangled Ms. Seretta and stole her television set. At the parole hearing at issue in this proceeding, petitioner acknowledged that she did not attempt to stop Joaquim. Instead, petitioner said, she left the apartment in a panic and did not report the incident.

The following day, petitioner spoke with the police. The investigating officer stated that petitioner's hands and elbow were bruised, and that petitioner had no explanation for her injuries. Petitioner informed the police about Joaquim and she accused him of murdering Ms. Seretta. In 1994, however, petitioner was tried and convicted of the murder. Prior to this point, petitioner's

sole conviction had been for the misdemeanor crime of petit larceny, for which she received a sentence of a conditional discharge.

The sentencing hearing took place on April 26, 1994. At the hearing, one of the victim's daughters made a statement in which she asked that petitioner be punished to the full extent of the law. Petitioner made a statement in which she proclaimed her innocence, vowed to appeal her conviction, and accused the victim's daughter and family of lying about petitioner's involvement, perhaps due to the arresting officer's misleading comments about her. In his comments, the judge mentioned that petitioner's bloody fingerprints had been found on Ms. Seretta's watch case. He imposed the maximum sentence, 25 years to life, and recommended that petitioner not be paroled at any time. Petitioner is incarcerated at Bedford Hills Correctional Facility (Bedford Hills).

Prior to her transfer to Bedford Hills, petitioner married Vernon Blyther, a longtime MTA employee. The two have been married for 25 years. While at Bedford Hills, petitioner has completed several mandatory and recommended therapeutic programs. These include several Alternative to Violence sessions and the Alcohol and Substance Abuse Treatment Program (ASAT). After her completion of the Alternative to Violence programs, petitioner participated in the program as an inmate-facilitator. In addition, petitioner, who graduated from high school with a GED, took college courses during her incarceration, eventually receiving a Bachelor's degree from Marymount Manhattan College. Petitioner additionally became a certified graphic arts technician following her completion of a three-year graphic arts apprenticeship. Further, for 15 years petitioner has worked at Hour Children, an organization within the prison which works to strengthen bonds between incarcerated mothers and their children. She also is a volunteer tutor for Marymount College. Petitioner's disciplinary record also is worthy of note. Though during the

early years of her imprisonment petitioner committed infractions, her record has been untarnished since 2001.

Limited credit time allowances (LCTA) against an individual's sentence are permissible under 7 NYCRR § 290.1-290.4. An inmate's sentence may be reduced if he or she successfully completes an Associates or Bachelor's degree program during incarceration (7 NYCRR § 290.2 [d] [1]).¹ Such credit, moreover, is allowed only if the inmate has not "committed a 'serious disciplinary infraction' or maintained an overall poor institutional record' during the current term of incarceration" (7 NYCRR § 290.2 [b]). If an LCTA is granted, the inmate is entitled to an earlier parole hearing. In the case at hand, petitioner's academic studies, which earned her a Bachelor's degree, her lack of a serious disciplinary infraction, and her good overall institutional record, entitled her to an LCTA. Therefore, she appeared before respondent six months early, in March 2017. Respondent denied her application for parole at that time. This denial is not at issue here.

Next, she appeared before the board on August 8, 2017, pursuant to her regular parole schedule. Among the papers petitioner submitted in support of her 2017 applications is a January 13, 2017 letter from the National Lawyers Guild's Parole Preparation Project, which vigorously supported petitioner's application. The letter pointed to petitioner's warm, generous nature, the strong support of her family, and her diligent work to maintain her sobriety², the development of her anger management skills, and the sense of support and community she created with and among her fellow inmates. The letter noted that due to petitioner's good behavior she has lived in Fiske Honor Housing since 2007. In addition to discussing her educational advances and her work experience, the letter commended petitioner for her volunteer and charity work, including her tutoring activities and her knitting project (knitting scarves and helmet warmers for troops in

¹ There are numerous other ways this credit may be obtained, but they are not relevant to this proceeding.

² According to the letter, petitioner has maintained her sobriety throughout her time at Bedford Hills.

Afghanistan. Finally, the letter stated that petitioner has two employment offers pending, both outgrowths of her work with inmates and with inmates and their children, and she additionally intends to pursue her avocations, graphic arts, knitting, and photography.

In addition, petitioner submitted letters in support of her application. Petitioner's husband, sisters, and several nieces and a nephew, all wrote on petitioner's behalf. Her sister, Margarite Sullivan, noted that although petitioner continued to maintain her innocence, she had taken full responsibility for the consequences of her actions, including the death of Ms. Seretta. Reverend Sharon White-Harrigan, a licensed social worker who also heads a transitional homeless shelter for women after their release from jail, called petitioner a dynamic speaker, excellent role model, and compassionate individual who can help women transition from jail to the shelter and then to better lives. She also guaranteed petitioner a job upon her release. Aileen Baumgartner, the director of the Bedford Hills College Program, which coordinates with Marymount College, wrote about petitioner's intelligence, dedication, and her generosity and willingness to help others. Other instructors also commended petitioner. Two of petitioner's fellow inmates wrote that petitioner helped them move forward with their lives in more positive directions, getting one of them a job at the parenting center, and assisting the other with her anger and trust issues while also supporting and facilitating the woman's relationship with her daughter and her aging mother.

Respondent also had petitioner's behavioral record at its disposal. Significantly, among the documents before respondent was petitioner's COMPAS report. COMPAS, which stands for Correctional Offenders Management Profiling for Alternative Sanctions, is widely used in New York and elsewhere to assist in the evaluation of parole applicants. Essentially, it takes a number of factors, and plugs them into an algorithm which helps predict the parole applicant's likelihood

of recidivism (see *Matter of Rossakis v New York State Board of Parole* [Rossakis], 146 AD3d 22, 25 n 2 [1st Dept 2016]).

Petitioner's parole hearing took place on August 8, 2017. Respondent noted that early in her incarceration petitioner had amassed several infractions, but she had not had any problems since 2001. Upon inquiry, petitioner opined that it took her time to adjust to her situation. Respondent stated that petitioner's COMPAS scores were excellent, as she scored as a low risk for prison misconduct, propensity for future violence, and subsequent criminal problems. Respondent noted that her history of violence score was in the medium range because of the severity of her crime. Petitioner still maintained that she did not commit the murder, but she acknowledged that she was the catalyst for the crime because she allowed the murderer to enter the victim's apartment, that she was wrong to run away from the crime scene rather than intercede, and that she improperly did not say anything to the police that evening. The parole hearing focused also on the pre-sentence investigation and on petitioner's comments about the victim's family during the sentencing hearing. Petitioner again expressed her apology for the family's loss. She stated that her callous comments during the sentencing hearing were immature and inconsiderate, and that she should have treated the family with more sympathy and consideration. Respondent discussed the additional materials it had received since the March 2017 hearing, including the letters in support from her academic program and the Hour Children's Center.

After the hearing, respondent denied petitioner's parole application. It stated, as the reasons for the denial:

This panel has concluded that your release to supervision is not compatible with the welfare of society and therefore parole is denied. This finding is made following a personal interview, record review and deliberation.

Of significant concern is your course of conduct during the instant offense of murder 2nd where an elderly female known to you was viciously attacked with a knife causing death. The factors considered include your admission that you were under the influence of drugs and in the residence when the crime occurred. You also admit that despite your shock at what occurred you failed to immediately go to authorities for help. In addition, your comments during sentencing were noted, including those directed at the grieving relatives of the victim. Your document submissions, case plan, COMPAS report and programming are positive. Your behaviour *{sic}* early in the sentence was marginal but has improved since July 2001. Required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community reintegration.

To grant you a release at this time would so deprecate the seriousness of your offense as to undermine respect for the law.

Petitioner filed an appeal, which respondent denied on March 29, 2018. Citing Executive Law (Exec. Law) § 259-i (2) (c) (A), respondent noted that an inmate is not released “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, [she] will live and remain at liberty without violating the law, and that [her] release is not incompatible with the welfare of society and will not so deprecate the seriousness of [her] crime as to undermine respect for the law.” Respondent determined that the board considered all the factors delineated in the statute, and^{vii} it noted the high degree of discretion the board has in reaching its conclusions. Respondent found that it was appropriate to rely on the severity of petitioner’s offense along with her comments during sentencing. According to respondent, the board also rationally relied on the fact that 17 years before the hearing petitioner had committed some behavioral infractions. Respondent found that, although there was not a probability that petitioner would violate the law if released, the board rationally concluded that her release was incompatible with the welfare of society and would deprecate the seriousness of her crime. Further, respondent stated, the board’s decision was

sufficiently specific, and its decision not to rely on petitioner's COMPAS scores did not necessitate discussion. The law requiring such explanation was not in effect until the month after the parole hearing, respondent says.

In this Article 78 proceeding, petitioner seeks a judgment by this Court which annuls respondent's denial of her parole application and remits the matter to respondent for a de novo hearing. Respondent held a video conference parole hearing with petitioner on August 8, 2017 and issued its determination the same day. The current proceeding challenges the August 8 decision as irrational. Petitioner argues that respondent improperly based its decision solely on the severity of the crime. Respondent counters that it properly considered all relevant factors and issued a rational order well within the scope of its discretionary powers and should therefore be affirmed. For the reasons below, the Court grants the petition and remits the matter to respondent for further review.

DISCUSSION

"In an article 78 petitioner challenging a parole decision, the petitioner bears the burden to show that the decision is the result of irrationality bordering on impropriety and is thus arbitrary and capricious" (*Rossakis*, 146 AD3d at 26). This burden is a heavy one (*Garcia v New York State Div. of Parole*, 239 AD2d 235, 239 [1st Dept 1998]). Therefore, judicial review of a parole board determination is "narrowly circumscribed" (*Matter of Coleman v New York State Dept. of Correction and Community Supervision*, 157 AD3d 672, 672 [2nd Dept 2018]). The Board must consider all applicable statutory factors, including the inmate's institutional record, her release plan, impact statements by the victim's representative, the seriousness of the offense, the sentencing and pre-sentencing reports, mitigating and aggravating factors after the inmate's arrest, and the inmate's prior criminal record (Exec. Law § 259-i [2] [c] [A]). The board need not discuss each of the factors or weigh them equally (*Rossakis*, 146 AD3d at 27).

Despite the deference with which courts review a parole board's determination, courts do not rubber stamp a parole denial. Where the record shows that the board did not fairly consider each of the factors, "the courts must intervene" (*Matter of King v New York State Div. of Parole*, 190 AD2d 423, 431 [1st Dept 1993], *aff'd*, 83 NY2d 788 [1994]). For example, under 9 NYCRR 8002.3 (b), whenever the board denies a parole application it must provide the inmate a writing which includes detailed reasons for the decision "in factually individualized and non-conclusory terms." The board must consider only the relevant statutory factors (*see Matter of King v New York State Div. of Parole*, 83 NY2d 788, 791 [1994]), and it must give those factors adequate consideration (*see Matter of Mitchell v New York State Div. of Parole*, 58 AD3d 742, 742-43 [2nd Dept 2009]). As a result of these standards, board decisions which merely include a list of an inmate's achievements and progress and track the language of the Executive Law regarding the harmful impact of release on society and the deprecation of the serious nature of the offense which would result from the inmate's release can suggest that the Board's decision violated the statutory mandates (*see Rossakis*, 146 AD3d at 28). In addition, although the COMPAS score is not binding on the parole board (*see Dawes v Annucci*, 122 AD3d 1059, 1060-61 [3rd Dept 2014]), it is an important factor which the parole board must duly consider (*see Symes v New York State Board of Parole*, 117 AD3d 959, 959 [2nd Dept 2014]). Indeed, the COMPAS score is so critical that the failure to consider it adequately mandates a remand (*see Symes*, 117 AD3d at 959; *Kennedy v New York State Board of Parole*, 117 AD3d 948, 949 [2nd Dept 2014]; *Malerba v Evans*, 109 AD3d 1067 [3rd Dept 2013], *lv denied*, 22 NY3d 858 [2014]).

There is another significant limitation on the discretion of the parole board. Where the petitioner makes "a convincing showing" that the board reached its determination "based almost exclusively on the nature and seriousness of the offense," the decision may be overturned (*Matter*

of *Wallman v Travis*, 18 AD3d 304, 307 [1st Dept 2005] [emphasis supplied]). Although the underlying crime is “acutely relevant,” the parole board must consider other relevant statutory factors. As the First Department has stated, “[a] Parole Board’s exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by statute, but also effectively constitutes an unauthorized resentencing of the defendant” (*Wallman*, 18 AD3d at 307-08).

In the proceeding at hand, the Court concludes that respondent did not engage in the type of review that the statute and regulations require. Instead, respondent relied almost exclusively on the seriousness of the crime, with a brief mention of the statements petitioner had made 25 years earlier at her sentencing hearing. Respondent noted but did not discuss the weight of petitioner’s minor infractions prior to 2001 or her clean record for the past 17 years. The decision refers only fleetingly to petitioner’s overwhelmingly positive submissions, her plans upon release, and her COMPAS score, the latter of which predicted a low probability of recidivism; and, it does not explain how these factors weighed in the parole denial decision. As stated, the COMPAS instrument is “intended to bring the Board into compliance with . . . amendments to [the Executive Law]” (*Matter of Malerba v Evans*, 109 ad3D 1067, 1068 [3rd Dept 2013]; see *Pulinario v New York State Dept. of Correction and Community Supervision*, 42 Misc 3d 1232 (A), 2014 NY Slip Op 50301 (U), ***4 [Sup Ct NY County 2014]), and respondent’s failure to evaluate these factors is problematic.

Respondent’s written conclusions that 1) petitioner’s release was incompatible with the welfare of society and 2) her release would deprecate the seriousness of her offense and therefore undermine respect for the law merely track the statutory language, without explanation or context. Thus, the Court cannot evaluate their rationality (see *Rossakis*, 146 AD3d at 28). Inmates are

released on parole following murder convictions without doing this sort of damage, and respondent provides no information showing why it concludes that such a risk exists here. Furthermore, there is no "explanation of why the [25] year old crime outweighed the voluminous evidence that indicates [petitioner] would presently be able to live a quiet and crime-free life in society" (*Pulinario*, 42 Misc 3d 1232 (A), 2014 NY Slip Op 50301 (U), *4) [remanding to parole board, which denied parole to petitioner in 17-year-old murder case]]. For these reasons, it is

ORDERED that the petition is granted; and it is further

ORDERED that the matter is remanded to respondent for a de novo hearing.

Dated: *January 7th*, 2018 ~~2019~~

ENTER:

Carmen Victoria St. George
CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.

FILED

JAN 10 2019

COUNTY CLERK'S OFFICE
NEW YORK