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January 2020

### Decision in CPLR Article 78 proceedings - Phillips, George (2019-10-01)

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

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GEORGE PHILLIPS,

Petitioner,

DECISION, ORDER  
AND JUDGMENT

-against-

Index No. 52579/19

TINA M. STANFORD, CHAIR OF THE NEW YORK  
STATE PAROLE BOARD,

Respondent.

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The following papers were read on this Article 78 petition:

NOTICE OF PETITION  
PETITION  
EXHIBITS A - F

ANSWER AND RETURN  
EXHIBITS 1 -1 3

REPLY AFFIRMATION

This is an Article 78 proceeding in which Petitioner challenges a determination denying him discretionary parole release. In January 2000 Petitioner was sentenced after trial in Queens County to an aggregate term of 20 to 40 years incarceration after being convicted of two counts of Rape in the First Degree, one count of Sodomy and three counts of Sexual Abuse in the First Degree. Petitioner then entered an Alford plea (without admission of guilt) in Nassau County to charges of Rape in the First Degree, Sodomy in the First Degree and Attempted Sodomy in the First Degree resulting in an aggregate sentence of 10 to 20 years to run concurrently with the Queens County sentences. Petitioner was accused of cruising for teenage victims on the Nassau and Queens border, forcing them into his vehicle by displaying a weapon and/or making verbal threats and then driving to more secluded areas where rapes, sodomy and sexual abuses occurred. The challenged determination was made on October 9, 2018 at Petitioner's second appearance before the parole board. As of that date he was 54 years old and had served 22 years in prison.

Pursuant to Executive Law §259-i(2)(c), the New York State Board of Parole is required to consider a number of statutory factors in determining whether an inmate should be released to parole.

See Matter of Miller v. NYS Div. of Parole, 72 AD3d 690 (2<sup>nd</sup> Dept. 2010). The parole board must also consider 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 and will not so deprecate the seriousness of his crime as to undermine respect for the law.” 9 NYCRR 8002.1. A parole board is not required to give equal weight to each statutory factor, nor is it required specifically to articulate every factor considered. See Matter of Huntley v. Evans, 77 AD3d 945 (2<sup>nd</sup> Dept. 2010). It is further permitted to place a greater emphasis on the gravity of offense committed. See Matter of Serrano v. Alexander, 70 AD3d 1099, 1100 (3<sup>rd</sup> Dept. 2010). However, in the absence of aggravating circumstances, a parole board may not deny release solely on the basis of the seriousness of the offense. Huntley v. Evans, 77 AD3d at 947; King v. New York State Div. of Parole, 190 A.D.2d 423 (1<sup>st</sup> Dept. 1993). Moreover, while the board need not consider each guideline separately and has broad discretion to consider the importance of each factor, the board must still consider the guidelines. Executive Law § 259-i(2)(a). Finally, the board must inform the inmate in writing of the factors and reasons for denial of parole and “[s]uch reasons shall be given in detail and not in conclusory terms.” Executive Law §259-i(2)(a); Malone v. Evans, 83 AD3d 719 (2<sup>nd</sup> Dept. 2011). A determination by a parole board whether or not to grant parole is discretionary, and if made in accordance with the relevant statutory factors, is not subject to judicial review absent “a showing of irrationality bordering on impropriety.” Matter of Russo v. NYS Bd. of Parole, 50 NY2d 69, 77 (1980).

Executive Law §259-c(4) was amended in 2011 to require the board to establish new procedures to use in making parole determinations. The statutory amendment was intended to have parole boards focus on an applicant’s rehabilitation and future rather than giving undue weight to the crime of conviction and the inmate’s pre-incarceration behavior. To assist the members of the board in taking this approach when making parole determinations, the amendment required the establishment of written guidelines incorporating risk and needs principles to measure an inmate’s rehabilitation and likelihood of success upon release. See Ramirez v. Evans, 118 AD3d 707 (2<sup>nd</sup> Dept. 2014). In response, the board of parole adopted the COMPAS (Correctional Offender Management Profiling for Alternative Sanction) assessment tool. A COMPAS assessment was prepared in connection with Petitioner’s October 9, 2018 appearance before the Parole Board.

Petitioner claims that the Parole Board’s decision was improperly based solely on the seriousness of his offenses, failed to adequately detail the reasons for the denial of the parole, failed to provide a justification for departing from reliance upon his low COMPAS scores and denied him his due process rights. Petitioner submitted a parole packet prior to the hearing that included evidence of successful completion of numerous programs including Aggression Replacement Training (“ART”), the Large Print Vocational Education program, Transitional Services I and II, Legal Research and several religious programs. He further submitted numerous letters of support from attorneys currently representing him in connection with his claims of innocence, family members and friends. He also produced letters extending him employment offers upon release. His COMPAS risk assessment instrument found him a low risk in all categories and stated he had a high school diploma, a skill or trade, family support and specific employment plans with no history of substance abuse.

Petitioner's parole hearing began with a significant discussion pertaining to his claims of innocence. He initially requested an adjournment of the hearing based upon an alleged pending application. The Parole Board properly recognized that it was required to presume Petitioner was guilty of the offenses for which he was convicted. The Board then recounted the factual allegations underlying Petitioner's crimes and made an inquiry as to how he could have been convicted in light of his adamant claims of innocence. A discussion then ensued about Petitioner's failure to participate in a sex offender treatment program. Petitioner indicated that while he could sign up for the program, he believed that maintaining his innocence would result in his discharge. The Board then made inquiry into his release plans. Petitioner stated that he intended to reside with his elderly parents and had offers of employment in the medical diagnostic field doing administrative work with an alternative plan to work for a financial consultant. Petitioner noted that he had a bachelor's degree in economics and business that he obtained prior to his incarceration, stating that he had owned a commercial real estate company for fifteen years. Petitioner asserted that he would not need any financial support upon release. The Board acknowledged Petitioner's low COMPAS scores but disagreed with the low score for history of violence based on the violent nature of his crimes. It acknowledged his program accomplishments, lack of any significant disciplinary record and work history while incarcerated. The Board noted that his behavior while incarcerated was commendable while simultaneously stating that it was required to consider the serious nature of his crimes of conviction. It further acknowledged receiving responses from the sentencing judge and the district attorney's office.

Following the hearing the Parole Board issued a short decision denying parole. The decision stated that if Petitioner were released, there was a reasonable probability he would not live and remain at liberty without violating the law and that "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." The decision stated that the Board considered the required statutory factors along with Petitioner's institutional adjustment including discipline, program participation, risk and needs assessment and his needs for successful re-entry into the community. The Board stated, however, that more compelling was the serious nature of the rape, sodomy and sexual assault charges for which he was convicted. It further cited a prior conviction for public lewdness, stating that the instant offenses represented a serious escalation of violent and criminal behaviors. It noted his positive programming and limited disciplinary record. Stating that the panel weighed and considered the results of his risks and needs assessment and low scores indicated therein, it found that the "serious and lifelong pain and suffering [petitioner caused] his many female victims" outweighed these factors. The decision recounted that these victims were abducted, forced into a vehicle, threatened with a weapon or physical harm and then sexually assaulted. Based on the foregoing, the Board determined discretionary release was not warranted.

This court's role is not to usurp the decision making authority statutorily vested in the Board of Parole. It only has the authority to determine whether the Board considered the relevant statutory factors in making its final determination. See Matter of Russo, supra. In conducting such review, the court considers the parole interview and entire record before it but ultimately must assess whether the parole board's decision is arbitrary or affected by an error of law. Here, the sole facts

set forth in the Board's written's decision supporting parole denial are a recitation of Petitioner's crimes of conviction, the violent nature of such crimes, the impacts they had on the victims and an assertion that the instant offenses represent an escalation of violent and criminal behavior based upon prior convictions for disorderly conduct and public lewdness. These facts and the Board's assertion that the violent nature of Petitioner's offenses warranted a higher score for "history of violence" on his COMPAS assessment are all directly or indirectly related to his crimes of conviction. A Parole Board is permitted to place a greater emphasis on the gravity of the offenses committed, but may not deny parole based solely on the seriousness of such offenses. See Ferrante v. Stanford, 172 AD2d 31 (2<sup>nd</sup> Dept 2019); Rossakis v. NYS Bd of Parole, 146 AD3d 22 (2016). While the Board concluded that Petitioner's release would be incompatible with the welfare and safety of society because he would likely not live and remain at liberty without violating the law, the only facts cited in support of this conclusion were based on the conduct underlying Petitioner's offenses.

An action is arbitrary and capricious when it is taken without sound basis in reason nor regard to the facts. See Matter of Wooley v. NYS Dept. of Corr. Servs, 15 NY3d 275 (2010). Here, other than citing facts related to petitioner's offenses, the facts the parole board articulated do not support its ultimate determination. Petitioner's COMPAS scores, program participation, disciplinary history, employment history and release plans all support a finding contrary to that made by the parole board. It is not the function of this court to review the record to determine whether or not it, taken as a whole, would lend rational support to the Board's final determination. The Board is obligated to articulate facts underlying its ultimate determination to enable this court to review whether it rationally applied those facts to the requisite statutory factors. The Board in this case failed to articulate such facts and thus its decision lacks a rational basis. While there may be factors in the record supporting its ultimate determination, it is the obligation of the Board to state those facts and its reliance thereon in its decision.

Petitioner also demonstrates that the Board failed to comply with 9 NYCRR §8002.2(a). That rule requires a Parole Board making a release determination to be guided by an inmates's risks and needs scores as generated by a risk assessment instrument. If the Board's determination to deny release departs from a risks and needs assessment score, it is required to specify any scale in such assessment from which it departed and provide an individualized reason for such departure. See 9 NYCRR §8002. The COMPAS assessment prepared in connection with Petitioner's parole appearance gave him the lowest possible rating in categories for risk of felony violence, re-arrest, absconding, for criminal involvement and found he was unlikely to have issues with family support or significant financial problems upon release. The Parole Board finding that discretionary release would not be compatible with the welfare of society directly contradicts these scores. In accordance with 9 NYCRR §8002.2, the Board was thus required to articulate with specificity the particular scales in petitioner's COMPAS assessment from which it was departing and provide an individualized reason for such departures. The Board's conclusory statement that it considered statutory factors, including his institutional adjustment, discipline, program participation and needs for successful re-entry in finding that the discretionary release would not be compatible with the welfare of society fails to meet this standard. As such, its determination denying parole release was also affected an error of law. Based on the foregoing, it is

ORDERED that the petition to vacate and annul the October 9, 2018 determination denying parole release as arbitrary and as affected by an error of law is granted to the extent that the Board of Parole shall conduct a *de novo* parole release interview within sixty days of the date of this decision and order. The court rejects Petitioner's claim that the denial of parole was in violation of his constitutional due process rights. There is no inherent constitutional right to parole and a Parole Board's discretionary determination to deny parole release does not implicate a constitutionally protected liberty interest. See Matter of Russo v. NYS Bd. of Parole, 50 NY2d at 76; Bama v. Travis, 239 F.3d 169 (2<sup>nd</sup> Cir. 2001). Petitioner's claims of actual innocence have no bearing on this court's determination as such claims were not relevant to the Court's review of the Parole Board's challenged determination. Nor did the court consider Petitioner's *pro se* letter and exhibits submitted in reply. As Petitioner is represented by counsel who submitted an affirmation in reply, he is not permitted to submit a second *pro se* reply.

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

Dated: October 1<sup>st</sup>, 2019  
Poughkeepsie, New York

ENTER:

  
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MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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