December 2020

Decision in Art. 78 proceeding - Lackwood, Mark (2018-07-06)

To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of

MARK LACKWOOD- 95A6878,

Petitioner,

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

NEW YORK STATE BOARD OF PAROLE,

Respondent.

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DECISION & ORDER

Index No. 2464/2017

ACKER, J.S.C.

The following papers, numbered 1 to 20, were considered on Petitioner's application pursuant to CPLR Article 78, brought by Order to Show Cause, for judicial review of the denial of his release to parole supervision:

Order to Show Cause-Petition-Exhibits 1-2[1] 1-4
Answer and Return-Exhibits 1-14[2] 5-19
Reply Affidavit of Petitioner 20

Petitioner commenced the instant proceeding seeking the following: an Order (1) reversing and vacating Respondent New York State Board of Parole's determination of April 28,

[1] Exhibit 1 is Petitioner's appeal packet as to his administrative appeal of the Board's denial, which includes Exhibits A-H.
[2] The Court also reviewed, *in camera*, the confidential documents submitted by Respondent as part of Exhibits 2, 3, 10 and 13.

2017; (2) ordering Respondent to hold a *de novo* interview within 30 days, which panel shall not be made up of any member who sat on the April 25, 2017 Board, nor any member who sat on the September 14, 2017 appeal panel who affirmed the April 28, 2017 decision; (3) Ordering such panel to adhere strictly to the statutory requirements and issue a determination that shall be supported by the record; and for such other and further relief as to the Court shall seem just and proper.

Petitioner is currently incarcerated at Otisville Correctional Facility, serving an aggregate term of 15 years to life for two (2) counts of Robbery in the 1st Degree and one (1) count of Murder in the 2nd Degree. This sentence arises from indictments related to three (3) separate incidents. On August 17, 1994, Petitioner and his accomplices entered a liquor store, displayed a handgun, handcuffed a male employee, put duct tape on his mouth and stole approximately $5,000 in cash and several bottles of liquor. On August 24, 1994, Petitioner and an accomplice again entered a liquor store and while displaying a handgun, stole $2,000, a cordless phone and jewelry. On August 31, 1994, Petitioner and an accomplice entered a liquor store and armed with two (2) handguns, stole cash, jewelry and liquor. The store owner, armed with a handgun, followed the car that Petitioner was driving and a car chase ensued, with gunfire being exchanged. In the process of fleeing the scene, Petitioner struck and killed a fourteen (14) year old boy riding his bicycle. Petitioner pleaded guilty to the charges enumerated above and was sentenced to an aggregate term of 15 years to life. At the time of his April 25, 2017 parole board hearing, he had served almost 23 years, eight (8) years beyond his minimum sentence.

Petitioner appeared before his fifth (5th) parole board on April 25, 2017. He was denied release on April 28, 2017 and ordered held for an additional eighteen (18) months. Petitioner

filed and perfected an administrative appeal and on, September 14, 2017, the Parole Board Administrative Appeals Unit affirmed the Board's determination.

Petitioner makes four (4) distinct arguments as to why the Parole Board's decision should be overturned, to wit: (1) Respondent violated federal constitutional requirements when it failed to consider Petitioner's youth as a mitigating factor in evaluating his criminal history; (2) Respondent improperly based its denial solely on the nature of the instant offenses; (3) Respondent failed to consider a Conditional Parole for Deportation Only ("CPDO") as a mitigating factor; and (4) Respondent failed to explain how and why there was a reasonable probability that Petitioner would reoffend and how release would deprecate the crime and undermine respect for the law.

Respondent submits an Answer and Return with eleven (11) exhibits. Respondent maintains that (1) Petitioner improperly relies on case law dealing with the rights of inmates with indeterminate sentences with a maximum of life who were minors at the time they committed the crimes for which they are seeking parole; (2) Petitioner's position that Respondent's decision was based solely on the instant offenses is without merit; (3) Petitioner's contention that Respondent failed to consider CPDO is without merit; and (4) Petitioner's argument that Respondent's decision is impermissibly lacking in detail is not correct.

New York Executive Law §259-i(2)(a) provides:

> [d]iscretionary 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.

The Parole Board is required to consider the following in making a parole decision:

(i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
(ii) performance, if any, as a participant in a temporary release program;
(iii) release plans including community resources, employment, education and training and support services available to the inmate;
(iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;
(v) any current or prior statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;
(vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law;
(vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and
(viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

New York Executive Law §259-i(2)(c)(A)(i)-(viii)

"If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms. (emphasis added)" Executive Law §259-i(2)(a).

Judicial review of a determination of a parole board is narrowly circumscribed. *Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 AD3d 672 [2d Dept. 2018]. A determination of the parole board, "if made after consideration of the statutory factors, is not subject to judicial review absent a showing of irrationality bordering on impropriety." *LeGeros v. New York State Bd. of Parole*, 139 AD3d 1068, 1069 [2d Dept. 2016], *citing*, *inter alia*,

Executive Law §259-i(2)(c)(A) and *Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000]. While Respondent Board is required to consider the relevant statutory factors, it is not required to address each factor in its decision or accord all of the factors equal weight. *Coleman*, *supra*. Whether Respondent Board considered the proper factors and followed the proper guidelines are questions that should be assessed based on the written determination evaluated in the context of the parole hearing transcript. *Jackson v. Evans*, 118 AD3d 701 [2d Dept. 2014], *citing Matter of Siao-Pao v Dennison*, 11 NY3d 777, 778 [2008].

Respondent's April 25, 2017 Interview and April 28, 2017 Decision

The transcript of Petitioner's April 25, 2017 parole interview is annexed to the Petition within Exhibit 1 and to the Answer and Return as Exhibit 4 (hereinafter referred to as "Interview Transcript"). Respondent's April 28, 2017 decision denying parole is annexed to the Petition as part of Exhibit 1 and to the Answer and Return as Exhibit 5.

A review of the Interview Transcript and the April 28, 2017 decision make clear that Respondent Board focused primarily on the seriousness of the instant offenses and Petitioner's prior criminal history in rendering its decision.

Notably, contrary to Petitioner's first contention, Respondent Board was not required "to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission" of Petitioner's prior criminal history. *Hawkins v. New York State Dep't of Corr. & Cmty. Supervision*, 140 AD3d 34, 36 [3d Dept. 2016]. *Hawkins*, as properly noted by Respondent, deals only with cases in which the inmate seeking parole was a minor at the time of the commission of the offenses for which he is incarcerated. In the instant matter, it is uncontested that Petitioner was not a minor, as he was 23 years old at the time of the commission of the crimes for which he is currently seeking parole. As such, this argument is rejected.

The remainder of Petitioner's contentions, however, warrant a deeper discussion. Upon review of the Interview Transcript and the April 28, 2017 Decision, there is no evidence that Respondent Board considered Petitioner's Order of Deportation as required by Executive Law §259-i(2)(c)(A)(iv). During the interview, Petitioner affirmatively mentioned his final order of deportation and later asked if he could be considered for Conditional Parole for Deportation Only. "The existence of the deportation order does not require that parole be granted, but is a factor for the Board to consider." *Delrosario v. Stanford*, 140 AD3d 1515 [3d Dept. 2016], *see also Lackwood v. New York State Div. of Parole*, 127 AD3d 1495 [3d Dept. 2015]. However, the record is devoid of evidence that Respondent Board gave any consideration to the existence of the deportation order.[3] Nor is there is any mention of Petitioner's release plans (a statutory factor), which include a job offer in Costa Rica and a letter from his parents that indicates they purchased a home in Costa Rica where Petitioner may reside upon his release.

Instead, Respondent Board's decision largely addresses Petitioner's underlying crimes and criminal background. The Board notes that Petitioner's criminal history began in his "JD" years, culminating in the instant offenses. Respondent Board acknowledges only in passing Petitioner's clean discipline record in over 23 years of incarceration, his overall low COMPAS score[4], his parole packet, support letters and his program completion.

Aside from detailing the seriousness of the underlying crimes and Petitioner's prior criminal history, Respondent Board also discussed Petitioner's relationship with his parents as a youth and the domestic violence he reported that he experienced as a child. In fact, the April 28,

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[3] The Court notes that the Second Department previously held that Respondent Board gave due consideration to Petitioner's outstanding deportation order at Petitioner's 2013 appearance. *Lackwood, supra.* The record in the instant matter shows no such "due consideration."

[4] Indeed, Petitioner scored "unlikely" or "low" on every risk assessment in his COMPAS, except for a 4 out of 10 or "probable" for re-entry substance abuse.

2017 decision states that the "interview revealed a childhood where you witnessed domestic violence, and angerey [*sic*] with your father resulting in your being ejected from the household launching a juvenile delinquent lifestyle." This conclusion is not one of the listed statutory factors, nor is it supported elsewhere in the record.[5] Further, Respondent Board's "concern" about re-entry substance abuse is not supported by the unredacted records available to the Commissioners. Finally, the record reflects that Respondent Board did not receive opposition from the District Attorney's Office for Petitioner's 2017 appearances and there is no evidence of opposition from the victim's family.

Thus, a review of the complete record demonstrates that in light of all of the factors, notwithstanding the seriousness of the underlying offense, Respondent Board's determination to deny the petitioner release on parole evinced irrationality bordering on impropriety. *Coleman*, *supra* at 673, *citing Matter of Goldberg v New York State Bd. of Parole*, 103 AD3d 634 [2013]. The Board does not give any explanation of how it balanced the seriousness of Petitioner's crimes and criminal history against the other statutory factors that weigh in Petitioner's favor. Moreover, the failure to address the order of deportation is a significant omission as Petitioner referenced the deportation order several times during his interview and specifically asked to be considered for a CPDO.

The Court acknowledges, and does not minimize, that this case involved the death of an innocent young teenager. A murder conviction is surely among the most serious of crimes. However, if a Parole Board denies release to parole solely on the basis of the seriousness of the offense, New York courts will deem its decision to be irrational in the absence of any

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[5] The Court also notes that Commissioner Cruse's following comment at the interview is troubling and the conclusion is completely unsupported by the record - "Now, you've killed a fourteen-year-old kid. Popped him up in the air, so he came down on his head; because you wanted to steal something from somebody, to get back at your parents. Do you see how convoluted that story is?" Interview Transcript, p. 10.

aggravating circumstance. *Huntley v. Evans*, 77 AD3d 945, 947 [2d Dept. 2010]. On the record before it, the Court finds that that Respondent's determination that there is a reasonable probability that Petitioner would not live and remain at liberty without again violating the law and that his release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law, are without support in the record. *Coleman, supra.*

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the Petition is granted and the April 28, 2017 determination is annulled; and it is hereby

ORDERED that the matter is remitted to Respondent for a *de novo* parole release interview and review before a panel of the Board consisting of members who were not involved in the April 25, 2017 interview or in the September 14, 2017 Appeal panel; and it is further

ORDERED that Respondent shall afford Petitioner the full evaluative process described by Executive Law §259-i(2)(c); and it is further

ORDERED that said interview is to be conducted within sixty (60) days of the date of this Court's Decision and Order, and a decision is to be issued within thirty (30) days of the date of such hearing.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
July 6, 2018

HON. CHRISTI J. ACKER, J.S.C.

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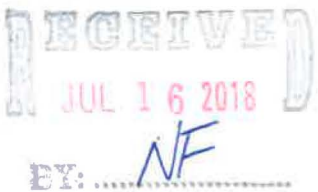

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