September 2021

Decision in Art. 78 proceeding - Alexander, Paul (2012-06-05)

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
PAUL ALEXANDER,#08-A-4112,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2011-0789.36
INDEX #137461
ORI # NY044015J

-against-

ANDREA EVANS, Chairwoman, NYS Board of Parole,

Respondent.

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This proceeding was originated by the Petition for Habeas Corpus of Paul Alexander, filed in the St. Lawrence County Clerk's office on October 31, 2011. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging the February 2011 determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on November 4, 2011 and as a part thereof this proceeding was converted into a proceeding for judgment pursuant to Article 78 of the CPLR.

The Court has received and reviewed respondent's Answer/Return, including confidential Exhibits B and C, verified on December 16, 2011, as well as petitioner's undated Reply thereto, filed in the St. Lawrence County Clerk's office on December 29, 2011. By Letter Order dated January 23, 2012 chambers provided counsel for the respondent with copies of numerous letters that had been mailed by petitioner directly to chambers. In view of these mailings the Court found it appropriate to permit respondent to submit such additional answering papers as she deemed advisable.[1] The

[1] The Letter Order of January 23, 2012 also notified petitioner that it was inappropriate for him to send *ex parte* correspondence to the Court and/or to submit correspondence to the Court addressing the substance of the pending proceeding outside the context of his pleadings. Accordingly, additional materials

Court has since received and reviewed petitioner's Amended Reply, dated both January 25, 2012 and January 31, 2012, filed in the St. Lawrence County Clerk's office on February 7, 2012, as well as counsel for the respondent's Letter Memorandum of February 3, 2012, filed in the St. Lawrence County Clerk's office on February 13, 2012.

On July 17, 2007 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to a controlling indeterminate sentence of 3 to 6 years upon his convictions, following a jury trial, of the crimes of Bribery 3° and Unlawful Possession of Marijuana.[2] Petitioner's conviction and sentencing were affirmed on direct appeal to the Appellate Division, First Department. *People v. Alexander*, 72 AD3d 559, *lv den* 15 NY3d 746, *recon den* 15 NY3d 801. Having been denied merit parole release in August of 2010, petitioner made his initial regular appearance before a Parole Board on February 15, 2011. Following that appearance a decision was rendered denying him discretionary release and directing that he be held for an additional 24 months. The parole denial determination reads as follows:

> "PAROLE IS AGAIN DENIED. A REVIEW OF THE RECORD, THE I.O. [Instant Offense] BRIBERY 3RD AND THE FILE IN ITS ENTIRETY LEAVES THE PANEL TO FIND YOUR RELEASE INCOMPATIBLE WITH THE PUBLIC SAFETY AND WELFARE. YOUR 30 YEAR CRIMINAL HISTORY INDICATES AN ESTABLISHED PATTERN OF CRIMINAL BEHAVIOR. ABSOLUTELY NOTHING HAS DETERRED YOU FROM CONTINUING TO DISREGARD THE LAW WHEN FREE IN SOCIETY. CONSIDERATION HAS BEEN GIVEN TO YOUR POSITIVE INSTITUTIONAL ADJUSTMENT AND BEHAVIOR, LETTERS OF SUPPORT AND PAROLE PLANS, HOWEVER, THIS PANEL REMAINS CONCERNED ABOUT YOUR CONTINUED LAWLESSNESS. WE

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received from petitioner after January 23, 2012 were not considered by the Court, with the exception of his Amended Reply.

[2] As noted by the 2007 sentencing court, the Bribery 3° and Unlawful Possession of Marijuana convictions arose from an incident where petitioner, who had been previously convicted of sex offenses, was pulled over because of irregularities in the temporary license plates on the car he was driving. There were teenage girls in the car and marijuana was found on petitioner's person. The Bribery 3°conviction was based upon petitioner's offer of cash to the arresting officer.

CONCLUDE BASED ON YOUR HISTORY THERE IS A REASONABLE PROBABILITY YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW."

The parole denial determination was affirmed on administrative appeal with the final determination apparently mailed to the petitioner and his counsel on September 16, 2011.

At the time of petitioner's February 15, 2011 parole interview Executive Law §259-i(2)(c)(A) provided, in relevant 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. In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates . . . [and] (iii) release plans including community resources, employment, education and training and support services available to the inmate . . ." In addition to the above factors, where, as here, the minimum period of imprisonment was established by the sentencing court, the pre-March 31, 2011 version of Executive Law§259-i(2)(c)(A) incorporated by reference the pre-March 31, 2011 version of Executive Law §259-i(1)(a), requiring the Board to also consider " . . . the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, 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 and prior to confinement; and . . .prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement . . .” *See* pre-March 31, 2011 versions of Executive Law §§259-i(2)(c)(A) and 259-i(1)(a).

Executive Law §259-i(1) was repealed and Executive Law §259-i(2)(c)(A) was amended by L 2011, ch 62, part C, subpart A, §§38-f and 38-f-1, effective March 31, 2011. The amendments to Executive Law §259-i(2)(c)(A) included the incorporation of relevant language from repealed Executive Law §259-i(1)(a) with respect to consideration of the seriousness of the underlying offense and the inmate’s prior criminal record. Thus, as of March 31, 2011, Executive Law §259-i(2)(c)(A) provides, in relevant 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 the law. In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates . . .(iii) release plans including community resources, employment, education and training and support services available to the inmate . . . (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 presentence 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 . . ."

At the time of petitioner's February 15, 2011 Parole Board interview Executive Law §259-c(4) provided, in relevant part, that the Board of Parole shall " . . .establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4) was amended by L 2011, ch 62, part C, subpart A, §38-b, effective September 30, 2011[3], to provide that the New York State Board of Parole shall " . . .establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principals 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 maybe released to parole supervision . . ." (Emphasis added).

Petitioner initially appears to argue that the Parole Board failed to give adequate consideration to, and/or address, his assertion that he was, in fact, innocent of the underlying bribery charges. This Court, however, rejects such argument. Although the circumstances of the criminal act underlying an inmate's incarceration in DOCCS custody is a relevant consideration at a discretionary parole release interview, it is not the proper role of the Board, or this Court for that matter, to make an independent determination as

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[3] In the petition it is asserted that the amendment to Executive Law §259-c(4) became effective on September 1, 2011. This assertion is incorrect. L 2011, ch 62, part C, subpart A, section 49(f) provides that ". . . the amendments to subdivision 4 of section 259-c of the executive law made by section thirty-eight-b of this act shall take effect six months after it shall have become a law . . ." Since the underlying legislation was enacted on March 31, 2011, the amendment to Executive Law §259-c(4) became effective as of September 30, 2011 (or October 1, 2011).

to whether or not the parole candidate was actually guilty of the crime for which he/she was convicted. Thus, in the case at bar, although the Board afforded petitioner more than adequate opportunity to discuss the events associated with the arrest that ultimately led to his Bribery 3° conviction, the Board properly alerted the petitioner that it did not intend to retry the criminal case and properly directed petitioner to "move on" when it was perceived that petitioner was continuing to over-focus the parole interview on the issue of his guilt or innocence. As noted to previously, petitioner's July 17, 2007 conviction/sentencing was affirmed on direct appeal to the Appellate Division, First Department, and the Court of Appeals twice, in effect, denied his application for leave to appeal to that court. *People v. Alexander*, 72 AD3d 559, *lv den* 15 NY3d 746, *recon den* 15 NY3d 801.

A portion of the remainder of the petition is focused, in one way or another, upon the argument that the Parole Board failed to give adequate consideration to statutory factors other than the nature/circumstances of the crimes underlying petitioner's current incarceration and his criminal history. In this regard petitioner asserts that " . . . he has taken all the mandated programs plus extra ones and not gotten into any trouble so what more does the parole board want . . .[I]f the parole board had focused on all that I have done while incarcerated they should have let me go."

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5) unless there has been a showing of irrationality bordering on impropriety. *See Silmon v. Travis,* 95 NY2d 470, *Vasquez v. Dennis*on, 28 AD3d 908, *Webb v. Travis*, 26 AD3d 614 and *Coombs v. New York State Division of Parole*, 25 AD3d 1051. Unless the petitioner makes a "convincing demonstration to the contrary" the Court must presume that the New York State Board of Parole acted properly in accordance with statutory

requirements. *See Nankervis v. Dennison,* 30 AD3d 521*, Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

A parole board need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole determination, nor is it required to expressly discuss each of those factors in its written decision. *See Martin v. New York State Division of Parole*, 47 AD3d 1152, *Porter v. Dennison*, 33 AD3d 1147 and *Baez v. Dennison,* 25 AD3d 1052, *lv den* 6 NY3d 713. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination "...is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior. *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

In the case at bar, a review of the Inmate Status Report and transcript of the parole interview reveals that the Board had before it information with respect to the appropriate statutory factors including petitioner's receipt of an Earned Eligibility Certificate, his therapeutic programming, vocational achievements, disciplinary record, release plans, as well as the circumstances of the crime underlying his incarceration and prior criminal record. *See Zhang v. Travis*, 10 AD3d 828. The Court, moreover, finds nothing in the transcript to suggest that the Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries. In view of the above, the Court finds no basis to conclude that the parole board failed to consider the relevant statutory factors. *See Davis v. Lemons,* 73 AD3d 1354, and *Pearl v. New York State Division of Parole,* 25 AD3d 1058. Since the requisite statutory factors

were considered, and given the narrow scope of judicial review of discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality bordering on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying his current incarceration and his criminal history. *See Id.*

Petitioner's next argument is that the Parole Board, in rendering the February 16, 2011 parole denial determination, failed to implement the procedures referenced in Executive Law §259-c(4) as amended by L 2011, ch 62, part C, subpart A, §38-b. According to petitioner, "[t]he new law states that what the parole board should consider is all the things that a person has done while incarcerated to better himself, and not focus so much solely on a person [sic] past Criminal History . . ." In support of this argument petitioner cites the December 21, 2011 determination of the Supreme Court, Orange County, in *Thwaites v. New York State Board of Parole*, 34 Misc 3d 694. Notwithstanding the fact that the 2011 amendment to Executive Law §259-c(4) was designated by the legislature as taking effect on September 30, 2012, the *Thwaites* court found that the amendment had to be applied retroactively to Mr. Thwaites' March 16, 2010 parole denial determination. This Court, however, respectively disagrees with the conclusions of the *Thwaites* court and, for the reasons set forth in the March 6, 2012 Decision and Judgment of the Supreme Court, Albany County (Hon. Richard M. Platkin) in *Hamilton v. New York State Division of Parole*, ___ Misc 3d___, 2012 Slip Op 22112, finds no basis to apply the amended version of Executive Law §259-c(4) in reviewing the parole denial determination of February 16, 2012. As stated by the Hamilton court, "[i]t is apparent . . . that the State Legislature considered the question of the effectiveness of the 2011 Amendments and determined that the new procedures contemplated by the amendments to Executive Law §259-c(4) should not be given effect with respect to

administrative proceedings conducted prior to October 1, 2011." *Id* at ____. In the case at bar, as was the case in *Hamilton*, the challenged parole denial determination was rendered and the administrative appeal was denied prior to the September 30, 2012 effective date of the amendment to Executive Law §259-c(4).

Finally, the Court finds no basis to overturn the February 16, 2011 parole denial determination, with an additional 24-month hold, simply by reason of the facts that petitioner's established guideline range was 20 to 36 months[4] and he had already been incarcerated for approximately 35 months as of the February 15, 2011 parole release interview. The guideline ranges established pursuant to 9 NYCRR §8001.3 " . . . are intended only as a guide, and are not a substitute for the careful consideration of the many circumstances of each individual case." 9 NYCRR §8001.3(a). The Court finds, moreover, in spite the fact that the parole denial determination of February 16, 2011 effectively resulted in the petitioner being held in DOCCS custody beyond his established guideline range, such parole denial determination contained sufficient detail to inform petitioner of the reasons for the denial of his request for discretionary parole release. *See* 9 NYCRR §8001.3(c), *Davis v. Travis,* 292 AD2d 742, *lv dis* 98 NY2d 669, and *Richards v. Travis*, 288 AD2d 604.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: June 5, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court

[4] In the petition it is asserted that the guideline range was 24 to 30 months. This assertion is incorrect.