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Matter of Allen v New York State Bd. of Parole
2013 NY Slip Op 30729(U)
January 29, 2013
Supreme Court, Albany County
Docket Number: 4934-12
Judge: George B. Ceresia Jr
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This opinion is uncorrected and not selected for official publication.

[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JODY ALLEN,

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent,

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

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-12-ST3980 Index No. 4934-12

Appearances: Jody Allen
Inmate No. 86-B-2551
Petitioner, Pro Se
Livingston Correctional Facility
Inmate Mail PO Box 1991
Route 36, Sonyea Road
Sonyea, NY 14556

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Gregory J. Rodriguez,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Livingston Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated November 15, 2011 to deny petitioner discretionary release on parole. He is serving concurrent terms of

imprisonment as follows: murder in the second degree, 25 years to life; robbery in the first degree, 12 ½ to 25 years; and criminal possession of a weapon in the second degree, 5 to 15 years. The petition maintains that the Parole Board gave no consideration to many of the factors under Executive Law 259-i. He maintains that the Parole Board failed to consider his "risk of felony violence", "negative social cognitions", "optimism", and his "self-efficacy". In his view, the determination was a foregone conclusion. He maintains that the decision lacked factual detail and was conclusory.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Parole is denied for the following reasons: After a careful review of your record and this interview, it is the determination of this Panel that if released at this time there is a reasonable probability that you would not live and remain at liberty without violating the law and your release at this time is incompatible with the welfare and safety of the community. This decision is based on the following factors: the serious nature of the instant offense of Murder 2, Robbery 1 and CPW 2 involved you acting in concert shooting the elderly victim causing his demise. Your actions clearly displayed a propensity for violence and a callous disregard for the sanctity of human life resulting in a senseless loss of life. This is a pattern of your criminality towards elderly victims. Since your last appearance you incurred a serious disciplinary infraction for drug possession which is problematic. Note is made of your positive programming. However discretionary release is inappropriate at this time for the Panel to hold otherwise would so deprecate the severity of the crime as to undermine respect for the law."

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of De La Cruz v Travis, 10 AD3d 789 [3d Dept., 2004]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3d Dept.,

2001]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]; see also Matter of Graziano v Evans, 90 AD3d 1367, 1369 [3d Dept., 2011]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's institutional programming (including completion of ASAT, and work towards a GED), his disciplinary record, family support in the community, and his plans upon release. With regard to the latter points, the petitioner mentioned that he intended to reside with his mother in Brooklyn. He asserted that he had a job waiting for him, arranged through his Aunt. He was afforded an opportunity to speak on his own behalf.

The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Siao-Pao, 11 NY3d 773 [2008]; Matter of Whitehead v Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Matos v New York State Board of Parole, 87 AD3d 1193 [3d Dept., 2011]; Matter of Dudley v Travis, 227 AD2d 863, [3rd

Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see Matter of MacKenzie v Evans, supra; Matter of Matos v New York State Board of Parole, supra; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [3rd Dept., 2010]; Matter of Wise v New York State Division of Parole, 54 AD3d 463 [3rd Dept., 2008]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

With respect to petitioner's argument that the Appeals Unit failed to issue a timely decision, the Court observes that such a failure does not operate to invalidate the underlying administrative decision. The sole consequence is to permit the petitioner to deem his or her administrative remedy to be exhausted, and enable the petitioner to immediately seek judicial

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review of the underlying determination (see 9 NYCRR § 8006.4 [c]; Graham v New York State Division of Parole, 269 AD2d 628 [3rd Dept, 2000], lv denied 95 NY2d 753; People ex rel. Tyler v Travis, 269 AD2d 636 [3rd Dept., 2000]; Matter of Mentor v New York State Division of Parole, 67AD3d 1108, 1109 [3rd Dept., 2009]).

To the extent that the petitioner maintains that the Parole Board failed to comply with the requirements of Executive Law § 259 (c) (4), as pointed out by the respondent, the petitioner failed to raise such issues in his administrative appeal. As such, they must be deemed un-preserved and waived (Matter of Santos v Evans, 81 AD3d 1059 [3d Dept., 2011];Matter of Nicoletta v New York State Div. of Parole, 74 AD3d 1609, 1610 [3d Dept., 2010]; Matter of Hernandez v Alexander, 64 AD3d 819 [3d Dept., 2009]). Moreover, and apart from the foregoing, the Court is of the view that the Parole Board decision had a rational basis.

A review of the sentencing minutes reveals that the sentencing Judge recommended, in the strongest of terms, that the petitioner not be released on parole.

Lastly, the Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

The Court has reviewed petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The

petition must therefore be dismissed.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

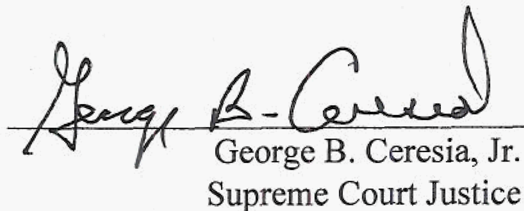
Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: January 29, 2013
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated, September10, 2012 Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated November 9, 2012, Supporting Papers and Exhibits

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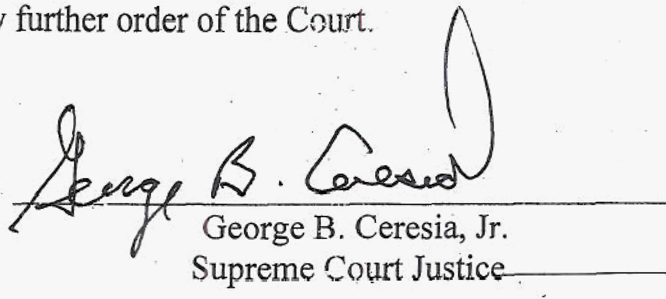
SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit B, Presentence Investigation Report, and respondent's Exhibit D, Confidential Portion of Inmate Status Report, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: January 29, 2013
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice