September 2021

Decision in Art. 78 proceeding - Almonor, Chester (2007-08-21)

[*1]

Matter of Almonor v New York State Bd. of Parole
2007 NY Slip Op 51588(U) [16 Misc 3d 1126(A)]
Decided on August 21, 2007
Supreme Court, New York County
York, J.
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Decided on August 21, 2007

Supreme Court, New York County

In the Matter of Chester Almonor, Petitioner,

against

New York State Board of Parole, Respondent.

405208/2006

For the petitioner:

Chester Almonor:pro se, Wallkill, NY

For the respondent:

Andrew Cuomo, Attorney General

New York, NY

(Judy Prosper of Counsel)

Louis B. York, J.

The Court has issued several decisions in this matter already. Below, therefore, is a somewhat redundant background and analysis of the proceeding:

On December 1, 1991, petitioner then 20 years old was at a nightclub with some friends when a fight broke out. Petitioner and other friends were drawn into the fight, the details of which are unclear. According to petitioner, he was slashed in the face with a knife; and one of his friends gave him a gun with which to defend himself. Ultimately, petitioner fired the gun three times, injuring one woman and killing one man. He was sentenced to 12 ½ to 25 years for criminal use of a firearm in the first degree, and to 8 1/3 to 25 years for manslaughter one.

Petitioner's record reveals that, during his years in jail, he successfully completed various programs to deal with his aggression. He received his GED and also completed training programs that enable him to work as an electrician's assistant and a custodial maintenance worker. In addition, he trained in legal research, received an associate's degree in paralegal studies; and, he has worked as a paralegal in the prison library. The Law Library Supervisor, Corrections Officer M. Duminuco, has given him consistently superior evaluations for his conduct. His record also details other vocational and rehabilitative achievements, including his work with the hearing impaired and his work as an HIV/AIDS Peer Educator between February [*2]2000 and February 2002.

His file also contains information about his personal life. In 2004, petitioner married Jennifer L. Hallman Almonor, his high school sweetheart. Ms. Hallman Almonor, a former teacher who now works as a Guidance Counselor with the New York City Department of Education, wrote a letter on behalf of her husband in connection with his 2006 application for parole. In addition to his wife, numerous relatives and friends and Karim Camara, petitioner's local assemblyman, wrote letters to the Parole Board on petitioner's behalf. Finally, he submitted evidence showing that he was actively seeking both employment and entrance into a four-year college in the event of his release on parole.

As for his behavioral record, petitioner's record includes one minor infraction since 2002. In all, since 1991, he received seven tier II tickets and one tier III ticket. The significance of the tiers has not been discussed in the papers before the court.

At his parole hearing on April 18, 2006, the Commissioners discussed these various factors. Notably, one of the Commissioners, named Rodriguez, commented that he found it "rather interesting" that his manslaughter charge received a smaller sentence than his weapons charge. (Hearing, at p. 2). The Commissioners also gave petitioner the opportunity to make a closing statement, in which he expressed his remorse and stated that he was older and wiser and he would not repeat his earlier mistakes. The entire hearing, which is transcribed in a mere 12 pages (pages 2-13 of the hearing transcript), must have lasted only a handful of minutes.

Following deliberation, the Commissioners issued their determination on the record. In full, they stated:

Parole is again denied due to the serious nature and violent circumstances of the instant offenses, criminal use of a firearm first and manslaughter one, wherein you shot and killed one man and shot and injured a female victim.

All considered, discretionary release cannot be granted at this time.

Guidelines are unspecified.

(Hearing, at p 14). The Court notes that, except for the specification of petitioner's criminal offenses, this is virtually identical to language used in several other decisions the Court has seen denying parole.

Petitioner filed an administrative appeal on May 19, 2006. Respondent did not issue a determination within 120 days, or by approximately September 19, 2006. To preserve his statutory rights, petitioner commenced this proceeding around October 24, 2006. As "petitioner's administrative remedy was deemed exhausted when the Appeals Unit failed to render a decision within four months," the court allowed the petition to proceed. *See Miller v. Board Of Parole*, 278 AD2d 697, 697, 717 NYS2d 747, 748 (3rd Dept. 2000).

Although it received proper and timely notice of the proceeding, respondent mailed petitioner a copy of its initial application for an adjournment only one day before making the application to the Court, alleging that it could not contact petitioner in advance of that date because petitioner was incarcerated. Presumably, despite petitioner's incarceration, respondent which has resources far exceeding those of petitioner; which regularly litigates against the incarcerated; and which had petitioner's papers, and address, before it knew how to contact petitioner and could have mailed its request to him earlier. [*3]

In addition, despite the lengthy adjournment, respondent filed no opposition to the petition. Instead, separately, it moved by order to show cause to transfer the proceeding to Albany County. Moreover, respondent failed to file an affirmation regarding the separate application when the petition was submitted or in any way to alert the Motion Support Office of its existence. Thus, that petition was submitted to the Court on default. The Court evaluated it and granted it, as it was unopposed and petitioner's arguments were clear and persuasive, with both legal and factual support. After that decision, the first order to show cause arrived in this Part.

Subsequently, on April 18, 2007, yet another order to show cause was submitted to the Court by respondent. Respondent requested that the Court vacate the March 29 decision and change venue of the proceeding. Respondent also wrote to the Court and sought the same relief, without mentioning that it had made a motion as well. Fortunately, the Court found both applications and considered them together.

In petitioner's opposition papers, petitioner noted that respondent had short-served him with its notice to change venue, and thus its April 18, 2007 application to change venue suffered from a fatal procedural defect. In reply, respondent conceded its untimeliness but stated that the Court had the power to, and therefore should, overlook its untimeliness. Respondent also conceded that its affidavit

of service, a sworn statement from its counsel's office, was inaccurate, setting forth the wrong date and therefore indicating that service of the notice was timely.

In its decision on the order to show cause, the Court vacated the default of respondent but refused to change venue. It based the denial of the request on respondent's failure to serve petitioner with the original notice in a timely fashion. The Court noted that, as respondent stated, the Court had the discretion to overlook the short service. However, during the short history of the litigation, respondent had operated in a fashion that deprived petitioner of reasonable notice on several occasions. First, respondent did not give petitioner notice of the application for an adjournment of the petition. Instead, it mailed petitioner the application only one day in advance, thus rendering it impossible for him to respond to it. Second, respondent short-served Petitioner with the prerequisite demand and submitted an inaccurate affidavit of service which, presumably inadvertently, hid this failure.

Accordingly, the Court directed respondent to answer the petition, and gave petitioner time to respond to the answer. Now, all the papers are before the Court.

In addition to its answer, respondent mailed papers to the court which it asked the Court to review in camera. According to the suggestion in the letter, which it also mailed to petitioner, these papers were considered by respondent and affected its decision to deny parole. Respondent did not obtain permission to submit these papers. The letter cites 9 NYCRR 8000.5, which sets forth a number of bases on which portions of a parole file may be confidential, but does not specify the specific basis for confidentiality here.

Moreover, under Executive Law § 259-i(2)(a), "the inmate shall be informed in writing . . . of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms." The decision denying parole made no mention of the consideration of confidential papers; and respondent has not presented a single argument supporting its right to base its decision on the papers without informing petitioner that the papers played a role in the parole determination. *Id.* Even though, on some occasions, 9 NYCRR 8000.5 allows respondent [*4]to consider materials such as diagnostic opinions, probation reports, or information revealing the names of confidential sources, among many others which are protected from a parole applicant's review, respondent would not have the right to keep the fact of their consideration secret from the applicant.

Respondent also did not legally support its right to submit in camera documents in this Article 78 proceeding, with concomitant legal arguments. This is the proper procedure when there is an camera application, so that although he or she does not know the content of the documents the other party has sufficient notice of the application's nature to enable him or her to challenge it properly, if desired.

Finally, on the issue of these documents, the Court notes that it already has asked respondent twice to follow proper procedures in the litigation and not to send applications to this Court without thoroughly informing the Court or petitioner of its intentions. In light of this, the current application to consider documents is troubling. Accordingly, the Court shall not consider the communication and instead shall return the mailing.

Now, the Court turns to the substance of the proceeding. Petitioner challenges the denial of his parole application as arbitrary and capricious. After considering the petition and without deciding the merits of petitioner's parole application itself, the Court finds that petitioner has shown his right to a new hearing.

The Parole Board "has been vested with an extraordinary degree of responsibility in determining who will go free and who will remain in prison, and a petitioner who seeks to obtain judicial review on the grounds that the Board did not properly consider all of the relevant factors, or that an improper factor was considered, bears a heavy burden." *Garcia v. New York State Div. of Parole*, 239 AD2d 235, 239, 657 NYS2d 415, 418 (1st Dept. 1998). Therefore, the Board has been accorded great discretion in reaching its decisions on the issues before it. "Absent a convincing demonstration to the contrary, the Board is presumed to have acted properly in accordance with statutory requirements." *Nankervis v. Dennison*, 30 AD3d 521, 522, 817 NYS2d 123, 124 (2nd Dept. 2006).

Nonetheless, this discretion is not unfettered. The main limitation is that the Board cannot base its determination solely on the serious nature of the crime. *See Guzman v. Dennison*, 32 AD3d 798, 821 NYS2d 208 (1st Dept. 2006)(affirming trial court decision which denied petition, where additional factors were set forth as basis for parole denial). Instead, although it need not discuss every statutory factor, it must consider these factors "as to every person who comes before it." *Rios v. New York State Div. of Parole*, Index No. 31731/06 (Sup. Ct. Kings County March 12, 2007)(avail at 2007 WL 846561, at *4)(citation and internal quotation marks

omitted); *see Prout v. Dennison*, 26 AD3d 540, 541, 809 NYS2d 261, 262 (3rd Dept. 2006). This includes consideration of the inmate's institutional record including, as is relevant here, the inmate's vocational education, his training and work assignments, therapy, and his release plans. *Silmon v. Travis*, 95 NY2d 470, 476-77, 718 NYS2d 704, 708 (2000). "[W]here the record convincingly demonstrates that the Parole Board did in fact fail to consider the proper standards, the courts must intervene." *King v. New York State Div. of Parole*, 190 AD2d 423, 431, 598 NYS2d 245, 250 (1993).

Here, the Board apparently relied exclusively on the severity of the offense in its decision to deny parole. Indeed, the decision which the court quoted above in its entirety does not [*5]mention any factor other than the seriousness of the crime as its basis. Thus, the Board's action here "not only contravenes the discretionary scheme mandated by statute, but also effectively constitutes an unauthorized resentencing of the defendant." *Wallman v. Travis*, 18 AD3d 304, 307, 794 NYS2d 381, 386 (1st Dept. 2005). In this, the Board's review even fell below the level deemed irrational and unsatisfactory in other recent Article 78 proceedings. *E.g.*, *Coaxum v. New York State Bd. of Parole*, 14 Misc 3d 661 (Sup. Ct. Bronx County 2006); *Rios*, Index No. 31731/06 (avail at 2007 WL 846561). In addition, the Court notes the short length of the parole hearing, the Commissioners' unwillingness to discuss petitioner's letters in support of his application and, in particular, Commissioner Rodriguez's comment suggesting that he thought petitioner's sentence for manslaughter was too short. (*See* Hearing, at p. 2).

In opposition to the petition, respondent cites a number of cases stating that respondent has enormous discretion in parole board matters. The Court agrees with this point in its entirety. In fact, respondent has correctly stated the general standard in all respects. Nevertheless, respondent does not address the particular problems that exist with respect to the determination at hand. These are problems of which respondent had ample notice, based on the petition and on this court's earlier decision.

Respondent points to *Phillips v. Dennison*, 41 AD3d 17, 834 NYS2d 121 (1st Dept. 2007), as supporting its decision here. There, too, the Board relied on the nature of the crime and the fact that parole would deprecate the crime's serious nature. *Id.* at , 834 NYS2d at 123. However, that case involved a crime more heinous and premeditated than petitioner's admittedly awful crime here, and involved a situation in which the petitioner clearly and on the record failed to take responsibility for his actions. The petitioner in *Phillips*, while a police officer, engaged in "a pattern of extortion, in the course of which he committed a cold-blooded double homicide and shot a witness." *Id.* at , 834 NYS2d at 125. Moreover, as the First Department also noted, the Board's determination that the granting of parole would deprecate the serious nature of the crime was supported in the record not only by the crimes themselves but by the petitioner's "apparent reluctance or inability to plainly admit to the Board, without prompting, the exact nature of his criminal acts." *Id.* Initially, he expressed remorse for the acts because "I ruined my life because of one incident." *Id.* at , 834 NYS2d at 123. The Court further opined that "petitioner's limited remorse and insight into his criminal acts is not only pertinent to his rehabilitative progress . . . but also deprecates the seriousness of his crimes." *Id.* at , 834 NYS2d at 125. The hearing record, therefore, amplified the *Phillips* Board's decision and showed that the *Phillips* Board considered additional factors. Here, on the other hand, no evidence militated against the granting of parole other than the crime itself, and one commissioner's intimation that the sentence for the murder might have been too short.

Petitioner raises other arguments which, as respondent states, are unpersuasive. For example, petitioner points to the fact that at one point respondent refers to the "weapons" charge against him, when in fact he only had one weapon. However, it is clear from the record as a whole that respondent understood the nature of the charge, and that the use of the plural was a mere typographical error.

The Court does not reach petitioner's argument that respondent habitually and deliberately denies parole to violent first time offenders in order to obtain certain funding.

Based on the above, it is [*6]

ORDERED that the petition is granted, and it is further

ORDERED that the court annuls respondent's decision denying petitioner's release to parole supervision and remands petitioner's request for parole to respondent, which, within 30 days of the service of a copy of this order with notice of entry, shall hold a new hearing before a different panel. That panel shall consider the statutorily required factors; and within 14 days after the hearing respondent shall issue a decision, in non-conclusory terms, on the appropriateness of petitioner's release to parole supervision.

The Court notes that petitioner has the right to a new hearing every two years. It hopes that, rather than belabor this proceeding any longer, respondent allows petitioner the right to a new hearing before his challenge is moot.

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

ENTER:

Dated:August 21, 2007_____

LOUIS B. YORK, J.S.C.

Return to Decision List