September 2021

Decision in Art. 78 proceeding - Atkinson, Tyrone (2009-05-28)

[*1]

Matter of Atkinson v New York State Bd. of Parole
2009 NY Slip Op 51298(U) [24 Misc 3d 1207(A)]
Decided on May 28, 2009
Supreme Court, Albany County
Ceresia, J.
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Decided on May 28, 2009

Supreme Court, Albany County

In The Matter of Tyrone Atkinson, Petitioner,

against

New York State Board of Parole, Respondent, For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

8318-08

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George B. Ceresia, J.

The petitioner, an inmate at Arthurkill Correctional Facility, is currently serving the following terms of imprisonment: five to fifteen years for manslaughter in the second [*2]degree[FN1]; five to fifteen years for criminal possession of a weapon in the second degree; and two to six years for criminal possession of a weapon in the third degree. He has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated January 8, 2008 which denied him discretionary release on parole.

Among the many arguments set forth in the petition, the petitioner indicates that he has an impeccable institutional record, and that he possesses an earned eligibility certificate. He points out that he has completed the ART program, the Transitional Program, Phases I-III, ASAT, and ATV. He also obtained a GED degree. He has been employed full time as a porter. According to the petitioner, he has strong family ties, including a wife and six children and three sisters. The petitioner maintains that the denial of release was based solely upon the serious nature of the crimes for which he was convicted. He accuses the Parole Board of re-sentencing him to a new term of imprisonment. He also maintains that the decision was predetermined. He asserts that the Parole Board failed to consider (in his words) "the mitigating factors" in this case. In his view, the fact that the sentencing judge imposed a comparatively light sentence for the homicide, standing alone, should preclude denial of release by the Parole Board. The petitioner also criticizes the Parole Board for asking questions during his parole interview with regard to his prior criminal history, which he maintains was improper. Incredibly, notwithstanding the fact that he was convicted of the crime of manslaughter in the second degree, he makes the following statement in paragraph 14 of the petition: "In addition, there was no one injured as a result of the underlying crime." The petitioner argues that the Parole Board failed to consider all of the statutory factors under Executive Law § 259-i. He faults the Parole Board for inquiring into the facts underlying the crime for which he was incarcerated, even commenting: "[t]o continuously ask an individual to relive, reenact and rehash an incident and past criminal behavior is counterproductive and begs for inconsistent responses." The petitioner asserts that the Parole Board improperly failed to consider his sentencing minutes and the recommendations of the sentencing judge. The petitioner also criticizes the manner of questioning of members of the Parole Board during the parole interview, describing it as being "negative, intense, and at times sarcastic". He contends that his rights to Due Process and Equal Protection have been violated; and that the determination to impose a twenty four month hold was excessive as a matter of law.

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

"Despite earned eligibility certificate, parole is denied for the following reasons: [*3]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 instant offense of manslaughter 2nd, CPW 2nd and CPW 3rd involved you shooting the victim causing his death. This is an escalation of your criminal history with the propensity for violence. You were unapprehended for several years where you fled to Maryland. You express no remorse for the victim. You minimize your involvement and responsibility.

"Note is made of your positive programing and disciplinary record. However, discretionary release is inappropriate at this time."

As stated in Executive Law §259-i (2) (c) (A):

"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; (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 []; (v) any statement made to the board by the crime victim or the victim's representative []" (Executive Law §259-i [2] [c] [A]).

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]). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial

review (*Matter of De La Cruz v Travis*, *supra*). 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]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by [*4]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, his disciplinary record, and his plans upon release. 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 Weir v. New York State Division of Parole*, 205 AD2d 906, 907 [3rd Dept., 1994]; *Matter of Sinopoli v. New York State Board of Parole*, 189 AD2d 960, *supra*; *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 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).

It is well settled that receipt of a certificate of earned eligibility does not serve as a guarantee of release (*Matter of Dorman v New York State Board of Parole*, 30 AD3d 880 [3rd Dept., 2006]; *Matter of Pearl v New York State Division of Parole*, 25 AD3d 1058 [3rd Dept., 2006]).

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing, in violation of the Double Jeopardy Clauses's prohibition against multiple punishments are conclusory and without merit (*see Matter of Bockeno v New York State Parole Board*, 227 AD2d 751 [3rd Dept., 1996]; *Matter of Crews v New York State Executive Department Board of Appeals Unit*, 281 AD2d 672 [3rd Dept., 2001]; *Matter of Evans v Dennison*, 13 Misc 3d 1236A, [Sup. Ct., Westchester Co., 2006]). The fact that [*5]an inmate has served his or her minimum sentence does not confer upon the inmate a protected liberty interest in parole release (see *Matter of Motti v Alexander*, 54 AD3d 1114, 1115 [3rd Dept., 2008]). The Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the fact that the sentencing court set the minimum term of petitioner's sentence (*see Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000]; *Matter of Cody v Dennison*, 33 AD2d 1141, 1142 [3rd Dept., 2006] *lv denied* 8 NY3d 802 [2007]; *Matter of Burress v Dennison*, 37 AD3d 930 [3rd Dept., 2007]).

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court first observes that there is no inherent right to parole under the constitution of either the United States or the State of New York (*see Greenholtz v Inmates of the Nebraska Penal and Correctional Complex*, 442 US 1, 7 [1979]; *Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 73, *supra*). It has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate expectation of, release; therefore, no constitutionally protected liberty interests are implicated by the Parole Board's exercise of its discretion to deny parole (*see Barna v Travis*, 239 F3d 169, 171 [2d Cir., 2001]; *Marvin v Goord*, 255 F3d 40, 44 [2d Cir., 2001]; *Boothe v Hammock*, 605 F2d 661, 664 [2d Cir., 1979]; *Paunetto v Hammock*, 516 F Supp 1367, 1367-1368 [SD NY, 1981]; *Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 75-76, *supra*, *Matter of Gamez v Dennison*, 18 AD3d 1099 [3rd Dept., 2005]; *Matter of Lozada v New York State Div. of Parole*, 36 AD3d 1046, 1046 [3rd Dept., 2007]). The Court, accordingly, finds no due process violation.

With respect to petitioner's equal protection argument, the Fourteenth Amendment of the Federal Constitution forbids States from denying to any person within their jurisdiction the equal protection of the laws, but does not prevent the States from making reasonable classifications among persons (*Western & S.L.I. Co. v Bd. of Equalization*, 451 US 648, 68 L Ed 2d 514, 523 101 S Ct 2070 [1981]). Where the action under review does not involve a suspect class or fundamental right, it is not subject to strict judicial scrutiny, but rather is examined using the rational basis standard to determine if the action violated the equal protection clause (*see*, *Massachusetts Bd. of Retirement v Murgia*, 427 US 307, 49 L Ed 2d 520, 524, 96 S Ct 2562 and *Maresca v Cuomo*, 64 NY2d 242, 250). In this instance there is simply no evidence of either selective or disparate treatment or that the respondent's determination was motivated by impermissible considerations (*see Giordano v City of New York*, 274 F3d 740, 751 [2nd Cir., 2001]). In addition, because "New York courts addressing a state equal protection claim will ordinarily afford the same breadth of coverage conferred by federal courts under the US Constitution in the same or similar matters" (*Brown v State of New York*, 45 AD3d 15, 20-21 [2007 [3rd Dept., 2007], quoting *Brown v State of New York*, 9 AD3d 23, 27 [2004]), the Court discerns no violation of NY Const art 1 § 11. The Court finds the argument to have no merit. [*6]

With regard to the Parole Board's alleged failure to consider the sentencing minutes, it appears that both sets of sentencing minutes were a part of the record before the Parole Board at the time the instant determination was made. In addition, the Court observes that the statute requires that the Parole Board consider the *recommendations* of the sentencing court (*see* Executive Law 259-i [2] [c] [A] last sentence, which makes reference to the provisions of Executive Law § 259-i [1] [a]). In this instance, a review of both sets of sentencing minutes reveals that, contrary to the assertions of the petitioner, the sentencing court made no recommendation with regard to release of the petitioner upon expiration of his minimum term of imprisonment. Thus, even if it were true that the Parole Board did not consider the sentencing minutes, the Court would conclude that such failure was harmless (*see Matter of Schettino v New York State Div. of Parole*, 45 AD3d 1086, 1086-1087 [3rd Dept., 2007]).

The Court discerns no evidence in the record to support the petitioner's assertion that the parole decision was predetermined.

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.

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. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: May 28, 2009*/s/ George B. Ceresia, Jr.*Troy, New YorkSupreme Court Justice

George B. Ceresia, Jr.

Footnotes

Footnote 1: The Court observes that the petitioner was originally convicted of depraved indifference murder (Penal Law § 125.25 [2]). The Court of Appeals modified the conviction by reducing it to manslaughter in the second degree (Penal Law § 125.15 [1]), and by remitting the case to Supreme Court for re-sentencing (*see People v Atkinson*, 7 NY3d 765 [2006]).

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