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Matter of Belgrave v NYS Bd. of Parole

2014 NY Slip Op 30345(U)

January 28, 2014

Sup Ct, Franklin County

Docket Number: 2013-667

Judge: S. Peter Feldstein

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This opinion is uncorrected and not selected for official publication.

[* 1]

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
NOEL BELGRAVE, #85-A-2104,
Petitioner,

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

-against-

NYS BOARD OF PAROLE,
Respondent.

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DECISION AND JUDGMENT
RJI #16-1-2013-0333.84
INDEX # 2013-667
ORI #NY016015J

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Noel Belgrave, verified on July 24, 2013 and filed in the Franklin County Clerk's office on July 31, 2013. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the July 2012 determination denying him parole and directing that he be held for an additional 24 months. An Order to Show Cause was issued on August 7, 2013. The Court has since received and reviewed respondent's Answer and Return, including *in camera* materials, verified on September 26, 2013 and supported by the September 26, 2013 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General. The September 30, 2013 Affirmation of Terrence X. Tracy, Esq., Counsel to the New York State Board of Parole, with exhibits, is annexed to the Letter Memorandum of September 26, 2013. The Court has also received and reviewed petitioner's Reply, dated October 9, 2013 and filed in the Franklin County Clerk's office on October 15, 2013, as well as his additional correspondence, with an exhibit, dated January 1, 2014 and received directly in chambers on January 8, 2014.

On March 22, 1985 petitioner was sentenced in Supreme Court, New York County, to an indeterminate sentence of 15 years to life upon his conviction of the crime of Murder

[* 2]

2°. Petitioner's conviction/sentencing was affirmed on direct appeal to the Appellate Division, First Department. *People v. Belgrave*, 172 AD2d 335, *lv den* 78 NY2d 962. After being denied discretionary parole release on eight previous occasions, petitioner re-appeared before a Parole Board on July 10, 2012. Following that appearance a decision was rendered again denying him discretionary parole release and directing that he be held for an additional 24 months. The parole denial determination reads as follows:

> "AFTER A REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND YOUR 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.
>
> THIS DECISION IS BASED ON THE FOLLOWING FACTORS: YOUR INSTANT OFFENSE IS MURDER 2ND IN WHICH AFTER GOING TO A REMOTE LOCATION WITH YOUR ESTRANGED WIFE, YOU SHOT HER FIVE TIMES CAUSING HER DEATH AND DUMPED HER BODY IN THE RIVER. NOTE IS MADE OF YOUR SENTENCING MINUTES, COMPAS, PAROLE PACKET, RISKS, NEEDS, OPPOSITION TO RELEASE, EDUCATION, REHABILITATIVE EFFORTS, AND ALL OTHER REQUIRED FACTORS. AFTER DECASED [sic] [presumably decades] OF LYING ABOUT YOUR GUILT YOU NOW PRESENT A VERSION OF EVENTS SO SELF-SERVING AND MITIGATING, IT DEFIES BELIEF. PAROLE IS DENIED."

The document perfecting petitioner's administrative appeal from the parole denial determination was received by the DOCCS Parole Appeals Unit on December 6, 2013. Although the Appeals Unit apparently failed to issue its findings and recommendation within the four-month time frame set forth in 9 NYCRR §8006.4(c), a belated decision on administrative appeal was, in fact, issued on or about September 11, 2013, after this proceeding had been commenced.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C, subpart A, §§38-f and 38-f-1, effective March 31, 2011, 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; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department . . . (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 . . ."

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.

Petitioner advances a variety of arguments in support of his ultimate contention

that the underlying parole denial determination must be vacated and a *de novo* hearing ordered. The Court will first address petitioner's broader arguments, starting with his claim that the New York State Board of Parole failed to promulgate certain "new written procedures," to be utilized in connection with discretionary parole determinations as mandated under a 2011 amendment to Executive Law §259-c(4). That statute, the Court notes, was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, 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 may be released to parole supervision . . ."[1] Although respondent takes the position that a certain memorandum issued on October 5, 2011 by former Board Chairwoman Andrea W. Evans (the Evans Memorandum) " . . . serves as the written procedures of the Board pursuant to section 259-c(4) of the Executive Law," petitioner, noting that the Evans Memorandum was not formally enacted in compliance with the rule making provisions of the State Administrative Procedures Act, argues that the issuance of the memorandum does not represent compliance with the mandates of amended Executive Law §259-c(4).

The first issue to be addressed is not new to the courts, although there is not as yet appellate authority on the subject. The leading cases which have addressed it head-on, with diametrically opposite results, are *Partee v. Evans*, 40 Misc 3d 896, and *Morris v. New York State Department of Corrections and Community Supervision*, 40 Misc 3d

[1] Prior to the amendment the statute had 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 . . ."

226. *Morris* holds that the failure to establish written procedures, through the processes of rule making including filing with the Secretary of State, constitutes "[d]isregard of a legislative mandate through an administrative agency's inaction," and is thus "arbitrary and capricious and contrary to law." (*Morris* at 232) On this issue (among others), the petitioner in *Morris* was granted the relief of a prompt new hearing.[2]

On the other hand, the petition in *Partee* was dismissed after thorough analysis of the issue and of the *Morris* rationale. The *Partee* court relies upon *Medical Society of the State of New York v. Serio*, 100 N.Y.2d 854, for the proposition that where "standards encompass case-specific mitigating factors and vest the decision makers with significant discretion with which to independently exercise their professional judgment, the standards constitute not rules but guidelines." *Id.* at 868-869 (citations omitted). Justice McGrath in *Partee* examines "the underlying regulatory scheme here, which still requires case by case analysis and is dependent on the Board's 'independent exercise of their professional judgment.' " *Partee v. Evans*, 40 Misc.3d 896, 907-908, quoting *New York City Transit Auth. v. New York State Dept. of Labor*, 88 N.Y. 2d 225, 230. On this analysis and the framework of both *Transit Authority* and *Medical Society*, Justice McGrath finds that inasmuch as the new legislation at issue does not divest the Parole Board of its historically recognized discretionary role, the rule-making provisions of the State Administrative Procedures Act are not applicable here. Thus "the failure to file written procedures with the Secretary of State does not render the parole decision in violation of lawful procedure and this court declines to follow the rationale set forth in

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[2] It is unclear how respondent in *Morris* could comply with the directives of the court in the time allotted, given the necessary delays implicit in the formal rule-making process.

Morris." *Partee* at 908. This Court finds the rationale of *Partee* compelling, and for the reasons fully set forth therein rejects Petitioner's argument on this point.

Petitioner also argues that the July 2012 parole denial determination was fatally flawed inasmuch as no Transitional Accountability Plan (TAP) was prepared for consideration by the Parole Board in determining whether or not petitioner should be released to parole supervision. As part of the same legislative enactment (L 2011, ch 62, part C, subpart A) wherein Executive Law §§ 259-c(4) was amended, a new Correction Law § 71-a was added, as follows:

> "Upon admission of an inmate committed to the custody of the department [DOCCS] under an indeterminate or determinate sentence of imprisonment, the department shall develop a transitional accountability plan. Such plan shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the inmate. The purpose of such plan shall be to promote the rehabilitation of the inmate and their successful and productive reentry and reintegration into society upon release. To that end, such plan shall be used to prioritize programming and treatment services for the inmate during incarceration and any period of community supervision."

Although Correction Law §71-a became effective on September 30, 2011, the Court finds nothing in the legislative enactment to suggest that it mandates the preparation of a TAP with respect to an inmate - like petitioner - already in DOCCS custody prior to the effective date of the statute. Accordingly, petitioner's argument on this point is also rejected.

Much of the remainder of the petition is focused, in one way or another, on the argument that the parole denial determination was improperly based upon the nature of the crime underlying petitioner's incarceration, without adequate consideration of other factors. Before this argument can be addressed, however, the Court finds it appropriate to consider the circumstances underlying the Parole Board's stated concerns with respect

to petitioner "LYING" about his criminal guilt over a period of decades and currently presenting such a "SELF-SERVING AND MITIGATING" version of the events surrounding his estranged wife's death that it "DEFIES BELIEF." In this regard the record suggests that from the time of his wife's murder in September of 1983 until his 2010 Parole Board appearance petitioner steadfastly maintained that he had nothing whatsoever to do with the crime. In 2010, however, petitioner admitted for the first time that he did, in fact, shoot his estranged wife. His recent version of the events carried over into the July 10, 2012 Parole Board interview when the following colloquy occurred:

"Q [Parole Commissioner Thompson]: The instant offense relates to events in September of '83 when your wife was found deceased floating in the river. She had been shot multiple times in the chest, abdomen, and vagina. It appears that the victim was still alive when she was in the water because there's evidence that she drowned.

For a very long time you had denied your guilt. You went to trial professing your innocence, appealed professing your innocence, and subsequent to that, your new version of events is that she went to this location with you. She didn't want to be married to a police officer. You hadn't told her that you were getting appointed and hired as a transit police officer. I think the both of you were corrections officers at the time initially.

A [petitioner]: That's correct.

Q: She pulled off to an area near the water. You say that you were talking. She suddenly assaulted you with a gun and struck you in the head with it. You knocked the gun from her hand and it was on the ground. You said she pulled another gun out. You picked up the first gun, fired it repeatedly. She backed away and fell into the river. You called for her but heard nothing and left the scene.

A: That's correct, sir."

Later during the course of the July 10, 2012 Parole Board interview petitioner made the following statement: "In regards to the incident, okay, I went there with my wife, my former wife, under the assumption that she wanted to speak to me. At first I was reluctant to go but I did go. She pulled into an area that was known to her, okay, and we were going along, and what elapsed, the answers that I was giving her were short answers, okay, I don't know whether she believed that I was ignoring her or wasn't responding appropriately. She assaulted me, okay. I went down to my left. In the process, I apparently hurt my back and my leg after being struck with the gun. This arm went up (indicating), my right arm, and it knocked the gun away. The gun fell. I pretty much fell on it and I held it and I figured that was the end of it. By then, my vision was blurred. It was dark, at night, and I was in severe pain, and I looked up and I saw her with a second gun. I believe the gun was fired because I saw flashes even though my sight was somewhat blurred from being struck in the head. At that point I fired the weapon. I was on my back. I cannot believe that she had intended to kill me. I was afraid, Mr. [Parole Commissioner] Ferguson. When I fired, she back up and fell into the water. I got up a

few minutes later, okay, and even though I was disoriented somewhat, I went over and I looked and I called her name and I heard nothing. I was disoriented, I was frightened, I was traumatized, and I was terrified and I left the scene."

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, reviews of the Inmate Status Report and transcript of the July 10, 2012 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors including petitioner's low risk for felony violence or rearrest as scored on the COMPAS Re Entry Risk Assessment instrument, his excellent therapeutic/vocational programming record, academic achievements, letters supporting release (including some from correction officers), lack of any prior criminal record, release plans and generally favorable prison disciplinary record, in addition to the

disturbing nature of the violent crime underlying petitioner's incarceration, including his long-standing denial of responsibility for the crime. *See Zhang v. Travis*, 10 AD3d 828. The Court finds, moreover, nothing in the parole appearance 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. Indeed, before closing the record of the parole interview Commissioner Ferguson asked the petitioner " . . . is there anything you wanted to add . . ." In response to that open-ended invitation petitioner responded as follows:

> "Yes. Basically, I want to say that I accept full responsibility for my actions. I deeply regret the loss of human life. I apologize to my former wife's family, my own family, and society for the harm that I caused.
>
> In addition to that, I want to point out that I recognize the harm that I caused. In doing so, I fully addressed the crime that I committed through anti-violence and therapeutic programs and I'm a changed man. I'm a fully rehabilitated man and I strongly believe that I am ready for society. I recognize that I wasn't truthful at first and that was wrong.
>
> I grew up in a family, a religious family, a family of integrity and honor. My dad is a minister, a pastor, an assistant pastor of a church. I let them down. I let myself down. I don't ever want to put my family, my friends, and whomever through this shame that I'm experiencing every day.
>
> I ended up with a lawyer who I thought was in my best interest, who influenced my well-being, told me what to say even though I told him specifically the facts, but I was wrong and I'm going to admit that I was wrong and I just didn't want to continue to live my life that way.
>
> I'm a human being with feelings. I love people, I enjoy people. I'm ashamed. I'm deeply ashamed.
>
> Coming to prison, I've learned from this experience. I've truly learned . . . And I would never ever be involved in such activity. I've done the programs. The programs have taught me well. I've internalized the information. That way I can become a better person. I know I'm better now and I'm confident that I can be an asset to the community."

In view of the above, the Court finds no basis to conclude that the Parole Board failed to consider the relevant statutory factors. *See McAllister v. New York State Division of Parole* 78 AD3d 1413, *lv den* 16 NY3d 707, and *Davis v. Lemons,* 73 AD3d 1354. 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 violent nature of the crime underlying petitioner's incarceration (*see Veras v. New York State Division of Parole,* 56 AD3d 878, *Serrano v. Dennison*, 46 AD3d 1002 and *Schettino v. New York State Division of Parole,* 45 AD3d 1086*)* as well as his ongoing failure to take responsibility for the commission of the crime (*see Silmon v. Travis*, 95 NY2d 470).

To the extent it is asserted in paragraph 50 of the petition that "[d]uring the [July 10, 2012] hearing Petitioner admitted his guilt, as he had done previously, including at his July 2010 Parole hearing," this Court simply notes that the version of events described by petitioner during the July 10, 2012 Parole Board interview certainly does not constitute an admission of guilt with respect to the crime of Murder 2°. Indeed, based upon petitioner's verison of events, one could construct a persuasive argument that his admitted use of deadly physical force against his estranged wife was justified under the provisions of Penal Law §35.15 and, therefore, that he committed no crime at all.

With respect to the COMPAS ReEntry Risk Assessment instrument prepared in conjunction with the consideration of petitioner for discretionary parole release, it is noted that such instrument scored petitioner as the lowest risk for felony violence or rearrest. This fact was acknowledged, on the record, by Parole Commissioner Ferguson

at petitioner's July 10, 2012 Parole Board interview. Although the Appellate Division, Third Department has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* 112 AD3d 1056*, Malerba v. Evans,* 109 AD3d 1067 and *Garfield v. Evans*, 108 AD3d 830), this Court finds nothing in such cases, or the amended statute, to suggest that the quantified risk assessment determined through utilization of a risk and needs assessment instrument supercedes the independent discretionary authority of the Board of Parole to determine, based upon its consideration of the factors set forth in Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. In this regard it is noted that the "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A). *See Partee v. Evans,* 40 Misc 3d 896. In the case at bar the Parole Board ultimately concluded that the denial of parole was warranted based upon the violent

nature of the crime underlying petitioner's incarceration as well as his ongoing failure to take responsibility for the commission of the crime.

In addition, the Court rejects the argument set forth in paragraphs 25 and 26 of the petition that upon the merger of the New York State Department of Correctional Services and New York State Division of Parole " . . . former Parole Officers, now ORCs [Offender Rehabilitation Coordinators], where stripped of their authority to make recommendations to the Board as to who they think should be released, as that is now a function of the COMPAS Risk Assessment Instrument." In any event, the Court has examined all three parts of the Inmate Status Report and finds no basis to conclude that any improper recommendations were set forth therein.

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: January 28, 2014 at
Indian Lake, New York.

____

S. Peter Feldstein
Acting Supreme Court Justice