September 2021

Decision in Art. 78 proceeding - Booth, Norman E. (2015-02-10)

Matter of Booth v Stanford
2015 NY Slip Op 30265(U)
February 10, 2015
Supreme Court, Franklin County
Docket Number: 2014-570
Judge: S. Peter Feldstein

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

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In the Matter of the Application of
NORMAN E. BOOTH, #03-A-6438,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2014-0294.59
INDEX # 2014-570
ORI #NY016015J

TINA STANFORD, Chairwoman,
NYS Board of Parole,
Respondent.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Norman E. Booth, verified on July 11, 2014 and filed in the Franklin County Clerk's office on July 24, 2014. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the February 2013 determination denying him discretionary parole release. The Court issued an Order to Show Cause on August 8, 2014 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on September 22, 2014 and supported by the Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General, dated September 22, 2014, as well as by the Affirmation of Terrence X. Tracy, Esq., Counsel, New York State Board of Parole, dated September 22, 2014. The Court has also received and reviewed petitioner's Answer and Objection of the Point of Law, sworn to on October 11, 2014 and filed in the Franklin County Clerk's office on October 17, 2014.

On December 2, 2003 petitioner was sentenced in Schenectady County Court, after a plea, to an indeterminate sentence of 8⅓ to 25 years upon his conviction of the crime

of Conspiracy 2°. After having been denied discretionary parole release on two prior occasions[1], petitioner reappeared before a Parole Board on February 5, 2013. Following that reappearance petitioner was again denied discretionary parole release and directed to 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 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.
>
> THE BOARD HAS CONSIDERED YOUR INSTITUTIONAL ADJUSTMENT INCLUDING DISCIPLINE AND PROGRAM PARTICIPATION. REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED INCLUDING YOUR RISK TO SOCIETY, REHABILITATION EFFORTS AND YOUR NEEDS FOR SUCCESSFUL RE-ENTRY INTO THE COMMUNITY. YOUR RELEASE PLANS HAVE ALSO BEEN CONSIDERED. MORE COMPELLING, HOWEVER, IS THE CALLOUS DISREGARD YOU EXHIBITED FOR THE LIFE OF THE VICTIM AND HIS FAMILY WHEN YOU CONSPIRED TO CAUSE THE DEATH OF THE VICTIM. THIS CRIME WAS A CONTINUATION AND SEVERE ESCALATION OF A PATTERN OF ILLEGAL CONDUCT. SINCE YOUR LAST BOARD APPEARANCE, YOU INCURRED A TIER II INFRACTION FOR VIOLENT CONDUCT.
>
> THE BOARD NOTES THE LETTER OF SUPPORT FROM YOUR FATHER ADN [sic] LETTERS FROM TRANSITIONAL PROGRAMS. THE BOARD ALSO NOTES YOUR WORK ASSIGNMENTS, PROGRAM COMPLETIONS, WORK IN THE FACILITY INFIRMARY, AND YOUR MEDICAL CONDITION.
>
> ALL FACTORS CONSIDERED, YOUR RELEASE AT THIS TIME IS NOT APPROPRIATE."

The document perfecting petitioner's administrative appeal from the February 2013 parole denial determination was received by the DOCCS Board of Parole Appeals Unit on July 29, 2013. Although the Appeals Unit apparently failed to issue its findings and

[1] Petitioner first appeared before a Parole Board for merit parole consideration. His initial regular Parole Board appearance was in February of 2011.

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 March 20, 2014. This proceeding ensued.

As a threshold matter respondent asserts in an Objection in Point of Law that petitioner's challenge to the underlying parole denial determination is time barred under the four-month statute of limitations set forth in CPLR §217(1). In this regard it is alleged in respondent's answering papers (at page four of the Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General) that "[t]he Appeals Unit mailed the Administrative Appeal Decision Notice and Statement of Appeals Unit Findings & Recommendation to Petitioner and his counsel on March 20, 2014." This proceeding was commenced on July 24, 2014 when the Petition was filed in the Franklin County Clerk's office. *See* CPLR §304(1). Respondent maintains that the four-month statute of limitation set forth in CPLR §217(1) commenced running on March 20, 2014 when the decision notice was mailed to petitioner. Accordingly, respondent argues, in effect, that this proceeding was commenced four days after the statute of limitations period expired and that dismissal is therefore required. For the reasons set forth below, however, the Court disagrees.

"It is well settled that the Statute of Limitations period does not begin to run until a petitioner receives notice of the final administrative determination, and not upon the issuance thereof." *Warburton v. Department of Correctional Services*, 251 AD2d 831, 832, *quoting Biondo v. New York State Board of Parole*, 60 NY2d 832, 834. *See Jackson v. Fischer*, 67 AD3d 1207. The burden of proving the applicability of the affirmative defense of statute of limitations rest upon the party asserting it, here the respondent. *See*

Jackson v. Fischer, 67 AD3d 1207 *and Brush v. Olivo*, 81 AD2d 852." In the case at bar respondent makes no effort to demonstrate when petitioner or his attorney received the belated determination on administrative appeal. Even if the statute of limitations commenced running on the date the notice was mailed to petitioner and/or his attorney, the only indication that the final Administrative Appeal Decision Notice was mailed on March 20, 2014 is an unidentified handwritten notation on the notice document. No affidavit of service with respect to the alleged mailing is included with respondent's papers. Under such circumstances the Court finds no basis to conclude that this proceeding should be dismissed as time-barred.

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 . . . (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, *Hamilton v. New York State Division of Parole,* 119 AD3d 1268, *Vasquez v. Dennis*on, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. 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 portion of the petition is focused on the assertion that the parole denial determination was improperly based solely on the nature of the crime underlying petitioner's incarceration, without adequate consideration of other relevant statutory factors. A Parole Board, however, 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 Montane v. Evans,* 116 AD3d 197, *lv granted* 23 NY3d 903, *Valentino v. Evans,* 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. 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 (February 2013 Reappearance Report) and transcript of petitioner's February 5, 2013 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's therapeutic/vocational programing records, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record and release plans/community support in addition to the circumstances of the crimes underlying petitioner's incarceration and his prior criminal record. The Court, moreover, finds nothing in the hearing transcript to suggest that the Parole 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 the February 5, 2013 Parole Board appearance was concluded one of the presiding commissioners inquired of petitioner as follows: "Is there anything that I haven't mentioned that you think would be important for us to know?" Petitioner responded as follows: "Well, I'm trying to do my best. I believe I've come a long way and learning things and doing things to better my life and to be more responsible. I know right now as the way it stands, I would rather be a productive member of society and I know that's what I will be if I'm given the chance. This is my first time upstate, as you see. As long as I've been in jail, I've been abiding by the rules, I've been doing what I have to do of changing myself. I've never learned of self-inventory, of checking what I do wrong with myself until I've came to prison. Prison has taught me a lot and I believe that the Department of Correctional Services have did a great

deed in changing me and I believe if given the chance to be released, I will be - - the Department of Correctional Services will be proud of the things I've accomplished in life."

In view of the above, the Court finds no basis to conclude that the Parole Board failed to consider the relevant statutory factors. *See Pearl v. New York State Division of Parole,* 25 AD3d 1058 and *Zhang v. Travis*, 10 AD3d 828. 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 boarding on impropriety as a result of the emphasis placed by the Board on the nature of the crime underlying petitioner's incarceration as well as his prior criminal record and prison disciplinary record. *See Shark v. New York State Division of Parole Chair,* 110 AD3d 1134 *lv denied* 23 NY3d 933, *Dalton v. Evans,* 84 AD3d 1664 and *Ondrizek v. Dennison*, 39 AD3d 1114.

Citing *King v. New York State Division of Parole*, 190 AD2d 423, *aff'd* 83 NY2d 788, petitioner specifically argues " . . . that the seriousness of a crime is NOT to be determining factor when the Board is considering an inmates parole. Further, the law is even clearer that at a second or subsequent Parole Board interview, the Board may only focus on the inmate's institutional record, record of temporary release participation, and release plans." In *King* the Appellate Division, First Department, not only determined that the Parole Board improperly considered matters not within its purview (penal policy with respect to convicted murders) but also that the Parole Board failed " . . . to consider and fairly weigh all of the information available to them concerning petitioner that was relevant under the statute, which clearly demonstrates his extraordinary rehabilitative achievements and would appear to strongly militate in favor of granting parole." *Id* at 433.

The appellate-level court in *King* went on to note that the only statutory criterion referenced by the Board in the parole denial determination was the seriousness of the crime underlying Mr. King's incarceration (felony murder of an off-duty police officer during the robbery of a fast food restaurant). According to the Appellate Division, First Department, "[s]ince . . . the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself." *Id* at 433.

In July of 2014 the Appellate Division, Third Department - whose precedent is binding on this Court - effectively determined that the above-referenced "aggravating circumstances" requirement enunciated by the First Department in *King* does not represent the state of the law in the Third Department. *See Hamilton v. New York State Division of Parole,* 119 AD3d 1268. In *Hamilton* it was noted that the Third Department " . . . has repeatedly held - both recently and historically - that, so long as the [Parole] Board considers the factors enumerated in the statute [Executive Law §259-i(2)(c)(A)] it is 'entitled . . . to place a greater emphasis on the gravity of [the] crime' (*Matter of Montane v. Evans,* 116 AD3d 197, 203 (2014), *lv granted* 23 NY3d 903 (2014) [internal quotation marks and citations omitted]' . . ." *Id* at 1271 (other citations omitted). After favorably citing nine Third Department cases decided between 1977 and 2014, the *Hamilton* court ended the string of cites as follows: " . . . *but see Matter of King v. New York State Div. of Parole,* 190 AD2d 423, 434 (1993), *aff'd on other grounds* 83 NY2d 788[2] (1994) [a First Department case holding, in conflict with our precedent, that the

[2] The Court of Appeals in *King* only referenced the fact that " . . . one of the [Parole] Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the

Board [of Parole] may not deny discretionary release based solely on the nature of the crime when the remaining statutory factors are considered only to be dismissed as not outweighing the seriousness of the crime]." 119 AD3d 1268, 1272. The *Hamilton* court continued as follows:

> "Particularly relevant here, we have held that, even when a petitioner's institutional behavior and accomplishments are 'exemplary,' the Board may place 'particular emphasis' on the violent nature or gravity of the crime in denying parole, as long as the relevant statutory factors are considered (*Matter of Valderrama v. Travis,* 19 AD3d at 905). In so holding we explained that, despite [the *Valderrama*] petitioner's admirable educational and vocational accomplishments and positive prison disciplinary history, '[o]ur settled jurisprudence is that a parole determination made in accordance with the requirements of the statutory guidelines is not subject to further judicial review unless it is affected by irrationality bordering on impropriety' (*id.* [internal quotation marks and citations omitted]). We emphasize that this Court [Appellate Division, Third Department] has repeatedly reached the same result, on the same basis, when reviewing denials of parole to petitioners whom we recognized as having exemplary records and as being compelling candidates for release." 119 AD3d 1268, 1272 (additional citations omitted).

This Court therefore finds petitioner's reliance on the decision of the Appellate Division, First Department, in *King* to be misplaced.

Petitioner also argues that the Parole Board improperly evaluated his risk assessment in that he was scored as a low risk for committing a new violent felony offense, for rearrest and/or for absconding. This Court notes, however, that 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.*

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consequences to society if those sentences are not in place. Consideration of such factors is not authorized by Executive Law §259-i." 83 NY2d 788, 791. The Court of Appeals, however, did not address that aspect of the Appellate Division, First Department, decision in *King* holding that a parole denial determination must be based upon a showing of some aggravating circumstances beyond the inherent seriousness of the underlying crime.

Evans, 109 AD3d 1067, *lv denied* 22 NY3d 858 and *Garfield v. Evans*, 108 AD3d 830), there is nothing in such cases, or the amended version of Executive Law §259-c(4), to suggest that the quantified risk assessment determined through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Parole Board 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. 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) including, as here, the nature of the underlying crime and prior criminal record. *See Rivera v. New York State Division of Parole,* 119 AD3d 1107 and *Partee v. Evans*, 40 Misc 3d 896, *aff'd* 117 AD3d 1258, *lv denied* 24 NY3d 901.

Finally, although the Court shares petitioner's concern with respect to the basis of the COMPAS scoring of his "Prison Misconduct" at 8 ("High"), the Court finds nothing in the record to suggest that such scoring was a factor in the February 2013 parole denial determination. While petitioner's May 2011 Tier II Disciplinary Hearing infraction involving charges of violent conduct/fighting was referenced in the parole denial

determination, the Inmate Status Report (February 2013 Reappearance Report) specifically noted that such infraction was petitioner's only disciplinary referral since his prior Board appearance and that such infraction only resulted in a loss of privileges disposition. During the course of the February 5, 2013 Parole Board interview, moreover, it was specifically noted that petitioner had incurred no Tier III infractions since entering DOCCS custody and the details of the incident underlying the May 2011 Tier II determination were discussed at some length, with petitioner afforded full opportunity to explain the circumstances of the incident. Based upon the foregoing, the Court concludes that any possible error in the COMPAS numerical scoring of petitioner's "Prison Misconduct" record was harmless in view of the Board's obvious familiarity with petitioner's disciplinary record.

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: February 10, 2015 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice