September 2021

Decision in Art. 78 proceeding - Borcsok, Bela (2008-04-25)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of BELA BORCSOK,

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 # 01-08-ST8530 Index No. 1119-08

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Coxsackie Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated February

13, 2007 to deny petitioner discretionary release on parole. The petitioner is serving a term of twenty years to life upon a conviction after trial of the crime of murder in the second degree. Among the many arguments set forth in the petition, the petitioner points out that he has served seventy months beyond his minimum term, and that this was his fourth appearance before the Parole Board. The petitioner indicates that he has an exemplary inmate disciplinary record. He contends that his release plans, which include returning to his mother's home in Delaware County, and being employed as a refinisher in an antique dealer's business, are adequate. He asserts that he possesses carpentry skills acquired during his vocational programming while incarcerated. It is indicated that the petitioner received an Honors Award from Sullivan Community College where he earned an Associates Degree. He finished one semester at Marist College. The petitioner has also received a Certificate of Training for HIV infection and Aids.

The petitioner argues that the Parole Board's finding that "at this time your release is not in the best interest of society", is not in accordance with the statutory factors (see Executive Law §259-i [2] [c] [A]). He asserts that the parole determination is unsupported in the record, and is therefore irrational bordering on impropriety. In his view it is based upon an error of law in that it failed to consider and apply the requisite statutory factors, and is based solely upon the severity of petitioner's instant offense. He contends that absent aggravating or egregious circumstances associated with the crime itself, the serious nature of the offense cannot serve as the sole basis for denying release. The petitioner takes the

position that the Parole Board's determination is so arbitrary and capricious as to violate principles of fundamental due process. As a separate ground for vacating the Parole Board's determination, it is argued that the Parole Board failed to consider petitioner's sentencing minutes.

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

> "After careful consideration, including a personal interview, review of the instant offense murder 2d and deliberation, parole is denied. You have been incarcerated for more than half your life for a senseless murder. The victim did not deserve to be disposed of because he was considered a nuisance. The options were many and even after all this time you appear to have little insight into the gravity of your instant offense. This panel is concerned with your lack of remorse. We do note your positive programming and you have remained ticket free since 2001. Your file lacked a legitimate release plan. There are no recent letters of community support, no letters from outside agencies nor letters of reasonable assurance from potential employers. Mr. Borcsok, what happened in 1981 stole the lives of three men. It affected their families and community. In considering you for parole, we have taken all these factors into consideration. *We find at this time your release not in the best interest of society.*" (emphasis supplied)

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 Sinopoli v New York State Board of Parole, 189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v. New York State Bd. of Parole, 157 AD2d 944). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (see Ristau v. Hammock, 103 AD2d 944 [3rd Dept., 1984]). 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 the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

Notwithstanding the foregoing, the Court observes that the Appellate Division, in

Matter of Prout v Dennison (26 AD3d 540 [3d Dept., 2006]), affirmed a judgment of Supreme Court which annulled a determination which had denied parole to an inmate-petitioner where the determination recited that "discretionary release is *contrary to the best interest of the community*" and "is not appropriate, as this . . . is not consistent with community standards and interests, and release would not serve society" (id., at 541, internal quotes omitted, emphasis supplied). The Appellate Division faulted the Parole Board for failing to provide a factual analysis in its determination predicated upon the appropriate statutory and regulatory criteria (see Executive Law §259-i [2] [c] [A]). As the Court in Prout (supra) stated, "here, on the other hand, because there is no . . . explanation, the courts are left to speculate as to whether the Board imposed a higher standard for release to wit, that petitioner had some burden to demonstrate that his release would somehow enhance society" (id.). The Prout case was recently cited in Matter of Vaello v Parole Board Division of State of New York (48 AD3d 1018 [3rd Dept., 2008]), which again, upheld a judgment of Supreme Court which annulled a determination of the Parole Board that had denied parole release. In Vaello (supra) the Parole Board had stated in its determination, "[all] factors considered . . . you are a poor candidate for release to the community" (id.). The Appellate Division commented that "the dearth of any analysis of the statutory or regulatory criteria 'makes it impossible for this Court to give meaning to the language used by the Board'" (id., quoting Matter of Prout v Dennison, supra, at 541).

In the Court's view, the Parole Board's determination did not adequately demonstrate

that there is a reasonable probability that the petitioner, if released, would not live and remain at liberty without violating the law, that his release is incompatible with the welfare of society, or that his release would so deprecate the seriousness of his crime as to undermine respect for law (see Executive Law §259-i [2] [c] [A]). Under the circumstances, the Court concludes that the petition must be granted, the determination annulled, and the matter remanded to the Parole Board for a *de novo* parole interview.

Separate and apart from the foregoing, the Court is mindful of the decisions in Matter of McLaurin v New York State Board of Parole (27 AD3d 565 [2nd Dept., 2006], lv to appeal denied 7 NY3d 708) and Matter of Standley v New York State Division of Parole (34 AD3d 1169 [3rd Dept., 2006]), in which parole determinations were annulled by reason of the failure of the Parole Board to consider the inmate's sentencing minutes. In this instance, the respondent concedes that the Parole Board did not do so here. The respondent argues, however, that this omission was cured when the sentencing minutes were obtained and considered by the Appeals Unit in connection with the petitioner's administrative appeal. To support the foregoing argument, the respondent annexes a copy of the sentencing minutes reviewed by the Appeals Unit as an exhibit to its answer. A review of the sentencing minutes reveals that they are incomplete, and do not contain the trial court's pronouncement of sentence. As such, the Court finds, that the Parole Board's failure to consider the petitioner's sentencing minutes constitutes a separate and distinct ground for the annulment of the instant parole determination.

The Court need not review the parties' remaining arguments and contentions. The Court concludes that the petition must be granted, the parole determination vacated, and the matter remanded to the Parole Board for a *de novo* parole interview.

Accordingly, it is

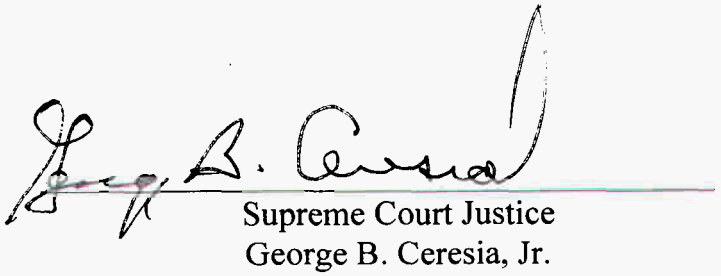
ORDERED and ADJUDGED, that the petition be and hereby is granted; and it is

ORDERED and ADJUDGED, that the parole determination dated February 13, 2007 be and hereby is vacated and annulled and the matter remanded to the respondent, which is directed to conduct a *de novo* parole interview, after obtaining a complete copy of the petitioner' sentencing minutes.

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: April 25, 2008
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Notice of Petition dated February 6, 2008, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated February 25, 2008, Supporting Papers and Exhibits
3. Reply Affirmation dated March 6, 2008 of Brian Dratch, Esq.