September 2021

Decision in Art. 78 proceeding - Bruetsch, John (2014-05-11)

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Matter of Bruetsch v New York State Dept. of Corr.and Community Supervision
2014 NY Slip Op 50755(U) [43 Misc 3d 1223(A)]
Decided on May 11, 2014
Supreme Court, Sullivan County
LaBuda, J.
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Decided on May 11, 2014

Supreme Court, Sullivan County

In the Matter of the Application of John Bruetsch, 86 A7650, Petitioner,

against

New York State Department of Corrections and Community Supervision, TINA M. STANFORD, Chairwoman of the New York State Board of Parole, ANTHONY J. ANNUCCI, Acting Commissioner of the New York State Department of Corrections and Community Supervision, Respondents.

0230-14

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Attorney General of the State of New York, One Civic Center Plaza—Suite 401, Poughkeepsie, NY 12601, By: J. Gardner Ryan, AAG, of counsel, Attorney for Respondents

Frank J. LaBuda, J.

This matter comes before the Court on Petitioner's request for immediate release to parole, or in the alternative, a *de novo* parole hearing. Respondents have submitted and affirmation in opposition. The court heard oral argument on March 31, 2014.

At the outset, Respondents argued, and this Court agrees, that the Court is without authority to order Petitioner's immediate release. For the reasons stated below, however, the Petitioner is entitled to a *de novo* parole hearing.

Factual Background

On October 29, 1985, Petitioner shot and killed his estranged wife during a verbal argument. According to Petitioner, he had gone to see the victim in an attempt to convince her to resume marriage counseling. The two were sitting in Petitioner's vehicle, when the situation escalated, and as the victim attempted to exit the vehicle, Petitioner shot her. As the victim attempted to move to safety, Petitioner exited his vehicle and shot the victim repeatedly. Petitioner fled the scene on foot, but was apprehended shortly thereafter. At the time of the [*2]incident, Petitioner was a New York City Metropolitan Transportation Authority (hereinafter, "Transit") Police Officer and the victim was a New York City Police Officer (hereinafter "NYPD"). Neither the Petitioner nor the victim were on duty at the time of the incident and the shooting was not work related or otherwise related to their positions as police officers.

Prior to trial, the Rockland County District Attorney offered Petitioner a plea agreement to manslaughter, which would have entailed a sentence of seven to 21 years in state prison. According to the record, the trial judge would have accepted that plea agreement, but Petitioner rejected the offer and went to trial. After a jury trial, he was convicted of murder in the second degree, and was sentenced to an indeterminate term of 20 years to life in state prison. On appeal, the Third Appellate Division reduced the sentence to 15 years to life in state prison. ***People v. Bruetsch*, 137 AD2d 823, 824 [2nd Dept. 1988]**.

Petitioner appeared for his ninth parole hearing [FN1] on July 17, 2012, at Woodbourne Correctional Facility, having served over 26 years (11 years beyond his minimum sentence) at the time of that hearing. He is now 66 years old. The three-member board denied parole release and imposed a 24-month hold. Petitioner timely perfected an administrative appeal of the decision on

July 29, 2013. The Appeals Unit did not issue a decision. Petitioner timely filed the within Article 78 petition.

For the reasons stated below, this Court agrees that the board's decision was wholly unsupported by the record, and therefore arbitrary and capricious.

Parole Law

Executive Law, Section 259-i(2)(c)(A) states in pertinent part:

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....

The parole board must also consider whether "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 [*3]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." **9 NYCRR 8002.1**.

In reaching its decision, the board must also consider:

(a) the inmate's institutional record;

(b) the inmate's release plans;

(c) any statement made to the board by the victim's representative;

(d) the seriousness of the offense, with consideration of the sentence and the recommendation of the sentencing court; and

(e) the inmate's prior criminal record.

Parole Boards have very wide discretion to grant or deny parole release; the board decides how much weight to give each of the factors listed above. ***Phillips v. Dennison*, 41 AD3d [1st Dept. 2007]**. It is also not necessary that the board expressly discuss each of the factors or any guidelines in its determination. ***Walker v. Travis*, 252 AD2d 360 [3rd Dept. 1998]**. An inmate bears the heavy burden of establishing that the determination of a parole board was the result of "irrationality bordering on impropriety." ***Matter of Silmon v. Travis*, 95 NY2d 470 [2000] *Russo v. New York State Bd. of Parole*, 50 NY2d 69 [1980]**. Nonetheless, the reasons for denying parole must "be given in detail and not in conclusory terms." **Executive Law, Section 259-i(2)(a); *Wallman v. Travis*, 18 AD3d 304 [1st Dept. 2005] *Malone v. Evans*, 83 AD3d 719 [2nd Dept. 2011]**.

The standard of review in regard to parole release is whether the decision was so irrational as to border on impropriety. ***Matter of Russo v. New York State Board of Parole*, 50 NY2d 69 [1980]**; ***Epps v Travis*, 241 AD2d 738 [3rd Dept. 1997] *Matter of Silmon v. Travis*, 95 NY2d 470 [2000]**. When considering the various factors, the weight accorded to any particular factor is solely within a parole board's discretion. ***Matter of Santos v. Evans*, 81 AD3d 1059 [3rd Dept. 2011]**; ***Matter of Wise v. New York State Division of***

***Parole*, 54 AD3d 463 [3rd Dept. 2008]**.Included in such factors are the seriousness of the instant offense(s) and an inmate's criminal history. **Executive Law §259-i(2)(A)**.

In 2011, the legislature made changes to **Executive Law, §259**. The changes to **Executive Law, §259-c(4)** became effective on October 1, 2011. In essence, those modifications now require that parole boards (1) consider the seriousness of the underlying crime in conjunction with the other factors enumerated in the statute, **Executive Law, §259-i(2)**, and (2) conduct a risk assessment analysis to determine if an inmate has been rehabilitated and is ready for release. **Executive Law, §259-(c)(4)**. The changes were intended to shift the focus of parole boards to a forward-thinking paradigm, rather than a backward looking approach to evaluating whether an inmate is rehabilitated and ready for release.

Discussion [*4]

At the outset, with regard to Petitioner's argument that there was no TAP provided to him or for the board's review—this argument is without merit. The TAP was enacted pursuant to **Corrections Law §71-a**, which became effective on September 30, 2011, and which only pertains to inmates coming into state custody on or after September 30, 2011. ***See Ortiz v. Evans*, index No. 3933-12 [Sup. Ct. Albany Co., December 3, 2012]**. Petitioner was incarcerated in 1986; therefore, a TAP was not required.

While a parole board enjoys a significant level of discretion, the discretion is not unlimited. There are three things a parole board cannot do. First, a parole board cannot base its decision to deny parole release solely on the serious nature of underlying crime. ***Rios v. New York State Div. of Parole*, 15 Misc 3d 1107(A) [Sup. Ct. Kings Co. 2007]** ***see also*, *King v. New York State Division of Parole*, 190 AD2d 423 [1st Dept. 1993]**. Second, while the board need not consider each guideline separately, and has broad discretion to consider the importance of each factor, the board *must still consider the guidelines*. **Executive Law §259-i(2)(a); *Rios*, *supra*.** Third, the reasons for denying parole must be given in detail and not conclusory terms. **Executive Law §259-i(2)(a); *Wallman v. Travis*, 18 AD3d 304 [1st Dept. 2005]**.

After a thorough review of the record before this Court, including the confidential materials for *in camera* review, this Court has determined the board based its decision to deny parole release to Petitioner solely on the serious and violent nature of the instant offense, did not consider all of the guidelines or factors, and the decision was in conclusory terms. In addition, several passages in the transcript of the parole hearing suggest that the board viewed this crime as premeditated, completely mischaracterizing the incident as understood by the trial court and jury. Another comment indicates the board was of the opinion that Petitioner could never make amends for killing his wife.

There is no additional rational, other than the board's opinion of the heinous nature of the instant offense, to justify denial of parole release: Petitioner has had a perfect disciplinary record while incarcerated, has had and continues to have outside clearance without incident, has completed every program offered by DOCCS as well as additional programs, and has no criminal history. Petitioner submitted numerous letters of recommendation for his release from corrections officers, officials, and members of the community. He has a substantial support system on the outside, release plans, guaranty of employment and housing ready upon his release.

Petitioner has repeatedly expressed remorse and taken full responsibility for murdering his wife. He cannot change what he did and parole boards are supposed to have a forward focused review; yet a comment by one of the commissioners strongly suggests otherwise. When discussing the instant offense at his parole hearing, Petitioner indicated, "...if I would have listened to people when they tried to help me my wife Milda would be alive. That was my fault. Now I corrected it and..." One of the commissioners interrupted him and stated, "Well I don't think so, sir, I don't think there's no — you've corrected you." The Court is of the opinion that this comment strongly suggests the commissioner was of the opinion there was no way Petitioner could ever make amends for his past crime. Such an opinion and approach to parole has [*5]repeatedly been held to be in violation of the statutory scheme regarding parole release.

> Certainly, every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of human life. Since, however, 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 seriousness of the crime itself. ***King*, *supra*, at 433**.

The hearing transcript reveals that while the board discussed other factors and Petitioner's achievements while in prison, such discussion was done in a very perfunctory manner, and the board based its decision solely on the instant offense. ***See*, *Matter of Coaxum v. New York State Board of Parole*, 14 Misc 3d 661 [Sup. Ct. Bronx Co. 2006]**. Although the board obligatorily questioned Petitioner about his numerous achievements while in prison, his plans for release, his skills, his very positive scores on the COMPAS Risk Assessment, and the other positive factors weighing heavily in favor of parole release, and noting that every other factor was positive and therefore in favor of release, the board somehow concluded his release would be incompatible with the welfare and safety of the community and that his release would "deprecate the serious nature of the instant offence as to undermine respect for the law," without any further detail. Petitioner asks how that is so; Respondents provided no specific explanation in their answering papers or during oral argument, other than to repeatedly state that the victim was an NYPD police officer.

This Court, therefore, is left with no ability to evaluate why the board made this conclusory and vague statement in its decision. Looking at the record as a whole, the Court concludes that not only does the record fail to clarify on what specific grounds the board denied parole, other than the instant offense, but the record strongly supports parole release for this inmate who has served nearly double the time of his minimum sentence. The board's decision and Respondents' counsel's oral argument fail to specify why the board concluded Petitioner's release would be incompatible with the safety and welfare of society or why his release would deprecate the serious nature of the crime so as to undermine respect for the law, in light of his exemplary prison record. ***Rios*, *supra***.

> ....While making a passing reference to [Petitioner's] clean disciplinary record and positive programmatic efforts,' the Parole Board made clear that those factors no matter how impressive, could not justify his release form prison when weighed against the seriousness of the crime. Thus, the passing mention in the Parole Board's decision of petitioner's rehabilitative achievements cannot serve to demonstrate that the parole board weighed or fairly considered the statutory factors where, as here, it appears that such achievements were mentioned only to dismiss them in light of the seriousness of petitioner's crime (*see Matter of Phillips v. Dennison, NYLJ,* Oct. 12, 2006, at 23, col1; *quoting Matter of King*, 190 AD2d at 434." ***Rios*, *supra***.

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In addition, an exchange between Petitioner and one of the commissioners strongly suggests that at least that one commissioner was of the opinion that the victim had some type of "inclination" that Petitioner was going to kill her, even though Petitioner was not charged with premeditated murder.

> Q: You killed her? Do you think she had any inclination that perhaps she wasn't going to be safe with you, in hindsight.?
>
> A: Maybe she though that because of the arguments and the screaming.
>
> Q: Why not, frankly she was right I would say [sic] wouldn't you."

The board in this matter has failed to articulate any reasoning for its decision to deny parole release to Petitioner, and therefore this Court holds the decision was arbitrary and capricious. It is unacceptable, under the law, for Respondents to have simply restated the usual and predicable language contained in so many parole release denial decisions, with no specificity or other explanation to justify parole denial. While this Court recognizes the substantial discretion afforded to parole boards by statutory authority, that authority and parole board decision are reviewable by courts and must stand up to the other statutory requirements regarding parole release procedures. In the instant matter, the Court finds that the board has failed to meet those standards by rendering a conclusory decision, clearly based solely on the instant offense, and completely unsupported by the record and Petitioner's history of incarceration.

Based on the foregoing, it is therefore

ORDERED, that the Petition is granted to the extent that the Parole Board shall afford the petitioner herein a *de novo* Parole hearing within thirty (30) days of the date of entry of this order, and a decision thereon not more than fifteen (15) days thereafter; and it is further

ORDERED, that the *de novo* hearing herein shall consist of at least two Parole Board members, none of whom sat on the prior parole hearing involving the above captioned inmate.

This shall constitute the Decision and Order of this Court.

DATED:May 11, 2014

Monticello, New York

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Hon. Frank J. LaBuda

Acting justice Supreme Court

Papers considered:

Notice of Petition, by Christopher P. Ng, Esq., dated January 31, 2014 [*7]

Verified Petition with Exhibits and Attorney Certification, by Petitioner, dated January 31, 2014

Answer and Return with Exhibits, by J. Gardner Ryan, AAG, dated March 21, 2014

Documents from Respondents for *in camera* inspection

Footnotes

Footnote 1: Petitioner appeared before the board on June 12, 2012, at which interview there were two commissioners and no consensus was reached after the parole hearing.

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