September 2021

Decision in Art. 78 proceeding - Butler, Herbert (2010-08-18)

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

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In the Matter of the Application of
HERBERT BUTLER, #97-B-2604,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2010-0158.29
INDEX # 2010-429
ORI #NY016015J

-against-

NEW YORK STATE DIVISION
OF PAROLE,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Herbert Butler, verified on March 22, 2010 and filed in the Franklin County Clerk's office on March 29, 2010. Petitioner, who is an inmate at the Wallkill Correctional Facility, is challenging the March/April 2009 determination denying him parole and directing he be held for an additional 24 months. The Court issued an Order to Show Cause on April 1, 2010 and has received and reviewed respondent's Answer, including Confidential Exhibits B and D, verified on May 20, 2010. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on June 8, 2010.

On November 26, 1997 petitioner was sentenced in Onondaga County Court to a controlling indeterminate sentence of 12½ to 25 years upon his convictions of the crimes of Robbery 1°, Assault 2° and Grand Larceny 4°. On December 23, 1997 he was sentenced in that court to an additional concurrent indeterminate sentence of 12½ to 25 years upon another conviction of the crime of Robbery 1°. Petitioner's convictions were affirmed on

direct appeal to the Appellate Division, Fourth Department. *People v. Butler*, 269 AD2d 807, *lv den* 95 NY2d 794 and *People v. Butler*, 269 AD2d 884, *lv den* 95 NY2d 794.

Petitioner made his initial appearance before a Parole Board on March 31, 2009. Following that appearance a decision was rendered denying him parole and directing that he be held for an additional 24 months. All three parole commissioners concurred in the denial determination which reads as follows:

> "PAROLE IS DENIED FOR THE FOLLOWING REASONS: AFTER A CAREFUL REVIEW OF YOUR RECORD AND THIS INTERVIEW, IT IS THE DETERMINATION OF THIS PANEL THAT IF RELEASE 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 SERIOUS BRUTAL NATURE OF THE INSTANT OFFENSE ROBBERY 1ST (2 CTS) AND ASSAULT 2ND INVOLVED YOU ACTING INCONCERT ARMED WITH WEAPONS ENTERING A RESTAURANT ORDERING VICTIMS TO LAY ON THE FLOOR, STRIKING ANOTHER VICTIM WITH A BASEBALL BAT CAUSING PHYSICAL INJURY AND FORCIBLY REMOVING U.S. CURRENCY. IN A SEPARATE INCIDENT YOU AGAIN ACTING INCONCERT DID FORCIBLY REMOVE U. S. CURRENCY FROM ANOTHER PREMISE [sic]. THIS IS CLEARLY AN ESCALATION OF YOUR CRIMINAL HISTORY. NOTE IS MADE OF YOUR POSITIVE PROGRAMING. HOWEVER, YOUR REPEATED ACTS OF CRIMINALITY AND YOUR UNWILLINGNESS TO OBEY FACILITY RULES LEADS THIS PANEL TO DETERMINE THAT YOUR RELEASE TO A COMMUNITY IS INAPPROPRIATE AT THIS TIME."

The document perfecting petitioner's administrative appeal from the parole denial determination was received by the Division of Parole Appeals Unit on August 28, 2009. The Appeals Unit, however, failed to issue it's findings and recommendation within the four-month time frame specified in 9 NYCRR §8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A) 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 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 . . .[and] (iii) release plans including community resources, employment, education and training and support services available to the inmate . . .” In addition to the above, where the minimum period of imprisonment was established by the sentencing court, the Board must also consider the seriousness of the underlying offense and the inmate’s prior criminal record. *See* Executive Law §259-i(2)(c)(A) and §259-i(1)(a).

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.

A significant portion of the petition is focused, in one way or another, on the assertion that the parole denial determination was improperly based solely on the nature and severity of the crimes underlying petitioner’s incarceration, without adequate

consideration of other 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 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).

A review of the Inmate Status Report and the transcript of the parole hearing reveals that the Board had before it, and considered, the appropriate statutory factors including petitioner's programming and vocational achievements, disciplinary record (four Tier III's and two Tier II's) and release plans, as well as the circumstances of the crimes underlying his incarceration and limited prior criminal record. *See Zhang v. Travis*, 10 AD3d 828. The petitioner was also afforded an opportunity at the parole hearing to make his own statement to the presiding commissioners. In view of the foregoing, 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. In addition, under the facts and circumstances of this case the Court finds no basis to conclude that the parole denial determination usurped the authority of the judiciary by effectively resentencing petitioner for his crimes.

See Comfort v. New York State Division of Parole, 68 AD3d 1295, *Smith v. New York State Division of Parole*, 64 AD3d 1030 *and Marsh v. New York State Division of Parole*, 31 AD3d 818.

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 nature of the crimes underlying petitioner's incarceration. *See Champion v. Dennison,* 40 AD3d 1181, *lv dis* 9 NY3d 913, *Valerio v. Dennison*, 35 AD3d 938, *McCorkle v. New York State Division of Parole,* 24 AD3d 926, *Larmon v. Travis,* 14 AD3d 960 and *Zhang v. Travis,* 10 AD3d 828.

Petitioner also argues that the 24-month hold imposed by the Board was excessive. The Court disagrees. "The scheduling of the reconsideration hearing was a matter for the Board to determine the exercise of its discretion . . . subject to the statutory 24-month maximum." *Tatta v. State of New York, Division of Parole*, 290 AD2d 907, 908, *lv den* 98 NY2d 604 (citations omitted). The Court finds the 24-month hold is not excessive nor improper under the circumstances of this case. *See Lue-Shing v. Travis*, 12 AD3d 802, *lv den* 4 NY3d 705 and *Tatta v. State of New York Division of Parole*, 290 AD2d 907, *lv den* 98 NY2d 604.

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: August 18, 2010 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice