September 2021

Decision in Art. 78 proceeding - Cappiello, John (2004-11-30)

[*1]

Cappiello v New York State Bd. of Parole
2004 NY Slip Op 51762(U)
Decided on November 30, 2004
Supreme Court, New York County
Wetzel, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on November 30, 2004

Supreme Court, New York County

JOHN CAPPIELLO, Petitioner, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

against

NEW YORK STATE BOARD OF PAROLE, Respondent.

110337/04

For the Petitioner:John Cappiello

DIN No.77-B-1191

175 Academy Avenue

Staten Island, New York 10309

Pro se

For the Respondent:Eliot Spitzer

Attorney General of the State of New York

Office of the Attorney General

120 Broadway

New York, New York 10271

By: Nicola N. Grey, Esq.

Assistant Attorney General Of Counsel

William A. Wetzel, J.

Petitioner brings this CPLR Article 78 motion (a) to review and set aside respondent's denial of his parole release as arbitrary and capricious; (b) to require respondent to conduct a new parole hearing forthwith according to the factors enumerated in Executive Law §259-i; (c) to set aside respondent's imposition of a 24-month hold as excessive and unnecessary; and (d) to grant such other relief as

the court may deem just and proper.

BACKGROUND

Following a 1977 jury trial, petitioner and his co-defendants, Anthony Tamilio and Ralph [*2]Santanella, were convicted of two counts of Felony Murder, robbery, burglary, and related crimes. Defendant's conviction was subsequently reversed on appeal due to an incorrect jury instruction regarding the affirmative defense to the Felony Murder charge. *People v. Santanella*, 63 AD2d 744 (2nd Dept. 1978). Petitioner and his co-defendants were re-tried in July of 1979, and petitioner was again convicted of two counts of Felony Murder and related crimes. Judge John R. Starkey sentenced the defendant to a term of 15 years to life on the Felony Murder counts and lesser concurrent terms on the related robbery, burglary, and narcotics-related charges. Petitioner was 18 years old at the time of his conviction and had no prior criminal convictions.

The facts adduced at trial can be summarized as follows. On August 10, 1976, petitioner and his co-defendants burglarized the home of Joseph Tucci, age 76, and his wife Angelina Tucci, age 52. Co-defendant Tamilio was familiar with the victims because his father had a business relationship with Mr. Tucci. The evidence was that the defendants intended to rob the elderly couple. The victims were bound, gagged, and beaten. Ultimately, they were killed by trauma caused by a blunt instrument, resulting in multiple injuries to the head, skull fractures, contusions and lacerations to the brain. Detectives recovered a hammer near the body of Mrs. Tucci and an axe next to her husband. *Cappiello v. Hoke*, 698 F.Supp. 1042, 1048-1049 (E.D.NY, 1988), *aff'd*, *Cappiello v. Hoke*, 858 F.2d 59 (2d Cir. 1988). The evidence also showed that shortly after the murders, petitioner and co-defendant Tamilio tried to withdraw money from the victim's bank account. *See* Inmate Status Report (I), August, 2003, annexed to Respondent's Affirmation as Exhibit C.

At petitioner's re-trial, a bench trial before Judge Starkey, the court found that petitioner had failed to prove the fourth element of the affirmative defense to Felony Murder set forth in Penal Law §125.25(3)(a-d), specifically, that he had no reasonable ground to believe that his co-defendants intended to engage in conduct likely to result in death or serious injury. On December 7, 1981, the Appellate Division affirmed petitioner's conviction. *People v. Cappiello,* 85 AD2d 608 (2nd Dept.1981). On March 2, 1982, the New York State Court of Appeals denied leave to appeal. *People v. Cappiello*, 56 NY2d 595 (1982).

In 1994, petitioner was placed in a Work Release Program at Queensboro Correctional Facility. His participation in this program was on a "five and two basis," meaning petitioner was living at home with his wife and working five days a week, but required to report to the correctional facility two evenings a week for approximately ten hours. *See generally* Ex. D of Respondent's Answer. While placed in the Work Release Program, petitioner was able to find employment with the A-Best Waterproofing Co. as a laborer. In the spring of 1992, petitioner obtained a job as a Youth Outreach Worker for the Safe City Safe Streets Program funded by the New York State Department of Youth Services. He was promoted to director of that program and under his supervision, the program "serviced the largest number of youth in the New York City area." Notice of Petition at p. 8, ¶17. Exhibits A and B of the petition are an impressive compendium of letters and testimonials from a variety of individuals, all of whom attest to petitioner's rehabilitation and exemplary efforts to take advantage of his time to improve himself as well as his community.

Petitioner is currently a participant in the Work Release Program at the Lincoln Correctional Facility located at 31-33 West 110th Street, New York, New York. His status is basically unchanged from the time he began the Work Release Program in the early 90's. He [*3]lives at home on Staten Island with his wife, goes to work every day during the week, and reports to the facility two nights a week for approximately ten hours. Since his incarceration, petitioner has appeared before the parole board seven times, and all of those appearances have resulted in denial of parole. After the first four appearances, the Board imposed the maximum 24-month hold. Appearances five and six resulted in an 18-month hold. After the September 10, 2003 hearing, the Board inexplicably imposed a 24-month hold once again.

In August of 2003, petitioner made his sixth appearance before the Parole Board. At the conclusion of that hearing, the decision was postponed for one month due to a lack of consensus among the board members. *See* Respondent's answer at p. 6, ¶14. Petitioner reappeared before the Board in September, 2003. The transcript of that hearing appears at Exhibit A of Respondent's answer (hereinafter designated "Tr."). The transcript contains ten substantive pages of testimony. Of those ten pages, eight pages focus exclusively on the facts of the crime for which the defendant was incarcerated, detailing the concededly horrific details of the 1976 murder of the elderly couple. Only two pages of the transcript address the other relevant statutory factors, i.e., the defendant's

performance on Work Release, his gainful employment while on Work Release, his residence at his wife's home in Staten Island, his plans for the future, and the fact that he had no disciplinary infractions in the program since his last Board appearance. There is a cursory inquiry as to whether there is "anything else...that you think is important for us to take into consideration as we look at your case today,", Tr. at p.11, lines 20-22. In response, petitioner directs the Board's attention to the voluminous written material submitted in connection with his interview; however, there is no indication in the record as to whether the commissioners read those materials or considered them in any way. The Board fails to ask petitioner anything about those materials.

At the conclusion of the interview, apparently without any discussion among any of the board members, Commissioner Vizzie declared the Parole Board's decision to deny petitioner's application and to impose a 24-month hold.

> "Parole denied. Hold 24-months. Next appearance 8-2005. After a review of the record and this interview parole is again denied. The instant offense, Murder Second, Robbery First, Burglary Second, Criminal Sale Controlled Substance near a school, Criminal Possession of Stolen Property, occurred when you, acting in concert with others, armed with guns, entered the apartment of an elderly couple. During the commission of this crime, those victims were bound, gagged and brutally murdered. This offense took place in conjunction with a robbery attempt.
>
> Your merciless assault on two vulnerable victims leads this panel to determine that your release at this time would pose a threat to public safety. Discretionary release is denied. His guidelines are not specified (Commissioners concur)" Tr. at p.13, lines 1-19.

Petitioner filed and perfected his administrative appeal of this decision. The Appeals Unit affirmed the denial of parole supervision in a decision dated March 12, 2004. *See* Respondent's answer at Exhibit E. This Article 78 proceeding challenging the Parole Board determination denying petitioner's discretionary release to parole followed. In his petition, petitioner argues that the Board's decision was arbitrary and capricious; that they did not apply the relevant statutory factors; that they properly and/or solely focused on petitioner's criminal [*4]offense to the exclusion of other required statutory factors, including petitioner's institutional accomplishments; and, finally, that the Board's decision appeared to have been made without deliberation and indeed, predetermined. Petitioner also challenges the 24-month maximum hold as excessive. For the reasons which follow, the petition is granted to the extent that the decision of the Parole Board of September, 2003, including the subsequent affirmance thereof, is vacated. Respondent is ordered to provide petitioner with an immediate *de novo* parole hearing in conformance with the provisions of §259 of the Executive Law, at which time petitioner's application shall be reconsidered in strict accordance with the statutory requirements.

DISCUSSION

There is no inherent constitutional right to parole, however, when a state establishes a sentencing scheme that creates a legitimate expectation of early release from prison, there does exist a liberty interest which is entitled to constitutional protection. *Matter of Russo v. New York State Bd. Of Parole*, 50 NY2d 69, 73 (1980); *see also*, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979). New York has established such a scheme, *See* Penal Law §70.00-1. The rule is that the Parole Board's decisions are discretionary and are not judicially reviewable so long as they are made in accordance with the law. *People ex rel. Herbert v. New York State Bd. Of Parole*, 97 AD2d 128 (1st Dept. 1983); Executive Law §259-i, (5).

Here, petitioner alleges noncompliance with the law. Therefore this court must review the Parole Board's decision and determine (1) whether it was arbitrary and capricious, or contrary to the requirements of the law, and thus violated petitioner's constitutional right to due process, and (2) whether the Parole Board's decision to impose a 24-month hold was excessive and unnecessary. *See Matter of Russo v. New York State Bd. Of Parole*, 50 NY2d 69 (1980).

Section 259 of the Executive Law enables the Parole Board to exercise broad discretion related to the parole release of inmates, and prescribes the limits of that discretion. *Matter of King v. Division of Parole*, 190 AD2d 423, 430 (1st Dept. 1993), *aff'd*, 83 NY2d 788 (1994). Under Executive Law 259-i(2)(c)(A), denial of parole must be reasonably predicated on one or more of three qualitative standards: (1) whether, if released, the inmate will live and remain at liberty without violating the law; (2) whether the inmate's release will be incompatible with the welfare of society; and (3) whether release will not so deprecate the seriousness of the crime so as to undermine respect for law (McKinney 1993).

Section 259-i(2)(c)(A) affirmatively requires that the Parole Board consider all of the following factors when determining whether parole should be granted or denied according to the standards above: ( ) 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. *King*, 190 AD2d at 431-32; *See also*, 9 NYCRR 8002.3(b).[FN1]

The Parole Board is not required to refer specifically to each and every one of the above [*5]factors in its written decision, nor is it required to give each of them equal weight. *King* at 431; *see also*, *Herbert v. New York*, 97 Ad2d 128, 133 (1st Dept. 1983). The Parole Board does, however, have an unquestionable duty to fairly consider each of the applicable statutory factors as to every person who comes before it. *King*, at 431. When the record of the Parole hearing fails to convincingly demonstrate that the Parole Board adequately considered all of the statutory factors, or to qualitatively weigh the relevant factors in light of the three statutorily acceptable standards for denying parole release, the decision is arbitrary and capricious and violates the applicant's right to due process of law *See*, CPLR §7803; Executive Law §259-(i)(c).

In this case, it does not appear that respondent made any attempt to determine whether parole was appropriate according to any of the three statutorily acceptable standards. Although there is a vague passing reference to "a review of the record," Tr. at p.13, line 4, the only consideration referred to in the Parole Board's written decision and on the record, was "the merciless assault on two vulnerable victims [which] leads this panel to determine that your release at this time would pose a threat to public safety" Tr. at p. 13, lines 14-17.

The determination of the appropriate penalty for the commission of a particular crime is exclusively a legislative function except insofar as the legislature has entrusted the imposition of individual sentences to the judiciary [FN2]. *King*, 190 AD2d at 432. In this case, petitioner was convicted of Felony Murder and related crimes, and sentenced to 15 years to life by the judge who presided over the defendant's second trial as the *finder of fact,* since there was no jury. That judge, after weighing all the facts and circumstances available at the time of trial, determined that petitioner should be eligible for parole after serving 15 years in prison. In 2003, after serving 27 years in prison, petitioner was denied parole based solely upon the severity of the crime for which he was originally convicted. The Parole Board's failure to qualitatively determine whether petitioner presented a current danger to society, based on all of the relevant statutory factors, was a clear abdication of its statutory duty. Furthermore, its unjustifiable reliance solely on the "severity of the crime" was in excess of its administrative discretion and contrary to the rule enunciated in *King*.

In *King*, the parole applicant who faced possible life in prison on a conviction for murder was shown to be fully "rehabilitated" by his accomplishments in prison. Like petitioner, he had participated in educational and rehabilitative programs and seemed to have achieved all that was possible for him to achieve in prison, yet his parole applications were routinely denied every 2 years based on the severity of the crime committed 22 years earlier. The record showed that the commissioner in *King* discussed with the prisoner his philosophy regarding capital punishment and even puzzled with the prisoner over how to best solve the "dilemma" created by the state's failure to execute him before he had the opportunity to become the model citizen he then appeared to be. As affirmed by the Court of Appeals, "The establishment of penal policy is not the role of the Parole Board or of any other administrative agency...The role of the Parole Board [*6]is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether as of this moment given all of the relevant statutory factors, he should be released." *King*, *supra*, at 432.

Murder is obviously a very serious, tragic crime involving the loss of a human life. This Court presides in the Supreme Court, Criminal Term, every day, and has tried countless murder cases. Many of those cases have unfortunately involved violence and brutality even more horrific than petitioner's crime. Each day, this court interacts with defendants accused and convicted of terrible murders, as well as the families of the victims. Those families come to court, listen to the evidence, weep at the crime scene photos, and speak passionately about their loss at the sentencing of the convicted defendants. There is no greater agony than that of a family member of a murder victim, and this court acknowledges and empathizes with that pain. It is pain which does not abate over the years and nothing can be done to relieve that suffering. The only variable that can change in this situation is the defendant. Some defendants, unfortunately, go to prison only to re-offend in the institution and again outside, if they are released. Other defendants, like this petitioner, take advantage of the opportunities in prison for rehabilitation, move on in their lives to do service in the community to make amends for their past actions, and to make contributions to their families and to society. Their achievements, as great as they are, will never erase the horrendous brutality of the past, nor can it ever fully compensate society for the damage which has been done. However, in a system which is premised on the hope and possibility of rehabilitation, and a statutory system which mandates a serious,

rational, and meaningful evaluation of the statutory criteria, we must allow an individual who has taken advantage of opportunities to rehabilitate himself to move beyond a horrific act of many years ago and to rejoin society to contribute according to his ability.

As noted above, however, the legislature has provided the Parole Board with express guidance as to how the severity of the crime is to be considered. In this case the Parole Board made little attempt to explain why the circumstances of this particular Felony Murder conviction were so extraordinary that they should preclude parole. In justification of its apparent reliance upon the seriousness of the crime the Parole Board noted the "merciless assault on two vulnerable victims." Tr. at p.13, lines 14-15. This fact, and indeed, all the relevant facts were known to the sentencing judge at the time of sentencing. They did not change from hearing to hearing. In fact, they will never change. Although the Parole Board is to consider the severity of the crime, *see* Executive Law §259-i(1)(a)(i); (2)(c)(A); 9 NYCRR 8002.3(a), its role is to evaluate the likelihood that the inmate presents a current danger to society based on his overall comportment during the period of incarceration, not to resentence the inmate by substituting its own opinion of the severity of the crime for that of the sentencing court. *Id.*

Accordingly, section 259-i(2)(a) requires that, "If parole is not granted ...the inmate shall be informed in writing...of the factors and reasons for such denial of parole. *Such reasons shall be given in detail and not in conclusory terms*" (Emphasis supplied). The purpose of requiring a detailed written explanation is to enable intelligent review. *Canales v. Hammock*, 105 Misc 2d 71, 74 (Sup. Ct. Richmond County, 1980). The requirement of a detailed written explanation also serves as a helpful guide to an inmate's conduct while in prison and in his endeavor to return to society as a useful citizen. *Matter of Cummings v. Regan*, 45 AD2d 222 (4th Dept., 1974), *rev'd on grounds of mootness*, 36 NY2d 969 (1975); *Canales v. Hammock*, 105 Misc 2d at 74 [*7](Sup. Ct. Richmond County, 1980); *see also*, *United States ex rel. Johnson v. Chairman of New York State Bd. Of Parole*, 363 F.Supp. 416, 419, *aff'd*, 500 F2d 925 (stating that failure to inform prisoners of the reasons for the denial of parole can only instill frustration and bitterness in an already difficult environment).

As of the September, 2003 hearing, petitioner had an exemplary record as an inmate and as a Work Release Program participant. As petitioner poignantly observes in his Reply Brief at p.2, ¶3, "It is clearly arbitrary and capricious when the cycle of twenty-four month holds are reduced to eighteen months then extended back up to twenty-four months without any misbehavior on petitioner's part nor any requirements or direction provided by the Board and not followed by the petitioner. There is nothing more petitioner can do to demonstrate he is the model case of rehabilitation."

Clearly, the paucity of detail in respondent's written decision provides very little for this court to review, and offers no guidance to petitioner as to his future conduct. In addition the record of the hearing minutes supports the inference that petitioner's hopes for parole were doomed from the start. Many of the relevant statutory factors weighed in favor of petitioner's release, but none of these factors were discussed in any substantive way among the board members, nor mentioned in the written decision. In fact, it appears from the record that there was no discussion whatsoever among the commissioners before Commissioner Vizzie pronounced petitioner's application denied. This strongly suggests that the decision to deny parole was made before petitioner ever stepped into the room. For the Parole Board to decree that parole should be denied to anyone responsible for "a merciless assault on two vulnerable victims", represents a disregard for the judgment of the sentencing court and the directives of the Executive Law. *King*, *supra*, at 434.

The appeals board's affirmation offers little clarification or justification for the offhand manner in which the decision was rendered. "Your merciless assault on two vulnerable victims leads this panel to determine that your release at this time would pose a threat to public safety." This statement rings hollow for many reasons. The facts of the crime which are the basis of the petitioner's incarceration will always represent a significant factor. After all, if the applicant were not a convicted criminal he would not be the subject of parole hearings. Petitioner is currently participating in a Work Release Program which allows him to live and work in the community for "92% of the week." Reply at p. 2 ¶2, and report to the Correctional Facility for two nights a week, approximately ten hours. He has been living successfully under this regime for *twelve years.* He has never "posed a threat to public safety" during that "92% of the week" that he lives and works in the public sphere. Therefore, the implicit rationale of the Parole Board's decision is that allowing petitioner that additional 8% of life in the community, *while living under 100% parole supervision*, would "pose a threat to public safety." Simply to state that premise is to see its speciousness.

The Parole Board may impose a hold for up to 24 months when denying parole. "The Board shall specify a date not more than 24-months for reconsideration, and the procedures to be followed upon reconsideration shall be the same." Executive Law §259-(i)(2)(a).

This Court concludes that the length of the hold, being discretionary, should also reflect a qualitative determination, after fair consideration of the statutory factors, of the amount of additional time necessary before release might be appropriate. Upon the two prior parole hearings, petitioner's [*8]hold was set at 18 months. In the interim, petitioner's Work Release Performance continued to be exemplary. What possible non-pretextual, non-arbitrary, non-capricious rationale could the Parole Board have for suddenly going from the 18-month hold to the maximum 24-month hold? The length of the hold should not automatically be set at the maximum.

Petitioner's motion for a judgment pursuant to CPLR Article 78 is granted to the extent that his parole release application shall be reconsidered in strict accordance with the statutory requirements. The decision of the Parole Board of September 10, 2003, including the subsequent affirmance thereof, is vacated. Respondent is ordered to provide petitioner with an immediate *de novo* parole hearing in conformance with the provisions of section 259 of the Executive Law.

Finally, this court makes one procedural observation. At the close of the September 10, 2003 hearing, during the Parole Board's cursory look at matters aside from the facts of petitioner's offense, Commissioner Vizzie inquired, "Anything else you want to tell us, sir, that you think is important for us to take into consideration as we look at your case today?" Petitioner answered "I think you have it there," Tr. at p.11, lines 20-23, referring to written submissions in support of the application for parole release . It is apparent from petitioner's submissions to this court that petitioner is both conscientious and comprehensive in his submission of relevant materials to the fact-finding body. This court has no doubt that petitioner submitted many of the exhibits which have been designated "Exhibit A and B" of petitioner's submission here, which is a collection of correspondence, recommendations, and glowing evaluations of petitioner's behavior and achievements during his incarceration as well as his participation in the Work Release Program.

By his response during the hearing, petitioner obviously and understandably assumed that the Parole Board would read the materials submitted and consider them during its deliberations as it performed its statutory duty. However, no express acknowledgment of that appears on the record by any commissioner or member of the Parole Board, and there is certainly no evidence in the "deliberations" - - if any were held - - that those materials were read or considered in any way. Nonetheless, respondent seems to hold petitioner responsible for spelling out all of the information contained in his submission and for his mistaken reliance on the Parole Board actually reading the submitted materials. Respondent castigates petitioner for failing "to take the opportunity to make a personal statement on his own behalf" at the conclusion of the interview when asked if he had anything further to add. *See* Respondent's answer at p.9, ¶19. Apparently, it is respondent's position that it is not responsible for reading and incorporating written submissions as part of its deliberative process. Therefore, it is the direction of this court that at the *de novo* hearing, petitioner shall inquire on the record of the Parole Board whether they have read all of the materials submitted by petitioner, and petitioner shall ask that the Parole Board acknowledge or deny reading those materials *on the record*. If the Parole Board does not respond to petitioner's on-record inquiry, to avoid any possibility of being faulted yet again, for his failure to make an appropriate "personal statement," petitioner shall read into the record all of the items that appear in Exhibits A and B as part of his petition. Therefore, there will be no question that the material will officially be before the Board, on the record.

This constitutes the Decision and Order of this court.

Dated: November 30, 2004 [*9]

New York, New York

_____

William A. Wetzel

Footnotes

Footnote 1:9 NYCRR 8002.3(b) applies to cases where the parole board has applied its own guidelines, and expressly provides that "[r]elease shall be granted unless one or more of the [enumerated factors] is unsatisfactory.

Footnote 2: The sentencing Judge must weigh the seriousness of the offense, the social history of the offender, any aggravating or mitigating circumstances, victims statements, pre-sentencing reports, memoranda submitted by probation departments, and recommendations made by district attorneys and defense attorneys. (Crim. Pro. Law §§380.10, 390.40, Penal Law §1.05 (5)

(McKinney 1999), *see*, *People v. Farrar*, 52 NY2d 302, 305 (1981) ("the "sentencing decision is a matter committed to the exercise of the Court's discretion and [that it] can be made only after careful consideration of all facts available at the time of sentencing" (emphasis in original)).

Return to Decision List