September 2021

Decision in Art. 78 proceeding - Crum, Timothy (2011-10-25)

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

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In the Matter of the Application of
TIMOTHY CRUM, #87-A-3352,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2011-0263.54
INDEX # 2011-578
ORI #NY016015J

-against-

ANDREA W. EVANS, Chief Executive Officer, NYS Division of Parole and 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 Timothy Crum, verified on May 18, 2011 and filed in the Franklin County Clerk's office on June 13, 2011. Petitioner, who is now an inmate at the Attica Correctional Facility, is challenging the September 2010 determination denying him parole and directing he be held for an additional 24 months. The Court issued an Order to Show Cause on June 17, 2011 and has received and reviewed respondent's Answer, verified on August 23, 2011 and supported by the Affirmation of Adam W. Silverman, Esq., Assistant Attorney General, dated August 23, 2011. The Court has received no Reply thereto from petitioner.

On April 28, 1987 petitioner was originally sentenced in Supreme Court, Kings County, to a controlling indeterminate sentence of 25 years to life upon his convictions of the crimes of Murder 2° and Kidnaping 1°. These convictions, however, were reversed and a new trial ordered on direct appeal to the Appellate Division, Second Department. *People v. Crum*, 160 AD2d 892. On June 11, 1991 petitioner was sentenced in Supreme

Court, Kings County, to an indeterminate sentence of 15 years to life upon his conviction of the crime of Murder 2°.

After having been denied the discretionary parole release on five previous occasions, petitioner made his sixth appearance before a Parole Board on August 31, 2010. Following that appearance a decision was rendered again denying petitioner parole and directing that he be held for additional 24 months. All three parole commissioner's concurred in the denial determination which reads as follows:

> "DESPITE YOUR LCTA [Limited Credit Time Allowance] CERTIFICATE, 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. THIS DECISION IS BASED ON THE FOLLOWING FACTORS: YOUR IO [Instant Offense] IS MURDER 2ND FOR WHICH YOU ARE SERVING 15-LIFE. YOUR CRIME INVOLVED YOU AND OTHERS BRUTALLY ASSAULTING, SODOMIZING, AND STABBING A FEMALE VICTIM TO DEATH. THE BOARD NOTES YOUR EDUCATIONAL AND PROGRAM ACCOMPLISHMENTS. THE BOARD ALSO NOTES YOUR CLEAN DISCIPLINARY RECORD SINCE THE LAST BOARD APPEARANCE AND YOUR LETTERS OF SUPPORT. MORE COMPELLING, HOWEVER, IS THE EXTREME VIOLENCE EXHIBITED IN THE IO AND YOUR CALLOUS DISREGARD FOR THE LIFE OF THE VICTIM."

The document perfecting petitioner's administrative appeal from the parole denial determination was received by the Division of Parole Appeals Unit on January 31, 2011. The parole denial determination was affirmed on or about May 2, 2011. 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, as here, the minimum period of imprisonment was established by the sentencing court, the Board must also consider the seriousness of the underlying offense as well as the inmate’s prior criminal record. *See* Executive Law §259-i(2)(c)(A) and §259-i(1)(a).[1]

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.

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[1] The quoted excerpts from Executive Law §§259-i(2)(c)(A) and 259-i(1)(a) are taken from those statutes as they existed at the time of the September 2010 parole denial determination. Executive Law §259-i(1) was repealed and Executive Law §259-i(2)(c)(A) was amended by L 2011, ch 62, part C, subpart A,§§38-f and 38-f-1, effective March 31, 2011. The amendments to Executive Law §259-i(2)(c)(A) include the incorporation of relevant language from repealed Executive Law §259-i(1)(a).

The petition itself does not set forth any arguments in support of petitioner's challenge to the September 2010 parole denial determination. Instead, the petition incorporates by reference the "APPELLANT'S BRIEF" submitted on his behalf by counsel on administrative appeal. Although the petition, at paragraph six thereof, suggests that there are nine causes of action set forth in the brief on administrative appeal, a review of that nine-page document reveals no separately-delineated causes of action set forth therein. Indeed, petitioner's brief on administrative appeal is focused, in one way or another, almost entirely on the assertion that the parole denial determination improperly emphasized the nature and severity of the crime underlying his incarceration, without adequate consideration of other statutory factors. More specifically, it is set forth in petitioner's administrative appeal that "[h]e has completed all required programing as well as additional programs with were not required and has held numerous assignments. He has earned his LCTA Certificate for acquiring his Bachelor of Science degree. There are no further recommendations for institutional programing from the Facility Parole Officer. Further he has an acceptable release plan. He will reside with his wife and family and has all skills necessary to obtain employment and has contacted post release programs for assistance . . . The only reason the Board can possibly use to support their denial is the instant offense itself and that may be understandable when a person is first eligible for parole, but is highly unjust when a person is appearing a sixth time before the Board for consideration of release with a [sic] institutional record as exemplary as Mr. Crum's."

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 (Exhibit C and confidential Exhibit D, annexed to respondent's Answer) and the transcript of the parole hearing reveals that the Board had before it, and considered, the appropriate statutory factors including petitioner's programming, vocational and academic achievements, clean disciplinary record since last Board appearance, release plans, family support, as well as the circumstances of the crime underlying his incarceration. *See Zhang v. Travis*, 10 AD3d 828. During the course of the August 31, 2010 Board appearance, moreover, petitioner was specifically afforded an opportunity to discuss " . . .anything in particular that you [petitioner] want to point out to us [the Board] that I haven't mentioned [.]" 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.

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

particularly horrendous nature of the crime underlying petitioner's incarceration. *See Marcus v. Alexander*, 54 AD3d 476, *Montalvo v. New York State Board of Parole*, 50 AD3d 1438, *Cruz v. New York State Division of Parole*, 39 AD3d 1060 and *Mandala v. Dennison*, 20 AD3d 757, *lv den* 5 NY3d 714.

The *Cruz* case (39 AD3d 1060), which was decided in April of 2007, is particularly illustrative. Mr. Cruz had been convicted of the crimes of Manslaughter 1° and Criminal Possession of a Weapon 3° and sentenced to an aggregate, indeterminate sentence of imprisonment of 10 to 30 years. The incident underlying Mr. Cruz's incarceration stemmed from an altercation between two groups of men that culminated in his retrieval of a gun from the trunk of a car and the firing of a single shot. Mr. Cruz, who was seventeen years old and had been drinking and smoking marijuana at the time of the incident, turned himself in the following day after finding out that an individual had been hit by his shot. Although he had no prior criminal record Mr. Cruz was denied parole on three separate occasions. "Information available to the Board of Parole revealed that petitioner [Cruz] had always admitted his guilt and expressed his remorse for his conduct . . . [H]e was involved in only one disciplinary proceeding in over 15 years of imprisonment. He had participated in numerous available programs to avoid future misconduct, which include alcohol and substance abuse treatment, the alternatives to violence project, and the earning of 45 college credits. Information concerning available employment opportunities was also provided in addition to a letter from a New York City police officer and several relatives who offered to assist petitioner in his transition from prison life to general society. Finally, petitioner detailed the support that he receives from his wife who visits him weekly and he continued to express the sorrow for the taking of another person's life, and the suffering that he caused." *Id* at 1061. Notwithstanding the foregoing parole was denied and it was directed that Mr. Cruz be held for an additional

24 months. According to the Appellate Division, Third Department, the Parole Board had concluded that Mr. Cruz's " '. . . actions that led to the death of a male victim leads this panel [Parole Board] to determine that if released at this time there is a reasonable probability that your [sic] would not live and remain at liberty without violating the law.' " *Id* at 1061. Despite finding Mr. Cruz's academic and institutional achievements to be "exemplary," and despite noting the Mr. Cruz seemed to be a "prime candidate" for release to parole supervision, the Third Department, found that ". . . given the standard of review available to us, we cannot find that the Board's decision exhibits " " 'irrationality boarding on impropriety' " " *Id* at 1062 (citations omitted). The *Cruz* court instead found that it was "constrained" to affirm the parole denial determination. In the case at bar this Court finds itself similarity constrained.

Finally, to the extent petitioner's brief on administrative appeal suggest that the provisions of 9 NYCRR §8002.3(b) precludes a Parole Board from considering the seriousness/nature of the crime underlying an inmate's incarceration after an initial parole denial determination, the Court finds petitioner's reliance on that regulatory provision to be misplaced. *See Flecha v. Travis*, 246 AD2d 720.

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: October 25, 2011 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice