September 2021

Decision in Art. 78 proceeding - Cruz, Harry (2014-12-09)

Matter of Cruz v Stanford
2014 NY Slip Op 33378(U)
December 9, 2014
Supreme Court, Franklin County
Docket Number: 2014-273
Judge: S. Peter Feldstein

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

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In the Matter of the Application of
HARRY CRUZ, #87-A-9804,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2014-0137.27
INDEX # 2014-273
ORI #NY016015J

-against-

TINA STANFORD, Chairwoman,
NYS Board 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 Harry Cruz, verified on March 28, 2014 and filed in the Franklin County Clerk's office on April 8, 2014. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the April 2013 determination denying him discretionary parole release. The Court issued an Order to Show Cause on April 11, 2014 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on May 29, 2014 and supported by the May 29, 2014 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General, and the Affirmation of William B. Gannon, Esq., Assistant Counsel to the New York State Board of Parole, dated April 28, 2014. The Court has also received and reviewed petitioner's Reply thereto (denominated by Answer to Respondent's Reply), sworn to on July 20, 2014 and filed in the Franklin County Clerk's office on July 24, 2014.

On August 31, 1987 petitioner was sentenced in Supreme Court, Kings County, as a second violent felony offender, to a controlling indeterminate sentence of 25 years to life upon his convictions of the crimes of Murder 2° and Criminal Possession of a Weapon 2°. Petitioner's conviction/sentencing was affirmed on direct appeal to the Appellate Division, Second Department. *People v. Cruz*, 160 AD2d 893, *lv denied* 76 NY2d 854.

After having been denied discretionary parole release on one prior occasion, petitioner made his second appearance before a Parole Board on April 16, 2013. Following that appearance a decision was rendered again denying petitioner discretionary parole release and directing that he be held for an additional 24 months. The parole denial determination reads as follows:

> "AFTER A REVIEW OF THE RECORD, INTERVIEW AND DELIBERATION, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND THAT YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE AND SAFETY OF SOCIETY AND WOULD SO DEPRECATE THE SERIOUS NATURE OF THE CRIME AS TO UNDERMINE RESPECT FOR THE LAW. PAROLE IS DENIED.
>
> REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, TOGETHER WITH YOUR INSTITUTIONAL ADJUSTMENT INCLUDING DISCIPLINE AND PROGRAM PARTICIPATION, YOUR RISK AND NEEDS ASSESSMENT, AND YOUR NEEDS FOR SUCCESSFUL RE-ENTRY INTO THE COMMUNITY. YOUR RELEASE PLANS AND ANY LETTERS OF REASONABLE ASSURANCE ARE ALSO NOTED. MORE COMPELLING, HOWEVER, ARE THE FOLLOWING:
>
> YOUR SERIOUS INSTANT OFFENSES OF MURDER 2ND, CPW 2ND, AND YOUR PREVIOUS HISTORY [OF] UNLAWFUL BEHAVIOR, WHICH INCLUDES BUT IS NOT LIMITED TO ASSAULT 2ND. THE INSTANT OFFENSES OF MURDER 2ND INVOLVED YOU, IN CONCERT

> WITH CO-DEFENDANTS, CAUSING THE DEATH OF THE VICTIM BY SHOOTING HIM ONE TIME IN THE HEAD. ACCORDING TO YOUR FILE, THE VICTIM WAS BEATEN PRIOR TO BEING SHOT.
>
> YOUR POSITIVE PROGRAMING AND LETTERS OF REASONABLE ASSURANCE ARE ALL NOTED. HOWEVER, PREVIOUS UNLAWFUL BEHAVIOR, PROBATION SUPERVISION AND A SHORTER SENTENCE OF INCARCERATION HAVE ALL FAILED TO PREVENT YOU FROM ENGAGING IN BEHAVIOR THAT ULTIMATELY RESULTED IN THE SENSELESS DEATH OF THE VICTIM. THE RECORD REFLECTS THAT WHILE AN ALTERCATION BETWEEN YOU AND THE VICTIM TOOK PLACE SOME TIME PRIOR TO HIM BEING SHOT, YOU RETURNED LATER WITH TWO INDIVIDUALS AND THEY PROCEEDED TO BEAT THE VICTIM. THIS ULTIMATELY SHOWS THAT YOU WERE IN NO IMMINENT DANGER AND THIS UNFORTUNATE DEATH COULD HAVE BEEN AVERTED.
>
> THEREFORE, BASED ON ALL REQUIRED FACTORS IN THE FILE CONSIDERED, DISCRETIONARY RELEASE AT THIS TIME IS NOT APPROPRIATE."

The document perfecting petitioner's administrative appeal from the April 2013 parole denial determination was received by the DOCCS Parole Appeals Unit on September 18, 2013. The Appeals Unit, however, failed to issue its findings and recommendation within the four month time frame set forth in 9 NYCRR §8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, 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 the law. In making the parole release decision, the procedures 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 interactions with staff and inmates . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate . . . (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement . . ."

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, *Hamilton v. New York State Division of Parole,* 119 AD3d 1268*, Vasquez v. Dennis*on, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. 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 of the crimes underlying petitioner's incarceration, as well as his prior criminal record, without adequate consideration of other relevant 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 Montane v. Evans,* 116 AD3d 197*, lv granted* 23 NY3d 903*, Valentino v. Evans,* 92 AD3d 1054 and *Martin v. New York State*

Division of Parole, 47 AD3d 1152. 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).

In the case at bar, reviews of the Inmate Status Report and transcript of petitioner's April 16, 2013 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's therapeutic/educational programing records, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record and release plans/community support in addition to the circumstances of the crime underlying petitioner's incarceration and his prior criminal record. The Court, moreover, finds nothing in the hearing transcript to suggest that the Parole Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries. Indeed, before the April 16, 2013 Parole Board appearance was concluded one of the presiding commissioners inquired of petitioner as follows: "Sir, we've covered everything that I needed to cover. Is there anything that I left out or anything more important that you want to tell us before we finish?" Petitioner responded by simply apologizing to the family of the deceased.

In view of the above, the Court finds no basis to conclude that the Parole Board failed to consider 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 boarding on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying petitioner's incarceration as well as his prior criminal record. *See Hamilton v. New York State Division of Parole,* 119 AD3d 1268*, Olmosperez v. Evans,* 114 AD3d 1077*, lv granted* 23 NY3d 907 and *Bonilla v. New York State Board of Parole,* 32 AD3d 1070.

Executive Law §259-c(4) was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, to provide that the New York State Board of Parole shall ". . . establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."[1] To the extent petitioner argues that the Parole Board failed to adopt rules or regulations implementing the above-referenced amendment to Executive Law §259-c(4), the Court finds that the promulgation of the October 5, 2011 memorandum from Andrea W. Evans, then

[1]Prior to the amendment the statute had provided, in relevant part, that the Board of Parole shall ". . . establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."

Chairwoman, New York State Board of Parole, satisfied the Parole Board's obligations with respect to the 2011 amendments to Executive Law §259-c(4). *See Partee v. Evans*, 117 AD3d 1258, *lv denied* 24 NY3d 901 and *Montane v. Evans*, 116 AD3d 197, *lv granted* 23 NY3d 903.

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: December 9, 2014 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice