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| Matter of Darshin v New York State Bd. of Parole |
| 2007 NY Slip Op 32024(U) |
| June 19, 2007 |
| Supreme Court, Franklin County |
| Docket Number: 0001150/2006 |
| Judge: S. Peter Feldstein |
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| This opinion is uncorrected and not selected for official publication. |

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

X

In the Matter of the Application of
MARC DARSHIN, #04-A-5561,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules

**DECISION AND JUDGMENT
RJI #16-1-2006-0425.051
INDEX #2006-1150
ORI #NY016015J**

-against-

**NEW YORK STATE BOARD
OF PAROLE, and NEW YORK
STATE DIVISION OF PAROLE,**
Respondents.

X

This proceeding pursuant to Article 78 of the CPLR that was originated by the petition of Marc Darshin, verified on November 2, 2006, and stamped as filed in the Franklin County Clerk's Office on November 13, 2006. The petitioner, who is an inmate at the Camp Gabriels Correctional Facility, is challenging the January, 2006, determination denying him parole for and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on November 28, 2006, and has received and reviewed respondent's Answer, verified on February 9, 2007. Petitioner filed a verified Reply on February 27, 2007.

Petitioner asserts that the respondent acted arbitrarily, capriciously and irrationally for denying him parole. Petitioner states that the board failed to consider the factors required pursuant to Executive Law §259-I, and instead focused solely on the seriousness of the instant offense without any consideration of petitioner's positive programming while incarcerated or his remorse. Furthermore, petitioner asserts that the Parole Board wrongly considered erroneous factors, i.e., that petitioner used a weapon in

the instant offense and that he had three or more misdemeanor convictions previous to the instant offense.

Respondents deny petitioner's assertions and moves for dismissal stating that this Court has limited authority to review parole board decisions absent found impropriety. Furthermore, respondents assert that the parole board considered all the relevant factors and did not commit error in denying parole. In addition, respondents submit an affidavit of Larry McQuinn, Facility Parole Officer II, at Franklin C.F., who acknowledges petitioner's perceived "errors" on the Form 9026; respondents deny that such error, if any, impacted the Board's decision to deny parole. Notwithstanding, respondents assert that the majority of petitioner's claims were not raised in his administrative appeal and therefore, are not preserved for judicial review.

In his Reply, petitioner continues to assert that the Parole Board erroneously considered his instant offense involved the use of a weapon, even disputing that a lighter should be considered as an "incendiary device" in this instance because he was not charged with the crime of Arson. Petitioner further argues that the incorrect information included on Form 9026 proves that the Parole Board considered the information. In addition, petitioner raises a claim of ineffective assistance of counsel with respect to the administrative appeal and petitioner chastises his assigned attorney for failing to include enough and, what petitioner considers relevant, background information into the administrative appeal.

The Parole Board rendered the following decision:

"Parole denied, hold 24 months. Next appearance 01/08 Board.

Reasons: Parole is denied. You currently serve a 2 to 6 year term upon your conviction for the crime of Manslaughter in the 2nd Degree. This

involved you lighting your victim on fire after he doused himself with lighter fluid. He subsequently died. The crime represented a severe escalation in your previous history of otherwise drug related criminal conduct. The Panel is concerned about the loss of the victim's life. Therefore, while the Panel notes that you have received an earned Eligibility Certificate, the Panel concludes that if you are released at this time, there exists a reasonable probability that you will not live and remain at liberty without further violations of the law. All factors considered, including the escalation in your criminal history, the Panel concludes that your release would be incompatible with the welfare and safety of the community at this time. He is inside the guidelines. All commissioners concur."

Preliminarily, only those claims raised in the administrative appeal have been preserved for judicial review. *Matter of Cruz v. Travis*, 273 A.D.2d 648, 649 (3d Dept. 2000). Although petitioner raises in his Reply his dissatisfaction with his appellate counsel for the administrative appeal, petitioner's assertions in this regard are also not preserved. "It is well settled that judicial intervention in a parole determination 'is warranted only when there is a showing of irrationality bordering on impropriety' (*citations omitted*)." *Williams v. Travis*, 11 A.D.3d 788, 788 (3d Dept. 2004). From a review of the transcript of the January 11, 2006, parole hearing, the confidential inmate status report, the presentence investigation report, and papers presented by both parties, it is clear that the board considered many relevant factors, as outlined by Executive Law §259-I. "(T)he Board is not required to give equal weight to each statutory factor, nor is it required to specifically articulate every factor considered (*citations omitted*)." *Zhang v. Travis*, 10 A.D.3d 828, 828 (3d Dept. 2004). It is clear that the reckless nature of the instant offense while petitioner was under the influence of drugs and alcohol, ultimately resulting in a person's death, weighs heavily in the Board's decision, which is not irrational or improper. While the Board obviously weighed petitioner's positive adjustment since being incarcerated, such period of time has been relatively brief and

petitioner's history reveals previous periods of sobriety and then tragic relapse. This Court will not intervene to disturb the Board's decision.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that respondent's motion is granted; and it is further

ADJUDGED, that the petition herein is dismissed.

DATED: June 19 , 2007 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice