September 2021

Decision in Art. 78 proceeding - Delano, Thomas (2007-03-30)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of THOMAS DELANO,

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-06-ST7260 Index No. 7550-06

Appearances: Thomas Delano
Inmate No. 02-A-2779
Petitioner, Pro Se
Camp Pharsalia Correctional Facility
Route 23
South Plymouth, NY 13844

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State of New York
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Camp Pharsalia Correctional Facility, has commenced the

instant CPLR Article 78 proceeding to review a determination of respondent dated December 20, 2005 to deny petitioner discretionary release on parole. Petitioner is serving a term of two and one half years to five years for conviction of the crime of burglary third degree. He was on parole supervision at the time he committed the crime. Among the many arguments set forth in the petition, petitioner contends that the Parole Board failed to consider his accomplishments while he has been incarcerated. He points out that he obtained a certificate in Phase III Transitional Services and completed the Alcoholics Anonymous and ASAT programs. He indicates that he completed the custodial maintenance program. He has worked over 200 hours in a community based work crew. He has annexed to his petition a number of letters of support. He indicates he has an excellent disciplinary record. Petitioner criticizes the Parole Board for not considering the factors under Executive Law § 259-i. In his view the Parole Board improperly focused on the seriousness of the crime for which he is incarcerated and that the actions of the Board were tantamount to a re-sentencing. Petitioner maintains that the Parole Board violated his Due Process rights. He points out that he is above the guideline range (see 9 NYCRR 8001.3 [c]). He asserts that the Parole Board failed to provide a detailed explanation for its determination. Petitioner also contends that the determination was the result of an executive policy adopted by Governor Pataki to deny parole to violent felony offenders.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Despite your receipt of an earned eligibility certificate, parole is denied for the following reasons: After a careful review of your record and your interview, it is the determination of this panel that, if released 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. The decision is based on the following factors:
> "Your instant offense of burglary third by plea continues an extensive history of criminal justice involvement dating to 1983 and including approximately seven misdemeanor and nine felony convictions. Also noted are past failures on community supervision. It is noted that you were on parole when you committed the instant crime. Your programming and disciplinary record since your last Board appearance have been considered. Discretionary release must again be denied due to your continuing criminal justice involvement, pattern of burglary-related criminality and negative response to past correctional influences. You are a career criminal who refuses to stop breaking the law and if released at this time, there is a reasonable probability that you will not remain at liberty without violating the law.
> "He is above the guidelines. Continuous involvement with the criminal justice system, pattern of similar offenses, negative response to past correctional influences."

As stated in Executive Law §259-i (2) (c) (A):

> "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; (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; (iv) any deportation order issued by the federal government against the inmate []; (v) any statement made to the board by the crime victim or the victim's representative []" (Executive Law §259-i [2] [c] [A]).

"Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable" (Matter of Sinopoli v New York State Board of Parole,189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v. New York State Bd. of Parole, 157 AD2d 944). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (see Ristau v. Hammock, 103 AD2d 944 [3rd Dept., 1984]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such

factors as petitioner's institutional programming, his disciplinary record, his plans upon release, and support letters in his file. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Weir v. New York State Division of Parole, 205 AD2d 906, 907 [3rd Dept., 1994]; Matter of Sinopoli v. New York State Board of Parole, 189 AD2d 960, supra; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see Matter of Farid v Travis, supra; Matter of Moore v New York State Bd. of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3rd Dept., 2001]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other

statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

It is well settled that receipt of a certificate of earned eligibility does not serve as a guarantee of release (see, People ex rel. Justice v Russi, 226 AD2d 821 [3rd Dept., 1996]; Matter of Flecha v Russi, 221 AD2d 780 [3rd Dept., 1985]; Matter of Walker v Russi, 176 AD2d 1185 [3rd Dept., 1991] lv dismissed 79 NY2d 897).

With respect to petitioner's argument that he has served time in excess of the guideline range (see 9 NYCRR 8001.3), the guidelines "are intended only as a guide, and are not a substitute for the careful consideration of the many circumstances of each individual case" (see 9 NYCRR 8001.3 [a]; Matter of Tatta v State of New York Division of Parole, 290 AD2d 907, 908 [3rd Dept., 2002]). Thus, the Court finds that this does not serve as a basis to overturn the Board's decision.

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing, in violation of the Double Jeopardy Clauses's prohibition against multiple punishments are conclusory and without merit (see Matter of Bockeno v New York State Parole Board, 227 AD2d 751 [3rd Dept., 1996]; Matter of Crews v New York State Executive

Department Board of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A, [Sup. Ct., Westchester Co., 2006]). Moreover, it is well settled that the Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the fact that the sentencing court set this as the minimum term of petitioner's sentence (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000]; Matter of Cody v Dennison, 33 AD2d 1141, 1142 [3rd Dept., 2006] lv denied ___ NY2d ___ [January 16, 2007]).

The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New York Division of Parole, 294 AD2d 726 [3rd Dept., 2002]; Matter of Jones v Travis, 293 AD2d 800, 801 [3rd Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3rd Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3rd Dept., 2006]).

With respect to petitioner's argument that the Appeals Unit failed to issue a timely decision, the Court observes that such a failure does not operate to invalidate the underlying administrative decision. The sole consequence is to permit the petitioner to deem his or her administrative remedy to be exhausted, and enable the petitioner to immediately seek judicial review of the underlying determination (see 9 NYCRR § 8006.4 [c]; Graham v New York State Division of Parole, 269 AD2d 628 [3rd Dept, 2000], lv denied 95 NY2d 753; People ex

rel. Tyler v Travis, 269 AD2d 636 [3rd Dept., 2000]).

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court observes that it has been repeatedly held that a constitutionally protected liberty interest does not arise under Executive Law § 259-i, since it does not create an entitlement to, or legitimate expectation of release (see Barna v Travis, 239 F3d 169 [2nd Cir., 2001]; Marvin v Goord, 255 F3d 40 [2nd Cir., 2001], at p. 44; Paunetto v Hammock (516 F Supp 1367 [US Dist. Ct., SD NY, 1981]; Washington v White, 805 F Supp 191 [SDNY, 1992]). The Court, accordingly, finds no due process violation.

With respect to petitioner's equal protection argument, the Fourteenth Amendment of the Federal Constitution forbids States from denying to any person within their jurisdiction the equal protection of the laws, but does not prevent the States from making reasonable classifications among persons (Western & S.L.I. Co. v Bd. of Equalization, 451 US 648, 68 L Ed 2d 514, 523 101 S Ct 2070 [1981]). Where the action under review does not involve a suspect class or fundamental right, it is not subject to strict judicial scrutiny, but rather is examined using the rational basis standard to determine if the action violated the equal protection clause (see, Massachusetts Bd. of Retirement v Murgia, 427 US 307, 49 L Ed 2d 520, 524, 96 S Ct 2562 and Maresca v Cuomo, 64 NY2d 242, 250). In this instance there is simply no evidence of either selective or disparate treatment or that the respondent's determination was motivated by impermissible considerations (see Giordano v City of New York, 274 F3d 740, 751 [2nd Cir., 2001]).

The Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see, Matter of Tatta v State of New York, Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

The Court has reviewed petitioner's remaining arguments and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The petition must therefore be dismissed.

Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: March 30 , 2007
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated November 20, 2006, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated January 11, 2007, Supporting Papers and Exhibits
3. Affirmation of Bridget E. Holohan, Esq., dated January 11, 2007