September 2021

Decision in Art. 78 proceeding - Duffy, John (2009-05-26)

[*1]

Matter of Duffy v New York State Div. of Parole
2009 NY Slip Op 51005(U) [23 Misc 3d 1130(A)]
Decided on May 26, 2009
Supreme Court, Kings County
Schack, J.
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Decided on May 26, 2009

Supreme Court, Kings County

In the Matter of the Application of John Duffy, Petitioner, For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules

against

New York Division of Parole, Respondent.

2934/09

Petitioner, pro se

John Duffy

Warwick NY

Respondent

Kevin Harkins, Esq

ANDREW M CUOMO, Attorney General

NY NY

Arthur M. Schack, J.

Petitioner JOHN DUFFY seeks an order, pursuant to Article 78 of the CPLR,

vacating the September 5, 2007 denial of parole to him by respondent NEW YORK STATE DIVISION OF PAROLE and granting him a *de novo* parole hearing. Respondent opposes the petition and seeks its dismissal. It is clear that the Parole Board's failure to review the trial judge's sentencing minutes and any recommendation in the September 5, 2007 denial of parole to [*2]petitioner is "a showing of irrationality bordering on impropriety." (*Russo v New York State Board of Parole*, 50 NY2d 69, 77 [1980]). Therefore, respondent shall conduct a *de novo* parole hearing within 60 days of the date of this order, and at the *de novo* hearing afford petitioner a favorable inference as to the trial judge's sentencing recommendation.

Background

According to petitioner's commitment order [exhibit A of verified answer], petitioner was convicted by a jury of murder in the 2nd degree on November 20, 1981 in Nassau County Court. The Honorable Henry J. Kalinowski presided. The crime was committed on January 23, 1979. Petitioner was arrested on July 9, 1980. Judge Kalinowksi, on January 29, 1982, sentenced petitioner to an indeterminate sentence of 20 years to life imprisonment.

Petitioner was denied parole by the Parole Board in 2001, 2003, 2005 and 2007 [exhibit A of verified petition - petitioner's administrative appeal brief]. Petitioner, prior

to his September 5, 2007-Parole Board interview, inquired if his sentencing minutes were available for his upcoming appearance before the Parole Board. The minutes were not available. Respondent's "Inmate Status Report for Parole Board Appearance [exhibit A of petitioner's administrative appeal brief]" states "[s]entencing minute's unavailable - requested 6/7/07 [sic]."

Petitioner, at the subject September 5, 2007-Parole Board interview conducted at the Arthur Kill Correctional Facility, Staten Island, New York, was questioned extensively about his January 23, 1979 crime [exhibit B of verified answer - transcript of Parole Board interview]. Petitioner, 19 years old at the time of his crime, told the Parole Board that he was responsible for the murder of James Connelly, then almost 16 years old, and admitted responsibility for Connelly's murder. He told the Board that he was high on LSD, angel dust and beer at the time of the crime [p 4.]. Petitioner told the Parole Board, "[o]bvioulsy at the time I was out of my mind on drugs, and I don't say that as an excuse because I'm one hundred percent responsible, but I didn't even know everything that took place [p. 6, lines 11 - 14]."

Further, at the Parole Board interview, petitioner outlined how he fled after the accident and then voluntarily surrendered in 1980, and was out on bail until his conviction [pp. 8 - 11]. In answering questions at the interview, petitioner noted that while incarcerated he earned his high school equivalency diploma, an associate's degree in alcohol and drug abuse counseling, and credits toward a bachelor's degree [p. 11]. Also, he hasn't received a ticket at Arthur Kill in more than ten years [p. 11]. If paroled he has a job available with a cousin's electrical business in Queens [pp. 11 - 12].

No mention was made in the parole interview transcript of Judge Kalinowski's sentencing minutes or any recommendation by Judge Kalinowksi. At the conclusion of the interview the Parole Board panel rendered its decision, stated by Commissioner Henry Lemons [p. 22, l. 5 - p. 23, l. 9]:

Parole is denied. Hold 24 months. Next appearance 9-2009.

Following a careful review of your record and interview, the

panel concludes that if released, there is a reasonable probability

that you would not live and remain at liberty without violating the

law and that your release at this time is incompatible with the welfare

and safety of the community.

Your instant offense of murder two involves you stabbing [*3]

the victim. After an argument you had with the victim, you stabbed

him at least 20 times. Examination of scene indicates that the victim

was stabbed as he attempted to flee from you. You then left the

victim lying on the roadside and fled alluding authorities for 18

months. This was your third arrest and first felony conviction.

Your institutional programming has been noted. You've

completed quite a number of programs and have obtained an associate's

college degree.

Your disciplinary record has been encouraging. You've

received no tickets in over ten years. The board acknowledges

your positive progress.

However, the violence displayed during the commission of

the instant offense, and a complete review of your entire folder,

release at this time would not be compatible with the welfare of

society at large and would tend to deprecate the seriousness of the

instant offense and undermine respect for the law.

(Commissioners concur.)

On the next day, September 6, 2007, petitioner was transferred to the Mid-

Orange Correctional Facility, Warwick, New York. Petitioner, at Mid Orange, on September 21, 2007 wrote to Parole Officer II Morgiewicz to make a Freedom of Information Law (FOIL) request for his sentencing minutes [exhibit B of petitioner's administrative appeal brief]. Parole Officer II Morgiewicz sent a note to petitioner on October 5, 2007, stating "[s]orry for the delay in response to your request. Your sentencing minutes were requested from the Court on 6-7-07 but were never received by the parole office at Arthur Kill or at Mid-Orange [exhibit B of petitioner's administrative appeal brief]." Then, petitioner filed an administrative appeal with respondent's appeal unit on January 9, 2008 [¶ 14 of petition].

Respondent, in ¶ 25 of the verified answer, concedes "that the sentencing

minutes no longer exist in the files of the sentencing court." In an October 21, 2008-letter [exhibit D of verified answer] from Jerri Krevoff, Chief Court Reporter for Nassau County Court to Craig Mausier, Esq., Assistant Counsel of the New York State Division of Parole, it states "[t]he court reporter who stenographically recorded the minutes is no longer working in County Court, and not living in the State of New York. A search of our archives reveals that the stenographic notes are not available; and, therefore, the minutes are not able to be furnished." Respondent argues, in ¶ 28 of its verified answer, that "[c]learly, the Board cannot review the sentencing minutes which, in good faith are no longer in the files of Nassau County . . . Therefore, the Petitioner is not entitled to a *de novo* hearing as the Board is presumed to have acted . . . properly in light of the good faith showing that the sentencing minutes no longer exist."

On November 7, 2008, respondent's Administrative Appeals Unit made the following determination with respect to petitioner JOHN DUFFY:

Findings:

Counsel for the appellant has submitted a brief to served as

the perfected appeal. The brief raises only one issue. Appellant [*4]

claims the Board did not review his sentencing minutes at the interview.

In response, appellant is correct that the Board did not do so,

as they did not have them. However, subsequent to the interview, the

Division of Parole has been informed that the sentencing minutes no

longer exist and are as such unavailable. Thus, there is no legally

reversible error.

Recommendation:

Accordingly, it is recommended the decision of the Board

be affirmed.

Subsequently, petitioner filed and served the instant Article 78 petition. Contrary to respondent's viewpoint, the failure of the Parole Board to consider petitioner's January 29, 1982 sentencing minutes and any recommendation by Judge Kalinowski at the September 5, 2007-parole interview of petitioner was in violation of the statute governing parole board determinations. Thus, respondent's denial of parole to petitioner in the absence of any review of his sentencing minutes is arbitrary, capricious and an abuse of discretion.

Discussion

The standard for judicial review in an Article 78 proceeding is "to scrutinize the record and determine whether the decision of the administrative agency is supported by substantial evidence and not arbitrary and capricious (*Matter of Pell v Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroncek, Westchester County,* 34 NY2d 222 [1974])." (*Marsh v Hanley*, 50 AD2d 687, 687 [3d Dept 1975]).

(S*ee Consolation Nursing Home, Inc. v Commissioner of New York State Dept. of Health,* 85 NY2d 326, 331 [1995]; *Sullivan County Harness Racing Ass'n v Glasser*, 30 NY2d 269 [1971]; *Sewell v City of New York*, 182 AD2d 469 [1st Dept 1992], *lv denied* 80 NY2d 756 [1992]). If the reviewing court finds that the agency determination has a rational basis, supported by substantial evidence, such determination must be sustained. (*Halperin v City of New Rochelle*, 24 AD3d 768 [2d Dept 2005]; *Dawson v Zoning Board of Appeals of Town of Southold*, 12 AD3d 444 [2d Dept 2004]).

It is axiomatic that "the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld." (*Howard v Wyman*, 28 NY2d 434, 438 [1971]). (*See Gaines v Div. of Housing and Community Renewal*, 90 NY2d 545 [1997]; *Bernstein v Poia*, 43 NY2d 437 [1977]; *Lower Manhattan Loft Tenants v New York City Loft Bd.,* 104 AD2d 223 [1st Dept 1984], *affd* 66 NY2d 298 [1985]; *Tommy and Tina, Inc. v Dept. of Consumer Affairs of the City of New York*, 95 AD2d 724 [1st Dept 1983], *affd* 62 NY2d 671 [1984]). However, "[i]t is well settled that an agency acts arbitrarily and capriciously by failing to comply with its own rules and regulations." (*Church v Wing*, 229 AD2d 1019, 1020 [4th Dept 1996]). (*See Mullen v County of Suffolk Police Dept.*, 307 AD2d 1036 [2d Dept 2003]).

Moreover, although administrative agencies are to be afforded great deference with regard to interpreting statutes and regulations that they are responsible for enforcing or applying, a court may, nonetheless, find that an agency determination is arbitrary and capricious where the agency "neither adhered to its own prior precedent nor indicated its reasons for reaching different results on essentially the same facts." (*2084-2086 BPE Associates v State of New York Div. of [*5]Housing and Community Renewal*, 15 AD3d 288 [1st Dept 2005]). "A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious." (*Matter of Charles A. Field Delivery Service, Inc.*, 66 NY2d 516, 517 [1985]). Stated differently, "[w]here two cases are so similar as to require the same treatment, to treat them differently would be evidence that the determination should be considered arbitrary and capricious." (*Buffalo Civic Auto Ramps, Inc. v Serio*, 21 AD3d 722, 725 [1st Dept 2005]).

In *721 Ninth Avenue, LLC v New York State Div. of Housing and Community Renewal* (8 AD3d 41, 43 [1st Dept 2004]), an administrative agency's determination that a building was subject to the Rent Stabilization Code was held to be arbitrary and capricious when the agency "failed to follow a prior determination in a proceeding with remarkably similar facts or explain its reasons for reaching a contrary result." The Court, in *Civic Ass'n of Setaukets v Trotta* (8 AD3d 482, 483 [2d Dept 2004]), found that a zoning board's determination was arbitrary and capricious because the board granted an application for a zoning variance identical to an application it had denied a year earlier. In *Klein v Levin* (305 AD2d 316, 318 [1st Dept 2003], *lv denied* 100 NY2d 514 [2003]), an agency's determination denying petitioner's application for a public adjuster's license was deemed arbitrary and capricious because "a comparison of the facts of petitioner's case with [another agency determination which had granted such a license to a different applicant] reveals that the two cases are virtually indistinguishable and that, if anything, the slight factual differences that do exist make petitioner's case the more compelling for granting his license application." (*See Waylonis v Baum*, 281 AD2d 636, 638 [2d Dept 2001]; *72A Realty Associates v New York City Environmental Control Bd.*, 275 AD2d 284, 287 [1st Dept 2000]; *Los-Green, Inc. v Weber*, 156 AD2d 994 [4th Dept 1989], *lv denied* 76 NY2d 701 [1990]; *Uniondale Union Free School Dist. v Newman*, 140 AD2d 612, 612-613 [2d Dept 1988]; *Stop Polluting Orleans County, Inc. v Crotty*, 3 Misc 3d 1111 (A) [Sup Ct, Albany County 2004]; *Cittadino v Bellacosa*, 136 Misc 2d 999, 1002 [Sup Ct, New York County 1987]).

With respect an Article 78 review of a Parole Board determination, the Court of Appeals in *Silmon v Travis* (95 NY2d 470 [2000]), instructed at 476:

> Our jurisprudence also is well settled as to the authority of
>
> the Parole Board. *Judicial intervention is warranted only when there*
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> *is a "showing of irrationality bordering on impropriety*" (*see, Matter*
>
> *of Russo, supra*, 50 NY2d at 77 [1990]*; Matter of Briguglio v New*
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> *York State Bd. of Parole*, 24 NY2d 21, 29 [1969]). Thus, we review
>
> whether the Board's decision to deny parole was arbitrary or capricious.
>
> [*Emphasis added*]

Article 12-B of the Executive Law details the authority and duties of the New York State Division of Parole and the Parole Board. § 259-i, "Procedures for the conduct of the work of the state board of parole," describes, in § 259-i (2)(c) (A), the standards to be considered by the Parole Board in determining if an inmate should be released on parole:

> 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, [*6]
>
> 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 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 while in the custody of the department of correctional services . . . (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; . . . Notwithstanding the provisions of this section, in making *the parole release decision for persons whose minimum period of imprisonment was not fixed pursuant to the provisions of subdivision one of this section* [inmates like petitioner, sentenced by a judge to a minimum sentence], *in addition to the factors listed in this paragraph the board shall consider the factors listed in paragraph (a) of subdivision one of this section.* [*Emphasis added*]

Paragraph (a) of § 259-i (1) referred to above lists the guidelines to be considered by the Parole Board and:

> *shall include* (i) 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 pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest and prior to confinement; and (ii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement. [*Emphasis added*]

Further, § 259-i (1) (a) states that the notification of the Parole Board's "determination and of any subsequent determinations and of the reasons therefor shall be furnished in writing to the sentenced person and to the person in charge of the institution as soon as practicable. Such reasons shall be given in detail and not in conclusory terms." [*7]

Thus, respondent Parole Board is required to consider the sentencing minutes and recommendations of the sentencing judge. In *Edwards v Travis* (304 AD2d 576 [2d Dept 2003]), the Court could have been reviewing the instant failure of the Parole Board to review petitioner's sentencing minutes, holding that:

> Before making a parole release decision, the Executive Law requires a parole board to consider, among other things, the inmate's institutional record, performance in a temporary release program, and release plans (*see* Executive Law § 259-i [2] [c] [A]. Additionally, *where a court determines the minimum sentence of imprisonment*, as was done here,

the parole board is also required to consider, among other factors, *the*

"recommendations of the sentencing court" (Executive Law § 259-i [1]

[a] [i]; [2] [c] [A]).[*Emphasis added*]

"Given that the Legislature has mandated that the sentencing court's recommendation be considered, the Board must adhere to the statutory requirement and review these recommendations." (*Boudin v Travis*, 6 Misc 3d 1005 (A) [Sup Court, Albany County 2003]). "It is unquestionably the duty of the [Parole] Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the board did in fact fail to consider the proper standards, the courts must intervene." (*King v New York State Div. of Parole*, 190 AD2d 423, 431 [1d Dept 1993], *affd* 83 NY2d 788 [1984]). (*See People ex. rel. Herbert v New York State Bd. of Parole*, 97 AD2d 128 [1d Dept 1983]).

Further, pursuant to Criminal Procedure Law (CPL) § 380.70, the sentencing

minutes should have been delivered to the Sing Sing Correctional Facility, to which petitioner was committed by the New York State Department of Correctional Services (DOCS) after his January 29, 1982 sentencing. CPL § 380.70 mandates that "where a person receives an indeterminate . . . sentence of imprisonment, a certified copy of the stenographic minutes of the sentencing proceeding . . . must be delivered to the person in charge of the institution to which the defendant has been delivered within thirty days from the date such sentence was imposed."

In *McLaurin v New York State Bd. of Parole* (27 AD3d 565 [2d Dept 2006]), an

inmate brought an Article 78 proceeding to review the Parole Board's determination that he be held for an additional twenty-four months without any review of the trial judge's sentencing minutes. The Court held, at 565-566:

Contrary to the contention of the New York State Board

of Parole (hereinafter the Board) the Supreme Court did not err

in granting the petition and directing that it hold a de novo hearing.

The statements in the County Court's resentencing minutes constituted

a sentencing recommendation by the sentencing judge. Thus, the

Board was required to obtain and consider those minutes prior to

making its determination (*see* Executive Law § 259-i; *Matter of*

Edwards v Travis, 304 AD2d 576 [2003]; *Matter of Boudin v Travis*, [*8]

6 Misc 3d 1005 [A]; *see also Matter of Weinstein v Dennison,* 7 Misc

3d 1009 [A] [2005]).

The *McLaurin* Court also took notice of CPL § 380.70, stating that "t]he statute mandates that a certified copy of sentencing minutes be delivered to the person in charge of the institution to which the defendant has been delivered' (CPL 380.70) presumably to be placed in the inmate's permanent file so as to be available for, inter alia, parole hearings."

The Court, in *Standley v New York State Div. of Parole* (34 AD3d 1169 [3d Dept 2006], noted that parole was denied to an inmate in 2003, 2004 and 2005, with the Parole Board failing to consider the sentencing court's minutes and recommendations. The Court held, at 1170-1171, that [g]iven this omission, which is not contested, the judgment must be reversed and the matter remitted to the Board for a de novo hearing during which the sentencing minutes and recommendations of the sentencing court shall be considered by

the Board." "Clearly, the [Parole] Board is required to consider any recommendations made by the sentencing judge in making parole release determinations." (*Schettino v New York State Div. of Parole*, 45 AD3d 1086 [3d Dept 2007]). In *Hartwell v Division of Parole* (34 AD3d 1169 [3d Dept 2008], the Parole Board conceded that it "did not have the sentencing minutes before it during the parole hearing." Further, the Court held that the "Supreme Court granted petitioner the appropriate relief by remanding the matter for a de novo hearing at which the Board is to consider petitioner's sentencing minutes."

As noted above in discussing the standard of review in an Article 78 proceeding,

"[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious" (*Matter of Charles A. Field Delivery Service, Inc.*, *supra*). In administrative appeals at the Mid-Orange Correctional Facility, where petitioner is now incarcerated, for inmate Thomas Elery on April 16, 2007 and for inmate Frank Marsicoveteri on April 25, 2007, the Appeals Unit admitted that it did not have the trial judge's sentencing minutes and cited *McLaurin* and *Standley* in ordering the Parole Board to conduct "a de novo interview of the appellant." Further, one of the

Parole Commissioners who granted a *de novo* hearing to Frank Marsicoveteri was Debra Loomis, who on November 7, 2008 affirmed the denial of parole to petitioner DUFFY, holding that "the Division of Parole has been informed that the sentencing minutes no longer exist and are as such unavailable. Thus, there is no legally reversible error." This certainly demonstrates that the denial of parole to petitioner is arbitrary, capricious and an abuse of discretion and demonstrates "irrationality bordering on impropriety." (*Russo v New York Bd. of Parole, supra*).

Petitioner has appeared before the Parole Board on four separate occasions and each time the Parole Board made no documented attempt to obtain petitioner's sentencing minutes until the commencement of the instant litigation. The indifference by the Parole Board to consider petitioner DUFFY's sentencing minutes, in violation of Executive Law 259-i (1) (a) (i), is unconscionable. Justice George D. Marlow, in an unpublished decision, *Martinez v Alexander* (Index No. 5823/08, Sup Ct, County of Dutchess [December 17, 2008]), had before him an Article 78 proceeding against the Parole Board for denial of parole, in which the sentencing minutes for a 1992 robbery conviction were unavailable. Citing *Standley, Edwards and [*9]McLaurin*, Justice Marlow held [p. 4] that "petitioner is entitled to a de novo hearing during which the recommendation of the sentencing court shall be considered by the Board." However, Justice Marlow noted, at p. 6, that ordering a *de novo* hearing

> will be meaningless as respondent has sufficiently demonstrated
>
> that the sentencing minutes cannot be located . . . Therefore, in
>
> order to avoid remand for a pointless hearing, the court must fashion
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> a remedy that offers some form of relief to petitioner, as respondent
>
> has failed to comply with its statutory obligation, while conforming
>
> to the limitations of its power to grant petitioner relief.

Justice Marlow ordered the Parole Board to conduct a reconstruction hearing if it could obtain "the necessary missing information [p. 6]," but noted that "given the numerous hearings at which the Parole Board does not produce already-existing sentencing minutes, the court is not hopeful that a reconstruction hearing would ever be held [p. 6]." He then ordered that if a reconstruction hearing could not be held within 60 days, that the Parole Board "must conduct a de novo hearing at which it must afford petitioner a favorable inference on the issue of sentencing recommendation. [pp. 6-7]."

This Court believes that after almost thirty years an attempt to find petitioner DUFFY's sentencing minutes and any recommendation of Judge Kalinowski would be futile. Therefore, this Court adopts Justice Marlow's remedy, in *Martinez v Alexander*, of how the Parole Board should deal in a parole hearing with missing sentencing minutes. Respondent Parole Board shall "conduct a de

novo hearing at which it must afford petitioner a favorable inference on the issue of sentencing recommendation."

Conclusion

Accordingly, it is

ORDERED, that the CPLR Article 78 petition of petitioner JOHN DUFFY is granted and the September 5, 2007 denial of parole to petitioner JOHN DUFFY by respondent NEW YORK STATE DIVISION OF PAROLE is vacated; and it is further

ORDERED, that respondent NEW YORK STATE DIVISION OF PAROLE shall conduct a *de novo* parole hearing for petitioner JOHN DUFFY within sixty days of the date of this order, at which time it must afford petitioner JOHN DUFFY a favorable inference as to the sentencing recommendation of his trial judge.

This constitutes the Decision and Order of the Court.

ENTER

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Hon. Arthur M. Schack

J. S. C.

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