September 2021

Decision in Art. 78 proceeding - Evans, Bryant (2009-11-16)

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

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In the Matter of the Application of
BRYANT EVANS,#93-A-4410,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2009-0284.71
INDEX # 2009-0805
ORI #NY016015J

-against-

ANDREA 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 Bryant Evans, verified on June 5, 2009, and filed in the Franklin County Clerk's office on June 12, 2009. Petitioner, who is now an inmate at the Oneida Correctional Facility, is challenging the January, 2009, determination denying him parole and directing he be held for an additional 24 months. The Court issued an Order to Show Cause on June 18, 2009, and had received and reviewed respondent's Answer, including Confidential Exhibits B and D, verified on July 29, 2009, supported by the Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General, dated July 29, 2009. The Court has also received and reviewed petitioner's Reply thereto and Memorandum of Law, both filed in the Franklin County Clerk's office on August 13, 2009.

On May 20, 1993, petitioner was sentenced in Supreme Court, New York County, to consecutive indeterminate sentences of 8⅓ to 25 years and 2⅓ to 7 years upon his convictions of the crimes of Manslaughter 1° and Criminal Possession of a Weapon 3°.

At that time a concurrent indeterminate sentence of 5 to 15 years was also imposed upon petitioner's conviction of the crime of Criminal Possession of a Weapon 2°. After having been denied discretionary parole release on four previous occasions petitioner appeared before a three-member Parole Board at the Bare Hill Correctional Facility, via teleconference, on January 6, 2009. Following the interview petitioner was again denied parole release and it was directed that he be held in DOCS custody for an additional 24 months. The parole denial determination reads as follows:

> "AFTER A CAREFUL REVIEW OF YOU RECORD, A PERSONAL INTERVIEW, AND DELIBERATION, PAROLE IS DENIED. THIS PANEL REMAINS CONCERNED ABOUT THE SERIOUS NATURE OF THE INSTANT OFFENSE OF MANSLAUGHTER 1ST, CPW 2ND AND CPW 3RD SERVING AN AGGREGATED TERM OF 10¾ [should be 10⅔] TO 32 YEARS. IN 1992, YOU, ARMED WITH A 9 MM HANDGUN, SHOT AND KILLED A MALE VICTIM. YOUR INSTITUTIONAL ACCOMPLISHMENTS AND RELEASE PLANS ARE NOTED. YOU HAVE RECEIVED 2 TIER II INFRACTIONS SINCE YOUR LAST PAROLE BOARD APPEARANCE; THEREFORE, WHEN CONSIDERED WITH OTHER REQUIRED AND RELEVANT FACTORS LEADS TO THE CONCLUSION THAT YOUR DISCRETIONARY RELEASE AT THIS TIME IS INAPPROPRIATE.
>
> IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW.
>
> YOUR RELEASE AT THIS TIME IS INCOMPATIBLE WITH THE WELFARE AND SAFETY OF THE COMMUNITY."

The document perfecting petitioner's administrative appeal was received by the Division of Parole Appeals Unit on January 20, 2009. The Appeals Unit , however, failed to

issued its findings and recommendations within the time prescribed in 9 NYCRR §8006.4(c) . 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 . . .(iii) release plans including community resources, employment, education and training and support services available to the inmate; [and] (iv) any deportation order issued by the federal government against the inmate while in the custody of the department of correctional services . . ." In addition to the above, where the minimum period of imprisonment was established by the sentencing court, the Board must also consider the seriousness of the underlying offense and the inmate's prior criminal record. *See* Executive Law §259-i(2)(c)(A) and §259-i(1)(a).

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.

The Court initially finds that the failure of the respondent to make a timely determination with respect to petitioner's administrative appeal did not serve to invalidate the underlying parole denial determination. Such failure only entitled petitioner to deem his administrative remedies exhausted and seek judicial review of the denial determination with the respondent barred from asserting an exhaustion defense. *See* 9 NYCRR §8006.4(c). *See also Graham v. New York State Division of Parole*, 269 AD2d 628, *lv den* 95 NY2d 753 and *People ex rel Tyler v. Travis*, 269 AD2d 636.

The main focus of the petition centers around the assertion that the Parole Board failed to give adequate consideration to petitioner's rehabilitative achievements and community support. According to petitioner, the Board simply "glossed over"these matters and improperly based the parole denial determination exclusively on the seriousness of the offense underlying his incarceration and two minor disciplinary infractions incurred since his last Board appearance.

The record before the Court reveals that petitioner's Parole Board had before it, and discussed, a variety of statutory factors other than the nature of the underlying offense. During the course of the January 6, 2009, parole interview one of the

commissioner's noted that petitioner had completed all required programs and then invited petitioner to discuss such programs. Petitioner responded as follows: "When I first came to prison in '93 I got my G.E.D. and then shortly after that I enrolled in college program at Coxsackie-Russell Sage. After that I worked in industry, got my ART, did a vocational, did everything, teachers aid [sic], everything." A parole commissioner also noted that petitioner only had two minor Tier II count violations since his last Parole Board appearance. In addition, petitioner's plans to live with his step father in the Bronx, if released, was mentioned along with petitioner's plans to continue his college education at Bronx Community College. Finally, as the parole interview drew to a close, petitioner was asked if there was "[a]nything else you want to put on the record that we have not discussed here today?" Petitioner responded in the negative.

Respondent's assertions to the contrary notwithstanding, the Court finds that the Parole Board considered the appropriate statutory factors but opted to place emphasis, as it was free to do, on the seriousness of the underlying criminal offense wherein petitioner shot and killed a man during the course of a verbal altercation on the street. A Parole Board 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.

In these circumstances there is no basis to conclude that the parole denial determination was affected by irrationality bordering on impropriety. *See Montalvo v. New York State Board of Parole*, 50 AD3d 1438, *Cruz v. New York State Division of*

Parole, 39 AD3d 1060 and *Thompson v. New York State Division of Parole*, 30 AD3d 746, *lv den* 7 NY3d 716.

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: November 16, 2009, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice