September 2021

Decision in Art. 78 proceeding - Evans, Clarence (2010-05-21)

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
CLARENCE EVANS, #06-R-4074,
Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2009-0722.53
INDEX #132148
ORI # NY044015J

-against-

NEW YORK STATE DIVISION OF PAROLE,

Respondent.

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The Court had before it the Petition for judgment pursuant to Article 78 of the CPLR of Clarence Evans, verified on October 22, 2009, and filed in the St. Lawrence County Clerk's office on October 30, 2009. Petitioner, who is an inmate at the Riverview Correctional Facility, purported to challenge the failure of the respondent to issue a determination with respect to the administrative appeal filed after he was denied discretionary parole release. By Decision and Order dated December 7, 2009, the Court denied petitioner's request for the issuance of an Order to Show Cause but granted him leave to file an Amended Petition challenging the parole denial determination on the merits. On January 5, 2010, petitioner's three-page, letter-like document containing the headings "Amended Petition Hearing" and "Statement of the Case based on merit," was filed in the St. Lawrence County Clerk's office. It was clear that petitioner intended the document in question to serve as his Amended Petition. Despite obvious technical deficiencies, the Court found it appropriate consider the newly filed document as constituting petitioner's Amended Petition challenging the December, 2008 determination denying him parole and directing that he be held for an additional 24

months. The Court issued an Order to Show Cause on January 12, 2010 and has received and reviewed respondent's Answer and Return, including confidential Exhibits B & C, verified on March 4, 2010. The Court has received no Reply thereto from petitioner.

On September 8, 2006 petitioner was sentenced in Supreme Court, Bronx County, to controlling, consecutive indeterminate sentences of 2 ⅓ to 7 years and 1 ⅓ to 4 years (aggregate 3 ⅔ to 11 years) upon his convictions of the crimes of Robbery 3°, Criminal Impersonation 1°, Criminal Sexual Act 3° and Criminal Impersonation 1°.

Petitioner made his initial appearance before a Parole Board on December 3, 2008. Following that appearance a decision was rendered denying him parole and directing that he be held for an additional 24 months. All three parole commissioners concurred in the denial determination which reads as follows:

> "AFTER CAREFUL REVIEW OF THE RECORD, YOUR APPEARANCE BEFORE THE PAROLE BOARD AND DELIBERATION PAROLE IS DENIED. THE INSTANT OFFENSE ROBBERY 3RD, CRIMINAL IMPERSONATION 1ST AND CRIMINAL SEX ACT 3RD INVOLVED YOU BEING FOUND GUILTY OF IMPERSONATING A POLICE OFFICER DURING TWO SEPARATE INSTANCES IN AUGUST 2005 ROBBING BOTH VICTIMS. IN ONE INSTANCE YOU SUBJECTED A FEMALE VICTIM TO UNWANTED SEXUAL CONTACT. YOUR CRIMINAL HISTORY DATES BACK TO 1970'S AND INDICATES AN IRREGULAR PATTERN OF CRIMINAL ACTIVITY. THE INSTANT OFFENSE IS A CLEAR ESCALATION OF VIOLENCE WHICH IS OF CONCERN TO THIS PANEL. CONSIDERATION HAS BEEN GIVEN TO YOUR MOSTLY POSITIVE INSTITUTIONAL ADJUSTMENT AND PAROLE PLANS, HOWEVER, THIS PANEL FINDS MORE COMPELING YOUR COMPLETE DISREGARD FOR THE LAW AND RIGHTS OF OTHERS. DESPITE RECEIPT OF AN EARNED ELIGIBILITY CERTIFICATE WE FIND YOUR RELEASE INCOMPATIBLE WITH COMMUNITY SAFETY AND WELFARE AND CONCLUDE THERE IS A REASONABLE PROBABILITY YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW."

The document perfecting petitioner's administrative appeal was received by the Division of Parole Appeals Unit on March 30, 2009. The Appeals Unit, however, failed to issue its

findings and recommendation within the 4-month time frame specified 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 . . .[and] (iii) release plans including community resources, employment, education and training and support services available to the inmate..." 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 rejects petitioner's contention that the parole denial determination was ". . . based solely upon the sexual nature of the instant offense without taking anything else into consideration." 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. As recently 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, a review of the Inmate Status Report and transcript of the parole hearing reveals that the Board had before it, and considered, the appropriate statutory factors including petitioner's receipt of an Earned Eligibility Certificate, his therapeutic programming/vocational achievements, disciplinary record, release plans, as well as the

circumstances of the crimes underlying his incarceration and prior criminal record. *See Zhang v. Travis*, 10 AD3d 828. Indeed, several pages of the transcript of the December 3, 2008 parole hearing (bottom of page five through much of page seven) are exclusively devoted to petitioner's prison disciplinary record, therapeutic/vocational programming record, and release plans. Petitioner's conclusory assertions to the contrary notwithstanding, moreover, the Court finds nothing in the transcript to suggest that the Board cut short his discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries. In view of the above, the Court finds no basis to conclude that the parole board failed to consider the 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 bordering on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying his current incarceration. *See Pearl v. New York State Division of Parole*, 25 AD3d 1058.

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

ADJUDGED, that the Amended Petition is dismissed.

Dated: May 21, 2010, at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Justice