September 2021

Decision in Art. 78 proceedings - Evans, James (2006-11-13)

[*1]

Matter of Evans v Dennison
2006 NY Slip Op 52144(U) [13 Misc 3d 1236(A)]
Decided on November 13, 2006
Supreme Court, Westchester County
Adler, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on November 13, 2006

Supreme Court, Westchester County

In the Matter of the Application of James Evans, Petitioner,

against

Robert Dennison, Chairman N.Y.S. Division and Board of Parole, Respondent.

06-09412

MR. JAMES EVANS, No.00A0166

Fishkill Correctional Facility

P.O. Box 1245

Beacon, New York 12508

HON. ELIOT SPITZER

Attorney General, State of New York

101 East Post Road

White Plains, New York 10601

By: Elyse Angelico, Esq.

Assistant Attorney General

Lester B. Adler, J.

Petitioner seeks a judgment pursuant to Article 78 of the Civil Practice Law and Rules annulling the October 23, 2005 determination by respondent Robert Dennison, as Chairman of the New York State Board of Parole (the "Board"), which denied him discretionary parole. The petition was filed with the Westchester County Clerk on August 11, 2006, and the verified answer of Attorney General of the State of New York was received by the Court on October 5, 2006.

FACTUAL BACKGROUND

On July 24, 1996, petitioner was convicted after a jury trial in the Ulster County Court (Bruhn, J.) of murder in the second degree. On October 11, 1996, he was

sentenced as a juvenile offender to an indeterminate term of nine years to life, the maximum [*2]sentence permissible by law.[FN1]

The charge stemmed from allegations that on or about December 28, 1994, petitioner murdered the grandmother of his 13-year-old girlfriend by strangling her first with his hands and then with kite string. Not only was it alleged that petitioner committed this heinous crime in the victim's own home, it was further alleged that he did so in the presence of both his girlfriend and her 11-year-old sister, who was subsequently locked in her bedroom in an attempt to prevent her from disclosing the crime. Petitioner then placed the victim's body in the trunk of her car, where it remained until such time as the girlfriend's sister escaped and ran to a neighbor's house, at which time law enforcement was notified of the murder. During the three-day period between the commission of the crime and the petitioner's arrest, both petitioner and his girlfriend drove around in the victim's car with her body in the trunk, using money stolen from her house to purchase alcohol and drugs.

Petitioner had his initial appearance before the Board in 2003, at which time he was denied parole and ordered held for an additional 24 months. Petitioner reappeared before the Board in October of 2005, at which time he was again denied parole and

ordered held for an additional 24 months.[FN2] The grounds stated for the denial contained in the Board's October 23, 2005 decision are as follows:

"AFTER A REVIEW OF THE RECORD AND THIS INTERVIEW, PAROLE IS DENIED. THE INSTANT OFFENSE MURDER 2 (A-1) OCCURRED WHEN YOU IN CONCERT WITH YOUR CO-DEFENDANT CAUSED THE DEATH OF YOUR CO-DEFENDANT'S GRANDMOTHER (AND LEGAL GUARDIAN) BY STRANGULATION. YOU STRANGLED THE VICTIM IN FRONT OF HER TWO GRANDDAUGHTERS FIRST USING HANDS AND THEN A KITE STRING. YOUR CODEFENDANT IMPRISONED HER SISTER IN THE BEDROOM WHERE THE TWO OF YOU TERRORIZED HER FOR APROX. (3) DAYS. THE VICTIM'S BODY WAS PLACED IN THE VICTIM'S CAR AND THE TWO OF YOU TOOK SEVERAL HUNDRED DOLLARS IN CASH FOUND IN HER RESIDENCE. THE BOARD NOTES YOUR CONTINUED COMPLIANCE WITH RECOMMENDED PROGRAMMING AND YOUR POSITIVE DISCIPLINARY RECORD. YOUR PROPENSITY FOR VIOLENCE, YOUR CALLOUS DISREGARD FOR HUMAN LIFE AND YOUR INDIFFERENCE FOR LAW, LEADS THIS PANEL TO DETERMINE THAT YOUR RELEASE IS INAPPROPRIATE AS IT WOULD DEPRECATE THE SERIOUSNESS OF THE CRIME AND SERVE TO UNDERMINE RESPECT FOR LAW." [*3]

Petitioner now brings this Article 78 proceeding alleging that the Board's denial of discretionary release was improper because: 1) the Board did not give sufficient reason for rendering a decision outside his guideline range; 2) the decision was arbitrary, capricious and constituted "irrationality bordering on impropriety;" 3) the Board relied exclusively upon the nature of his underlying offense; 4) the decision was predetermined; 5) the Board's decision constituted a resentencing; 6) the Board violated his constitutional rights to due process and equal protection; 7) the Board's

decision was written in conclusory terms; and 8) the imposition of a 24-month hold was excessive.

LEGAL ANALYSIS

Petitioner first argues that the Board's determination denying him discretionary parole should be annulled on the ground that the Board failed to state a sufficient reason for rendering a decision outside the petitioner's guideline range (see 9 NYCRR §8001.3).

The guidelines established by the Board "represent the policy of the board concerning the customary total time served before release for each category of offense" (9 NYCRR §8001.3[b][1]). However, "[t]he decisions of the Board require flexibility and discretion and the guidelines used to arrive at these decisions are not meant to establish a rigid, numerical policy invariably applied across-the-board to all [inmates] without regard to individualized circumstances or mitigating factors" (*Matter of D. Lue-Shing v. Travis*, 12 AD3d 802, 803, 784 NYS2d 259, *lv. denied* 4 NY3d 705, 792 NYS2d 898, 825 NE2d 1093 quoting *Matter of Schwartfigure*

v. Hartnett, 83 NY2d 296, 301, 610 NYS2d 125, 632 NE2d 434 [internal quotations omitted]; see also *Matter of Grigger v. New York State Div. of Parole*, 16 AD3d 853, 790 NYS2d 781, *lv. denied* 5 NY3d 702, 799 NYS2d 772, 832 NE2d 1188).

Although the ranges are intended only as a guide and "not a substitute for the careful consideration of the many circumstances of each individual case" (9 NYCRR §8001.31[a]; see also *Matter of Tatta v. State*, 290 AD2d 907, 737 NYS2d 163, *lv. denied* 98 NY2d 604, 746 NYS2d 278, 773 NE2d 1016), where a decision rendered by the Board is outside the guidelines, the Board must provide the inmate with a written detailed reason for the decision, including the fact or factors relied on (9 NYCRR §8001.3[c]).

In the present case, the decision indicates that, in addition to the severity of the petitioner's crime of conviction, the Board considered the callous manner in which the crime was committed, the age of the victim at the time of her death, the imprisonment of the co-defendant's younger sister in an attempt to hide the crime, and the posthumous theft of money from the victim. Since the aggravating factors upon which the Board relied in rendering a decision above the guidelines is set forth with sufficient detail (see *Matter of D. Lue-Shing*, 12 AD3d at 803-804), petitioner's application to annul the Board's decision on this ground is denied.

Petitioner further contends that the Board's decision constitutes "irrationality bordering on impropriety.

It is well settled that "because a person's rightful liberty interest is extinguished upon conviction, there is no inherent constitutional right to parole" (*Matter of Russo v. New York State Bd. of Parole*, 50 NY2d 69, 73, 427 NYS2d 982, 405 NE2d 225). Since the New York statute governing parole is discretionary and "holds out no more than the possibility of parole" (*Id.* at 75; see also *Barna v. Travis*, 239 F.2d 169, 171), parole release decisions, when made pursuant [*4]to relevant statutory factors, are not subject to judicial review in the absence of a showing of "irrationality bordering on impropriety" (*Matter of Silmon v. Travis*, 95 NY2d 470, 476, 718 NYS2d 704, 741 NE2d 501; *Matter of Thomas v. New York State Div. of Parole*, 286 AD2d 393, 394, 729 NYS2d 160, quoting *Matter of Russo v. New York State Bd. of Parole*, 50 NY2d 69, 77, 427 NYS2d 982, 405 NE2d 225; *Matter of Almeyda v. New York State Div. of Parole*, 290 AD2d 505, 506, 736 NYS2d 275).

The record reflects that the Board considered the relevant statutory factors, including petitioner's criminal conduct, institutional behavior, programming accomplishments and his residential and employment plans upon release (see *Matter of Silvero v. Dennison*, 28 AD3d 859, 811 NYS2d 822). Additionally, the reasons for the denial of parole were outlined in sufficient detail so as to inform petitioner of the basis of the decision in accordance with the provisions of Executive Law §259-i[2][a] (*People ex rel. Herbert v. New York State Bd. of Parole*, 97 AD2d 128, 133, 468 NYS2d 881; *Matter of Rice v. Hammock*, 99 AD2d 644, 472 NYS2d 60; *Matter of Walker v. New York State Div. of Parole*, 203 AD2d 757, 758, 610 NYS2d 397; *Matter of DeSantis v. New York State Bd. of Parole*, 152 Misc 2d 40, 41 574 NYS2d 500).

Although the Board may have placed particular emphasis on the violent nature of the underlying offense, which it found to have demonstrated a "propensity for violence," a "callous disregard for human life" and an "indifference for law," it "was not required to equally weigh or discuss each statutory factor or reward petitioner's achievements while incarcerated" (*Matter of Wilcher v. Dennison*, 30 AD3d 958, 959, 817 NYS2d 449, quoting *Matter of Webb v. Travis*, 26 AD3d 614, 615, 810 NYS2d 233 [internal quotations omitted]). To the extent the Board did not specifically recite and discuss the weight which it assessed to each factor, it was not required to do so (*Matter of Tatta v. Dennison*, 26 AD3d 663, 809 NYS2d 296; see also *King v. New York State Div. of Parole*, 83 NY2d 788, 791, 610 NYS2d 954, 632 NE2d 1277; *Garcia v. New York State Div. of Parole*, 239 AD2d 235, 239, 657 NYS2d 415; *Matter of Walker v. New York State Div. of Parole*, 203 AD2d 757, 758-59, 610 NYS2d 397).[FN3]

In the absence of a showing of "irrationality bordering on impropriety," the Board's decision is not subject to judicial review (*Matter of Silmon*, 95 NY2d at 477; *Tarter v. State of New York*, 68 NY2d 511; *Matter of Silvero*, 28 AD3d 859; *Matter of Thomas*, 286 AD2d at 394). Furthermore, the record does not support petitioner's claim that the Board's determination "was predetermined to satisfy an informal policy against releasing violent felons on parole" (*Matter of Perez v. New York State Div. of Parole*, 294 AD2d 726, 741 NYS2d 753), or that he was denied due process and equal protection because the denial was premised upon such an executive policy (see *Matter of Wilcher*, 30 AD2d 958).[FN4] [*5]

Petitioner also contends that the Board's denial of discretionary parole constitutes a resentencing in violation of the Double Jeopardy Clause's protection against the imposition of multiple punishments. In support of this contention, petitioner claims that by imposing a term of nine years to life, the sentencing court determined that "there would be some set of circumstances under which

[petitioner's] release after 9 years would be appropriate." Petitioner's claim is completely controverted by the sentencing minutes in which the sentencing judge opined as follows:

"* * * I sit here and think you committed this horrendous crime 15 days before you turned 16, had the crime been committed 15 days later you would be sitting here waiting to hear me sentence you to 25 years to life. However, because of your age at the time of the commission of this crime the maximum sentence that I can impose on you is a sentence of 9 years to life. The maximum sentence that I can impose is not appropriate in this instance for this crime it should be more, I wish it could more [sic] and I hope that when you first come before the parole board I hope on any occasion when you come before the parole board they will give a long hard look at the circumstances surrounding this crime they will say James Evans does not deserve to be paroled now."

Not only is petitioner's characterization of the sentencing court's sentiments belied by the record, his claim that the denial of parole release amounted to a resentencing is without merit (see *Matter of Crews v. New York State Executive Dept. Bd. of Parole Appeals Unit*, 281 AD2d 672, 720 NYS2d 855).

Lastly, petitioner argues that the 24-month hold is excessive in light of his "exemplary record of institutional and personal achievement and well thought out release plans." The scheduling of petitioner's reconsideration hearing is a matter for the Board "to determine in the exercise of its discretion" (*Matter of Tatta*, 290 AD2d at 908), subject, of course, to the statutory maximum of 24 months (Executive Law §259-i[2][a]; 9 NYCRR 8002.3[c]). In the absence of any impropriety on the part of the Board, there is no basis to disturb the Board's determination.

For the reasons set forth above, the petition is dismissed.

The foregoing constitutes the Decision, Order and Judgment of the Court.

Dated: White Plains, New York

November 13, 2006HON. LESTER B. ADLER

SUPREME COURT JUSTICE

Footnotes

Footnote 1: Prior to the imposition of sentence, the Court noted that, had the crime been committed 15 days later, petitioner would have been 16 years of age and the maximum sentence which could have been imposed would have been 25 years to life.

Footnote 2: Subsequent to this last appearance, petitioner filed an administrative appeal. According to the verified answer, the Board's Appeals Unit never responded to petitioner's appellate brief due to an "excessive caseload."

Footnote 3: Contrary to petitioner's claim, the Appellate Division, First Department's holding in *Matter of Wallman v. Travis*, (18 AD3d 304, 794 NYS2d 381) does not require a contrary holding. Unlike the determination in *Matter of Wallman*, the record in the present case does not support a finding that the Board relied exclusively on the severity of the offense to deny parole.

Footnote 4: The federal courts have noted that, based upon New York's statutory scheme, an inmate has no liberty interest in parole and, therefore, the protections of the Due Process Clause are inapplicable (*Barna v. Travis*k, 239 F.2d 169, 171; *Bottom v. Pataki*, 2006 WL 2265408).

Return to Decision List