September 2021

Decision in Art. 78 proceeding - Farid, Mujahid (2010-11-12)

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

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In the Matter of the Application of
MUJAHID FARID,#79-A-0362,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2010-0310.64
INDEX # 2010-779
ORI #NY016015J

-against-

ANDREA EVANS, Chief Executive Officer,
NYS Division of Parole, and **NYS DIVISION OF PAROLE,**
Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Mujahid Farid, verified on June 8, 2010 and filed in the Franklin County Clerk's office on June 16, 2010. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the September 2009 determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on June 25, 2010 and has received and reviewed respondents' Answer, including Confidential Exhibits B, D, and I, verified on August 18, 2010 and supported by the Affirmation of C. Harris Dague, Esq., Assistant Attorney General, dated August 19, 2010. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on September 10, 2010.

On January 19, 1979 petitioner was sentenced in Supreme Court, New York County, to concurrent indeterminate sentences of 11 to 22 years and 15 years to life upon his convictions of the crimes of Manslaughter 1° and Attempted Murder 1°. After having

been denied discretionary parole release on eight previous occasions[1], petitioner made his ninth appearance before a Parole Board on September 29, 2009. Following that appearance a decision was rendered again denying petitioner 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 A REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME, THAT YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY. THIS DECISION IS BASED ON THE FOLLOWING FACTORS: YOUR INSTANT OFFENSES ATTEMPTED MURDER 1ST AND MANSLAUGHTER 1ST, REPRESENT A CONTINUATION OF A CRIMINAL HISTORY THAT INCLUDES PRIOR CONVICTIONS FOR ROBBERY 2ND AND GRAND LARCENY 3RD. YOU HAVE MAINTAINED A SATISFACTORY DISCIPLINARY RECORD SINCE SEPTEMBER OF 1995. THIS PANEL NOTES YOUR CONTINUED WORK AS AN INMATE MOBILITY ASSISTANT 2ND."

Petitioner's administrative appeal was received by the Division of Parole Appeals Unit on December 18, 2009. The Appeals Unit, however, failed to issue its findings and recommendation within the four-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

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[1] At least three of the prior parole denial determinations were ultimately upheld by the Appellate Division, Third Department. *Farid v. Travis*, 17 AD3d 754, *app dis* 5 NY3d 782, *Farid v. Travis*, 239 AD2d 629 and *Farid v. Russi*, 217 AD2d 832.

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, as here, the minimum period of imprisonment was established by the sentencing court, the Board must also consider the seriousness of the underlying offense (with “due consideration” to, among other things, the “recommendations of the sentencing court . . .”) as well as 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.

Citing Executive Law §259-i(1)(a) petitioner first asserts that the most recent parole denial determination was fatally flawed by reason of the Board’s failure to obtain a copy of the 1979 sentencing minutes and the resulting failure of the Board to consider the recommendations of the sentencing court. According to petitioner, “ . . . it is clear by the comments made by the sentencing judge, and the discussions during sentencing, that

the court did not intend for Petitioner to serve the maximum possible sentence of life without parole . . . [T]he sentencing court's intentions and recommendations are clearly reflected in the fact that the court did not impose the maximum possible indeterminate sentence of twenty-five years to life for the attempted murder conviction, but, contrarily, imposed the minimum amount possible - - fifteen years to life - - for the conviction."

The respondents take the position that the petitioner's Parole Board had available for its review a copy of the 1979 sentencing minutes. In this regard it is noted that Exhibit H, annexed to the respondents' Answer, includes a copy of such minutes together with letters suggesting that a copy of the minutes was provided to parole staff at the Franklin Correctional Facility under cover letter dated February 2, 2009. Notwithstanding the foregoing, the Court notes that the Inmate Status Report prepared in anticipation of petitioner's originally-scheduled March 2009 Parole Board re-appearance[2], dated and approved on February 5, 2009, made no reference to the receipt of sentencing minutes and specifically stated that there were no "Official Statements" by the sentencing judge. The Inmate Status Report, moreover, was apparently updated in March and August of 2009 without reference to any receipt of sentencing minutes. In view of the foregoing it would be difficult for the Court to determine whether or not the members of petitioner's September 2009 Parole Board actually reviewed the 1979 sentencing minutes prior to the issuance of the parole denial determination at issue in this proceeding. For the reasons set forth below, however, the Court finds it unnecessary to make such determination.

A Parole Board considering a DOCS inmate for discretionary release is clearly required to take into account any parole recommendation of the sentencing judge and is therefore ordinarily required to have before it a copy of the relevant sentencing minutes.

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[2] Petitioner's Parole Board re-appearance was postponed and ultimately held on September 29, 2009.

See Standley v. New York State Division of Parole, 34 AD3d 1169 and *McLaurin v. New York State Board of Parole*, 27 AD3d 565. Notwithstanding the foregoing, however, even where a Parole Board erroneously fails to review the relevant sentencing minutes such error maybe considered harmless where a copy of the minutes is ultimately made part of the Article 78 court's record and reveals that the sentencing judge made no parole recommendation. *See Schettino v. New York State Division of Parole*, 45 AD3d 1086. In the case at bar an examination of the 1979 sentencing minutes, annexed to the respondents' Answer as part of Exhibit H, reveals that the sentencing judge, responding to an inquiry by the Assistant District Attorney, explained her imposition of a lesser sentence as follows:

> "I lessened this sentence because of the plea and the presentation of counsel. And from my unique perch as trial judge, I do see possibilities of redemptive value in this defendant. That is something that should be considered by parole authorities. There should also be some indication in the record that the circumstances of this case is what warranted a minimum sentence."

This Court finds that the above-quoted observations of the sentencing judge, rendered approximately 15 years before petitioner would be eligible for discretionary parole release, simply do not constitute a specific parole recommendation that would be required to be considered by petitioner's most recent Parole Board. *See Blasich v. New York State Board of Parole*, 68 AD3d 1339 at 1341 (a sentencing court's alleged statements "including that nothing in the pre-sentence report required a sentence harsher than that bargain for and a prediction that petitioner [defendant] 'would be released in his mid-thirties,' " would not constitute specific parole recommendations). *See also Duffy v. New York State Division of Parole*, 74 AD3d 965 (imposition of less than maximum sentence did not constitute an indication that the sentencing court made a favorable

parole recommendation) and *Schettino v. New York State Division of Parole*, 45 AD3d 1086

(sentencing court's comment that a minimum sentence was imposed due to petitioner's minimal criminal record did not constitute a parole recommendation). Compare *Edwards v. Travis*, 304 AD2d 576, wherein the relevant sentencing minutes revealed that the sentencing judge did not intend Ms. Edwards to serve more than the minimum term of imprisonment.

A significant portion of the petition is focused, in one way or another, on the assertion that the parole denial determination was improperly based solely on two "immutable factors" - the nature of the crimes underlying petitioner's incarceration and his prior criminal history - without adequate consideration of other statutory factors. A parole board, however, 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 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).

A review of the Inmate Status Report and the transcript of the parole hearing reveals that the Board had before it, and considered, the appropriate statutory factors including petitioner's programming and vocational achievements, disciplinary record and release plans, as well as the circumstances of the crimes underlying his incarceration and prior criminal record. *See Zhang v. Travis*, 10 AD3d 828. During the course of the September 29, 2009 parole interview the commissioners posed no specific questions with respect to the circumstances of the crimes underlying petitioner's incarceration. Rather, petitioner was broadly asked if there was anything he would like to say about such crimes. Much of the parole interview involved discussions with regard to petitioner's "satisfactory" prison disciplinary record since 1995, as well as his programming accomplishments and release plans, including potential post-release employment plans and living arrangements. The petitioner was also afforded an open-ended opportunity at the conclusion of the parole hearing to make his own statement to the presiding commissioners. In view of the foregoing, 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 petitioner's incarceration. *See Veras v. New York State Division of Parole,* 56 AD3d 878, *Serrano v. Dennison,* 46 AD3d 1002, *Schettino v. New York State Division of Parole,* 45 AD3d 1086 and *Farid v. Travis,* 17 AD3d 754, *app dis* 5 NY3d 782.

The Court next finds that the parole denial determination, predicated upon the statutory basis that petitioner's release would be incompatible with the welfare of society (Executive Law §259-i(2)(c)(A)) and based upon the nature of the crimes underlying petitioner's most recent convictions as well as his prior criminal history, is in compliance with statutory and judicial standards. *See Comfort v. New York State Division of Parole*, 68 AD3d 1295. *Cf. Vaello v. Parole Board Division of State of New York*, 48 AD3d 1018.

Petitioner also challenges the Parole Board's focus on his Manslaughter 1° conviction as one of the "instant offenses" underlying his ongoing incarceration. According to petitioner, he is no longer serving the indeterminate sentence of 11 to 22 years imposed more than 30 years ago in connection with the Manslaughter 1° conviction. The Court disagrees. Where, as here, an individual is subject to multiple indeterminate sentences of imprisonment, running concurrently, the respective maximum terms merge in and are satisfied by discharge of the term which has the longest unexpired time to run (Penal Law §70.30(1)(a)), thus yielding a single, merged maximum term. An inmate serving such a single, merged maximum term, moreover, remains subject to all component sentences for the duration of the merged maximum term of imprisonment. *See People v. Buss*, 11 NY3d 553 *and People v. Delk*, 59 AD3d 733. This Court therefore rejects petitioner's assertion that he has already completed serving the 22-year maximum term associated with his Manslaughter 1° conviction.

Finally, the mere fact that Parole Commissioner Elovich (who sat on petitioner's three-member Parole Board) and Facility Parole Officer Kissane (who approved the Inmate Status Report prepared in anticipation of petitioner's March 2009 Parole Board re-appearance as well as the addendums thereto) were apparently named by petitioner as two of 14 defendants in a federal civil rights lawsuit does not, in the absence of

discernable evidence of bias, serve to invalidate the parole denial determination at issue in this proceeding.

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 12, 2010 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice