September 2021

Decision in Art. 78 proceeding - Johnson, Douglas E. (2013-12-11)

Matter of Johnson v Fischer
2013 NY Slip Op 33103(U)
December 11, 2013
Supreme Court, Franklin County
Docket Number: 2013-508
Judge: S. Peter Feldstein

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

_____X

In the Matter of the Application of
DOUGLAS E. JOHNSON, #85-A-0659,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2013-0242.70
INDEX # 2013-508
ORI #NY016015J

-against-

BRIAN FISCHER, Commissioner, NYS Department of Corrections and Community Supervision and **ANDREA W. EVANS**, Chairwoman, NYS Board of Parole,
Respondents.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Douglas E. Johnson, verified on May 24, 2013 and filed in the Franklin County Clerk's office on June 11, 2013. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the July 2012 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 17, 2013 and has received and reviewed respondents' Answer and Return, including *in camera* materials, verified on August 8, 2013 and supported by the August 8, 2013 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General, as well as by the Affirmation of William B. Gannon, Assistant Counsel to the New York State Board of Parole, dated July 9, 2013 (hereinafter the Gannon Affirmation). The Court has also received and reviewed petitioner's Reply, sworn to on August 16, 2013 and filed in the Franklin County Clerk's office on September 4, 2013.

On January 22, 1985 petitioner was sentenced in Suffolk County Court to a controlling indeterminate sentence of 25 years to life upon his convictions of the crimes

of Murder 2° (three counts) and Rape 1°. Petitioner's 1985 convictions/sentencings were affirmed on direct appeal to the Appellate Division, Second Department. *People v. Johnson*, 160 AD2d 813, *lv den* 76 NY2d 790. Petitioner made his initial appearance before a Parole Board in November of 2008. Following that appearance a decision was apparently rendered denying him discretionary release and directing that he be held for an additional 24 months (next appearance presumably scheduled for November of 2010). On July 21, 2010, however, petitioner committed a new criminal offense while in DOCCS custody. On May 6, 2011 he was sentenced in Saratoga County Court, as a second felony offender, to an indeterminate sentence of 1½ years to 3 years upon his conviction of the crime of Attempted Promoting Prison Contraband 1°.

Petitioner made his first post-2011 conviction appearance before a Parole Board (second appearance overall) on July 10, 2012. Following that appearance a decision was issued again denying him discretionary release and directing that he be held for an additional 24 months. The 2012 parole denial determination reads as follows:

> "AFTER A REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME, YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY AND WOULD SO DEPRECATE THE SERIOUS NATURE OF THE CRIME AS TO UNDERMINE RESPECT FOR THE LAW. THE BOARD HAS CONSIDERED YOUR INSTITUTIONAL ADJUSTMENT INCLUDING DISCIPLINE AND PROGRAM PARTICIPATION, REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED INCLUDING YOUR RISK TO SOCIETY, REHABILITATION EFFORTS, AND YOUR NEED FOR SUCCESSFUL RE-ENTRY INTO THE COMMUNITY. YOUR RELEASE PLANS HAVE ALSO BEEN CONSIDERED. MORE COMPELLING, HOWEVER, IS THE EXTREME VIOLENCE AND DEVIANT CONDUCT YOU EXHIBITED WHEN YOU MURDERED A VULNERABLE 15 YEAR OLD GIRL. DURING THE COMMISSION OF THE CRIME YOU STRANGLED THE VICTIM AND DROPPED A 64 POUND CONCRETE BLOCK ON HER HEAD CRUSHING HER SKULL. YOU THEN SEXUALLY ASSAULTED HER LIFELESS BODY. YOU CONTINUE TO DENY RESPONSIBILITY FOR THIS HENIOUS [sic] CRIME. WHILE INCARCERATED, YOU POSSESSED A WEAPON AND YOU WERE

> ULTIMATELY CONVICTED OF THE ADDITIONAL CRIME OF ATTEMPTING TO PROMOTE PRISON CONTRABAND 1ST. THE BOARD NOTES YOUR COMPAS, RISK SCORES, YOUR PROGRAM, VOCATIONAL AND EDUCATIONAL ACCOMPLISHMENTS. THE BOARD ALSO NOTES YOUR LETTERS OF SUPPORT AND LETTERS FROM TRANSITIONAL PROGRAMS. ALL FACTS CONSIDERED, YOUR RELEASE AT THIS TIME IS NOT APPROPRIATE."

The document perfecting petitioner's administrative appeal from the July 2012 parole denial determination was received by the DOCCS Parole Appeals Unit on December 28, 2012. The Appeals Unit, however, failed to issue its findings and recommendation within the 4-month time frame set forth in 9 NYCRR §8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, 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 the law. In making the parole release decision, the procedures 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 interactions with staff and inmates . . . (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 . . . (vii) 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 presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement . . ."

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.

Petitioner argues, in effect, that the 2012 Parole Board unlawfully focused its attention on the nature of the crimes underlying his ongoing incarceration, without proper application of "new risk assessment guidelines" set forth in Executive Law §259-c(4). That statute was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, to provide that the New York State Board of Parole shall " . . .establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." (Emphasis added).[1] Since petitioner does not specifically challenge the implementation procedures put into effect by the Board of

[1] Prior to the amendment the statute had provided, in relevant part, that the Board of Parole shall " . . .establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."

Parole in response to the amendment to Executive Law §259-c(4), such potential issue will not be addressed in this Decision and Judgment.

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 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, reviews of the Inmate Status Report and transcript of the July 10, 2012 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors including petitioner's therapeutic and vocational programming records, COMPAS risk and needs assessment instrument, educational achievements, disciplinary record, release plans, community support and criminal record in addition to the circumstances of the crimes underlying his incarceration. *See Zhang v. Travis*, 10 AD3d 828. The Court, moreover, finds nothing in the hearing transcript to suggest that the Board cut short petitioner's 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 McAllister v. New York State Division of Parole* 78 AD3d 1413, *lv den* 16 NY3d 707, and *Davis v. Lemons,* 73 AD3d 1354. 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 crime underlying petitioner's initial incarceration in DOCCS custody as well as his additional, post-incarceration criminal conduct. *See Gordon v. New York State Board of Parole*, 81 AD3d 1032, *Gonzalez v. Chair, New York State Board of Parole*, 72 AD3d 1368 and *Marziale v. Alexander*, 62 AD3d 1227.

Turning specifically to the COMPAS risk and needs assessment instrument, it is noted that during the course of the July 10, 2012 parole interview one of the commissioners stated " . . . we have your COMPAS Reentry Risk Assessment Form. It scores you as a low risk of felony violence and rearrest, very high though for prison misconduct, and highly probable that you will have needs on the outside regarding finances and vocational." A copy of petitioner's COMPAS risk assessment instrument is included in the record of this proceeding as Exhibit E annexed to the Gannon Affirmation.

Although the Appellate Division, Third Department has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* ___AD3d _____, 2013 NY Slip Op 08189, *Malerba v. Evans,* 109 AD3d 1067 and *Garfield v. Evans*, 108 AD3d 830), this Court finds nothing in such cases, or the amended statute, to suggest that the quantified risk assessment determined through utilization of a risk and needs assessment instrument supercedes the independent discretionary authority of the Board of Parole to determine, based upon its consideration of the factors set forth in Executive

Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. In this regard it is noted that the "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A). *See Partee v. Evans*, 40 Misc 3d 896. In the case at bar the Parole Board ultimately concluded that a denial of parole was warranted based upon the particularly heinous nature of the crime underlying petitioner's initial incarceration as well as the fact that petitioner, while in DOCCS custody, committed a new, felony-level criminal offense after his initial 2008 Parole Board appearance.

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: December 11, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice