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Matter of Freeman v Evans
2013 NY Slip Op 32274(U)
September 6, 2013
Supreme Court, Franklin County
Docket Number: 2013-291
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

_____X

In the Matter of the Application of
JAMES FREEMAN, #88-B-1480,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2013-0137.39
INDEX # 2013-291
ORI #NY016015J

ANDREA EVANS, 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 James Freeman, verified on March 15, 2013 and filed in the Franklin County Clerk's office on March 28, 2013. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the August 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 April 2, 2013 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on May 24, 2013 and supported by the May 24, 2013 Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge. The Court has also received and reviewed petitioner's undated Reply thereto, filed in the Franklin County Clerk's office on May 31, 2013.

On June 29, 1988 petitioner was sentenced in Supreme Court, Kings County, to a controlling indeterminate sentence of 22 years to life upon his convictions of the crimes of Murder 2° and Criminal Possession of a Weapon 2°. On September 4, 1990, petitioner was sentenced in Chemung County Court, "as a predicate felony offender," to a controlling indeterminate sentence of 3½ to 7 years upon his convictions of the crimes of Assault 2°

and Attempted Assault 2°. This Court notes that the criminal act underlying petitioner's 1990 Chemung County sentences was committed at a time when petitioner was already incarcerated in DOCCS custody as a result of the 1988 Kings County sentence. Both convictions were affirmed on direct appeal. *See People v. Freeman*, 162 AD2d 704, *lv den* 76 NY2d 939 and *People v. Freeman*, 184 AD2d 864, *lv den* 80 NY2d 903.

On August 8, 2012 petitioner made his initial appearance before a Parole Board. Following that appearance a decision was rendered denying him discretionary release and directing that he be held for an additional 24 months. The parole denial determination reads, in relevant part, as follows:

> "FOLLOWING CAREFUL REVIEW AND DELIBERATION OF YOUR RECORD AND INTERVIEW, THIS PANEL CONCLUDES THAT DISCRETIONARY RELEASE IS NOT PRESENTLY WARRANTED DUE TO CONCERN FOR THE PUBLIC SAFETY AND WELFARE. THE FOLLOWING FACTORS WERE PROPERLY WEIGHED AND CONSIDERED. YOUR INSTANT OFFENSE IN BROOKLYN IN JUNE 1987, INVOLVED YOUR FATALLY SHOOTING A MALE VICTIM. WHILE CONFINED AT ELMIRA C.F. IN 1990, YOU INCURRED AN ASSAULT 2ND AND AN ATT. ASSAULT 2ND.
>
> YOUR HISTORY INDICATES YOU WERE ON YO PROBATION AT THE TIME OF THE FATAL SHOOTING.
>
> YOUR INSTITUTIONAL PROGRAMING INDICATES PROGRESS AND ACHIEVEMENT WHICH IS NOTED TO YOUR DISCIPLINARY RECORD REFLECTS SEVEN (7) TIER II AND FIVE (5) TIER III REPORTS. YOU HAVE SERVED SHU TIME.
>
> THE PANEL NOTES YOUR POSITIVE INSTITUTIONAL PROGRESS, HOWEVER, THE PANEL IS CONCERNED WITH YOUR TIER III DISCIPLINARY ISSUES.
>
> THE PANEL FURTHER NOTES THAT IT HAS CONSIDERED ALL REQUIRED FACTORS IN THE FILE.
>
> REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, INCLUDING YOUR RISK TO THE COMMUNITY, REHABILITATION

> EFFORTS, AND YOUR NEEDS FOR SUCCESSFUL COMMUNITY RE-ENTRY.
>
> YOUR DISCRETIONARY RELEASE, AT THIS TIME, WOULD THUS NOT BE COMPATIBLE WITH THE WELFARE OF SOCIETY AT LARGE, AND WOULD TEND TO DEPRECATE THE SERIOUSNESS OF THE INSTANT OFFENSE(S), AND UNDERMINE RESPECT FOR THE LAW."

The document perfecting petitioner's administrative appeal from the August 2012 parole denial determination ("APPELLANT'S BRIEF") was received by the DOCCS Parole Appeals Unit on October 24, 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 . . . (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.

Executive Law §259-c(4) 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 . . ."[1]

During the course of petitioner's August 8, 2012 Parole Board interview Commissioner Ludlow referenced the COMPAS risk and needs assessment instrument that had been prepared in conjunction with the Board's consideration of petitioner for discretionary release. According to Commissioner Ludlow, the COMPAS " . . . computer

[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 . . ."

generated score has you [petitioner] at a low risk for felony violence, arrest and absconding if you are on parole."

To the extent the parole denial determination was predicated upon the Board's concern for the public safety and welfare, petitioner argues that the denial determination must be considered "arbitrary and capricious in nature." Alluding to the COMPAS computer-generated low risk scores referenced by Commissioner Ludlow, petitioner goes on to argue that he " . . . cannot be found to be a low risk by Respondent, then deemed to be a threat to public safety by respondent . . ." The Court, however, is not persuaded by this argument.

Since petitioner does not specifically challenge the implementation procedures put into effect by the Board of Parole in response to the amendment to Executive Law §259-c(4), such issue will not be addressed in this Decision and Judgment. Although the Appellate Division, Third Department has indicated that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post- September 30, 2011 discretionary parole release determinations (*see Garfield v. Evans*, 108 AD3d 830), this Court finds nothing in *Garfield* or the amended statute to suggest that the quantified risk assessment determined through utilization of the needs and risk assessment instrument supercedes the independent discretionary authority of the Board of Parole to determine whether there is a reasonable probability that a prospective parolee would, if released, live and remain at liberty without violating the law, whether the release of the prospective parolee would be compatible with the welfare of society and/or whether the release of the prospective parolee would so deprecate the seriousness of his/her crime as to undermine respect for the law. 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, are only intended 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 (Sup Ct, Albany Co., June 28, 2013). In the case at bar the Board ultimately concluded, however, that a denial of parole was warranted based upon the nature of the crimes underlying petitioner's incarceration, the fact that petitioner was on YO probation status at the time of the fatal shooting underlying his 1988 Kings County conviction as well as petitioner's problematic prison disciplinary record.

Petitioner also argues that the parole denial determination resulted from the personal bias of one parole commissioner. In this regard petitioner alleges that when he was questioned by Commissioner Ferguson during the course of the August 8, 2012 parole interview, " . . . the Commissioner led off by calling the Petitioner a liar that he knew Petitioner was lying and that it was not going to end good for Petitioner. Commissioner Ferguson never stated what the Petitioner was lying about, but there was no denying that Petitioner was getting denied parole because of Commissioner Ferguson's personal bias."

During the course of the August 8, 2012 parole interview petitioner, responding to questioning by Commissioner Ludlow, described the events leading up to the fatal Kings County shooting. According to petitioner's description, he had received word that his younger brother and a group of friends " . . . was going somewhere to be involved in

an incident. And I was going to get him so he wouldn't be involved . . ." Petitioner went on to state that when he arrived at the scene of the incident his brother was already part of the group that was attacking an individual and petitioner tried to pull him away. According to petitioner, the individual being assaulted by the group " . . . swung at me, and as a result that's when I reached for a gun and started shooting." Later during the parole interview Commissioner Ludlow turned the questioning over to Commissioner Ferguson and the following colloquy occurred:

"COMMISSIONER FERGUSON: In terms of your conduct, you indicated that you carried a gun because you were bullied and became an angry person.

A [petitioner]: Yes, sir.

COMMISSIONER FERGUSON: So they gave you probation for that. While on probation you get yourself another gun. You described yourself as having been conditioned to respond when you are struck physically to pull out a gun and shoot someone. And you are indicating you went out - - the problem I have is I don't feel you are being honest. And for me, when you come in here and you are not honest that can often be a game ender. When you are saying that you went to play the peacemaker and get your brother and prevent him from being involved in a situation, and while breaking up a fight you take out a weapon on a guy who is already outnumbered 4-to-1, you make it 5-to-1, I can't imagine he's doing too well with four people beating him up, and somehow you get hit and need to shoot him twice. I am not done. You then get incarcerated and while incarcerated for a violent crime, you decide to carry a weapon. You then

introduce the weapon to a the [sic] fight where there's no indication this person had a weapon, and then the confrontation is so violent that an officer is swept up in this confrontation. So I am trying to reconcile that, with you telling us that you are the peacemaker going out to save your brother from a difficult situation, when, it's very clear you established yourself as a violent person with violent propensity. So, I can't reconcile that. How do you?

A: It's a contradiction. But I was never assaulted, I never said that Mr. Middleton [the shooting victim] hit me. I stated when I went to get my brother to grab him, he swung at me, and without thinking I pulled it [the gun] out and started shooting. I never said it was justification. Like I said, I just responded myself to certain situations when I felt threatened, but there was no justification for my actions.

COMMISSIONER FERGUSON: And your conditioned response for someone swinging at you, not even hitting you, is to shoot them twice?

A: That's was [sic] my thought process. I don't think like that any more, but that's how I used to think. It was irrational but that's how I used to think.

COMMISSIONER FERGUSON: Well, I see in your statement you talk about some crimes and violence that happened in your family when you were younger, so I understand when you are growing up and you are young and you feel threatened or afraid, it flight or fight. And, when you are a kid, you can't just pack up your bags and leave, so by

> default in many instances it has to be fight. All right, sir, thank you.

Petitioner's argument to the contrary notwithstanding, the Court finds nothing in Commissioner Ferguson's questioning of petitioner to be indicative of a personal bias warranting reversal of the parole denial determination. Given petitioner's criminal history - both before and after the Kings County shooting incident - it is not surprising to find a parole commissioner skeptical with respect to petitioner's assertion that he left his home (presumably with a loaded handgun) intending to defuse a potentially volatile situation. Commissioner Ferguson was open and direct in expressing his skepticism and soliciting a response from petitioner. The petitioner, for his part, acknowledge the "contradiction" between his criminal history and stated intention to act as a peacemaker on the day of the fatal shooting. In view of the foregoing, the Court finds no basis to disturb the parole denial determination.

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: September 6, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice