September 2021

Decision in Art. 78 proceeding - Fuentes, German (2012-08-06)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of GERMAN FUENTES,

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-12-ST3346 Index No. 8098-11

Appearances: German Fuentes
Inmate No. 92-B-0555
Petitioner, Pro Se
Cayuga Correctional Facility
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Rt. 38A
Moravia, NY 13118

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Cayuga Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated April 19, 2011

to deny petitioner discretionary release on parole. Petitioner is serving an indeterminate term of imprisonment of twenty years to life upon conviction of murder in the second degree. Among the many arguments set forth in the petition, petitioner contends that the Parole Board's determination violates his constitutional rights to due process and equal protection, is arbitrary and capricious, and constitutes an impermissible resentencing. He maintains that the Parole Board failed to consider factors supporting his release, including relocating to Puerto Rico to be with his wife, and work with his son in a restaurant. He indicates that he completed all programming requirements during his incarceration, and obtained his G.E.D. degree in 1993. He criticizes the Parole Board for making only passing reference to his program achievements. In his view, the Parole Board improperly considered only the seriousness of the crime for which he was convicted. The petitioner asserts that there is nothing in the record to support the Parole Board's finding that he has a disregard for human life; and indicates he has no previous criminal record. The petitioner also maintains that he has a clean institutional record, with no disciplinary infractions.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "After a review of the record and interview, the panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and 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. This decision is based on the following factors: your instant offense is murder 2nd in which you shot and killed an unarmed victim as he tried to aid a store owner who was being attacked. Note is made of your sentencing minutes, programming, disciplinary record, limited record, opposition to your release and all other factors. Your violent actions in which you retrieved a shot gun,

> struck the unarmed victim in the face with it then shot him in the back. The merciless and violent nature of your offense indicates the danger you pose. Parole is denied."

Turning first to a procedural issue, the petitioner maintains that the return date of the instant proceeding was improperly adjourned from March 23, 2012 to May 4, 2012, and that respondent's papers are untimely. From a review of the letter dated April 23, 2012 of James M. Stacy, Esq. of the Office of the Attorney General, it appears that the matter was adjourned at the request of the respondent on March 16, 2012. This was confirmed by a member of the staff of the office of the Albany County Supreme Court Clerk, who indicated that the adjournment was granted by the Judge assigned to the March 23, 2012 Albany County Special Term. As such, the Court finds that the adjournment was properly granted, and respondent's answer and opposing papers were timely served. Moreover, had the respondent failed to timely submit its answer, the Court would have directed the respondent to do so pursuant to the provisions of the last sentence of CPLR 7804 (e).

The Court notes that because there was no formal hearing in this instance, the standard of review is not whether the determination is supported by substantial evidence, but rather whether the determination is in violation of lawful procedure, affected by an error of law, arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Pell v Bd. of Educ., 34 NY2d 222 [1974]).

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of De La Cruz v Travis, 10 AD3d 789 [3d Dept., 2004]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3d Dept., 2001]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part

of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]; see also Graziano v Evans, 90 AD3d 1367 [3d Dept., 2011]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to petitioner's minimal disciplinary record and his plans upon release (which included an employment opportunity with his son in Puerto Rico, and eventually opening a print shop). The decision (supra) expressly mentions consideration of petitioner's sentencing minutes and institutional programing.

The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Siao-Pao, 11 NY3d 773 [2008]; Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Matos v New York State Board of Parole, 87AD3d 1193 [3d Dept., 2011]; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The

Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see Matter of Matos v New York State Board of Parole, supra; Matter of Young v New York Division of Parole, 74 AD3d 1681 [3rd Dept., 2010]; Matter of Wise v New York State Division of Parole, 54 AD3d 463 [3rd Dept., 2008]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

Petitioner's claims that the determination to deny parole is tantamount to a resentencing, in violation of the double jeopardy clauses's prohibition against multiple punishments are conclusory and without merit (see Matter of Bockeno v New York State Parole Board, 227 AD2d 751 [3rd Dept., 1996]; Matter of Crews v New York State Executive Department Board of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A, [Sup. Ct., West. Co., 2006]; Matter of Kalwasinski v Paterson, 80 AD3d 1065, 1066 [3d Dept., 2011]; Matter of Carter v Evans, 81 AD3d 1031, 1031 [3d

Dept., 2011]; Matter of Valentino v Evans, 92 AD3d 1054 [3d Dept., 2012]). The fact that an inmate has served his or her minimum sentence does not confer upon the inmate a protected liberty interest in parole release (see Matter of Motti v Alexander, 54 AD3d 1114, 1115 [3rd Dept., 2008]). The Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the fact that the sentencing court set the minimum term of petitioner's sentence (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000]; Matter of Gomez v New York State Division of Parole, 87 AD3d 1197 [3d Dept., 2011]; Matter of Cody v Dennison, 33 AD2d 1141, 1142 [3rd Dept., 2006] lv denied 8 NY3d 802 [2007]; Matter of Burress v Dennison, 37 AD3d 930 [3rd Dept., 2007]).

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court first observes that there is no inherent right to parole under the constitution of either the United States or the State of New York (see Greenholtz v Inmates of the Nebraska Penal and Correctional Complex, 442 US 1, 7 [1979]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 73, supra). It has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate expectation of, release; therefore, no constitutionally protected liberty interests are implicated by the Parole Board's exercise of its discretion to deny parole (see Barna v Travis, 239 F3d 169, 171 [2d Cir., 2001]; Marvin v Goord, 255 F3d 40, 44 [2d Cir., 2001]; Boothe v Hammock, 605 F2d 661, 664 [2d Cir., 1979]; Paunetto v Hammock, 516 F Supp 1367, 1367-1368 [SD NY, 1981]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 75-76, supra, Matter of Gamez v Dennison, 18 AD3d 1099 [3rd Dept., 2005]; Matter of Lozada v New York State Div. of Parole, 36 AD3d 1046, 1046 [3rd Dept., 2007]). The Court,

accordingly, finds no due process violation.

With respect to petitioner's equal protection argument, the Fourteenth Amendment of the Federal Constitution forbids States from denying to any person within their jurisdiction the equal protection of the laws, but does not prevent the States from making reasonable classifications among persons (Western & S.L.I. Co. v Bd. of Equalization, 451 US 648, 68 L Ed 2d 514, 523 101 S Ct 2070 [1981]). Where the action under review does not involve a suspect class or fundamental right, it is not subject to strict judicial scrutiny, but rather is examined using the rational basis standard to determine if the action violated the equal protection clause (see, Massachusetts Bd. of Retirement v Murgia, 427 US 307, 49 L Ed 2d 520, 524, 96 S Ct 2562 and Maresca v Cuomo, 64 NY2d 242, 250). In this instance there is simply no evidence of either selective or disparate treatment or that the respondent's determination was motivated by impermissible considerations (see Giordano v City of New York, 274 F3d 740, 751 [2nd Cir., 2001]). In addition, because "New York courts addressing a state equal protection claim will ordinarily afford the same breadth of coverage conferred by federal courts under the US Constitution in the same or similar matters" (Brown v State of New York, 45 AD3d 15, 20-21 [2007 [3rd Dept., 2007], quoting Brown v State of New York, 9 AD3d 23, 27 [2004]), the Court discerns no violation of NY Const art 1 § 11. The Court finds the argument to have no merit.

With regard to petitioner's argument concerning the Parole Board's consideration of confidential records, the Court observes that the Parole Board has the authority and obligation to collect and maintain information concerning prison inmates, including that which may be deemed confidential (see Executive Law § 259-k and 9 NYCRR 8000.5).

Access to such records by inmates is governed by 9 NYCRR 8000.5 (c). In this instance, there is no evidence that he made the necessary request for such records (see Matter of Cruz v Travis, 273 AD2d 648, 648 [3d Dept., 2000]).

In his reply, the petitioner argues that the 2011 amendments to the Executive Law should apply to the instant proceeding (see L 2011 ch 62, Part C, Subpart A, § 38-b, et seq.). The amendment to Executive Law 259-c (4), adopted on March 31, 2011, was made effective on October 31, 2012 (see L 2011, ch 62, Part C, Subpart A, § 49-[f]). The Court finds that does not apply to the instant determination, dated April 19, 2011 (see Matter of Hamilton v New York State Division of Parole (943 NYS2d 731, Platkin, Richard M.,Sup. Ct., Albany Co., 2012).[1]

In addition, the Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

The Court has reviewed petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of

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[1]Executive 259-i (2) (c) was also amended in 2011, to incorporate into one section the eight factors which the Parole Board was to consider in making release determinations (see L 2011 ch 62, Part C, Subpart A, § 28-f-1). This amendment was effective immediately upon its adoption on March 31, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49). However, this amendment did not result in a substantive change in the criteria which the Parole Board should consider in rendering its decision (see Hamilton v New York State Division of Parole, supra).

lawful procedure, affected by an error of law, arbitrary and capricious, or constitute an abuse of discretion. The petition must therefore be dismissed.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

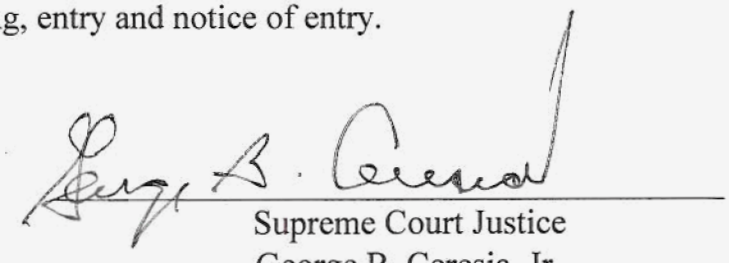
Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: August 6 , 2012
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated January 9, 2012, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated April 26, 2012, Supporting Papers and Exhibits
3. Petitioner's Response to Opposition sworn to May 8, 2012