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Matter of Germenis v New York State Div. of Parole
2007 NY Slip Op 31871(U)
June 28, 2007
Supreme Court, Albany County
Docket Number: 0087307/2007
Judge: George B. Ceresia
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[* 1]

STATE OF NEW YORK
SUPREME COURT | COUNTY OF ALBANY

In The Matter of SPYRO GERMENIS,

Petitioner,

-against-

NEW YORK STATE DIVISION 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 # 01-07-ST7464 Index No. 873-07

Appearances:

Spyro Germenis
Inmate No. 83-B-1433
Petitioner, Pro Se
Woodbourne Correctional Facility
99 Prison Road, P.O. Box 1000
Woodbourne, NY 12788-1000

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Steven H. Schwartz,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Woodbourne Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated September 6, 2005 to deny petitioner discretionary release on parole. Petitioner is serving a term of fifteen years to life on a conviction of murder second degree involving the death of his girlfriend. Among the many arguments set forth in the petition, the petitioner points out that this was his fifth appearance before the Parole Board. The petitioner attributes his crime to consumption of an illegal drug, lysergic acid diethyl amide (LSD). He indicates that he received a certificate in ministry from the New York State Theological Seminary. According to the petitioner, he was instrumental in establishing a ministry of the Greek Orthodox Church in the New York State prison system. He avers that he has completed three hundred hours of substance abuse therapy and aggression replacement therapy. He has been a facilitator for the aggression replacement therapy program. He has been a trainer and facilitator for the alternatives to violence program. He underwent eighty hours of training as inmate program associate. He was granted an outside work pass and worked in the administration building at Woodbourne Correctional Facility. He has received three superintendent's commendations. He maintains that he has had an exemplary disciplinary record while in prison, and that he has never been disciplined for a violent act. He has received a number of letters of recommendation, some from prominent members of the community.

The petitioner asserts that the Parole Board relied upon incorrect information in the

pre-sentence report. He argues that the decision of the Parole Board is, in his words, "bare and conclusory", and in violation of Executive Law § 259-i. In his view, the Parole Board, in rendering its determination, failed to articulate which factor or factors were found to be dispositive. He maintains that the determination was void of a reasoned explanation. He criticizes the Parole Board for violating his rights to equal protection and due process.

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

> "Upon a review of the record, personal interview and due deliberation, it is the determination of the panel that parole is denied. You are presently incarcerated upon your conviction of murder 2nd by plea, wherein you repeatedly stabbed your girlfriend, causing her death. You then hid her body and, days later, wrapped her body in plastic, attached a weight and threw it into the bay. It is noted that this offense is your only crime of conviction. The panel has considered your programming and disciplinary record since your last board appearance, including a Tier III and a Tier II infraction. Also considered are the documents submitted on your behalf, including numerous positive letters of support. Discretionary release must again be denied. You committed a vicious and violent crime evidencing a callous disregard for the sanctity of human life. Your brutal behavior was planned and further aggravated by your subsequent cover-up efforts. All factors considered, the panel concludes that you are a continuing risk to public safety and your continued incarceration is warranted. Release at this time would deprecate the severity of your conduct, undermine respect for the law and tend to trivialize the tragic loss of life which you caused."

As stated in Executive Law §259-i (2) (c) (A):

> "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 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; (ii) performance, if any, as a participant in a temporary release program; (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 []; (v) any statement made to the board by the crime victim or the victim's representative []" (Executive Law §259-i [2] [c] [A]).

"Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable" (Matter of Sinopoli v New York State Board of Parole, 189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v. New York State Bd. of Parole, 157 AD2d 944). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (see Ristau v. Hammock, 103 AD2d 944 [3rd Dept., 1984]). 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]). 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 such factors as petitioner's institutional programming, his disciplinary record, and letters submitted on his behalf. The Parole Board afforded the petitioner an opportunity to speak in favor of his release. The parole 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 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 crime and its violent nature (see Matter of Weir v. New York State Division of Parole, 205 AD2d 906, 907 [3rd Dept., 1994]; Matter of Sinopoli v. New York State Board of Parole, 189 AD2d 960, supra; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996). 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 Farid v Travis, supra; Matter of Moore v New York State Bd. of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3rd Dept., 2001]). 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).

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court observes that it has been repeatedly held that a constitutionally protected liberty interest does not arise under Executive Law § 259-i, since it does not create an entitlement to, or legitimate expectation of release (see Barna v Travis, 239 F3d 169 [2nd Cir., 2001]; Marvin v Goord, 255 F3d 40 [2nd Cir., 2001], at p. 44; Paunetto v Hammock (516 F Supp 1367 [US Dist. Ct., SD NY, 1981]; Washington v White, 805 F Supp 191 [SDNY, 1992]). 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]).

With regard to petitioner's argument that the Appeals Unit failed to issue a timely decision, the Court observes that such a failure does not operate to invalidate the underlying administrative decision. The sole consequence is to permit the petitioner to deem his or her administrative remedy to be exhausted, and enable the petitioner to immediately seek judicial review of the underlying determination (see 9 NYCRR § 8006.4 [c]; Graham v New York State Division of Parole, 269 AD2d 628 [3rd Dept, 2000], lv denied 95 NY2d 753; People ex rel. Tyler v Travis, 269 AD2d 636 [3rd Dept., 2000]).

The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New

York Division of Parole, 294 AD2d 726 [3rd Dept., 2002]; Matter of Jones v Travis, 293 AD2d 800, 801 [3rd Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3rd Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3rd Dept., 2006]).

There is no requirement that the deliberations of the Parole Board be recorded (see Executive 259-i [6]; Matter of Collins v Hammock, 96 AD2d 733 [4th Dept., 1983]).

With respect to petitioner's arguments concerning alleged erroneous information in the presentence report, It is well settled that "a defendant is not permitted to collaterally attack a presentence report" (see Matter of Cox v New York State Division of Parole, 11 AD3d 766, 767-768 [3rd Dept., 2004], quoting Matter of Salerno v Murphy, 292 AD2d 837, 837-838 [2002], lv denied 98 NY2d 607 [2002], and citing Matter of Sciaraffo v New York City Dept. of Probation, 248 AD2d 477, 477 [1998]). For this reason, the Court finds that petitioner's arguments concerning alleged errors in the presentence report are of no merit.

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 finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The petition must therefore be dismissed.

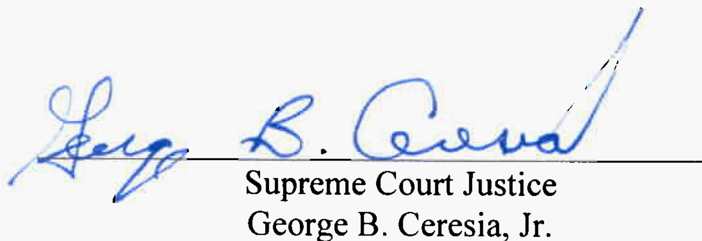
Accordingly, it is

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

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: June 28, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated February 1, 2007, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated March 15, 2007, Supporting Papers and Exhibits
3. Verified Reply dated April 3, 2007
4. Respondent's Letter dated April 10, 2007