September 2021

Decision in Art. 78 proceeding - Greathouse, Leon (2016-08-15)

Matter of Greathouse v New York State Bd. of Parole
2016 NY Slip Op 31549(U)
August 15, 2016
Supreme Court, St. Lawrence County
Docket Number: 147334
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
LEON GREATHOUSE,#08-A-2920,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2016-0159.03
INDEX #147334

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

- X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition (denominated Complaint) of Leon Greathouse, verified on March 17, 2016 and filed in the St. Lawrence County Clerk's office on March 24, 2016. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging the May 2015 determination denying him discretionary parole release and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on March 28, 2016 and has received and reviewed respondent's Answer and Return verified on May 20, 2016, including confidential Exhibits B, C and D. The Court has also received and reviewed the petitioner's reply thereto.

While on lifetime parole for an indeterminate sentence of incarceration for three (3) years to life, the petitioner was sentenced as a second felony offender following his plea of guilt to one count of Attempted Criminal Sale of a Controlled Substance in the Third Degree. The petitioner was sentenced on May 23, 2008 to a determinate term of incarceration of seven (7) years with three (3) years post-release supervision. The petitioner appeared for the second time before the Parole Board on May 20, 2015. Following that appearance, Petitioner was denied discretionary parole release and it was directed that he be held for an additional 24 months. The parole denial determination reads 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 SARATOGA COUNTY IN SEPTEMBER 2008, INVOLVED ATT. CSCS 3RD.

YOUR CRIMINAL HISTORY INDICATES YOU WERE ON PAROLE AT THE TIME ABOUT THIRTY (30) MONTHS FROM A 2002 CPCS 3RD.

YOUR INSTITUTIONAL PROGRAMMING INDICATES PROGRESS AND ACHIEVEMENT WHICH IS NOTED.

YOUR DISCIPLINARY RECORD REFLECTS ONE (1) TIER 2, AND ONE (1) TIER 3 REPORTS. YOU HAVE SERVED SHU TIME.

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, AND UNDERMINE RESPECT FOR THE LAW." Resp. Ex. F.

An appeal of the parole board's determination was filed on behalf of the petitioner on October 26, 2015. Thereafter, the Board of Parole Appeals Unit upheld the determination on December 1, 2015.

Petitioner challenges the denial of parole release alleging that the parole board failed to properly consider all of the statutory factors, specifically that the petitioner received his certificate of earned eligibility pursuant to Correction Law §805. Petitioner faults the parole board for failing to appreciate the positive steps he has made while incarcerated and further failed to consider the petitioner's plans upon release.[1] Petitioner further alleges that the

1 The Court notes that in the petition, the petitioner alleges that "his release plans include living with his father, or a sister, in Charleston, South Carolina." Petition, ¶54. However, during the parole interview, the petitioner advised that he would reside in the Bronx with the mother of his daughter, Ms. Alston. Resp. Ex.E, p.6.

parole board erroneously considered his instant offense, Attempted Criminal Sale of a Controlled Substance in the Third Degree, which had already been considered at the initial parole hearing. Petitioner asserts that the pursuant to 9 NYCRR §8002.3(b), the parole board was foreclosed from considering factors previously considered at the initial parole board appearance and utilizing the same information, particularly the details of the instant offense, is tantamount to resentencing. Similarly, the petitioner asserts that the parole board afforded weight to an arrest in 2000 for a charge of Murder that has not been indicted and to which the petitioner vehemently denies involvement. The petitioner alleges that there are compelling reasons to grant him parole and the parole board's denial of same is arbitrary and capricious. Furthermore, petitioner alleges the 24 month hold is excessive.

Respondent argues that the petitioner should be dismissed in its entirety insofar as the parole board is afforded great discretion in determining parole release provided that the board considers the relevant factors as described in Executive Law §259-i(c)(A). Respondent argues that there is no requirement that the parole board give equal weight to each factor nor does an inmate's exemplary institutional record compel parole release. Respondent asserts that the petitioner's reliance upon 9 NYCRR §8002.3(b) is misplaced as the language petitioner cited has been modified. Respondent further asserts that the denial of parole is not akin to double jeopardy and there is no "right" to discretionary parole release.

Executive Law §259-i(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 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 had been a showing of irrationality bordering on impropriety. *See Silmon v. Travis*, 95 NY2d 470; *Hamilton v. New York State Division of Parole*, 119 AD3d 1268; *Vasquez v. Dennison*, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. 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 Jackson v. Evans*, 118 AD3d 701, *Nankervis v. Dennison*, 30 AD3d 521 and *Zane v. New York State Division of Parole*, 231 AD2d 848.

To the extent Petitioner purports to rely on *King v. New York State Division of Parole*, 190 AD2d 423, *aff'd* 83 NY2d 788, the Court finds such reliance to be misplaced. In *King*, the Appellate Division, First Department, not only determined that the Parole Board improperly considered matters not within its purview (penal policy with respect to convicted murders) but also that the Parole Board failed "to consider and fairly weigh all of the information available to them concerning petitioner that was relevant under the statute, which clearly demonstrates his extraordinary rehabilitative achievements and would appear to strongly militate in factor of granting parole." *Id.* at 433. The appellate-level court in *King* went on to note that the only statutory criterion referenced

by the Board in the parole denial determination was the seriousness of the crime underlying Mr. King's incarceration (felony murder of an off-duty police office during the robbery of a fast food restaurant). According to the Appellate Division, First Department, "[s]ince ... the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself." *Id*. at 433.

This Court (Supreme Court, Saint Lawrence County) first notes that Mr. King had no prior contacts with the law. *Id*. at 426. Petitioner, on the other hand, previously served three (3) years of incarceration with DOCCS for Criminal Possession of a Controlled Substance in the Third Degree and, in fact, committed in the instant offense while on parole release. In addition, although the *King* court did not reference Mr. King's disciplinary record, it characterized his overall prison record as "exemplary." *Id*. at 425. The parole denial determination in *King*, as quoted by the Appellate Division, First Department, described Mr. King's institutional adjustment as "excellent." *Id*. at 430. In the case at bar, however, Petitioner's prison disciplinary record, as alluded to in the May 2015 parole denial determination, includes one Tier II infraction and one Tier III infraction which resulted in a disposition of SHU. It is clear, therefore, that the May 2015 parole denial determination was not based exclusively on the nature of the crimes underlying Petitioner's incarceration but, rather, was also based on his record of prior drug related felony offenses and his less than stellar prison disciplinary record despite the short period of time since his initial appearance before the parole board.

In any event, in July of 2014, the Appellate Division, Third Department - whose precedent is binding on this Court - effectively determined that the "aggravating circumstances" requirement enunciated by the First Department in *King* does not represent the state of the law in the Third Department. *See, Hamilton v. New York*

State Division of Parole, 119 AD3d 1268. In *Hamilton*, it was noted that the Third Department "has repeatedly held - both recently and historically - that, so long as the [Parole] Board considers the factors enumerated in the statute [Executive Law §259-i(2)(c)(A)] it is 'entitled . . . to place a greater emphasis on the gravity of [the] crime' (*Matter of Montane v. Evans*, 116 AD3d 197, 203 (2014), *lv granted* 23 NY3d 903 (20144) [internal quotation marks and citations omitted]'". *Id.* at 1271 (other citations omitted). After favorably citing nine Third Department cases decided between 1977 and 2014, the *Hamilton* court ended the string of cites as follows: "... but *see Matter of King v. New York State Div. of Parole*, 190 AD2d 423, 434 (1993), *aff'd on other grounds* 83 NY2d 788[2](1994) [a First Department case holding, in conflict with our precedent, that the Board [of Parole] may not deny discretionary release based solely on the nature of the crime when the remaining statutory factors are considered only to be dismissed as not outweighing the seriousness of the crime." 119 AD3d at 1272.

Petitioner's above arguments notwithstanding, 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 Montane v. Evans*, 116 AD3d 197; *see also Valentino v Evans*, 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination

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2 The Court of Appeals in *King* only referenced the fact that "one of the [Parole] Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place. Consideration of such factors is not authorized by Executive Law §259-i." 83 NY2d 788, 791. The Court of Appeals, however, did not address that aspect of the Appellate Division, First Department, decision in *King* holding that a parole denial determination must be based upon a showing of some aggravating circumstances beyond the inherent seriousness of the underlying crime.

> "... 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 (internal citations omitted)." *Comfort v. New York State Division of Parole*, 68 AD3d 1295, 1296.

The petitioner puts great emphasis on the fact that he had received a certificate of earned eligibility pursuant to Correction Law §805 for which he asserts the parole board failed to consider.

Correction Law §805 reads, in pertinent part:

> "...Notwithstanding any other provision of law, an inmate who is serving a sentence with a minimum term of not more than eight years and who has been issued a certificate of earned eligibility, shall be granted parole release at the expiration of his minimum term or as authorized by subdivision four of section eight hundred sixty-seven of this chapter **unless** the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society. Any action by the commissioner pursuant to this section shall be deemed a judicial function and shall not be reviewable if done in accordance with law (emphasis added)."

Earned eligibility does not preclude review of all the relevant factors as described in Executive Law §259-i(c)(A) and in fact, the parole board is required "after considering the documents and information set forth in paragraphs (a)(1)-(12) of [§8002.3], [to] apply the standard set forth in section 8002.1(b)." 9 NYCRR §8002.3(c). The parole board clearly found that the exception to earned eligibility release was warranted.

In the case at bar, reviews of the Parole Board Report and transcript of Petitioner's May 20, 2015 Parole Board appearance reveal that the Board had before it information with

respect to the appropriate statutory factors, including Petitioner's educational and therapeutic programming records, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record and his future plans regarding release, as well as information with respect to the circumstances of the crimes underlying his incarceration and prior criminal record. The Court, moreover, finds nothing in the hearing transcript to suggest that the Parole Board denied the Petitioner an opportunity to answer questions or provide insight into how and why he believed that he would be a good candidate for release. Indeed, the Petitioner was forthright when he indicated that he understood that his use of narcotics in the past led to his criminal behavior and he wanted to seek employment training in a field that would provide gainful employment.

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 the 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 and his prior criminal record (including that the instant offense occurred while he was on parole for a previous similar crime). *See Neal v. Stanford,* 131 AD3d 1320 and *Confoy v. New York State Division of Parole*, 173 AD2d 1014.

The Petitioner asserts that the Parole Board's determination of a 24 month hold was excessive insofar as the Petitioner has received his certificate for earned eligibility and he should have only received six or twelve months hold. In light of the foregoing factors discussed relative to the Petitioner's previous criminal history, including the instant offense occurring while he was on parole release for a previous felony sentence,

the Board's imposition of a 24 month hold is not unduly excessive. *See Shark v. New York State Division of Parole*, 110 AD3d 1134, 1135, *lv dismissed* 23 NY3d 933; *see also Smith v. New York State Division of Parole*, 81 AD3d 1026.

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: August 15, 2016
Indian Lake, New York

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S. Peter Feldstein
Acting Justice, Supreme Court