September 2021

Decision in Art. 78 proceeding - Hill, Jeffrey (2007-06-08)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JEFFREY HILL,

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 # 01-06-ST7219 Index No. 7540-06

Appearances: Jeffrey Hill
Inmate No. 82-A-2269
Petitioner, Pro Se
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Kelly L. Munkwitz,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently residing at Auburn Correctional Facility, has

commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated November 15, 2005 to deny petitioner discretionary release on parole. Petitioner is serving a term of twenty five years to life on a conviction of second degree murder and a term of eight years three months to twenty five years on a conviction of first degree manslaughter. Among the many arguments raised by petitioner (including those advanced in his administrative appeal) petitioner asserts that the respondent improperly failed to timely render a decision on his administrative appeal. He asserts that the Parole Board failed to consider the statutory factors under Executive Law § 259-i. In his view, the determination was based solely on the seriousness of the crimes for which he was incarcerated. He maintains that the Parole Board failed to consider his accomplishments while incarcerated[1], or his plans upon being released. He takes the position that the Parole Board improperly re-sentenced him to an additional term of imprisonment, and that this constituted a violation of the double jeopardy clause of the United States Constitution. In the petitioner's view, the Parole Board erred in not providing guidance as to how he could qualify for parole in the future. Petitioner also asserts that the Parole Board failed to provide anything other than general reasons for its determination, and that this violated his rights to due process.

Petitioner maintains that the Parole Board erred in its decision when it stated that his disciplinary record included multiple assaults. He asserts that the parole officer who

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[1]Petitioner provided a list of his activities while he has been incarcerated which include all of the following: porter work, RSAT program, Mess Hall/Food Service work, industry (plate shop work), store room clerk, mason's assistant, landscape laborer, tailor, soap shop worker, IPA, furniture shop worker, administrative clerk, student in printing, and Phase III Assessment.

interviewed him in advance of the Parole Board interview violated Division of Parole regulations by not interviewing him a full sixty days prior to the Parole interview. He further argues that the same parole officer violated his rights by failing to permit the petitioner to review certain documents including his criminal history form, pre-sentence report and statements of the District Attorney. He indicates that he has made plans for entry into a drug and alcohol treatment program when he is released; and that he been promised a job.

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

> "After careful review of the record, this interview, and due deliberation, parole is denied for the following reasons. You are currently serving concurrent sentences of the convictions of Murder 2nd and Manslaughter 1st, whereby records indicate an elderly female was brutally beaten in her apartment subsequently, causing her death. You have a criminal history that is assaultive and larcenous in nature. During this term of incarceration, your institutional adjustment has been unacceptable. The Panel notes multiple disciplinary infractions for assaultive and out of control behavior which you minimized during interview. You accepted no responsibility for your violent actions in the community as well as in the institution. All factors considered, early release is unwarranted."

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 his plans upon release. 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 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 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), 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 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).

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing, 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., Westchester Co., 2006]). Moreover, it is well settled that 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 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]).

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]).

With respect 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]).

As noted, petitioner maintains that the Parole Board's decision misstates the facts by indicating that he has incurred multiple disciplinary infractions for assaults. As set for above, the Parole Board actually stated that petitioner had multiple disciplinary infractions for "assaultive and out of control behavior". In fact, according to the inmate status report, petitioner has incurred 21 Tier II infractions and 18 Tier III infractions, which include fighting, harassment and making threats. Contrary to petitioner's contentions, the comment by the Parole Board appears to be accurate.

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.

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).

Petitioner's argument that the Parole Board is required to advise petitioner and/or provide guidance with regard to the programs he should take, or rehabilitative efforts he should engage in to increase his chance for release at a future parole interview has no merit (see Executive Law § 259-i [2] [a]; 9 NYCRR § 8002.3; Boothe v Hammock, 605 F2d 661 [2nd Cir, 1979]; Matter of Freeman v New York State Division of Parole, 21 AD3d 1174 [3rd Dept., 2005]).

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.

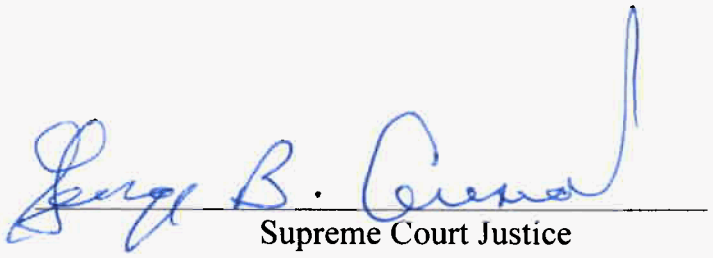
Accordingly, it is

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 8, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated November 20, 2006, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated March 14, 2007, Supporting Papers and Exhibits
3. Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General, dated March 14, 2007
4. Petitioner's Affidavit In Opposition to Respondent's Answer/Affirmation, sworn to March 17, 2007