September 2021

Decision in Art. 78 proceeding - Holland, Theresa (2011-03-01)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of THERESA HOLLAND,

Petitioner,

-against-

ANDREA EVANS, CHAIRMAN
OF 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 # 01-10-ST2045 Index No. 7323-10

Appearances: Theresa Holland
Inmate No. 86-G-0215
Petitioner, Pro Se
Albion Correctional Facility
3595 State School Road
Albion, NY 14411

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Justin C. Levin,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Albion Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated March 9, 2010 to deny petitioner discretionary release on parole. Petitioner is serving two indeterminate

concurrent terms of 25 years to life upon conviction after trial of murder in the second degree and kidnaping in the first degree. The petitioner contends that the decision of the Parole Board to deny release and to order her held for twenty four months was excessive and "insufficiently rational to be allowed to stand". She maintains that the Parole Board failed to follow the requirements of Executive Law § 259-i (2) (c). In her view, the Parole Board did not give sufficient weight to her institutional programing, disciplinary record and her plans upon being released. The latter includes taking up residence with Providence House in Brooklyn, New York. She points out that she has had a clean disciplinary record for the past four months. She criticizes the Parole Board for failing to consider her sentencing minutes. In addition, she maintains that the Parole decision failed to address the proper statutory factors.

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

> "This panel has concluded that your release to supervision is not compatible with the welfare of society and therefore, parole is denied. This finding is made following a personal interview, record review and deliberation. Of significant concern is the bizarre and violent nature of your instant offense of murder second and kidnaping first. This involved the in-concert kidnaping of a man for ransom. The victim was bound, gagged, beaten and had a pipe inserted in his rectum. This occurred over several days during which he died.
>
> "Positive factors considered include program accomplishments and document submissions. Your receipt of three disciplinary violations is also noted. In addition, your comments during the interview show little insight as to why you participated in this crime. To grant your release at this time would so deprecate the seriousness as to undermine respect for the law. The probability you will live and remain at liberty without violating the law is not found to be reasonable, given the factors noted above."

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 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]). If the Parole Board's decision is made in accordance with the statutory requirements, the Board's determination is not subject to judicial review (Matter of De La Cruz v Travis, supra). 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, vocational training, her disciplinary record, and her 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 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 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 Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [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).

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]; Matter of Mentor v New York State Division of Parole, 67AD3d 1108, 1109 [3rd Dept., 2009]).

With regard to the Parole Board's failure to consider the minutes of petitioner's sentencing, it is now well settled that this does not mandate a new hearing if, as here, the minutes were not available for review (see Matter of Freeman v Alexander, 65 AD3d 1429, [3rd Dept., 2009]; Matter of Blasich v New York State Division of Parole, 68 AD3d 1339, 1340-1341 [3rd Dept., 2009]; see also Matter of Lebron v Alexander, 68 AD3d 1476, 1477 [3rd Dept., 2009] [Held: where the Parole Board is unable to consider the sentencing minutes a favorable presumption does not arise]; Matter of Andreo v Alexander, 72 AD3d 1178 [3rd

Dept., 2010]).

In this instance, the Facility Parole Officer of Albion Correctional Facility made two requests to the sentencing court for the sentencing minutes. He did not receive a response. Counsel for the Division of Parole made two more requests for the sentencing minutes. On December 9, 2010 Counsel for the Division of Parole received an affidavit from Principal Court Reporter Frank Rizzo confirming that a diligent effort had been made to locate the sentencing minutes but that they could not be located; and that the court reporter who had taken the stenographic notes of the sentencing was no longer employed by the court system. The Court finds that the respondent made a diligent search for the sentencing minutes, and is unable to consider them for reasons beyond the Parole Board's control. For this reason petitioner's argument has no merit.

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 lawful procedure, affected by an error of law, irrational or arbitrary and capricious. 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: March 1, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated November 4, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated January 3, 2011, Supporting Papers and Exhibits

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SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit B, Presentence Investigation Report, and respondent's Exhibit E, Confidential Portion of Inmate Status Report, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: March 1, 2011
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.