September 2021

Decision in Art. 78 proceeding - Johnson, Rondell (2010-12-02)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of RONDELL JOHNSON,

Petitioner,

-against-

ANDREA D. EVANS, CHAIRMAN/CEO
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-ST1691 Index No. 3823-10

Appearances: Rondell Johnson
Inmate No. 98-B-1583
Petitioner, Pro Se
Southport Correctional Facility
236 Institution Road
P.O. Box 2000
Pine City, N Y 14871

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State of New York
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The Capitol
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Southport Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated June 2, 2009 to deny petitioner discretionary release on parole. The petitioner is serving an

indeterminate term of imprisonment of ten to twenty years on a conviction of the crime of first degree burglary, with a concurrent term of two and one half to five years for second degree assault. Among the many arguments set forth in the petition, petitioner indicates that the respondent failed to timely issue a decision with respect to his administrative appeal. He maintains that the sole factor the Commissioners considered was the seriousness of the offenses for which he is incarcerated. In his view, the Parole Board failed to consider other factors under Executive Law § 259-i. He maintains that the actions of the Parole Board were tantamount to a re-sentencing. The petitioner points out that he has completed several programs during the course of his incarceration, including ART, ASAT/RSAT, pre-GED and GED. While incarcerated he has served as a porter and a student in independent study. In his words, he has "never refused a program". His post-release plan is to live with his mother in Rochester, New York. He is a fitness trainer and plans, upon being released, to be employed in a gym. With regard to the seriousness of his offenses, he contends that he has served an excessive amount of time (over 11 years) for his crimes, particularly since he only shot his victim in the wrist; and that in any event the seriousness of his crimes may not properly serve as the sole basis for denial of release. The petitioner maintains that the parole interview was carried out in an improper manner in that it was conducted by video conference rather than having him personally appear before the Parole Board. He contends that this deprived him of his right to confront and cross-examination witnesses and his "accusers".

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 I.O.'s is/are burglary 1st and assault 2d in which you entered a dwelling while armed with a gun and shot the victim. Then while incarcerated you acted in concert and caused physical injury to a victim. Note is made of your sentencing minutes, poor disciplinary record and all required factors. You continue to have serious disciplinary problems, a poor parole plan and have continued drug related issues. Parole is denied."

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, his "somewhat" improved disciplinary record, and his plans upon release. He was afforded ample time to make a statement in support of his 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), 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 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).

With regard to petitioner's claim that the determination to deny parole is tantamount to a re-sentencing, the Court finds the assertion to be factually unsupported, 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]). 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 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 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, 67 AD3d 1108 [3rd Dept., 2009]).

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).

With respect to petitioner's objection to conducting the parole interview by video conference, it is well settled that "the use of teleconferencing technology in conducting a parole interview 'is consistent with the statutory requirement that petitioner be "personally

interview[ed]"'" (Mack v Travis, 283 AD2d 700, 701 [3d Dept., 2001], app dismissed 96 NY2d 896 [2001], quoting Matter of Vanier v Travis, 274 AD2d 797, 798, quoting Executive Law § 259-i [2] [a]; see also Matter of Webb v Travis, 26 AD3d 614 [3d Dept. 2006]).

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: December 2, 2010
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated June 28, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated September 22, 2010, Supporting Papers and Exhibits
3. Petitioner's Reply Letter dated September 29, 2010

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SUPREME COURT COUNTY OF ALBANY

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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 D, 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: December 2, 2010
Troy, New York

George B. Ceresia
Supreme Court Justice
George B. Ceresia, Jr.