September 2021

Decision in Art. 78 proceeding - Mackenzie, John (2015-10-02)

Mackenzie v Stanford
2015 NY Slip Op 32947(U)
October 2, 2015
Supreme Court, Dutchess County
Docket Number: 2789/15
Judge: Maria G. Rosa

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

JOHN MACKENZIE,

Petitioner,

-against-

TINA M. STANFORD, Chair of the New York State Parole Board,

Respondent.

DECISION, ORDER AND JUDGMENT

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The following papers were read and considered on this Article 78 petition.

NOTICE OF PETITION
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Petitioner brought this proceeding pursuant to CPLR Article 78 to review a determination of the Board of Parole denying his request for parole release. In 1976 petitioner was convicted after a jury trial of murder in the second degree, manslaughter in the first degree, burglary in the second degree, grand larceny in the second degree, criminal possession of a weapon in the third degree and other lesser offenses. Judgment was reversed on appeal, but in 1981 he was again convicted of the same offenses and sentenced to an aggregate term of 25 years to life. The convictions stemmed from the petitioner's participation in a burglary during which he shot and killed a police officer. Petitioner first became eligible for parole release in June 2000. On December 9, 2014 he appeared before the parole board for his eighth appearance. He was 68 years old and had been incarcerated nearly 40 years for his offenses of conviction, almost 15 years beyond the controlling minimum term of his indefinite sentence.

Pursuant to Executive Law §259-i(2)(c), the New York State Board of Parole is required to consider a number of statutory factors in determining whether an inmate should be released to parole. See Matter of Miller v. NYS Div. of Parole, 72 AD3d 690 (2nd Dept. 2010). The parole board must

also consider whether "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 the law." 9 NYCRR 8002.1. A parole board is not required to give equal weight to each statutory factor, nor is it required specifically to articulate every factor considered. See Matter of Huntley v. Evans, 77 AD3d 945 (2nd Dept. 2010). It is further permitted to place a greater emphasis on the gravity of offense committed. See Matter of Serrano v. Alexander, 70 AD3d 1099, 1100 (3rd Dept. 2010). However, in the absence of aggravating circumstances, a parole board may not deny release solely on the basis of the seriousness of the offense. Huntley v. Evans, 77 AD3d at 947; King v. New York State Div. of Parole, 190 A.D.2d 423 (1st Dept. 1993). Moreover, while the board need not consider each guideline separately and has broad discretion to consider the importance of each factor, the board must still consider the guidelines. Executive Law § 259–i(2)(a). Finally, the board must inform the inmate in writing of the factors and reasons for denial of parole and "[s]uch reasons shall be given in detail and not in conclusory terms." Executive Law §259-i(2)(a); Malone v. Evans, 83 AD3d 719 (2nd Dept. 2011). A determination by a parole board whether or not to grant parole is discretionary, and if made in accordance with the relevant statutory factors, is not subject to judicial review absent "a showing of irrationality bordering on impropriety." Matter of Russo v. NYS Bd. of Parole, 50 NY2d 69, 77 (1980).

Executive Law §259-c(4) was amended in 2011 to require the board to establish new procedures to use in making parole determinations. The statutory amendment was intended to have parole boards focus on an applicant's rehabilitation and future rather than giving undue weight to the crime of conviction and the inmate's pre-incarceration behavior. To assist the members of the board in taking this approach when making parole determinations, the amendment required the establishment of written guidelines incorporating risk and needs principles to measure an inmate's rehabilitation and likelihood of success upon release. See Ramirez v. Evans, 118 AD3d 707 (2nd Dept. 2014). In response, the board of parole adopted the COMPAS (Correctional Offender Management Profiling for Alternative Sanction) assessment tool. A COMPAS assessment was prepared in connection with petitioner's December 9, 2014 appearance before the parole board.

At petitioner's parole hearing, the board questioned him about his crimes of conviction, length of incarceration, acceptance of responsibility and remorse for his offenses, institutional achievements and prospects for employment and housing upon release. Petitioner discussed with the board that he began developing a victim's advocacy program in 1983, and that in 1997 he started the first victim awareness program in Green Haven Correctional Facility in honor of the police officer he had killed. The board acknowledged that petitioner had received a Bachelor of Science in Commerce from Niagra University in 1987 and Associate Degrees in Science and Arts from the Clinton Community College in 1979. The board further noted petitioner's achievements including adult peer counseling, pre-release counseling, working as a typist, doing legal research, welding, substance abuse program participation and as an apprentice baker. Petitioner received in excess of 60 letters of recommendation for release on his behalf including letters from individuals working in law enforcement. The board commented that petitioner's disciplinary record of no infractions for a 34 year period was remarkable. The COMPAS risk assessment designated petitioner as a low risk

for felony violence, arrest or absconding. Following the hearing, the board issued a decision denying parole. The decision recognized that the offenses of conviction were petitioner's only felonies of record, that his institutional programming indicated progress and achievement, that he had a clean disciplinary record and that there was significant community support for his release. The decision also noted "significant community opposition" to his release. Stating that the requisite statutory factors had been considered including petitioner's risk to the community, rehabilitation efforts and his needs for successful community re-entry, the board denied release. The stated reason was that it would not be compatible with the welfare of society at large and would depreciate the seriousness of the instant offenses and undermine respect for the law.

The record before the court reveals that the parole board considered the statutory factors set forth in Executive Law §259-i. However, the final determination to deny parole release and its conclusory statement that petitioner's release would not be compatible with the welfare of society and would depreciate the seriousness of his crimes of conviction is not supported by an application of the factual record to the statutory factors. Petitioner had no felony record at the time of his conviction, unquestionably exhibited acceptance of responsibility and remorse for his actions, had an exemplary record of institutional achievements, had no institutional infractions for over 35 years and his COMPAS assessment indicated he was a low risk for re-arrest or criminal involvement upon release. It found substance abuse or personality disorders to be unlikely and that he has family support and financial prospects upon release.

The court is cognizant that it is not its function to substitute its own judgment for that of a parole board. See generally, Matter of Cowan v. Kern, 41 NY2d 591 (1977). However, where an administration agency reaches a conclusion entirely unsupported by the factual record before it, a rational basis for the determination does not exist. It is clear to this court that the parole board's determination was based exclusively on the severity of petitioner's offense. A parole board is not entitled to exclusively rely on the severity of an offense to deny parole, as such a determination contravenes the discretionary scheme mandated by statute and constitutes an unauthorized re-sentencing of the defendant. See Matter of King v. NYS Division of Parole, 190 AD2d 423 (1st Dept. 1993). The parole board is not allowed to employ its own penal philosophy in making determinations as such factor is in encompassed within Executive Law §259-i(2)(c). To the extent that the board's determination here is based upon letters of community opposition, respondent has failed to demonstrate a rational basis for the challenged determination. Neither the letters nor a description of their content is before this court. Petitioner suggested at his parole hearing that the letters were written from police benevolent association groups who did not know the victim or petitioner and have no first-hand knowledge of the facts underlying his conviction. Accordingly, any such letters would reflect opposition to release based on penal philosophy; namely that individuals convicted of killing a police officer should never obtain parole release. This is not law and members of the parole board are not permitted to apply their own penal philosophy in determining whether release is appropriate. Thus, it is beyond cavil that the parole board may not deny parole based solely on letters from unknown third parties expressing their penal philosophies. Finding no rational support in the record before this court for respondent's determination, it is hereby

ORDERED that the board's determination dated December 15, 2014 denying petitioner parole release is vacated and the matter is remanded to the parole board to make a *de novo* determination on petitioner's request for parole release. It is further

ORDERED that none of the individual members on the parole board that rendered that challenged determination shall participate in the parole hearing to be held upon remand.

This constitutes the decision, order and judgment of this court.

Dated: October 2 ,2015
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

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Pursuant to 22 NYCRR 671.5, please be advised that you have the right to appeal, or to apply for permission to appeal, this order to the Appellate Division. Your notice of appeal must be filed at the Dutchess County Clerk's Office, 22 Market Street, Poughkeepsie, New York 12601. Upon proof of your financial inability to retain counsel and pay the cost and expenses of the appeal, you have the right to apply to the appellate court for assignment of counsel and leave to prosecute the appeal as a poor person. CPLR Section 5513 provides that an appeal may be taken, or motion for permission to appeal may be made, within thirty (30) days after the entry and service of any order or judgment from which the appeal is taken, or sought to be taken, and written notice of its entry.