September 2021

Decision in Art. 78 proceeding - Marcelin, Harvey (2010-09-16)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of HARVEY MARCELIN, 86-A-7063,

Petitioner,

-against-

ANDREA W. EVANS, CHAIRPERSON, NYS DIVISION OF PAROLE, ET. AL.

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-ST1338 Index No. 1408-10

Appearances: Harvey Marcelin
Inmate No. 86-A-7063
Petitioner, Pro Se
Gouverneur Correctional Facility
112 Scotch Settlement Road
P.O. Box 370
Gouverneur, New York 13642-0370

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Cathy Y. Sheehan,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Gouverneur Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated June 17,

2010 to deny petitioner discretionary release on parole. The petitioner is serving a term of life imprisonment under a sentence imposed for a murder he committed in 1963. The petitioner was paroled for that crime in 1984, but was arrested in 1986 and charged with manslaughter in the first degree. As the result of a plea bargain in connection with the latter charge, the petitioner was sentenced to an additional term of imprisonment of six to twelve years.

Among the many arguments set forth in the petition, the petitioner contends that the Parole Board failed to consider all of the factors set forth in Executive Law § 259-i in denying him parole. The petitioner asserts that he has already served his sentence, and the Parole Board is denying him the benefit of a negotiated plea bargain agreed to in 1986. The petitioner maintains that the use of teleconferencing equipment to enable him to participate in the parole interview (as opposed to an in-person appearance before the Parole Commissioners) violated his due process and equal protection rights. Petitioner contends that the he has been prejudiced by the board's inability to issue a timely decision of his administrative appeal.

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

> "Parole is denied for the following reasons: After a careful review of your record and this interview, it is the determination of this panel that, if released at this time, there is a reasonable probability that you would not live and remain at liberty without violating the law, and your release at this time is incompatible with the welfare and safety of the community. This decision is based on the following factors: The heinous, brutal nature of the instant offense of manslaughter first involved you stabbing the female victim, causing her demise, while on parole supervision for a murder one conviction, causing the death of another female victim. Your actions displayed a propensity for extreme

> violence and a depraved indifference for human life. Note is made of your positive programming and improved disciplinary record. However, to release you at this time would deprecate the severity of your criminal behavior. Your actions were out of control and without regard for the health and safety of others, also demonstrating a disregard for community supervision and the law. Therefore, discretionary release is inappropriate at this time."

The Court notes that because there was no formal hearing in this instance, the standard of review is not whether the determination is supported by substantial evidence, but rather whether the determination is in violation of lawful procedure, affected by an error of law, arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Pell v Bd. of Educ., 34 NY2d 222 [1974]).

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 and academic accomplishments, 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 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 AD 3d 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).

Petitioner's claim that he has already served his negotiated plea sentence is incorrect. Petitioner's parole violation and the plea that came from it did not abrogate his prior life sentence (see People v Curley, 285 AD2d 274 [4th Dept., 2001]). Rather, his maximum twelve year sentence from the manslaughter plea was added to his maximum sentence of life imprisonment, making his maximum prison term still life imprisonment (see Penal § 70.30 [1] [b]; and former Penal Law § 70.30, as that section read at the time of petitioner's sentencing; Matter of Brown v Annucci, 60 AD3d 1223, 1224 [3rd Dept., 2009]).

Petitioner's assertion that he was deprived of his due process and equal protection rights by reason that he appeared at the parole interview by teleconference rather than in person is equally without merit (Matter of Webb v. Travis, 26 AD3d 614 [3rd Dept., 2006]; Matter of Mack v Travis, 283 AD2d 700 [3rd Dept., 2001], lv dismissed 96 NY2d 896 [2001]; Matter of Vanier v Travis, 274 AD2d 797 [3rd Dept., 2000]).

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 A.D.3d 1108 [3rd Dept., 2009]).

Lastly, the petitioner objects to Commissioner Hernandez' characterization of him during the parole interview as a "grown-ass man". The remark was made after the petitioner, who was 47 years old at the time he committed his second homicide, attributed it to "youth and poor judgment and stupidity". While other words might otherwise have been chosen to convey the same thought, the Court finds that the petitioner has not demonstrated that Commissioner Hernandez or the Parole Commissioners were biased, or that the determination flowed from any such bias.

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: September 16, 2010
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated March 11, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated May 11, 2010, Supporting Papers and Exhibits
3. Petitioner's Affirmation in Reply To Respondent's Answer, dated May 17, 2010.