September 2021

Decision in Art. 78 proceeding - McCants, Clarence (2008-03-10)

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
CLARENCE McCANTS, #80-A-0674,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #44-1-2007-0623.041
INDEX #125593
ORI # NY044015J

-against-

NEW YORK STATE
DIVISION OF PAROLE,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition Clarence McCants, verified on September 6, 2007, and stamped as filed in the St. Lawrence County Clerk's office on September 14, 2007. Petitioner, who is now an inmate at the Otisville Correctional Facility, is challenging the November, 2006, determination denying him parole and directing that he be held for an additional 24-months. The Court issued an Order to Show Cause on September 25, 2007, and has received and reviewed respondent's Answer, including confidential Exhibits B and C, verified on November 9, 2007. The Court has received no Reply thereto from the petitioner.

On February 19, 1980, the petitioner was sentenced in Nassau County Court to a controlling, indeterminate sentence of imprisonment of 20 years to life upon his convictions of the crimes of Murder 2° (two counts) and Attempted Robbery 1° (two counts). After having been denied discretionary parole release on four previous occasions the petitioner appeared at a parole hearing before a three-member board on November 28, 2006. At the conclusion of that hearing a decision was issued again denying petitioner

parole and directing that he be held for an additional 24 months. The text of the parole denial determination is as follows:

> "AFTER REVIEW OF THE RECORD AND INTERVIEW PAROLE IS DENIED. YOU CONTINUE TO SERVE 20-0-0/LIFE FOR TWO COUNTS OF MURDER 2ND AND A CONCURRENT 4-0-0/12-0-0 YEAR TERM FOR TWO COUNTS OF ATTEMPTED ROBBERY 1ST. THESE OFFENSES REPRESENT A SERIOUS ESCALATION OF YOUR CRIMINAL BEHAVIOR AND A TOTAL LACK OF RESPECT FOR YOUR VICTIMS, SOCIETY, AND ITS LAWS. WHILE WE NOTE YOUR POSITIVE PROGRAMMING AND DISCIPLINE SINCE YOUR LAST BOARD APPEARANCE WHEN ALL FACTORS ARE CONSIDERED THE PANEL CONCLUDES THAT YOUR RELEASE AT THIS TIME WOULD DEPRECATE THE SERIOUSNESS OF YOUR VIOLENT ACTS AND UNDERMINE RESPECT FOR THE LAW."

Documents perfecting petitioner's administrative appeal were received by the Division of Parole Appeals Unit on March 19, 2007. The Appeals Unit, however, failed to issue its findings and recommendation within the four-month time period specified in 9 NYCRR §8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A) provides, in relevant part, as follows: "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 . . . [and] (iii) release plans including community resources, employment, education and training and support services available

to the inmate . . .” In addition to the above, where the minimum period of imprisonment was established by the sentencing court, the Board must also consider the seriousness of the underlying offense and the inmate’s prior criminal record. *See* Executive Law §259-i(2)(c)(A) and §259-i(1)(a). Discretionary parole release determinations are statutorily deemed to be judicial functions which are not review able if done in accordance with law (Executive Law §259-i(5)) unless there has been a showing of irrationality bordering on impropriety. *See Silmon v. Travis,* 95 NY2d 470, *Vasquez v. Dennis*on, 28 AD3d 908, *Webb v. Travis*, 26 AD3d 614 and *Coombs v. New York State Division of Parole*, 25 AD3d 1051. Unless the petitioner makes a “convincing demonstration to the contrary” the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Nankervis v. Dennison,* 30 AD3d 521*, Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

The petitioner advances a variety of arguments in support of his ultimate contention that the November, 2006, parole denial determination must be vacated. In the March 14, 2007, administrative appeal submitted on behalf of the petitioner by counsel, which is incorporated by reference into the petition, it is initially asserted that the petitioner “. . . completed all available programming and has maintained an exemplary institutional record.” It is also asserted in counsel’s administrative appeal document that the parole denial determination merely tracked statutory language without consideration of the factors enumerated in Executive Law §§ 259-i(2)(c)(A) and 259-i(1)(a). A review of the record before the parole board, however, reveals that the board had before it information pertaining to petitioner’s institutional record, including his disciplinary record and release plans. In addition, during the November 28, 2006, parole hearing the petitioner was questioned with regard to institutional accomplishments since his last

parole board hearing. Petitioner's clean disciplinary record since August of 2003 was brought up by a parole commissioner at the hearing. Petitioner's release plans, including proposed living arrangements and work prospects were also discussed at the parole hearing and a parole commissioner acknowledged the "numerous letters" that had been submitted to the board on behalf of the petitioner. Finally, the petitioner's "POSITIVE PROGRAMMING AND DISCIPLINE" were specifically acknowledged in the written parole denial determination. A parole board, however, need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole determination, nor is it required to expressly discuss each of those factors in its written decision. *See Martin v. New York State Division of Parole*, __AD3d __(2008 WL 191322), *Porter v. Dennison*, 33 AD3d 1147 and *Baez v. Dennison,* 25 AD3d 1052, *lv den* 6 NY3d 713. In view of the above, the Court finds no bases to conclude that the parole board failed to consider the relevant statutory factors. *See Bonilla v. New York State Board of Parole,* 32 AD3d 1070, *Lagarde v. New York State Division of Parole*, 23 AD3d 876 and *WanZhang v. Travis*, 10 AD3d 828. Since the requisite statutory factors were considered, and given the narrow scope of judicial review of discretionary parole denial determinations, this Court is unable to conclude that the emphasis placed by the board on the violent nature of petitioner's crime represents irrationality bordering on impropriety. *See, e.g. Cruz v. New York State Division of Parole*, 39 AD3d 1060, *Pulliam v. Dennison*, 38 AD3d 963, *Griffin v. Dennison*, 32 AD3d 1060 and *Thompson v. New York State Division of Parole*, 30 AD3d 746.

Petitioner's argument to the contrary notwithstanding, the Court next finds that the board's written parole denial determination is ". . . sufficiently detailed to permit intelligent appellate review and in overall compliance with the mandates of Executive Law

§259-i." *Ek v. Travis*, 20 AD3d 667, 668, *rev'g* 7 Misc 3d 1031 (A)(2005 WL 1334908). In addition, the Court finds no support in the record for petitioner's contention that the parole denial determination was the result of a "broad edict" issued by then Governor Pataki to the Division of Parole that all violent felony offenders must be detained in DOCS custody until their conditional release dates. *See Cardenales v. Dennison*, 37 AD3d 371, *Vargas v. New York State Board of Parole*, 20 AD3d 738 and *Lue-Shing v. Pataki*, 301 AD2d 827, *lv den* 99 NY2d 511.

The Court finds nothing irrational in the board's characterization of the crime underlying petitioner's incarceration as representing and "ESCALATION" of his criminal behavior, and the Court is aware of no statutory, regulatory or judicial authority prohibiting the board from repeatedly denying an inmate parole based upon the same factor or factors. Finally, the Court finds no basis in the record to disturb the board's determination that petitioner be held for an additional 24 months before reconsideration for discretionary release. *See Tatta v. State of New York, Division of Parole*, 290 AD2d 907, *lv den* 98 NY2d 604.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: March 10 , 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice