September 2021

Decision in Art. 78 proceeding - Naranjo, Fernando (2011-11-16)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of FERNANDO NARANJO,

Petitioner,

-against-

NEW YORK STATE 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 # 01-11-ST2934 Index No. 5010-11

Appearances: Fernando Naranjo
Inmate No. 02-A-3120
Petitioner, Pro Se
Bare Hill Correctional Facility
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Caller Box # 20
Malone, NY 12953

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Bare Hill Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated May 17, 2010

to deny petitioner discretionary release on parole. In 1995 the petitioner was given a sentence of five years to life, upon conviction of the crime of criminal possession of a controlled substance 2nd degree. He was later paroled to deportation to his native country, Columbia. He subsequently reentered this country illegally. In 2001 he committed the instant offense, robbery in the first degree. In 2002 he was convicted of that charge, and given a determinate sentence of eight years as a predicate felon.[1]

Among the many arguments set forth in the petition, the petitioner contends that the Parole Board failed to consider the appropriate factors under Executive Law § 259-i; that because he was granted a certificate of earned eligibility, he is entitled to a presumption in favor of early release; that the Parole Board failed to give meaningful consideration to his sentencing minutes; that he has already served time in excess of the appropriate guideline range; that he has an excellent institutional record, including programming; that the Parole Board failed to provide guidance or recommendations to enable him to obtain release in the future; that the determination was the result of an unofficial executive policy to deny parole to violent felony offenders; and that there is no rational basis to hold him for an addition twenty four months.

The determination of the Parole Board recites as follows:

> "Denied 24 months, March 2012. Notwithstanding the EEC, 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

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[1]Because a period of post-release supervision was not imposed at that time, the petitioner was brought back for re-sentencing on May 21, 2010. The sentencing court adhered to the eight year determinate term, but did not add post-release supervision.

with the welfare of society. This decision is based on the following factors: your instant offense is robbery in the first degree in which you produced a knife, acted in concert, threatened, beat and kicked the victim and when you found him later he was assaulted and threatened again. Your record dates back to a 1995 felony drug case. Note is made of your programming, disciplinary record, sentencing minutes and all other required factors. Despite being on life parole and here illegally after deportation you continue to engage in serious felonious conduct. 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 procedures 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 interactions 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 while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law; (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court,

> the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement." (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]). 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 possession of an earned eligibility certificate, his institutional programming, 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 Matos v New York State Board of Parole, 87 AD3d 1193 [3d Dept., 2011]; 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 Matos v New York State Board of Parole, supra; 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).

It is well settled that receipt of a certificate of earned eligibility does not serve as a guarantee of release (Matter of Dorman v New York State Board of Parole, 30 AD3d 880 [3rd

Dept., 2006]; Matter of Pearl v New York State Division of Parole, 25 AD3d 1058 [3rd Dept., 2006]).

The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New York Division of Parole, 294 AD2d 726 [3rd Dept., 2002]; Matter of Jones v Travis, 293 AD2d 800, 801 [3rd Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3rd Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3rd Dept., 2006]; Matter of Motti v Dennison, 38 AD3d 1030, 1031 [3rd Dep., 2007]; Matter of Garofolo v Dennison, 53 AD3d 734 [3rd Dept., 2008]; Matter of MacKenzie v Dennison, 55 AD3d 1092, 1193 [3rd Dept., 2008]).

Petitioner's argument that the Parole Board is required to advise petitioner and/or provide guidance with regard to the programs he should take, or rehabilitative efforts he should engage in to increase his chance for release at a future parole interview has no merit (see Executive Law § 259-i [2] [a]; 9 NYCRR § 8002.3; Boothe v Hammock, 605 F2d 661 [2nd Cir, 1979]; Matter of Freeman v New York State Division of Parole, 21 AD3d 1174 [3rd Dept., 2005]).

With respect to petitioner's argument that he has served time in excess of the parole guideline range (see 9 NYCRR 8001.3), the guidelines "are intended only as a guide, and are not a substitute for the careful consideration of the many circumstances of each individual case" (see, 9 NYCRR 8001.3 [a]; Matter of Tatta v State of New York Division of Parole, 290 AD2d 907, 908 [3rd Dept., 2002]; Matter of Rodriguez v Evans, 82 AD3d 1397 [3d

Dept., 2011]). Thus, the Court finds that this does not serve as a basis to overturn the Board's decision.

Petitioner's claims that the determination to deny parole is tantamount to a resentencing, in violation of the Double Jeopardy Clauses's prohibition against multiple punishments are 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., West. Co., 2006]; Matter of Kalwasinski v Paterson, 80 AD3d 1065, 1066 [3d Dept., 2011]; Matter of Carter v Evans, 81 AD3d 1031, 1031 [3d Dept., 2011]). 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 Gomez v New York State Division of Parole, 87 AD3d 1197 [3d Dept., 2011]; 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]).

Although the petitioner maintains that the Parole Board failed to consider the sentencing minutes, said minutes were a part of the record under review, and were specifically mentioned during the parole interview. As such, the argument has no merit.

The petitioner raises an argument that since he has completed his eight year

determinant sentence for robbery in the first degree, that the Parole Board exceeded its authority in holding him for twenty four months. In the Court's view, this argument ignores the fact that the petitioner was still serving the 1995 sentence for which he received five years to life, and that parole would have been automatically revoked with regard to that sentence upon his 2002 conviction of robbery first degree (see Executive Law § 259-i [3] [d] [iii]; Tineo v New York State Division of Parole, 14 AD2d 949 [3d Dept., 2005]; Matter of Meade v Boucaud, 67 AD3d 1263 [3d Dept., 2009]; Adams v New York State Division of Parole, 278 AD2d 621 [3d Dept., 2000]). The Parole Board's decision to hold petitioner for the maximum period (24 months) was 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: November 16, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated August 11, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated October 12, 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 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: November 16, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice