September 2021

Decision in Art. 78 proceeding - Oberoi, Gurpreet (2008-02-28)

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Matter of Oberoi v Dennison
2008 NY Slip Op 50569(U) [19 Misc 3d 1106(A)]
Decided on February 28, 2008
Supreme Court, Franklin County
Feldstein, J.
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Decided on February 28, 2008

Supreme Court, Franklin County

In the Matter of the Application of Gurpreet Oberoi, Petitioner,

against

Robert Dennison, Commissioner, New York State Division of Parole, Respondent.

2007-0996

S. Peter Feldstein, J.

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Gurpreet Oberoi, verified on July 16, 2007, and stamped as filed in the Franklin County Clerk's office on July 20, 2007. Petitioner, who is an inmate at the Bare Hill 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 Oder To Show Cause on August 3, 2007, and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on September 7, 2007, as well as respondent's Letter Memorandum of September 7, 2007. The Court has also received and reviewed petitioner's Reply thereto and Memorandum Law of Reply, both filed in the Franklin County Clerk's office on September 26, 2007. In addition to these basic pleadings, numerous additional papers have been filed in connection with this proceeding and the Court will refer such additional papers, as it deems necessary, during the course of this Decision and Judgement.

On August 10, 2004, the petitioner was sentenced in Supreme Court, New York County, to a controlling, concurrent, indeterminate sentence of imprisonment of 3 to 9 years upon his convictions of the crimes of Manslaughter 2 and Leaving the Scene of an Incident Without Reporting(Vehicle and Traffic Law § 600(2)(a)). He was received into DOCS custody on August 24, 2004. On October 31, 2006, the petitioner made his initial appearance before a three -member parole board at the Bare Hill Correctional Facility. [FN1] Following that interview the petitioner was denied parole release and it was directed that he be held in DOCS custody for an additional 24 months. The parole denied determination reads as follows :

"PAROLE DENIED. AFTER A PERSONAL INTERVIEW, REORD [presumably, RECORD] [*2]REVIEW AND DELIBERATION, THIS PANEL FINDS YOUR RELEASE INCOMPATIBLE WITH THE PUBLIC SAFETY AND WELFARE. YOUR INSTANT OFFENSES OF MANSLAUGHTER 2ND AND LEAVING THE SCENE OF AN ACCIDENT WITHOUT REPORTING BEGAN WITH YOU OPERATING A CAR AT A HIGH RATE OF SPEED WITHOUT A VALID NY STATE DRIVERS LICENSE. YOU STRUCK A PEDESTRIAN AND THE VICTIM WAS DRAGGED UNDER THE VEHICLE UNTIL IT WAS EVENTUALLY DISLODGED. YOU THEN FLED THE SCENE TO AVOID APPREHENSION. CONSIDERATION HAS BEEN GIVEN TO YOUR RECEIPT OF AN EARNED ELIGIBILITY CERTIFICATE, PROGRAM COMPLETION, AND SATISFACTORY BEHAVIOR. HOWEVER, DUE TO YOUR PARTICIPATION IN ILLEGAL ACTIVITY THAT RESULTED IN A DEATH, AND LIMITED EXPRESSION OF REMORSE FOR YOUR ACTIONS, YOUR RELEASE AT THIS TIME IS DENIED.

THERE IS A REASONABLE PROBABILITY YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW."

The document perfecting petitioner's administrative appeal was received by the Division of Parole Appeals Unit on March 2, 2007. The Appeals Unit , however, failed to issued its findings and recommendations within the time prescribed 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 . . .(iii) release plans including community resources, employment, education and training and support services available to the inmate ; [and] (iv) any deportation order issued by the federal government against the inmate while in the custody of the department of correctional services . . ." 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,* 30AD3d 521*, Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

Before addressing the specific arguments advanced in the petition, some general observations as to the nature of a CPLR Article 78 proceeding would be helpful at this juncture. A CPLR Article 78 Proceeding is a special proceeding. CPLR §7804(a). "A special [*3]proceeding is a civil judicial proceeding in which a right can be established or an obligation enforced in summary fashion. Like an action, it ends in a judgment. . . but the procedure is similar to that on a motion . . . Speed, economy and efficiency are the hallmarks of this procedure." Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7 B, CPLR C401:1. (Citations omitted). Although the Court in an Article 78 proceeding is statutorily authorized to "forthwith" conduct a trial where a triable issue of fact is raised (CPLR §7804(h)), such proceeding may be summarily determined ". . . upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised." CPLR §409(b). *See Battaglia v. Schuler*, 60 AD2d 759. Accordingly, to the extent the petitioner requests a jury trial and seeks the issuance of subpoenas to secure testimony at trial, those applications are denied.

As discussed previously, the scope of a court's authority to review a discretionary parole denial determination is extremely limited. Bearing this in mind, this Court finds that no issue or fact has been raised in this proceeding so as to warrant a trial pursuant to CPLR §7804 (h). Rather, the Court finds that the twin issues of whether or not the parole board acted in accordance with law and whether or not the parole denial determination was affected by irrationality bordering on impropriety are amenable to summary determination based upon the existing record pursuant to CPLR §409 (b).

Petitioner's challenge to the parole denied determination is set forth in six separate causes of action, three of which can be quickly addressed. In petitioner's second cause of action he asserts that the parole denial determination was not supported by substantial evidence. Parole denial determinations, however, are not subject to judicial review under the substantial evidence standard. *See Tatta v. Dennison*, 26 AD3d 663 and *Valderrama v. Travis*, 19 AD3d 904. Rather, as already noted, discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law§259-i(5)) absent a showing of irrationality bordering on impropriety. *See Silmon v. Travis*, 95 NY2d 470.

In his fourth cause of action petitioner asserts that the parole board violated his due process rights by relying upon factors beyond the scope of those permitted under the relevant regulatory provision. More specifically, the petitioner argues that the board violated 9 NYCRR §8002.3(b) went it considered the circumstances surrounding the commission of the crime underlining his incarceration.

Where, as here, the minimum period of imprisonment was established by the sentencing court, a parole board considering an inmate for discretionary release is statutorily directed to take into account the seriousness of the offense underling such inmate's incarceration. *See* Executive Law §§259-i(2)(c) (A)and 259-i(1) (a). The petitioner, however, has focused his attention on 9 NYCRR §8002.3(b) which provides as follows:

"Cases where the guidelines have previously been applied. In those cases where the guidelines have previously been applied**,** the board shall consider the following in making the parole release decision.Release shall be granted unless one or more of the following is unsatisfactory;

(1) the institutional record, including program goals and accomplishments, academic achievements, vocational education training or work assignments, therapy and interpersonal relationships with staff and inmates;

(2) performance if any, as a participant in a temporary release program; or [*4]

(3) release plans, including community resources, employment, education and training and support services available to the inmate."

The petitioner maintains that the guideline time range was previously applied by a different parole board panel in November of 2005 when he was denied early conditional parole for deportation only. According to the petitioner, the previous application of the guidelines by a parole board panel brought his subsequent consideration for discretionary parole release within the ambit of 9 NYCRR §8002.3(b) so as to render any consideration of the seriousness of the crime underlying his incarceration improper. This argument, however, was squarely considered and rejected by the Appellate Division Third Department in *Flecha v. Travis*, 246 AD2d 720. According to the *Felcha* court . . ."[b]ecause the trial court set petitioner's minium period of imprisonment, the Board was required to take into account, among other statutory factors, the seriousness of petitioner's crimes . . ." *Id (* citations omitted*). See also Guerin v. New York State Division of Parole*, 276 AD2d 899. Accordingly, to the extent petitioner has moved for partial summary judgment with respect to his fourth cause of action, the Court finds that such motion must be denied.

In his sixth cause of action the petitioner maintains that the parole board failed to give due consideration to the fact that he would be subject to prompt deportation to India if parole release were to be granted. Petitioner's final order of deportation, however, was noted and addressed in the Inmates Statues Report prepared in connection with the petitioner's parole board appearance. In addition, the final order of deportation was specifically discussed during the course of the October 31, 2006, parole interview. After it was noted that the petitioner was a citizen of India, a parole commissioner stated as follows: "If we were to release you at this point, most likely you would be deported as well. There is a final deportation order; is that correct?" The petitioner responded in the affirmative and, after further inquiry, confirmed that he wanted to return to India.

A parole board 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 final deportation order pending against the petitioner. *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.

Petitioner's remaining three causes of action(first, third and fifth) are interrelated to such a degree that it is difficult to address any one without considering elements set forth in the others. In his third cause of action the petitioner asserts that his receipt of a certificate of earned eligibility " . . . created a strong presumption in favor of release absence some extraordinary, objective reasons for denying such release." Under the provisions of Correction Law §805 the DOCS commissioner *may* issue a certificate of earned eligibility to an inmate you has complied with and successfully participated in assigned work and therapeutic treatment programs. Although the above-quoted assertion of the petitioner with respect to the impact of the issuance of a certificate of earned eligibility, which he has not supported by citation to any judicial authority, no doubt overstates the significance of [*5]such issuance, Correction Law §805 does provide, in relevant in part, as follows : "Notwithstanding any other provision of law, an inmate who is serving a sentence with a minimum term of not more than eight years and who has been issued a certificate of earned eligibility, shall be granted parole release at the expiration of his minimum term . . .unless the board of parole determines that there is a reasonable probability that, if such inmate is

released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." Clearly, an inmate's receipt of a certificate of earned eligibility does not preclude the parole board from issuing a discretionary determination denying such inmate parole. *See Corley v. New York State Division of Parole*, 33 AD3d 1142, *Romer v. Dennison*, 24 AD3d 866, *lv den* 6 NY3d 706 *and Barad v. New York State Board of Parole*, 275 AD2d 856, *lv den* 96 NY2d 702. Still, at least one appellate level court has agreed that Correction Law §805 " . . . creates a presumption in favor of parole release of any inmate who . . . has received a certificate of earned eligibility and has completed a minium term of imprisonment of eight years or less." *Wallman v. Travis*, 18 AD3d 304, 307 (citations omitted). Although the contours of such "presumption" have not been clearly fleshed out, this Court finds that the statutory language compels at least a subtle distinction in the review of parole denial determinations affecting inmates, such as the petitioner, who have been issued certificates of earned eligibility.

Against this backdrop the Court has serious reservations with respect to the rationality of the parole denial determination in the case at bar, at least insofar as such determination is premised upon petitioner's "LIMITED EXPRESSION OF REMORSE." Although an inmate's remorse, or lack thereof, is not specifically listed in any provision of Executive Law §259-i(2) as a factor that must be considered by the board when making a discretionary parole release determination, the Court of Appeals, citing the " . . . strong rehabilitative component in the statute that may be given effect by considering remorse and insight" into the underlying criminal offense, has concluded that it was neither arbitrary nor capricious for a parole board to consider such factors. *See Silmon v. Travis*, 95 NY2d 470. *See also Ward v. New York State Division of Parole*, 26 AD3d 712.

In an undated document labeled "PRELIMINARY STATEMENT" the petitioner apparently sought to address the commissioners who would sit on the parole board charged with determining whether or not he should be released from DOCS custody to parole supervision. The PRELIMINARY STATEMENT reads as follows:

"Respected Commissioners,

First, and foremost, I would like to state my sincere remorse and apologize for my conduct. I am concerned that it may appear, while answering your questions, that I am justifying and/or making excuses for my conduct, which brings me before you today. Nothing could be further from the truth.

I wish that I could take back the harm I have done, not only to [the victim], but also to his family members, and to the community as a whole. I wish I could do more than just serving prison term, in order to offer the family and friends of [the victim] some closure. In a letter, that was mailed to ADA Mr. Krutoy, I expressed that, I do not wish to cause any more harm or pain than I already have. If I can provide them (family members) closure, I am willing to do whatever I possibly can.' Further, I expressed that, If they want nothing more than to vent their anger and frustration at me, I will gladly listen and be there as an [*6]object at which they can direct their hatred.'

I understood that the family and friends may wish not to have any contact with me and that is why I wrote via District Attorneys' Office. Mr. Krutoy's response stated that he spoke to [the victim's] mother, in addition to forwarding my letter to her, and she does not wish to have any contact with me. I respect, and will continue to respect, her wishes. I will always be available to [the victim's] family members and friends if they ever wish to confront me. I do not know what they may wish to say to me, but my being available is the only thing I can do to directly ease their burdens, if they so request.

I am open to suggestions from this panel as to how may I ease the pain of these people. If you know of anything I may be able to do that will lessen their burden, I request that you please let me know.

I am also actively working towards fulfilling the goals I have set for myself. Those goals include sharing the deep regret that comes with criminal conduct. I cannot and should not forget what my misconduct in the past has brought forth, but it must not cripple more innocent people. Everyday I deal with shame and remorse resulting from my misconduct, but it is not only my remorse, that I see. I see the pain my incarceration is causing my family and friends. They know and understand that I deserve punishment in this matter. A punishment that I have accepted, and when in Court, I accepted full responsibility for my conduct. I turned myself in to the authorities once I recovered from my initial panic.

I strongly desire the opportunity to become a productive member of society, to better the community in which I will reside. Words can not convey the feelings of regret I have, nor should they. I ask that this panel give me the opportunity to move forward and teach

others the lesson I have learned, that being thoughtless is not an excuse and every man has a duty to show forethought. Something I failed to do, causing irreparable harm.

I do not ask for forgiveness from this panel, as I know this panel does not have the power and I have no right to expect forgiveness from the family and friends of the victim. What I do ask for is a chance. A chance to prove that I have good to give to the society if this panel grants me that chance. I thank this panel for their time, attention, and anticipated consideration to this matter."

In addition, towards the end of the parole interview on October 31, 2006, after being asked if there was anything else he wanted to tell the board, the petitioner responded " Sir, I have had a moment to introspect and look at my conduct and the harm it's done. I want to be able to teach someone, others, not to be irresponsible, sir. I have tried my best to learn to be responsible and look at the situation for what it is."

After considering the rather expansive statements of remorse set forth in petitioner's PRELIMINARY STATEMENT, as well as petitioner's recognition of the harm his irresponsible conduct caused, expressed less articulately during the parole interview, this Court struggles to make sense of the parole board's partial reliance upon petitioner's "LIMITED EXPRESSION OF REMORSE" in denying him discretionary parole release. Presuming that the parole board was aware of the contents of petitioner's PRELIMINARY STATEMENT, the Court finds that it was incumbent upon the board to go beyond its terse, conclusory assertion that the petitioner only expressed limited remorse for his actions. In order for this Court to determine whether or not the board's findings were affected by the rationality bordering on impropriety, it must have some understanding of the factor or [*7]factors considered by the board when it determined that petitioner's expressions of remorse were somehow deficient. In this regard the Court finds the circumstances considered by the Appellate Division, First Department, in *Wallman v. Travis*, 18 AD3d 304, to be similar to those under consideration in this case. Mr. Wallman was a 63-year old former attorney who had been convicted of the crimes of Grand Larceny 1° and Grand Larceny 2° (two counts) following his theft of $4.7 million from his clients' escrow accounts. Like the petitioner in the case at bar, Mr. Wallman had no prior criminal record, received a certificate of earned eligibility and had an exemplary disciplinary record. Among the factors cited by the parole board in denying discretionary release was Mr. Wallman's " limited insight into [his] ongoing crimes and victims of these crimes.'" *Id* at 305. In vacating the parole denial determination and ordering a *de novo* hearing, the First Department found, in part, as follows:

> "Moreover, the Board's perfunctory discussion of petitioner's alleged lack of insight is contrary to the Court of Appeals' decision in *Matter of Silmon v. Travis* (95 NY2d 477), which held that a petitioner's remorse and insight into his crimes are highly relevant in evaluating an inmate's rehabilitative progress, especially where, as here, the prisoner has otherwise lived a law abiding life and maintained a good prison record. Despite the critical significance of these factors in evaluating an inmate under the reasonable probability' standard, the Board's decision in this case offers no supportive facts justifying its finding of lack of insight and remorse.
>
> The Board's lack of supporting facts in its written decision might be excused if the parole hearing record otherwise supported its conclusion, but in this case it does not. The hearing transcript contains numerous statements by petitioner demonstrating his understanding of the harm caused by his misconduct and his remorse for it." *Id* at 308.

Similarly, in the case at bar, the Court finds that the parole board's failure to specify the bases of its conclusion that the petitioner only expressed limited remorse for his criminal actions requires that the parole denial determination be vacated.

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the November, 2006, parole denial determination is vacated and the respondent is directed to forthwith provide the petitioner with a *de novo* parole hearing before a different panel of parole commissioners.

Dated: February 28, 2008, at

Indian Lake, New York._____

S. Peter Feldstein

Acting Supreme Court Justice

Footnotes

Footnote 1: Although the October 31, 2006, parole board appearance marked petitioner's initial appearance upon completing service of his minimum period of imprisonment, he previously appeared before a parole board in November of 2005 and was considered at that time for early conditional parole for deportation only.

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