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[*1]

Matter of Palmeri v New York State Div. of Parole
2017 NY Slip Op 51204(U) [57 Misc 3d 1202(A)]
Decided on March 29, 2017
Supreme Court, St. Lawrence County
Feldstein, J.
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Decided on March 29, 2017

Supreme Court, St. Lawrence County

<p>In the Matter of the Application of Michael Palmeri, Petitioner,</p> <p>against</p> <p>New York State Division of Parole, Respondent.</p>

148563

S. Peter Feldstein, J.

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Michael Palmeri, verified on September 27, 2016 and filed in the St. Lawrence County Clerk's office on October 4, 2016. Petitioner, who is currently an inmate at the Gouverneur Correctional Facility, is challenging the determination of the Parole Board following a hearing in March 2016.

The Court issued an Order to Show Cause on October 7, 2016 and has received and reviewed respondent's Answer and Return verified on December 21, 2016, including confidential Exhibits B, C and I. No further reply was received.

On February 24, 1994, following his plea of guilt to two counts of Murder in the Second Degree, A-1 felonies, the Suffolk County Court sentenced petitioner to two concurrent indeterminate terms of incarceration of nineteen (19) years to life. The petitioner appeared for the fourth time before the Parole Board on March 23, 2016. Following that appearance, Petitioner was denied discretionary parole release and it was directed that he be held for an additional 24 months. The parole denial determination reads as follows:

"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 with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law. The panel has considered your institutional adjustment including discipline and program participation. Required statutory factors have been considered, including your risk to society, rehabilitation efforts, and your needs for successful re-entry into the community. Your release plans have been considered, as well as your COMPAS risk and needs assessment, case plan, and sentencing minutes which are in the file. Your instant offense, Murder 2nd, involved you strangling your girlfriend causing her death and dumping her body in an abandoned construction site. Your criminal history dates back to approximately the late 1970's and includes assaultive behavior and a Y.O. adjudication [*2] for assault related offense. Due consideration was give to your satisfactory programming and your parole plan, parole plan packets from Attorney Kates-Benman and letters of support. Your institutional discipline is noted and, although clean for a number of years, still needs improvement. This panel remains concerned about your history of unlawful and violent conduct, your anger management issues and your need to improve discipline. The instant offense is an escalation of your violent criminal history and resulted in the needless and senseless loss of life of an innocent victim. During your interview your displayed anger which escalates. Parole denied." Resp. Ex. F.

An appeal of the parole board's determination was filed by the petitioner on August 15, 2016. Thereafter, the Board of Parole Appeals Unit upheld the determination on September 19, 2016.

Petitioner challenges the denial of parole release alleging that the parole board's determination was arbitrary and capricious, as well as irrational bordering on impropriety. The petitioner argues that the parole board failed to consider any of the other criteria pursuant to Executive Law §259-i, including the COMPAS risk assessment, and instead focused solely on the instant offense. The petitioner argues that the parole board must give the inmate guidance in adjusting his future behavior and that the parole board failed to do so. The petitioner asserts that while there is no constitutional right to parole, that there is a liberty interest created by the expectation of early release from prison. The petitioner further argues that he is unable to change the underlying offense for which he was sentenced, but by the parole board failing to consider anything other than the instant offense, it creates a situation for which the petitioner will never be released. The petitioner asserts that he believes that his victim's ex-husband, a former police officer, has impacted the petitioner's inability to be paroled. Similarly, the petitioner argues that the parole board is relying upon the same criteria the trial judge used in sentencing the petitioner, which the petitioner argues collateral estoppel prohibits. Additionally, the petitioner alleges that the failure to be granted parole is tantamount to double jeopardy. The petitioner further asserts that the 24 month hold is excessive in light of the parole board's failure to indicate what, if any, further programming the petitioner needs for future appearances and the successive parole denials with 24 month holds each time is tantamount to a resentencing.

Respondent argues that the petition should be dismissed in its entirety insofar as the parole board is afforded great discretion in determining parole release provided that the board considers the relevant factors as described in Executive Law §259-i(c)(A). Respondent argues that there is no requirement that the parole board give equal weight to each factor nor does an inmate's exemplary institutional record compel parole release. Respondent further asserts that the denial of parole is not akin to double jeopardy and there is no "right" to discretionary parole release. The respondent argues that the petitioner's maximum sentence was life and therefore, the additional time is not excessive.

Executive Law §259-i(c)(A), as amended by L 2011, ch 62, part C, subpart A, §§38-f and 38-f-1, effective March 31, 2011, 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 [*3]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; ... (iii) release plans including community resources, employment, education and training and support services available to the inmate; ... (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 presentence 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."

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)) unless there had been a showing of irrationality bordering on impropriety. *See Silmon v. Travis*, 95 NY2d 470; [Hamilton v. New York State Division of Parole](#), 119 AD3d 1268; [Vasquez v. Dennison](#), 28 AD3d 908 and [Webb v. Travis](#), 26 AD3d 614. 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 Jackson v. Evans](#), 118 AD3d 701, [Nankervis v. Dennison](#), 30 AD3d 521 and [Zane v. New York State Division of Parole](#), 231 AD2d 848.

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 Montane v. Evans](#), 116 AD3d 197; [see also Valentino v. Evans](#), 92 AD3d 1054 and [Martin v. New York State Division of Parole](#), 47 AD3d 1152. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination

". . . is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior (internal citations omitted)."
[Comfort v. New York State Division of Parole](#), 68 AD3d 1295, 1296.

In the case at bar, reviews of the Parole Board Report and transcript of Petitioner's March 23, 2016 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including Petitioner's vocational and therapeutic programming records. It was noted that the COMPAS ReEntry Risk Assessment Instrument score was relatively low other than the probability of substance abuse after re-entry, despite the petitioner advising that he had been clean and sober since 1999.

Upon review of the parole board interview transcript, it was evident that the petitioner is [*4] indeed frustrated with his continued incarceration. Throughout the interview, the petitioner became increasingly angry and argumentative. The following exchange between Commissioner Sharkey and the petitioner exemplifies the anger:

"Q: I want to tell you what I am seeing. We have interviewed people from four facilities over two days. You have demonstrated a level of increased anger since I have been talking to you, and you seem to get more and more angry as we talk. Why do you think that is?

A: Because I am trying to get my point across because I am really angry that I am in this position. I am really mad at myself because I know that what I did is a disgrace and I'm trying to make you understand that, that's not really who I am. And that's a hard thing to do through a TV monitor. I only had one live Parole Board. The rest have been on video. Why I am angry, is because this is a very difficult thing to try to show you the person that I am, is not that person that did that crime. I am different person now. That's why I am angry." Resp. Ex. E [20:20-25; 21:1-9].

In view of the foregoing, the Court finds no basis to conclude that the Parole Board failed to consider the relevant statutory factors. *See Pearl v. New York State Division of Parole*, 25 AD3d 1058 and *Zhang v. Travis*, 10 AD3d 828. Since the requisite statutory factors were considered, and given the narrow scope of judicial review of the discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality bordering on impropriety as a result of the emphasis placed by the Board on the nature of the crime underlying Petitioner's incarceration, particularly inasmuch as the petitioner strangled a woman that he allegedly loved during an argument between them. Based upon the transcript of the parole board interview, the petitioner still exhibits issues with anger management control. *See Neal v. Stanford*, 131 AD3d 1320 and *Confoy v. New York State Division of Parole*, 173 AD2d 1014.

While the petitioner asserts that the Parole Board's determination of a 24 month hold was excessive and tantamount to a re-sentence, the argument is without merit. *See Shark v. New York State Division of Parole*, 110 AD3d 1134, 1135, *lv dismissed* 23 NY3d 933; *see also Smith v. New York State Division of Parole*, 81 AD3d 1026. The remaining arguments raised by the petitioner, such as that the victim's ex-husband exerted influence over the parole board, are wholly unsubstantiated and need not be addressed herein.

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 29, 2017

Indian Lake, New York

S. Peter Feldstein

Acting Justice, Supreme Court

[Return to Decision List](#)