September 2021

Decision in Art. 78 proceeding - Phillips, William R. (2005-03-08)

[*1]

Phillips v Travis
2005 NY Slip Op 50386(U)
Decided on March 8, 2005
Supreme Court, New York County
Schlesinger, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on March 8, 2005

Supreme Court, New York County

WILLIAM R. PHILLIPS, Petitioner, For Relief Pursuant to Article 78 of the Civil Practice Law and Rules,

against

BRION TRAVIS, Commissioner of the New York State Division of Parole, Respondent

111581/04

Daniel M. Perez, Esq.

Kuby & Perez, LLP

740 Broadway at Astor Place, 5th fl.

New York, NY 10003-9518

represents petitioner

Kevin McCaffrey, Esq.

Assistant Attorney General

120 Broadway

(212) 416-6296

represents respondent

Alice Schlesinger, J.

On November 21, 1974, a Manhattan jury convicted William Phillips, a former detective with the New York City Police Department, of two counts of murder and one count of attempted murder. Later, on January 28, 1975, Phillips was sentenced to a term of incarceration of 25 years to life on the first count, or murder. On the second count, he was sentenced to 20 years to life, and on the third count of attempted murder he was sentenced to 8 to 25 years, the three sentences to run concurrently.

Phillips had by then attained a kind of notoriety. He was the quintessential bad cop who had been caught and who had then agreed to cooperate with the authorities in the investigation of widespread corruption in the New York City Police Department. His story follows.

After serving in the Korean War, William Phillips joined the NYPD force in 1957. He was then 27. As he rose through the ranks of the Department, Phillips observed rampant dishonesty among his brethren and readily became an eager participant. Some time in the late 1960's while attempting to collect money from a bookmaker/pimp whom he had been shaking down, Phillips shot and killed that person, as well as the pimp's 19-year-old prostitute and a customer who had been in the apartment at the time. The customer, though severely wounded, lived and provided the police with a description of the perpetrator.Years passed and the crimes went unsolved. Meanwhile, in 1970, soon after the Knapp Commissioner had begun its work investigating allegations of police corruption in the Department, one of its investigators came upon Phillips in a compromising position. Phillips then agreed to work with the Commission in an undercover capacity. In the course of his work he agreed to wear a wire and meet with corrupt officers and major crime figures outside the Department. In October 1971, he appeared as the Commission's first and very possibly most important witness. He graphically detailed widespread corrupt practices in [*2]which he and others had participated. His work and testimony resulted in the indictment of 30 or more individuals.

But the public nature of the testimony (the hearings had widespread coverage on television and in the press) led to an identification of Phillips in the earlier murders. He was tried and convicted and his life, at age 43, changed directions drastically.

Mr. Phillips, at 74, has now been imprisoned for over 29 years — all of them spent in maximum security prisons. He has come before the Parole Board three times and has been denied discretionary release each time. In recent years, he has undergone two surgeries for prostate cancer, and in the course of this illness has had his right eye removed after a malignant tumor was found there.

What has he accomplished in these almost thirty years? A great deal. On the academic front, Mr. Phillips "attended" college at the State University of New York, earning a Bachelor's Degree in 1982. After he was transferred to the Auburn Correctional Facility, he enrolled at the State University at Buffalo, receiving a Master's Degree in 1983 with a straight "A" average.

In fact, as part of the papers he put together as his submission to the Parole Board was a letter/memo from Ms. June License, Program Coordinator at the State University at Buffalo, dated June 8, 1999. In it, Ms. License first speaks of Mr. Phillips' degree and perfect grade point average and then goes on to say how good his research and writing skills are and that "he showed a willingness to study subjects new to him with an open mind and thoughtful analysis." She adds that he also worked well with the other students. Later on she remarks that, after having learned some of Phillips' personal history, she and other staff came to realize "what a singular accomplishment this really was — both for him and for other students." She continues by opining that Phillips would be eminently qualified to teach at a college level should he be granted parole, as she understood he had been offered such an opportunity. In conclusion she states: "We know of no reason to think that he would be of any danger to the community if released and believe, indeed, that he could accomplish a great deal."

Almost more significant than the above was Phillips' decision to use the skills and learning he had obtained to help others. Beginning in 1978, after he had received a Legal Research Certificate, he took up employment in the Law Library, first at Attica Correctional Facility and later at Auburn. There, year after year, he taught a course in Legal Research and year after year received written commendations from the Law Library Coordinators thanking him for this work and other help he had given to his fellow prisoners. Phillips did this work for 17 years.

At Auburn, Phillips was elected to seven consecutive terms on the Inmate Grievance Resolution Committee, and in 1986 he was elected Chairman of the Lifer's Committee, where he served for over 15 years. He was also vice president of the Inmate Liaison Committee. In addition, he was a member of the Jaycees for many years and was Chairman of the Criminal Justice Committee.

Phillips also involved himself in charity work, most notably for the Quakers, at both Auburn and Eastern Correctional Facilities, and aided poor people in the community in receiving food and clothing. In this regard, in September of 1997 he received their highest award, the James Figeroa Award "given in recognition of service to the prison community." [*3]In the mid 90's, he also did charity work donating money for the rebuilding of churches in the South and for Kosovo refugees.

In 1993 Phillips was assigned to a pre-release program, where at the request of Deputy Superintendent Robert Nelson, he organized ASAT, a narcotics prevention program, and ART, an alternatives to violence program. In recognition of many of these volunteer efforts, Phillips was presented with a number of certificates of appreciation.

Phillips presented all of these facts to the Parole Board at his last hearing on September 24, 2003, at the Fishkill Correctional Facility. There were also numerous letters of support, as discussed below, as well as definite plans for a future upon release. There was nothing to counter any of these positives. In fact, the prison conceded that Phillips had been a model prisoner with no history of disciplinary action against him. In other words, it appears that Phillips' 29 years of incarceration, obviously not easy ones, particularly in the early years as a former cop (something he was asked about at the hearing) have been exemplary.

As to the letters of recommendation for parole, most impressively, there is one dated August 2, 1999 co-authored by U.S. District Judge Whitman Knapp, the Chairman of the Commission of that name, and Michael Armstrong, its former Chief Counsel. That letter details the "enormous part he [Phillips] played in the successful work of our Commission" doing work that was "arduous and dangerous", and adding that the fundamental changes in the culture and honesty of the New York City Police Department, where corruption was no longer tolerated, "would never have come about had it not been for the contribution of William Phillips."

There was also presented an update of that letter dated September 4, 2003 from Mr. Armstrong. In that shorter communication, Armstrong reiterates the public service Phillips had given years earlier, indicates that they have kept in touch, and emphasizes that he is aware of how well Phillips has served his time, helping and advocating for others, despite some serious physical setbacks. He states the following:

Now in his seventies, he is four years beyond the 25-year minimum sentence that the trial judge apparently felt was adequate punishment for the crimes for which he was convicted, assuming he conducted himself in prison in the exemplary way he has. Had the judge felt otherwise, he could have fashioned a more severe combination of sentences so as to make Mr. Phillips ineligible for parole at the conclusion of 25 years.

Others who were involved with Phillips' work with the Commission also wrote. There were supportive letters from Phillips' 2001 appearance before the Board from people connected with the Church of Jesus Christ of Latter-Day Saints, Bishop Ralph W. Young and Courtney Dalton. The latter, together with his wife, works with missionaries in the Auburn area. He wrote that they had gotten to know Phillips very well since 2000, though Phillips had been in contact with the Church since as early as 1990. Mr. Dalton expressed his support for Mr. Phillips after meeting with his family and believing in his sincerity. He said:Our relationship began with us being missionaries teaching him about the concepts and principles related to our faith. Over time we have become the closest of friends with William and now he is one of our dearest friends.

As to the future, at least at the time of Phillips' two earlier appearances before the [*4]Board in the years 1999 and 2001, Manhattanville College was prepared to offer him employment at their college, pursuant to a letter to that effect from the Vice President and General Counsel, Mary Lorraine. As to a residence, his niece Maureen Rave was prepared to have him live with her and her family, stating "we would welcome him into our home on Long Island for as long as he needs." Finally, pursuant to an August 12, 2003 letter from Taylor Hallman, CSW and Forensic Outreach Coordinator with the Department of Veterans Officers, Hudson Valley Health Care System, if Phillips were to be paroled, Hallman would "facilitate and coordinate the application process so that he [Phillips] can be admitted to the above mentioned residential program where he will receive medical and psychiatric care in addition to vocational and housing referral services." Phillips was eligible for this placement as an honorably discharged Veteran.

At the hearing, Phillips was given an opportunity to accept responsibility for the murders he committed, and he did so. He was also asked to elaborate on the details of the crime, which he also did. He explained how he had sunk to a depraved state while working as a police officer and how, within three years of his entry to the force, he had become deeply involved in corruption. However, upon entering prison, he was determined to gain back his self-respect and integrity. That is when he began working in the law library and helping other inmates with their problems. He then explained his plans for the future and willingness to join the Veterans Program. In conclusion he said, in part, the following:

I would like to sum up that there are two different people in me, one that came into here, in prison, that was involved in reprehensible conduct and I think over the last 29 years that I have shown that I can be very adaptive to change. I think I have changed my life around.

The Parole Board denied parole with a hold for 24 months, the maximum period,

until September 2005. In its entirety the decision reads as follows:

Parole is denied. You used a handgun to shoot two people to death. A third person was also shot and hospitalized. You were employed at the time as a New York City Police Officer and were extorting one of the victims. Your actions illustrate a lifestyle which was diametrically opposed to the chosen profession and oath which you had sworn to uphold, in particular "to protect and serve". You are a criminal of the worst kind whose danger to public safety is in the highest degree. Discretionary release remains inappropriate, as it would deprecate the seriousness of your criminal acts and serve to undermine respect for the law. Unspecified guidelines.

Phillips timely appealed, and on April 30, 2004, the Appeals Unit affirmed the denial of parole. The findings made therein consist primarily of string cites to cases standing for the following principles:

that the Parole Board, pursuant to Executive Law §259-i, is not limited to considering the inmate's institutional record but can consider the seriousness of the offense and the danger which the inmate's release may pose to the community;

that the denial of release based primarily on the severity of the crime is appropriate; [*5]

that the prisoner has no due process right to a statement as to what he could do to enhance his chances of release in the future;

that there is a presumption of honesty and integrity among fact finders and further that the Parole Board follows its statutory commands in fulfilling its obligations;

that the decision was sufficiently detailed to satisfy the criteria set out in §259-i of the Executive Law; and

that the courts have repeatedly rejected claims that violent criminals have been systemically denied release pursuant to political pressure exerted by the Governor

Significantly absent from the decision is any specific discussion of Mr. Phillips' particular circumstances.

Phillips then commenced the instant Article 78 proceeding. In the petition, he argues through counsel that the Board's decision was arbitrary and capricious and violates the mandates of Executive Law §259-i, subd. 2(c)(A), which sets forth the various criteria that the Board shall consider in reaching its decision. He asks this Court to annul the decision and direct the Parole Board to release him, or alternatively to grant him a new parole hearing as well as additional relief.

In opposition on the merits, the New York State Division of Parole, via its counsel, argues that the decision was made in accordance with law by a Board which has been vested with an extraordinary degree of responsibility in deciding which inmates to release from prison. It further asserts that parole is a decision properly vested in the executive branch of government, rather than the judicial branch, and that it would therefore be improper for a judge to substitute her judgment for that of the Board's.

As to the various criteria set out in §259-i of the Executive Law, the Division of Parole argues that there is evidence that the Board did consider some of the required factors but chose, as was their right, to emphasize the very serious nature of the crimes which were the basis for Phillips' conviction. It also contends that Phillips chose an improper venue for this proceeding, and that the requested release from custody is not a permissible remedy.

Discussion

Addressing first the venue issue, the Division of Parole alleges in its Verified Answer that Phillips' choice of venue in New York County is improper under CPLR §506(b), as the parole determination at issue was made in Duchess County and the Division's principal office is located in Albany County. Even assuming the Division is correct, it is not entitled to a change of venue as of right because it has not followed the demand procedure set forth in CPLR §511(a) and (b). *See Howard v. New York State Board of Parole*, 5 AD3d 271

(1st Dep't 2004); *Bank v. New York State & Local Employees' Retirement Sys.*, 271 AD2d 252 (1st Dep't 2000). Nor has the Division offered any alternative grounds for a discretionary change. *Banks*, 271 AD2d at 253. Therefore, the proceeding may go forward here. *Howard*, 5 AD3d at 272, citing *Phillips v. Tietjen*, 108 App Div 9, 10 (2nd Dep't 1905).

The more complex issue involves the review of the Parole Board's decision on the merits. There is no constitutional or statutory right to parole. As explained by the Court of [*6]Appeals in *Russo v. New York State Board of Parole*, 50 NY2d 69 (1980), when a person is convicted of a crime, his rightful liberty interest is extinguished. Consistent with this idea is the phrase "discretionary release" as used in Executive Law §259-i, subd. 2(c)(A). However, that same statute establishes criteria and mandates that guidelines consistent with those criteria "be established and followed unless reasons are given for not following them." *Russo*, 50 NY2d at 75.

Specifically, Executive Law §259-i, subd. 2(c)(A) states in relevant part that:

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 the respect for law.

In other words, the statute is forward looking. The statute then refers to guidelines adopted pursuant to the mandates of Executive Law §259-c, which "shall require" the Parole Board to consider specific factors when making a decision on release. Five factors are then listed. Arguably, three of the five are relevant here. The ones that are not relevant include number (iv), which deals with a deportation order, and number (ii), which concerns performance as a participant in a temporary release program. Phillips was never faced with a deportation order, as he is an American citizen by birth, and he was never placed in a temporary release program.

However, the other three factors are relevant. Number (i) refers to the inmate's "institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates." Number (iii) deals with "release plans including community resources, employment, education and training and support services available to the inmate." Finally, number (v) includes "any statement made to the board by the crime victim or the victim's representative." This factor is relevant to the extent that no such statement opposing parole was ever submitted to the Board in this case. In addition to these guidelines, where the court has set the minimum period of imprisonment, as was the case here, the Parole Board must also consider the seriousness of the offense and the inmate's prior criminal history. Executive Law §259-i, subds. 1(a) and 2(c).

This Court has reviewed Mr. Phillips' papers very closely and reread the 18-page transcript a number of times, along with the brief, almost angry decision of the Parole Board. Having done this, I cannot agree with counsel for the Division of Parole that the Board considered any other factors except for the brutal circumstances of the double murder committed by Phillips in 1968, for which he was tried and convicted six years later.

The proceedings themselves prove this point. At the hearing, Phillips was first asked about the crime, and then how he came to be in that situation. He discussed the depraved lifestyle to which he had fallen prey within the corrupt climate of the Police Department at that time. He was then asked how he had survived his long incarceration in light of his former life as a police officer, e.g., had he been threatened. "Yes" he responded, but he decided he did not want to be in protective custody, and for his own self-respect he opted to be a part of the general inmate population. That is when he began teaching and helping other prisoners with their problems. It bears repeating that Phillips has never been [*7]charged with any infraction in his almost thirty years of incarceration and rather has been an exemplary inmate.

The Commissioners then referred to the many letters written on Phillips' behalf, and it is obvious that they had been read. Phillips was asked about some of them. Inquiry was then made concerning his health, and he described his bouts with cancer. Finally, he was asked about release plans and what he would teach. Here he described the Veteran's Program referred to earlier, explaining that he would teach law.

So that while it is true that some questions were asked about Phillips' life in prison and a few about his future, there is absolutely nothing in the decision to indicate that factors such as institutional accomplishments, release plans, and lack of a prior criminal record

were even considered. Since the law mandates that they be, the decision was contrary to the law and arbitrary and capricious.

In *King v. New York State Division of Parole*, 190 AD2d 423 (1st Dep't 1993), *affd.* 83 NY2d 788 (1994), the court found that the inmate, who had been denied parole after having served 22 years in prison for murder and related crimes, had been denied a proper hearing because the relevant guidelines had not been considered. Certainly, seriousness of the crimes committed was important, but as the Appellate Division remarked: "Since, however, the legislature has determined that a murder conviction *per se* should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself." 190 AD2d at 433.

Arguably, the Parole Board in this case tried to note such "aggravating circumstances" by pointing out Phillips' career as a law enforcement person who had brutally exploited that position. However, that circumstance was all a part of the crime, which the judge presiding at the trial and reading the probation report believed was worthy of sentences of 25 years to life maximum to run concurrently. As Michael Armstrong pointed out in his letter, the sentencing judge had other options. These would have included consecutive sentences for the two lives taken. Further, while there is no denying the heinous nature of the crimes Phillips committed and the corrupt life he led, he was one of the few officers who came forward and cooperated with the authorities and he was successful in helping to bring about enormous changes in the culture and honesty of the New York City Police Department. While it is true that the judiciary must not usurp the role of the executive in making parole decisions, the converse is also true. The executive branch also should not usurp the role of the sentencing judge by prolonging a sentence to one without end.

This Court is cognizant of the fact that a petitioner such as Phillips has a heavy burden in disturbing a Board's finding where great regard is shown for the Board's expertise and responsibility in performing a difficult and complex function. *See Russo*, *supra*. But here I find that Phillips has sustained that burden. The text and texture of the Board's decision, which sets no guidelines for future conduct, has the appearance of saying to the inmate "There is simply nothing you can do or have done to change our minds because you did this terrible deed." Though this approach may have a superficial appeal, it does not follow the mandates of the law.

There are many instances, some cited by the Division of Parole here, where appellate and trial courts have upheld Board decisions, but each can be distinguished on [*8]their facts and circumstances. For example, in *Herbert v. New York State Board of Parole*, 97 AD2d 128 (1st Dep't 1983), *app withdrawn* 62 NY2d 617 (1984), the Board denied parole to inmate Paula Herbert, who had pleaded guilty to two separate murders and had served her minimum sentence of 8 years based on her sentence of 8 to 25 years. Herbert had made extraordinary rehabilitative strides while in prison. Notably, and in contrast to the instant case, the Board had acknowledged in its parole decision the positive aspects of Herbert's facility adjustment. However, it concluded that this positive factor was not sufficient to justify parole in light of Herbert's violent crimes and her long prior history of arrests and drug addiction. The Appellate Division stated (at p 132) that:

In view of petitioner's past history of violent behavior, addiction to drugs and violation of a prior period of probation, the Board was not unjustified in concluding that her release at this time was not compatible with the welfare of society.

In *Garcia v. New York State Division of Parole*, 239 AD2d 235 (1st Dep't 1997), the court also found that the inmate had not met his heavy burden of showing that the Board had not considered all the relevant factors in reaching its decision. Garcia had been in prison for thirteen years when he came before the Board a second time and was denied release**.** Again in contrast to the case at bar, the Board acknowledged Garcia's accomplishments while in prison and encouraged that they be continued. The Board nevertheless denied parole because of the heinous nature of the crime, a murder for hire, and the fact that Garcia's prior record reflected other offenses.

In *Walker v. Travis*, 252 AD2d 360 (1st Dep't 1998), Rita Walker's second parole application was denied after she had served 11 years of a sentence of 6 to 18 years upon a guilty plea to manslaughter to satisfy an indictment that she had fatally shot her boyfriend. Apparently, Walker had made an outstanding adjustment during the last several years before appearing before the Board. However, the Appellate Division concluded that the denial of parole had not been irrational or improper since it appeared that the Board had considered Walker's entire situation, even though it had relied on the severity of the crime in its decision.

On the other side, courts have annulled decisions of the Board and remanded when the Parole Board has failed to fairly consider the required factors. A prime example is the case of *Chan v. Travis*, NYLJ, 28:4 (February 27, 2003) where Supreme Court Justice Sheridan in Albany County found that the Board's exclusive reliance on the seriousness of the inmate's crimes and its failure to

adequately explain its denial of parole rendered the decision arbitrary and capricious, "particularly in light of petitioner's most remarkable institutional and rehabilitative record." Justice Sheridan then remanded the matter for a re-hearing, and the Division of Parole appealed. The appeal was ultimately dismissed as moot, as Chan had been released at the next regularly scheduled review before the re-hearing had been held. 3 AD3d 820 (3d Dep't 2004). Significantly, however, the Appellate Division declined to exercise its discretion, despite the Division's urging, to vacate Justice Sheridan's judgment. 3 AD3d at 821.

In *Cappiello v. New York State Board of Parole*, NYLJ, 18:1 (December 15, 2004), Justice Wetzel of this Court made a similar finding and disposition. There, the Board's decision was predicated on the following conclusion: "Your merciless assault on two [*9]vulnerable victims leads this panel to determine that your release at this time would pose a threat to public safety." The court found that the decision rang hollow for many reasons. Although in the course of a robbery in1976, Cappiello had brutally murdered an elderly couple in their home, in 1994 he had been placed in a work release program and had been there ever since doing extraordinarily well. He had appeared six times before the Board. The judge found there was no rational explanation for the Board's decision which could only be explained by reliance on the underlying crime to the exclusion of all other factors, and that such an approach was wrong.

As it is wrong here. If rehabilitation has meaning, if there is a belief that a man can change, if there is a faith that the goodness of a person can eventually resurface, then the law governing release on parole and the rationale for that law is being perverted by a Board that refuses to consider only what a man did 37 years ago and is paying for in almost 30 years of imprisonment. Does the Board honestly believe that Mr. Phillips, a 74-year-old man, half blind from cancer, who has helped countless people, and learned and taught principles of law to many, truly is a continuing threat to society?

I find that Phillips is entitled to a new hearing forthwith before a Board made up of different Commissioners who are to consider all of the statutory guidelines when determining Phillips' parole application and who are to make clear in their decision that they have done that.

Accordingly, it is hereby

ADJUDGED that the petition is granted, the Parole Board's determination is annulled, and the matter is remanded to the Division of Parole for a re-hearing consistent with the terms of this decision.

This constitutes the decision and judgment of the Court.

Dated: March 8, 2005

_____

J.S.C.

Return to Decision List