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Decision in Art. 78 proceeding - Pulinario, Keila (2014-02-11)

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SCANNED ON 2/14/2014
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. PETER H. MOULTON

PRESENT: _____ J.S.C. _____
Justice

PART 57

Pulivrio

INDEX NO. 100990/13

-v-

MOTION DATE _____

NYS Department of Correction

MOTION SEQ. NO. 01

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

*decided in accordance with the
written decision issued on today's date*

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

RECEIVED
FEB 13 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 2/11/14

[Signature]
HON. PETER H. MOULTON J.S.C.
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Supreme Court: New York County
Part 57

-----X
KEILA PULINARIO,

Petitioner,

-against-

Index No. 100990/13

NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION,
ANTHONY ANNUCCI, Acting Commissioner of
New York State Department of Corrections
and Community Supervision, NEW YORK
STATE BOARD OF PAROLE, and TINA STANFORD,
Chairwoman of the New York State Board
of Parole,

Respondents.

-----X
Peter H. Moulton, Justice

In this Article 78 proceeding petitioner Keila Pulinario ("Pulinario") challenges the decision of respondent New York State Board of Parole ("Parole Board") dated June 6, 2012, to deny her application for parole.

BACKGROUND

Pulinario was convicted in 1997 of the murder in the second degree of Imagio Santana ("Santana") in Suffolk County, New York. The two had been friends. Petitioner asserts that in 1995, Santana raped her in his car and then bragged to mutual acquaintances about the incident. After learning about Santana's statements, Pulinario borrowed a gun from her boyfriend and convinced Santana to

accompany her to a wooded area where she confronted him. She stated that Santana mocked her and threatened to do it again, although it is unclear from the record before the court if the threat included the implication of imminent violence. Pulinario then killed Santana with two bullets and buried the gun. She was apprehended, charged, and tried. After the jury delivered a verdict of second degree murder the court sentenced her to 25 years to life.

Pulinario subsequently brought a habeas corpus petition. The Federal District Court granted the petition and vacated her conviction and sentence.

Following the grant of the habeas petition Pulinario pleaded guilty to murder in the second degree and was re-sentenced with the prosecutor's recommendation to a period of 15 years to life. At the re-sentencing hearing the ADA, who had represented the People beginning with the first trial, noted that Pulinario had accepted responsibility for the crime and "had made great strides in the rehabilitation process" such that she was not the "the same person she was 10 years ago." The ADA also stated, inter alia, that had a determinate sentence of 15 years been available, that "likely" would have been the ADA's recommendation. She also stated that the Suffolk County District Attorney's office would not take a position on parole.

Pulinario's first application for parole, in 2010, was denied.

The instant proceeding concerns her second application.

Pulinario's second application for parole included extensive information concerning her participation in various programs while incarcerated, including STEPs to End Family Violence, a program that works with incarcerated women who have suffered abuse. Sister Mary Nerney of the STEPs program submitted a letter on Pulinario's behalf, in which she recounted Pulinario's positive changes in her fifteen years behind bars. In recommending that Pulinario was ready "to return to society" Sister Nerney noted that Pulinario had expressed remorse for her crime, and had participated in rehabilitative and vocational programs while incarcerated. This assessment was bolstered by the COMPAS report of Pulinario's Parole Officer, which stated that she was "low" risk of danger to society.

Pulinario's application also included a letter from Elaine Lord, who was the Superintendent of the Bedford Hills Correctional Facility in 1997 - when Pulinario arrived at that facility - through 2004. The letter contains a description of Pulinario's positive evolution while at Bedford Hills.

Ms. Pulinario will turn 38 on May 18 [2012]. She was 23 when she came to Bedford Hills. She has served a long time during which she has matured and grew and needs now to be in the community using the skills that she has acquired and the maturity they illustrate. There is nothing to be gained by keeping Ms. Pulinario in prison and every expectation that she would be an asset to our society if she were released.

On June 6, 2012, Pulinario appeared before the Parole Board

for the second time. The Parole Board denied her application on the same day.

At the hearing, almost all the Board's questions and comments concerned the circumstances of the crime, the rape, and Ms. Pulinario's relationship to Santana. The Parole Board made only passing references to the contents of the application packet. There were no questions about Pulinario's detailed release plans. There were no questions that went to Pulinario's vocational work -- and work on her behavior and self-knowledge -- during incarceration. The Parole Board spent no time at the hearing or in its decision discussing the COMPAS assessment and the comments by the ADA at Pulinario's resentencing.

The Parole Board issued its decision the same day. The decision states that "there is a reasonable probability that you would not live and remain at liberty without violating the law and that your release would be incompatible with the public safety and welfare of the community."

The remaining two paragraphs of the decision state:

This decision was based on the following: You continue to serve time for your conviction of murder second degree. You armed yourself with a gun, lured your victim to a secluded area and shot him in the chest and back causing his death. You then buried the gun in an effort to fool the police. During the interview you claim your actions were just to scare the victim. However your actions were premeditated.

The panel has considered your many accomplishments, your good conduct, your letters of support, the risk assessment and all factors required by law. However, the scenario and your conduct during the instant offense are concerning and describe a deviated and dangerous person who could impose a threat to the community. Parole at this time is denied.

DISCUSSION

Executive Law § 259-i(2)(c)(A) states in relevant part:

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 deprecate the seriousness of his crime as to undermine respect for the law.

It is the duty of the Parole Board to consider each of the applicable factors specified in the statute in determining the applications of people who come before it. (King v New York State Division of Parole, 190 AD2d 423, 431, aff'd 83 NY2d 788.) The Board has discretion to determine how much weight to give each of the applicable factors. The discretion reposed in the Board is broad, and its determination will only be overturned where it evinces "irrationality bordering on impropriety." (Samuel v Alexander, 69 AD3d 861, 862, appeal dismissed 14 NY3d 837.)

While this standard of review sets a high threshold, and courts are properly reluctant to second guess the Parole Board,

courts have reversed Parole Board decisions where the Board's decision is based solely on the seriousness of the crime. (E.g. Almonor v New York State Board of Parole, 16 Misc3d 1126[A].) Moreover, to demonstrate that it has properly considered and weighed applicable statutory factors, the Parole Board must do more than make a "passing reference" to such factors. (Rios v New York State Division of Parole, 15 Misc3d 1107[A].)

In considering petitioner's application, the Parole Board's overwhelming emphasis was on the offense, and the events that led up to the offense. At the hearing, there were only passing references to the contents of petitioner's application. In the decision there was only a perfunctory mention of all the statutory factors that weighed in Pulinario's favor.

There was no substantive discussion by the Parole Board at the hearing or in its decision of other factors relevant to its determination, including Pulinario's acceptance of responsibility for her crime, her vocational work in prison and her employment plans once released, her work in STEPs and other programs to change her behavior and prepare herself to live in society. There is nothing in the record to indicate that the Parole Board weighed the ADA's statements at Pulinario's 2004 re-sentencing. The ADA in question had been the prosecutor on the case from its inception. She did not have to make any statement concerning the defendant's rehabilitation at the re-sentencing. Her assessment that Pulinario

"had made great strides in the rehabilitation process," and other statements at sentencing, must be considered by the Parole Board. (Executive Law § 259-i(c)(A)(vii).)

There was no substantive discussion in the hearing or in the Parole Board's decision of the COMPAS assessment, which is designed to measure risks arising from a grant of parole. The overall assessment, by a Parole Officer who had worked with Pulinario since late 2010 at her correctional facility, was that Pulinario was a "low" risk for felony violence, re-arrest, or absconding from parole. The COMPAS assessment is integral to any parole decision. (See Garfield v Evans, 108 AD3d 830.)

In sum, the Parole Board gave great weight to the seriousness of Pulinario's crime without any explanation of why the seventeen year old crime outweighed the voluminous evidence that indicates that she would presently be able to live a quiet and crime-free life in society. Accordingly, the petitioner is entitled to a new hearing and determination. (Perfetto v Evans, 112 AD3d 640; Rabenbauer v New York State Dep't of Corrections, 41 Misc3d 1235[A].)

CONCLUSION

For the reasons stated it is

ORDERED and ADJUDGED that the petition is granted and it is further

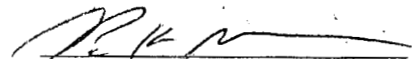
ORDERED and ADJUDGED that the court annuls respondent's decision, dated June 6, 2012, denying petitioner's release to parole supervision, and it is further

ORDERED and ADJUDGED that the matter is remitted to the State Board of Parole to hold such a hearing within 45 days of service of this order and judgment with notice of entry. This constitutes the Order and Judgment of the Court.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

DATED: February 11, 2013



J.S.C.

HON. PETER H. MOULTON