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Matter of Quiles v NYS Dept. of Corr. & Community Supervision
2015 NY Slip Op 31815(U)
September 8, 2015
Supreme Court, Franklin County
Docket Number: 2015-120
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

X

In the Matter of the Application of
LUIS QUILES, #83-A-2020,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #16-1-2015-0071.16
INDEX # 2015-120
ORI #NY016015J

-against-

NYS DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,
Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Luis Quiles, verified on February 3, 2015 and filed in the Franklin County Clerk's office on February 11, 2015. Petitioner, is now an inmate at the Franklin Correctional Facility, is challenging the September 2013 determination denying him discretionary parole release. The Court issued an Order to Show Cause on February 17, 2015 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on April 17, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated April 17, 2015. No Reply thereto has been received from petitioner.

On March 28, 1983 petitioner was sentenced in Supreme Court, Bronx County, to concurrent indeterminate sentences of 20 years to life upon his convictions of the crime of Murder 2°, as set forth in two separate indictments. After having been denied discretionary parole release on six previous occasions petitioner made his seventh appearance before a Parole Board on September 17, 2013. Following that appearance a decision was issued again denying him discretionary parole release and directing that he

be held for an additional 24 months. The September 2013 parole denial determination reads as follows:

> "AFTER CAREFULLY REVIEWING YOUR RECORD, A PERSONAL INTERVIEW AND DUE DELIBERATION, THIS PANEL CONCLUDES THAT DISCRETIONARY RELEASE IS NOT PRESENTLY WARRANTED AS THERE IS A REASONABLE PROBABILITY YOU WOULD NOT LIVE AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND FURTHERMORE, 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.
>
> YOU STAND CONVICTED OF THE SERIOUS OFFENSE OF 2 COUNTS OF MURDER 2ND. IT IS NOTED THAT THIS IS YOUR 1ST NYS INCARCERATION OF RECORD. THE BOARD ALSO NOTES THAT YOU HAVE NOT RECEIVED ANY DISCIPLINARIES SINCE 2008. MORE COMPELLING, HOWEVER, IS THE BRUTAL AND SERIOUS NATURE OF YOUR CRIME.
>
> THE PANEL MAKES NOTE OF ALL STATUTORY FACTORS INCLUDING YOUR REHABILITATIVE EFFORTS AND PROGRAMING, RISK AND NEEDS ASSESSMENT, RE-ENTRY PLANS, LETTERS OF SUPPORT, SENTENCING MINUTES AND IMPROVED DISCIPLINARY RECORD.
>
> AT THIS TIME, THE PANEL HAS DETERMINED AFTER WEIGHING ALL REQUIRED FACTORS, YOUR DISCRETIONARY RELEASE IS DENIED."

The document perfecting petitioner's administrative appeal from the September 2013 parole denial determination was received by the DOCCS Board of Parole Appeals Unit on January 22, 2014. Although the Appeals Unit apparently failed to issue its findings and recommendation within the four-month time frame set forth in 9 NYCRR §8006.4(c), a belated decision on administrative appeal affirming the September 2013 parole denial determination was issued on or about February 12, 2015, the day after this proceeding was commenced.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §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 society and will not so deprecate the seriousness of his crime as to undermine respect for the 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 has 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. Dennis*on, 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.

Petitioner first argues, in effect, that the Parole Board focused exclusively on the serious nature of the crimes underlying his incarceration, without adequate consideration of other statutory factors. A Parole Board, however, 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*, lv granted* 23 NY3d 903*, app dismissed* 24 NY3d 1052*, 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." *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

In the case at bar, reviews of the Parole Board Report (Reappearance September 2013) and transcript of petitioner's September 17, 2013 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's lack of a prior criminal record, therapeutic/vocational programing record, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record (clean since 2008) and release plans/community support in addition to the circumstances of the crimes underlying his incarceration[1]. The Court, moreover, finds

[1] The descriptions of the separate crimes underlying petitioner's incarceration, as set forth in the Parole Board Report (reappearance September 2013) and referenced during the course of the September 17, 2013 Parole Board appearance, are as follows: "The subject [petitioner] along with two accomplices on 1/3/82 entered the victim's apartment and while drinking alcohol and smoking marijuana forced victim to perform fellatio on them. After forcing victim to withdraw money from the bank, the three tied and gagged him. The three later stabbed, beat and bludgeoned the victim with a crucifix and screwdriver causing his death. They then robbed the apartment of shoes, a clock and suitcase and departed. The subject [petitioner] along with two accomplices, one the same as before, sometime before 1/9/82, accosted a [second] victim, stabbed him with a screwdriver (55 times) and bludgeoned him with a crucifix, as well as slashing his wrists three times before removing the victim[']s gold teeth with a pair of pliers." Although petitioner generally admitted guilt to the above-described crimes, he has repeatedly denied that there was any sexual component to the offenses. This Court notes, however, the above-referenced sexual component to the January 3, 1982 crime is consistent with the description of the offense set forth in the pre-sentence probation report.

nothing in the transcript to suggest that the Parole Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries.

In view of the above, 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 discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality boarding on impropriety as a result of the emphasis placed by the Board on the disturbing nature of the separate crimes underlying petitioner's incarceration. *See Jones v. New York State Parole Board,* 127 AD3d 1327*, Olmosperez v. Evans,* 114 AD3d 1077*, lv granted* 23 NY3d 907*, Dalton v. Evans,* 84 AD3d 1664 and *Marcus v. Alexander*, 54 AD3d 476.

To the extent petitioner purports to rely on *King v. New York State Division of Parole*, 190 AD2d 423, *aff'd* 83 NY2d 788, the Court finds such reliance misplaced. In *King* the Appellate Division, First Department, not only determined that the Parole Board improperly considered matters not within its purview (penal policy with respect to convicted murders) but also that the Parole Board failed " . . . to consider and fairly weigh all of the information available to them concerning petitioner that was relevant under the statute, which clearly demonstrates his extraordinary rehabilitative achievements and would appear to strongly militate in favor of granting parole." *Id* at 433. The appellate-level court in *King* went on to note that the only statutory criterion referenced by the Board in the parole denial determination was the seriousness of the crime underlying Mr. King's incarceration (felony murder of an off-duty police officer during the robbery of a fast food restaurant). According to the Appellate Division, First Department, "[s]ince . . . 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." *Id* at 433. In July of 2014, however, the Appellate Division, Third Department - whose precedent is binding on this Court - effectively determined that the above-referenced "aggravating circumstances" requirement enunciated by the First Department in *King* does not represent the state of the law in the Third Department. *See Hamilton v. New York State Division of Parole,* 119 AD3d 1268. In *Hamilton* it was noted that the Third Department " . . . has repeatedly held - both recently and historically - that, so long as the [Parole] Board considers the factors enumerated in the statute [Executive Law §259-i(2)(c)(A)] it is 'entitled . . . to place a greater emphasis on the gravity of [the] crime' (*Matter of Montane v. Evans,* 116 AD3d 197, 203 (2014), *lv granted* 23 NY3d 903 (2014) [internal quotation marks and citations omitted]' . . ." *Id* at 1271 (other citations omitted). After favorably citing nine Third Department cases decided between 1977 and 2014, the *Hamilton* court ended the string of cites as follows: " . . . *but see Matter of King v. New York State Div. of Parole,* 190 AD2d 423, 434 (1993), *aff'd on other grounds* 83 NY2d 788[2] (1994) [a First Department case holding, in conflict with our precedent, that the Board [of Parole] may not deny discretionary release based solely on the nature of the crime when the remaining statutory factors are considered only to be dismissed as not outweighing the seriousness of the crime]." 119 AD3d 1268, 1272. The *Hamilton* court continued as follows:

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[2] The Court of Appeals in *King* only referenced the fact that " . . . one of the [Parole] Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place. Consideration of such factors is not authorized by Executive Law §259-i." 83 NY2d 788, 791. The Court of Appeals, however, did not address that aspect of the Appellate Division, First Department, decision in *King* holding that a parole denial determination must be based upon a showing of some aggravating circumstances beyond the inherent seriousness of the underlying crime.

> "Particularly relevant here, we have held that, even when a petitioner's institutional behavior and accomplishments are 'exemplary,' the Board may place 'particular emphasis' on the violent nature or gravity of the crime in denying parole, as long as the relevant statutory factors are considered (*Matter of Valderrama v. Travis,* 19 AD3d at 905). In so holding we explained that, despite [the *Valderrama*] petitioner's admirable educational and vocational accomplishments and positive prison disciplinary history, '[o]ur settled jurisprudence is that a parole determination made in accordance with the requirements of the statutory guidelines is not subject to further judicial review unless it is affected by irrationality bordering on impropriety' (*id*. [internal quotation marks and citations omitted]). We emphasize that this Court [Appellate Division, Third Department] has repeatedly reached the same result, on the same basis, when reviewing denials of parole to petitioners whom we recognized as having exemplary records and as being compelling candidates for release." 119 AD3d 1268, 1272 (additional citations omitted).

The Court therefore rejects petitioner's argument on this point.

Petitioner specifically argues that the Parole Board improperly evaluated his risk assessment in that he was scored as a low risk for committing new felony violence for rearrest and/or for absconding. This Court notes, however, that although the Appellate Division, Third Department, has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* 112 AD3d 1056*, Malerba v. Evans,* 109 AD3d 1067, *lv denied* 22 NY3d 858 and *Garfield v. Evans*, 108 AD3d 830), there is nothing in such cases, or the amended version of Executive Law §259-c(4), to suggest that the quantified risk assessment determined through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Parole Board to determine, based upon its consideration of the factors set forth in Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. The "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole

supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A) including, as here, the disturbing nature of the separate crimes underlying his incarceration. *See Rivera v. New York State Division of Parole*, 119 AD3d 1107 and *Partee v. Evans*, 40 Misc 3d 896, *aff'd* 117 AD3d 1258, *lv denied* 24 NY3d 901.

Petitioner also argues, in effect, that the September 2013 parole denial determination was fatally flawed by reason of the Board's failure to consider parole recommendations allegedly set forth in his plea minutes. The March 28, 1983 sentencing minutes were properly before the Parole Board (and included in the record of this proceeding), but the plea minutes (date unknown) were apparently not before the Board for consideration. Although petitioner purports to quote from the plea minutes, he did not annex a copy of the minutes to his papers. In any event, the only "recommendation" identified by the petitioner is that the People recommended acceptance of a plea bargain whereby petitioner would be sentenced to less than the maximum term permitted by law. Even if the Parole Board was required to consider the plea minutes in addition to the sentencing minutes, this Court notes that a sentencing court's imposition of a less-than-maximum sentence does not indicate a favorable parole recommendation. *See Duffy v. New York State Division of Parole*, 74 AD3d 965. The Court therefore finds that, the People's recommendation/acceptance of a plea bargain agreement which would include

the imposition of a less-than-maximum sentence similarly does not constitute an indication that the People - or the sentencing court - made a favorable parole recommendation.

Finally, the Court finds that the September 2013 parole denial determination, predicated upon the statutory (Executive Law §259-i(2)(c)(A)) bases that "THERE IS A REASONABLE PROBABILITY YOU [petitioner] WOULD NOT LIVE AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND FURTHERMORE, 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" and based upon the "BRUTAL AND SERIOUS NATURE" of the crimes underlying petitioner's incarceration, is in compliance with statutory and judicial standards. *See Comfort v. New York State Division of Parole*, 68 AD3d 1295. *Cf. Vaello v. Parole Board Division of State of New York*, 48 AD3d 1018. *See also Ek v. Travis*, 20 AD3d 667, *lv dis* 5 NY3d 862.

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

ADJUDGED, that the petition is dismissed.

Dated: September 8, 2015 at
Indian Lake, New York.

_____
S. Peter Feldstein
Acting Supreme Court Justice