September 2021

Decision in Art. 78 proceeding - Rahiem, Sharif A. (2011-06-27)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
SHARIF A. RAHIEM, 89-A-2141,

Petitioner,

-against-

NEW YORK STATE DIVISION OF PAROLE,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-11-ST2347 Index No. 115-11

Appearances: Sharif A. Rahiem
Inmate No. 89-A-2141
Petitioner, Pro Se
Fishkill Correctional Facility
P.O. Box 307
Beacon, NY 12508

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Adam W. Silverman,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Fishkill Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated August 4, 2010

to deny petitioner discretionary release on parole. Petitioner is serving a term of fifteen (15) years to life upon a conviction of murder in the second degree. Among the many arguments set forth in the petition, petitioner contends that the Parole Board focused solely on petitioner's instant offense and did not consider all the statutory factors; the Board failed to consider the sentencing minutes; the Board did not consider petitioner's positive programing and achievements while incarcerated; the Board implemented an executive policy to deny parole to violent felony offenders; the Board's decision was pre-determined; the determination was unsupported by the record; the Board failed to timely respond to the petitioners's administrative appeal filed August 30, 2010; the Board's determination violated petitioner's due process rights; and that the denial of parole was tantamount to a re-sentencing.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Parole is denied. After a careful review of your record, your personal interview, and due deliberation, it is the determination of this panel that, if released at this time, there is a reasonable probability that you would not live at liberty without violating the law, your release at this time is incompatible with the welfare and safety of the community, and will so deprecate the seriousness of this crime as to undermine respect for law. This decision is based upon the following factors: You appear before this panel with the serious instant offense of murder 2nd wherein you in concert shot and killed the victim. The extreme violence associated with this terrible crime makes it clear that you had a callous disregard for human life. Since your last appearance you received a Tier II infraction for prison misconduct. Consideration has been given to any program completion however, your release at this time is denied."

As stated in Executive Law §259-i (2) (c) (A):

> "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; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate []; (v) any statement made to the board by the crime victim or the victim's representative []" (Executive Law §259-i [2] [c] [A]).

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of De La Cruz v Travis, 10 AD3d 789 [3d Dept., 2004]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3d Dept., 2001]). If the Parole Board's decision is made in accordance with the statutory requirements, the Board's determination is not subject to judicial review (Matter of De La Cruz v Travis, supra). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v.

New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's institutional employment and programming, his lack of prior criminal convictions, his disciplinary record while incarcerated, his plans upon release, and a letter from petitioner's defense attorney. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Siao-Pao, 11 NY3d 773 [2008]; Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]).

It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Weir v. New York State Division of Parole, 205 AD2d 906, 907 [3rd Dept., 1994]; Matter of Sinopoli v New York State Board of Parole, 189 AD2d 960, supra; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see Matter of Young v New York Division of Parole, 74 AD3d 1681 [3rd Dept., 2010]; Matter of Wise v New York State Division of Parole, 54 AD3d 463 [3rd Dept., 2008]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive

Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing, in violation of the Double Jeopardy Clauses's prohibition against multiple punishments are conclusory and without merit (see Matter of Bockeno v New York State Parole Board, 227 AD2d 751 [3rd Dept., 1996]; Matter of Crews v New York State Executive Department Board of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A, [Sup. Ct., West. Co., 2006]; Matter of Kalwasinski v Paterson, 80 AD3d 1065 [3d Dept., January 20, 2011]; Matter of Carter v Evans, 81 AD3d 1031 [3d Dept., February 3, 2011]). The fact that an inmate has served his or her minimum sentence does not confer upon the inmate a protected liberty interest in parole release (see Matter of Motti v Alexander, 54 AD3d 1114, 1115 [3rd Dept., 2008]). The Parole Board is vested with the discretion to determine whether release is appropriate notwithstanding the fact that the sentencing court set the minimum term of petitioner's sentence (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000]; Matter of Cody v Dennison, 33 AD2d 1141, 1142 [3rd

Dept., 2006] lv denied 8 NY3d 802 [2007]; Matter of Burress v Dennison, 37 AD3d 930 [3rd Dept., 2007]).

The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The 2007 remarks of former Parole Commissioner Manley[1] are not indicative of the procedure undertaken by petitioner's 2010 Parole Board, comprised of Commissioners Greenan and Gallivan, and are therefore irrelevant to this case. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New York Division of Parole, 294 AD2d 726 [3rd Dept., 2002]; Matter of Jones v Travis, 293 AD2d 800, 801 [3rd Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3rd Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3rd Dept., 2006]; Matter of Motti v Dennison, 38 AD3d 1030, 1031 [3rd Dep., 2007]; Matter of Garofolo v Dennison, 53 AD3d 734 [3rd Dept., 2008]; Matter of MacKenzie v Dennison, 55 AD3d 1092, 866 NYS2d 384 [3rd Dept., October 22, 2008]).

With respect to petitioner's argument that the Appeals Unit failed to issue a timely decision, the Court observes that such a failure does not operate to invalidate the underlying administrative decision. The sole consequence is to permit the petitioner to deem his or her administrative remedy to be exhausted, and enable the petitioner to immediately seek judicial

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[1]In sum and substance, former Commissioner Manley, in an address before the New York City Bar Association given on February 15, 2007, allegedly indicated that Parole Commissioners were insufficiently trained for their employment duties; had insufficient time to consider and review the inmate case file before them; and, because they were rushed and unprepared, would commonly be reviewing papers for the next parole interview during the appearance of the inmate then before them.

review of the underlying determination (see 9 NYCRR § 8006.4 [c]; Graham v New York State Division of Parole, 269 AD2d 628 [3rd Dept, 2000], lv denied 95 NY2d 753; People ex rel. Tyler v Travis, 269 AD2d 636 [3rd Dept., 2000]; Matter of Mentor v New York State Division of Parole, 67AD3d 1108, 1109 [3rd Dept., 2009]).

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court first observes that there is no inherent right to parole under the constitution of either the United States or the State of New York (see Greenholtz v Inmates of the Nebraska Penal and Correctional Complex, 442 US 1, 7 [1979]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 73, supra). It has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate expectation of, release; therefore, no constitutionally protected liberty interests are implicated by the Parole Board's exercise of its discretion to deny parole (see Barna v Travis, 239 F3d 169, 171 [2d Cir., 2001]; Marvin v Goord, 255 F3d 40, 44 [2d Cir., 2001]; Boothe v Hammock, 605 F2d 661, 664 [2d Cir., 1979]; Paunetto v Hammock, 516 F Supp 1367, 1367-1368 [SD NY, 1981]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 75-76, supra, Matter of Gamez v Dennison, 18 AD3d 1099 [3rd Dept., 2005]; Matter of Lozada v New York State Div. of Parole, 36 AD3d 1046, 1046 [3rd Dept., 2007]). The Court, accordingly, finds no due process violation.

With regard to the Parole Board's failure to consider the minutes of petitioner's sentencing, it is now well settled that this does not mandate a new hearing if, as here, the minutes were not available for review (see Matter of Freeman v Alexander, 65 AD3d 1429, [3rd Dept., 2009]; Matter of Blasich v New York State Division of Parole, 68 AD3d 1339,

1340-1341 [3rd Dept., 2009]; see also Matter of Lebron v Alexander, 68 AD3d 1476, 1477 [3rd Dept., 2009] [Held: where the Parole Board is unable to consider the sentencing minutes a favorable presumption does not arise]; Matter of Andreo v Alexander, 72 AD3d 1178 [3rd Dept., 2010]). Respondents have submitted the affidavit of Randy Berkowitz, the court reporter for the sentencing proceedings. This affidavit supports the Board's assertion that Mr. Berkowitz's notes and transcript could not be located. As such, the Court finds that the respondent made an adequate search for the sentencing minutes, and is unable to consider them for reasons beyond the Parole Board's control. For this reason petitioner's argument has no merit (see Matter of Andreo v Alexander, supra).

The Court has reviewed petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, arbitrary and capricious, or constitute an abuse of discretion. The petition must therefore be dismissed.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this

decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: June 27, 2011
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated February 3, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated April 15, 2011, Supporting Papers and Exhibits

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SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit B, Pre-Sentence Investigation Report, and respondent's Exhibit D, Confidential Portion of Inmate Status Report. For good cause shown, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: June 27, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice