September 2021

Decision in Art. 78 proceeding - Rodriguez, Raymond (2008-06-17)

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
RAYMOND RODRIGUEZ, #91-A-6604,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules

DECISION AND JUDGEMENT
RJI #16-1-2007-0509.109
INDEX # 2007-1358
ORI #NY016015J

-against-

GEORGE ALEXANDER, Chairman,
New York State Board of Parole,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Raymond Rodriguez, verified on September 8 or 18?, 2007, and stamped as filed in the Franklin County Clerk's office on October 3, 2007. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the May, 2006, determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on October 16, 2007, and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on January 11, 2008, as well as respondent's Letter Memorandum of January 11, 2008. Additional correspondence from counsel for the respondent, dated January 11, 2008, was received directly in chambers on January 14, 2008. The Court has also received and reviewed petitioner's Reply to the respondent's Answer and Return, filed in the Franklin County Clerk's office on January 30, 2008.

On August 21, 1991, the petitioner was sentenced in Supreme Court, Kings County, as a second felony offender, to an indeterminate sentence of imprisonment of 2½ to 5

years upon his conviction of the crime of Attempted Robbery 2°. The petitioner was apparently at liberty under parole supervision from a prior felony conviction at the time he committed the crime underlying his 1991 sentence. On October 18, 1993, the petitioner was sentenced in Supreme Court, Kings County to an indeterminate sentence of 15 years to life upon his conviction of the crime of Attempted Murder 1°. The sentence and commitment order specified that petitioner's 1993 sentence was to run "concurrent with sent. now being served." The petitioner was at liberty under parole supervision from his prior sentence(s) when he committed the crime underlying his 1993 conviction.

On May 2, 2006, the petitioner appeared at his initial parole release hearing after the imposition of the 1993 sentence. Following that hearing petitioner was denied parole and it was directed that he be held in DOCS custody for an additional 24 months. The parole denial determination reads as follows:

> "PAROLE IS DENIED. WHILE ON PAROLE YOU ROBBED ANOTHER PERSON AT KNIFEPOINT. ON A SUBSEQUENT OCCASION YOU ROBBED A SECOND PERSON AT KNIFEPOINT. WHEN A TRANSIT POLICE OFFICER ATTEMPTED TO ARREST YOU, YOU FIRED A SHOT. YOUR PRIOR 1988 PRISON TERM FOLLOWED CONVICTION FOR AN ATTEMPTED ROBBERY CHARGE AND ALSO INVOLVED A KNIFEPOINT ROBBERY. YOU HAVE ADDITIONALLY SERVED MULTIPLE SENTENCES TO LOCAL JAIL. YOU ARE A SIGNIFICANT THREAT TO PUBLIC SAFETY AND YOU ARE LIKELY TO COMMIT ADDITIONAL CRIMINAL ACTS WHEN YOU ARE AGAIN AT LIBERTY."

The document perfecting petitioner's administrative appeal was received by the Division of Parole Appeals Unit on September 21, 2006. The Appeals Unit, however, failed to issue its findings and recommendation within the time prescribed in 9 NYCRR § 8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A) 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 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 . . . [and] (iii) release plans including community resources, employment, education and training and support services available to the inmate . . ." In addition to the above, where the minimum period of imprisonment was established by the sentencing court, the Board must also consider the seriousness of the underlying offense and the inmate's prior criminal record. *See* Executive Law §259-i(2)(c)(A) and §259-i(1)(a). Discretionary parole release determinations are statutorily deemed to be judicial functions which are not review able 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, *Vasquez v. Dennis*on, 28 AD3d 908, *Webb v. Travis*, 26 AD3d 614 and *Coombs v. New York State Division of Parole*, 25 AD3d 1051. 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 Nankervis v. Dennison,* 30 AD3d 521, *Zane v. New York*

State Division of Parole, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

The petitioner contents, *inter alia*, that the parole board acted in violation of statute in that it did not have before it a copy of his sentencing minutes. Ordinarily, the board's failure to obtain a copy of the relevant sentencing minutes, and its resulting inability to consider any recommendations of the sentencing judge set forth therein, require that the underlying parole denial determination be vacated and a *de novo* hearing ordered. *See Carter v. Dennision*, 42 AD3d 779, *Lovell v. New York Division of Parole*, 40 AD3d 1166 and *Standley v. New York State Division of Parole*, 40 AD3d 1344. Notwithstanding the foregoing, in *Schettino v. New York State Division of Parole*, 45 AD3d 1086, the Appellate Division, Third Department deemed the parole board's failure to review sentencing minutes "harmless" where a copy of the minutes was attached to the board's answering papers and found to contain no parole recommendation. Obviously, in order to take advantage of the *Schettino* exception to the general rule requiring a parole board to have the sentencing minutes before it, a copy of the sentencing minutes must be provided to the Court reviewing the underlying parole denial determination.

In the case at bar the respondent acknowledges that the relevant sentencing minutes were not before the board when the petitioner was considered for discretionary release. In addition, the respondent has not provided the Court with a copy of such minutes in connection with this proceeding. In his correspondence of January 11, 2008, counsel for the respondent advised chambers that " . . .the Franklin Correctional Facility Parole Officer first sought Mr. Rodriguez's sentencing minutes on September 28, 2007,

after which Mr. Gannon [Assistant Counsel, New York State Division of Parole] sought them by letters of November 1, 2007, December 14, 2007, and January 9, 2008. . .” Counsel for the respondent further advised chambers that although the Division of Parole’s requests to the Supreme Court, Kings County for sentencing minutes in other cases are typically meet in three to five months from initial request, “ . . . there are instances where the Division has made requests dating back [a] year and still has not received the minutes, or even an affidavit to the effect that they are not available, from certain courts.” This Court notes that it has not received any notification to date indicating that a copy of petitioner’s sentencing minutes has been received by the Division of Parole. The Court therefore finds that the May, 2006, parole denial determination must be vacated and a *de novo* hearing ordered.

In the circumstances describe above, however, the Court finds that little purpose would be served in simply directing the board to promptly obtain a copy of the relevant sentencing minutes before conducting the *de novo* hearing. While the Court is satisfied that the respondent has diligently, although perhaps belatedly [1], sought to obtain a copy of the sentencing minutes from the Supreme Court, Kings County, it is becoming apparent that such minutes may not be available to the board in conjunction with a prompt *de novo* hearing and, in fact, may never be made available to the board. With this in mind the Court directs that if a copy of the sentencing minutes is not available to the parole board at the time it conducts the petitioner’s *de novo* parole release hearing, it shall presume

[1]Criminal Procedure Law §380.70 provides , in relevant part, that “[i]n any case where a person receives an indeterminate or determinate sentence of imprisonment, a certified copy of the stenographic minutes of the sentencing proceeding . . . must be delivered to the person in charge of the institution to which the defendant has been delivered within thirty days from the date such sentence was imposed . . .”

that the sentencing judge recommended, at sentencing, that petitioner be released to parole supervision upon completion of his minimum period of imprisonment.

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the May, 2006, parole denial determination is vacated and the board of parole is directed to conduct a *de novo* parole release hearing within forty-five days of the date of this Decision and Judgement; and it is further

ADJUDGED, that if the board of parole does not have a copy of the sentencing minutes before it at the time of the *de novo* hearing, it shall presume that the sentencing judge recommended, at sentencing, that petitioner be released to parole supervision upon completion of his minimum period of imprisonment.

Dated: June 17, 2008, at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice