September 2021

Decision in Art. 78 proceeding - Rodriguez, Ricardo (2007-07-05)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of RICARDO RODRIGUEZ,

Petitioner,

-against-

ROBERT DENNISON, N.Y.S. 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 # 01-07-ST7463 Index No. 874-07

Appearances:

Ricardo Rodriguez
Inmate No. 96-A-6234
Petitioner, Pro Se
Wallkill Correctional Facility
P.O. Box G
Prison Road
Wallkill, NY 12589-0286

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Richard Lombardo,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Wallkill Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated September 7, 2005 in which petitioner was denied discretionary release on parole. The petitioner is serving concurrent terms of robbery 1st degree (nine to eighteen years) and grand larceny second degree (three years four months to ten years). These offenses were committed while the petitioner was on probation for a youthful offender weapon possession adjudication. He was re-sentenced on the youthful offender adjudication. He is currently serving an aggregate sentence of ten and one third years to twenty two years. Among the many arguments set forth in the petition, petitioner contends that the Parole Board relied upon erroneous information in making its determination. He indicates that the Parole Decision incorrectly states that his convictions were the result of a plea, when in reality he was convicted after trial. He indicates that his criminal history incorrectly recites that he was convicted of attempted murder in the second degree and assault, when in fact he was acquitted of those charges. The petitioner maintains that the Parole Board exceeded the guideline range under 9 NYCRR 8001.3. He contends that the Parole Board failed to consider his institutional record, and violated his rights to due process. He points out that he has certificates of completion for institutional programs including Aggression Replacement Training, Alcohol and Substance Abuse Treatment, Transitional Services I and II, and is currently working on a certificate of earned eligibility. In petitioner's view the Parole Board inappropriately speculated on his future The reasons for the respondent's determination to deny petitioner

release on parole are set forth as follows:

> "Upon a review of the record, personal interview and due deliberation it is the determination of the panel that parole is denied. You are presently incarcerated upon you conviction of robbery 1st and larceny auto 2nd, both by plea. You committed an in concert gun point car jacking, shooting one of the car's occupants. You were on probation at the time for a weapon related YO adjudication. Your history also includes another YO adjudication, as well. All factors considered, the panel concludes that discretionary release is inappropriate at this time. The gratuitous violence exhibited in the instant offenses, your proclivity for guns and your negative response to past correctional influences all militate strongly against release. There is a reasonable probability that you will not remain at liberty without violating the law."

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 Sinopoli v New York State Board of Parole, 189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v. New York State Bd. of Parole, 157 AD2d 944). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (see Ristau v. Hammock, 103 AD2d 944 [3rd Dept., 1984]). 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 programming, his disciplinary record, and his plans upon release (including plans to become an electrician). 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 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 Farid v Travis, supra; Matter of Moore v New York State Bd. of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3rd Dept., 2001]). 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).

With respect to petitioner's argument that he has served time in excess of the guideline range (see, 9 NYCRR 8001.3), the guidelines "are intended only as a guide, and are not a substitute for the careful consideration of the many circumstances of each individual case" (see, 9 NYCRR 8001.3 [a]; Matter of Tatta v State of New York Division of Parole, 290 AD2d 907, 908 [3rd Dept., 2002]). Thus, the Court finds that this does not serve as a basis to overturn the Board's decision.

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court observes that it has been repeatedly held that a constitutionally protected liberty interest does not arise under Executive Law § 259-i, since it does not create an entitlement to, or legitimate expectation of release (see Barna v Travis, 239 F3d 169 [2nd Cir., 2001]; Marvin v Goord, 255 F3d 40 [2nd Cir., 2001], at p. 44; Paunetto v Hammock (516 F Supp 1367 [US Dist. Ct., SD NY, 1981]; Washington v White, 805 F Supp 191 [SDNY, 1992]). The Court, accordingly, finds no due process violation.

With respect to petitioner's claim that the Parole Board relied upon erroneous information, the parole interview reflects that the Commissioner Crowe initially commented that the petitioner shot the victim. At that point the petitioner pointed out that he was acquitted of the charges of attempted murder 2nd degree and assault 1st degree. Commissioner Crowe thereafter corrected himself by acknowledging that the petitioner was not convicted of the shooting. The determination itself only mentions convictions for robbery first degree

and grand larceny auto second degree, and never suggests that the petitioner was convicted of attempted murder or assault. While the determination does mention that the petitioner was convicted of participating in a car jacking "in concert" with his accomplices, and that during the car jacking an occupant of the car was shot, the determination does not indicate that he shot the victim. The Court finds that petitioner failed to establish that any of the alleged inaccuracies resulted in a violation of petitioner's constitutional rights or that they involved matters which affected respondent's decision to deny parole (see, Matter of Williams v Travis, 11 AD3d 788, 789-790 [3rd Dept., 2004]; Matter of Rossney v New York State Board of Parole, 267 AD2d 648, 649 [3rd Dept., 1999]; Matter of Howard v New York State Bd. of Parole, 272 AD2d 731 [3rd Dept., 2000]; Matter of Richburg v New York State Division of Parole, 284 AD2d 685, 686 [3rd Dept., 2001]); Matter of Morel v Travis, 278 AD2d 580 [3rd Dept., 2000], appeal dismissed 96 NY2d 752 [2001]). While it appears that the petitioner was convicted of the robbery and grand larceny charges after trial, rather than by plea, the petitioner fails to demonstrate how, or in what manner that fact in any material way affected the outcome of the parole determination.

The Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

To the extent that the petitioner claims that his criminal history record is inaccurate, the Court is of the view that his only redress is to attempt to correct any alleged inaccuracies

under the procedure set forth in 7 NYCRR Part 5. Moreover, the petitioner may not, in a proceeding seeking review of a determination denying parole, challenge the accuracy of matters contained in his pre-sentence report (see Matter of Williams v Travis, supra, at 789).

The Court has reviewed petitioner's remaining arguments 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, irrational or arbitrary and capricious. The petition must therefore be dismissed.

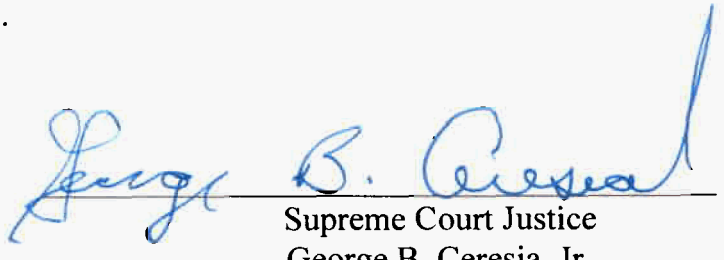
Accordingly, it is

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

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: July 5, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated February 1, 2007, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated April 9, 2007, Supporting Papers and Exhibits