September 2021

Decision in Art. 78 proceeding - Shark, Davey (2009-09-02)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of
DAVEY SHARK, 88-A-9726,

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 # 01-09-ST0110 Index No. 1627-09

Appearances: Davey Shark
Inmate No. 88-A-9726
Petitioner, Pro Se
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, New York 10990-0900

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

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Mid-Orange Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated March

3, 2008, which denied petitioner discretionary release on parole. The respondent opposes the petition seeking its dismissal.

The petitioner, sentenced as a second violent felony offender following a guilty verdict, is currently serving a controlling term of 21-years to life for Murder, Second Degree. The circumstances underlying this offense involved the petitioner approaching the male victim from behind and then shooting him in the head with a .38 caliber pistol.

On February 26, 2008, the petitioner appeared before the Parole Board for his initial appearance, which had been postponed to allow the Parole Board to obtain the sentencing minutes. At that interview, the Parole Board discussed the instant offense. The petitioner explained to the Board that, prior to the shooting, there were rumors that the victim was going to kill the petitioner or have him killed because the victim mistakenly believed that the petitioner had been involved in an earlier kidnapping of a family member of the victim. The petitioner also denied his involvement in a drug gang as mentioned at his sentencing, and indicated that he had never been arrested for drugs. The Parole Board noted that the petitioner had three Tier II violations. Further, the Parole Board noted the petitioner's efforts at programming and his post-release plans. The Board also gave the petitioner an opportunity to discuss any matters he wanted to raise with the Parole Board.

Following the interview, the Parole Board released its decision, which provided:

> After a review of the record and interview, the panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and our 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. This decision is based on the following factors: Your I/O's are: [sic]: Murder 2nd, CPW 2nd and CPW 3 in which you approached your victim from behind and shot the victim once in the head causing his death. Your criminal history dates back to 1983 CPW. Note is made of your program and disciplinary record. The I/O is a violent and senseless execution which escalates your prior criminal behavior. You are clearly a violent and dangerous criminal. You pose a serious risk to society (Parole Board Release Decision Notice [dated 3-3-08], Answer, Exhibit F).

The Parole Board held the petitioner for 24 months.

The petitioner then administratively appealed this determination. Prior to receiving a determination on that appeal, the petitioner commenced a CPLR article 78 proceeding, which Supreme Court, Albany County (McGrath, J.), dismissed for failure to exhaust administrative remedies. Thereafter, when the Appeals Unit did not determine the administrative appeal within a 120 days, the petitioner commenced the instant CPLR article 78 proceeding. Here, the petitioner effectively argues that the(1) determination is not supported by the record; (2) Parole Board predetermined the matter due to governmental policies; and (2) Parole Board violated the petitioner's due process rights by relying solely on the instant offenses and holding him for an excessive amount of time. In his reply, the petitioner also argues, inter alia, that the Parole Board relied on misinformation in rendering its determination.

First, the Court notes that, the sole consequence to the Appeals Unit failure to timely issue a decision is to permit the petitioner to deem his or her administrative remedy to be exhausted, and enable the petitioner to immediately seek judicial 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]). Otherwise, 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 programming, his disciplinary record, and his plans upon release. In addition, the Parole Board allowed the petitioner an opportunity to discuss any other matter he felt warranted the Parole Boards' attention (see Matter of Serna v New York State Div. of Parole, 279 AD2d 684, 684-685 [3d Dept 2001]). Contrary to claims made by the petitioner in his reply, the Parole Board did have the sentencing minutes before it and even referenced the minutes during the interview.

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.

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 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).

Further, 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 was 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]). Moreover, 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 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 Dept 2007]).

Further, the Court rejects petitioner's argument that the additional hold of 24 months is excessive. "The scheduling of the reconsideration hearing was a matter for the Board to

determine in the exercise of its discretion, subject to the statutory 24-month maximum" (Matter of Tratta v State of New York, Div. of Parole, 290 AD2d 907, 908 [3d Dept 2002]). Nothing in the record suggests that the Parole Board abused its discretion in holding petitioner for the maximum statutory period (see Matter of Marsh v New York State Div. of Parole, 31 AD3d 898, 898 [3d Dept 2006]; Matter of Absascal v New York State Bd. of Parole, 23 AD3d 740, 741 [3d Dept 2005]).

Finally, although improperly raised for the first time in his reply papers, there is nothing in the record that establishes that the Parole Board relied on any misinformation in determining this matter (see Matter of Gardiner v New York State Div. of Parole, 48 AD3d 871, 872 [3d Dept 2008]). Otherwise, the Court has reviewed petitioner's remaining arguments and finds them to be without merit. Thus, since petitioner has failed to meet his burden of showing the Parole Board's determination exhibited irrationality bordering on impropriety, judicial interference is unwarranted (Matter of Silmon, 95 NY2d at 476; Matter of Farid, 17 AD3d at 754).

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 is hereby dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is being returned to the attorney for the respondent. 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: September 2, 2009
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated March 11, 2009, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated May 13, 2009, Supporting Papers and Exhibits
3. Affirmation of C. Harris Dague, Esq., Assistant Attorney General dated May 13, 2009;
4. Reply dated May 20, 2009, with Exhibits.