September 2021

Decision in Art. 78 proceeding - Singh, Hardeep (2012-09-10)

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

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In the Matter of the Application of
HARDEEP SINGH, #08-A-5851,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2012-0162.41
INDEX # 2012-352
ORI #NY016015J

ANDREA W. EVANS, Chairwoman,
NYS 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 Hardeep Singh, verified on April 20, 2012 and filed in the Franklin County Clerk's office on April 27, 2012. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the September 2011 determination denying him parole and directing he be held for an additional 24 months. The Court issued an Order to Show Cause on May 2, 2012 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on June 22, 2010, as well as respondent's Letter Memorandum of June 22, 2010. The Court has also received and reviewed petitioner's Reply thereto, verified on July 10, 2012 and filed in the Franklin County Clerk's office on July 13, 2012.

On October 28, 2008 petitioner was sentenced in Orange County Court to a controlling indeterminate sentence of 3⅓ to 10 years on his convictions of the crimes of Manslaughter 2° and Assault 3° (three counts). Petitioner made his initial appearance before a Parole Board on September 28, 2011. Following that appearance, on October 3,

2011, a decision was rendered[1] denying him discretionary release and directing that he be held for an additional 24 months. The parole denial determination reads as follows:

> FOLLOWING A CAREFUL REVIEW OF YOUR RECORDS AND THE INTERVIEW, IT IS THE CONCLUSION OF THIS PANEL THAT IF YOUR [sic] WERE RELEASED AT THIS TIME THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW AND THAT YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE PUBLIC SAFETY AND WELFARE OF THE COMMUNITY. THIS DECISION IS BASED ON THE FOLLOWING: YOU COME BEFORE THIS PANEL SERVING TIME FOR YOUR CONVICTION OF MANSLAUGHTER 2ND DEGREE. YOU WERE DRIVING YOUR 2004 LINCOLN TOWN CAR AND SERVING AS A LIMO DRIVER WITH THREE PASSENGERS ON BOARD. YOU HAVE ADMITTED TO HAVING A NUMBER OR [sic] DRINKS BEFORE ATTEMPTING TO TAKE YOUR PASSENGERS TO NYC. DURING THE DRIVE YOU DROVE YOUR VEHICLE ON THE WRONG SIDE OF THE ROAD AND STRUCK AN ONCOMING VEHICLE HEAD ON. TWO PASSENGERS WERE IN THE OTHER VEHICLE, PASSENGERS IN BOTH VEHICLES SUFFERED INJURIES AND ONE INNOCENT VICTIM IN THE OTHER VEHICLE LOST HIS LIFE. AS A DRIVER OF A LIMO OR CAB YOU ARE EXPECTED TO BE SOBER AND ALERT WHEN BEHIND THE WHEEL OF THE VEHICLE. THE PUBLIC DESERVES NO LESS. NOTED ARE ALL RELEVANT FACTORS REQUIRED BY LAW INCLUDING YOUR EEC, GED AND PROGRAM COMPLETIONS HOWEVER RELEASE AT THIS TIME IS UNWARRANTED. PAROLE IS DENIED.

The parole denial determination was affirmed on administrative appeal with the final determination apparently mailed to the petitioner on April 17, 2012. This proceeding ensued.

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[1] Citing the transcript of the September 28, 2011 Parole Board appearance (Respondent's Exhibit D), respondent asserts in her answering papers that the parole denial determination was actually rendered on September 28, 2011. According to respondent, the "computerized report" (Parole Board Release Decision Notice annexed to her Answer and Return as Exhibit E) " . . . was not prepared for transmittal to the Petitioner under [until ?] October 3, 2012." The Court, however, finds nothing in the transcript of the September 28, 2011 Parole Board appearance shedding any light on the question of when the parole denial determination was actually issued. The transcript indicates that at the conclusion of petitioner's appearance before the Board he was "excused" and "[a]fter due deliberation by the Parole Board panel, the following decision was rendered . . ." Although the parole denial determination decision is printed out, nothing in the transcript indicates when the Parole Board panel actually concluded its deliberation and issued the decision. Accordingly, for the purposes of this Decision and Judgment, the Court will presume that the parole denial determination was issued on October 3, 2011, as set forth in the Parole Board Release Decision Notice.

At the time of petitioner's September 28, 2011 Parole Board appearance and the October 3, 2011 issuance of the denial determination Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, provided, 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 . . ."

At the time of petitioner's September 28, 2011 Parole Board appearance Executive Law §259-c(4) provided, in relevant part, that the Board of Parole shall " . . .establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4), however, was amended by L 2011, ch

62, part C, subpart A, §38-b, effective September 30, 2011[2]. Thus, although the amended version of Executive Law §259-c(4) was not yet in effect at the time of petitioner's September 28, 2011 Parole Board appearance, it was in effect on October 3, 2011 when the parole denial determination was issued. The amended version of Executive Law §259-c(4) provides that the New York State Board of Parole shall " . . .establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates maybe released to parole supervision . . ." (Emphasis added).

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, *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.

Citing, *inter alia*, *Thwaites v. New York State Board of Parole*, 34 Misc 3d 694, petitioner first asserts that the Parole Board erred in failing to apply the amended version of Executive Law §259-c(4) when it considered him for discretionary parole release and,

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[2] L 2011, ch 62, part C, subpart A, section 49(f) provides that ". . . the amendments to subdivision 4 of section 259-c of the executive law made by section thirty-eight-b of this act shall take effect six months after it shall have become a law . . ." Since the underlying legislation was enacted on March 31, 2011, the amendment to Executive Law §259-c(4) became effective as of September 30, 2011 (or October 1, 2011).

ultimately, denied such release. Notwithstanding the fact that the 2011 amendment to Executive Law §259-c(4) was designated by the legislature as taking effect on September 30, 2011, the *Thwaites* court found that the amendment had to be applied retroactively to Mr. Thwaites' March 16, 2010 parole denial determination. This Court, however, previously expressed its respectful disagreement with the conclusion of the *Thwaites* court and, for the reasons set forth in the March 6, 2012 Decision and Judgment of the Supreme Court, Albany County (Hon. Richard M. Platkin) in *Hamilton v. New York State Division of Parole*, 36 Misc 3d 440, found no basis to apply the amended version of Executive Law §259-c(4) in reviewing a pre-September 30, 2011 parole denial determination even where such parole denial determination was affirmed on administrative appeal after September 30, 2011. *See Tafari v. Evans*, 36 Misc 3d 1216(A), 2012 N.Y. Slip Op. 51355(U). As stated by the *Hamilton* court, "[i]t is apparent . . . that the State Legislature considered the question of the effectiveness of the 2011 Amendments and determined that the new procedures contemplated by the amendments to Executive Law §259-c(4) should not be given effect with respect to administrative proceedings conducted prior to October 1, 2011." 36 Misc 3d 440 at 443.

Notwithstanding the foregoing, the Court recognizes that the facts and circumstance in the case at bar present an unusual variation on the *Thwaites*/*Hamilton*/*Tafari* theme. As noted previously, the petitioner's Parole Board appearance occurred prior to the effective date of the amended version of Executive Law §259-c(4) but the parole denial determination was issued after such effective date. For the reasons set forth below, however, the Court ultimately concludes that the amended version of Executive Law §259-c(4) was not applicable to the Parole Board's consideration of petitioner for discretionary release.

The discretionary parole release consideration process is ongoing in nature and initially involves the creation/compilation of various records, reports and recommendations with respect to the prospective parolee and his/her suitability for release. *See* 9 NYCRR §8000.5(a) and (b). The ongoing discretionary parole release consideration process culminates with the inmate's appearance before a Parole Board panel. *See* 9 NYCRR §8002.2. At the Parole Board appearance, which is open-ended in nature, the panel of parole commissioners not only has an opportunity for face-to-face interaction with the prospective parolee, but also may solicit from him/her clarification of and/or additional information with respect to the various records, reports and recommendations compiled in anticipation of such inmate's eligibility for discretionary parole release. In addition, the Parole Board appearance affords the prospective parolee a final opportunity to clarify, comment upon and/or supplement such records, reports and recommendations and to otherwise finalize his/her argument(s) in support of discretionary release. Thus the parole release interview can be viewed as the final element in the creation of the record underlying a discretionary parole release determination. For this reason the Court finds that the Parole Board appearance represents that point on the discretionary parole release consideration continuum which is determinative with respect to the issue of which version of Executive Law §259-c(4) is applicable. The Court therefore concludes that the pre-amendment version of Executive Law §259-c(4) is properly applicable where, as here, the Parole Board appearance was concluded prior to September 30, 2011, notwithstanding the fact that the written parole denial determination was issued after that date.

A significant portion of the petition is focused, in one way or another, on the assertion that the parole denial determination was improperly based solely on the nature of the crimes underlying petitioner's incarceration, without adequate consideration of

other relevant statutory factors. According to petitioner, the " . . . Parole Board's decision is only rely [sic] on petitioner's offense and parole board briefly mention petitioner's institutional record and rehabilitation. Parole Board's consideration on only one factor, that petitioner can never change, making this decision capricious and irrational." 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 Martin v. New York State Division of Parole*, 47 AD3d 1152, *Porter v. Dennison*, 33 AD3d 1147 and *Baez v. Dennison,* 25 AD3d 1052, *lv den* 6 NY3d 713. 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 Inmate Status Report and transcript of the Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors including petitioner's therapeutic and vocational programming, academic achievements, receipt of an Earned Eligibility Certificate (EEC), limited disciplinary record, release plans, community support, lack of a prior criminal record in addition to the circumstances of the crimes underlying his incarceration. *See Zhang v. Travis*, 10 AD3d 828. The Court, moreover, finds nothing in the hearing transcript to suggest that the 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 McAllister v. New York State Division of Parole* 78 AD3d 1413, *lv den* 16 NY3d 707, and *Davis v. Lemons,* 73 AD3d 1354. 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 bordering on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying petitioner's incarceration. *See Sanchez v. Division of Parole,* 89 AD3d 1305, *Maricevic v. Evans,* 86 AD3d 879 and *Cruz v. New York State Division of Parole,* 39 AD3d 1060.

With regard to petitioner's receipt of an EEC, it is noted that Correction Law §805 provides, in relevant in part, as follows: "Notwithstanding any other provision of law, an inmate who is serving a sentence with a minimum term of not more than eight years and who has been issued a certificate of earned eligibility, shall be granted parole release at the expiration of his minimum term . . . unless the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." In similar fashion, 9 NYCRR §8002.3(c) provides, in relevant part, that "[w]hen the minimum term of imprisonment is in accord with or greater than the time ranges for imprisonment contained within the guidelines adopted pursuant to this Part, parole release shall be granted at the expiration of such minimum term of imprisonment as long as such release is in accordance with the remaining guideline criteria." It is clear, however, that an inmate's receipt of a EEC does not preclude the Parole Board from issuing a determination denying discretionary parole release nor does such receipt

preclude the Board from considering the nature of the crime(s) underlying the inmate's incarceration. *See Sanchez v. Division of Parole*, 89 AD3d 1305, *Rodriguez v. Evans*, 82 AD3d 1397, *Davis v. Lemons,* 73 AD3d 1354 and *Corley v. New York State Division of Parole*, 33 AD3d 1142.

Addressing the fact that he was denied discretionary parole release after the issuance of an EEC, the petitioner next suggests that the 2011 merger of the Division of Parole with the Department of Correctional Services to form the Department of Corrections and Community Supervision has rendered it "capricious and irrational by making two decisions from one department." The Court notes, however, that notwithstanding such merger the underlying legislation maintained the independent decision-making function of the Board of Parole as follows: "It is fundamental that the board of parole retain its authority to make release decisions based on the board members' independent judgment and application of statutory criteria . . . To this end, the legislation makes clear that the board shall continue to exercise its independence when making such decisions. The new agency's [DOCCS] provision of administrative support will not undermine the board's independent decision-making authority." L 2011, ch 62, Part C, Sub A, §1.

Petitioner also points out that in the written parole denial determination the Board incorrectly stated that it was a passenger in the second vehicle (not operated by petitioner) who lost his life. "[T]his point," according to petitioner, "showes [sic] parole board's ignorance to look [into] petitioner's case and made [sic] instant decision." Where erroneous information serves as a basis for a parole denial determination, such determination must be vacated and a new hearing ordered. *See Smith v. New York State Board of Parole*, 34 AD3d 1156, *Hughes v. New York Division of Parole*, 21 AD3d 1176 and *Lewis v. Travis*, 9 AD3d 800. Although it is clear that petitioner's Parole Board was

under the erroneous assumption that the deceased victim was a passenger in the second vehicle, rather than the vehicle operated by petitioner, the Court finds no basis to conclude that this erroneous information served as a basis for the underlying parole denial determination. Petitioner does not suggest, not can this Court fathom, any thought process whereby the precise seating location of the deceased passenger (in petitioner's vehicle or the other vehicle) might have been a relevant factor in the Parole Board's consideration of whether or not petitioner should be released to parole supervision. Accordingly, the Court finds that the erroneous information set forth in the parole denial determination does not constitute a basis to overturn that determination. *See Sutherland v. Evans*, 82 AD3d 1428 and *Restivo v. New York State Board of Parole*, 70 AD3d 1096.

Finally, under the facts and circumstances of this case the Court finds no basis to conclude that the parole denial determination usurped the authority of the judiciary by effectively resentencing petitioner for his crimes. *See Comfort v. New York State Division of Parole*, 68 AD3d 1295, *Smith v. New York State Division of Parole*, 64 AD3d 1030 and *Marsh v. New York State Division of Parole*, 31 AD3d 898.

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

ADJUDGED, that the petition is dismissed.

Dated: September 10, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice