September 2021

Decision in Art. 78 proceeding - Smith, Anthony (2010-06-29)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of ANTHONY SMITH, 89-A-6874,

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-ST2363 Index No. 638-11

Appearances: Anthony Smith
Inmate No. 89-A-6874
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
(Brian J. O'Donnell,
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 November 10, 2009 to deny petitioner discretionary release on parole. Petitioner is serving a term of fifteen

(15) years to life upon conviction (after plea) of kidnaping in the first degree. Among the arguments set forth in the petition, the petitioner contends that the Parole Board's decision does not give the petitioner guidance in adjusting his future behavior in order to gain parole, the court failed to consider the liberty interest in the expectation of early release, the denial of parole was improperly based on the same criteria as the sentencing hearing, thus subjecting the petitioner to Double Jeopardy and violating collateral estoppel, the Board relied on erroneous facts in making its determination, the Board's decision was pre-determined, the board did not give appropriate weight to petitioner's status as a re-appearing parole candidate or his institutional record, and the twenty-four (24) month hold placed on petitioner was excessive.

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

> "After a review of the record and interview, the Panel has determined that if released at this time your 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 instant offense is kidnaping 1st Degree, for which you are serving 15 to life. The crime involved you and others abducting a victim in a shopping center parking lot at gunpoint, demanding ransom money and repeatedly raping her. The Board notes your letters of support, letter of employment and positive program evaluation. More compelling, however, is the brutal and vicious nature of the instant offense and your callous disregard for the physical and emotional well-being for the victim. As such, your release at this time is inappropriate."

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]). 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 and his plans upon release. 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]).

Petitioner's argument that the Parole Board is required to advise petitioner and/or provide guidance with regard to the programs he should take, or rehabilitative efforts he should engage in to increase his chance for release at a future parole interview has no merit (see Executive Law § 259-i [2] [a]; 9 NYCRR § 8002.3; Boothe v Hammock, 605 F2d 661 [2nd Cir, 1979]; Matter of Freeman v New York State Division of Parole, 21 AD3d 1174 [3rd Dept., 2005]).

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., June 24, 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., Westchester Co., 2006]). 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]).

With regard to the Parole Board's failure to consider the minutes of petitioner's sentencing (as required under Executive Law 259-i [2] [c] [A] last sentence, which makes reference to the provisions of Executive Law § 259-i [1] [a]), it is now well settled that this

does not mandate a new hearing where, as here, the minutes are not available for review, after a diligent search has been made to obtain them (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]). In this instance, the respondent has submitted the affidavit of Jerri Krevoff, Chief Court Reporter of Nassau County Court, who avers that the Court Reporter who took the sentencing minutes is no longer in the employ of the court system, and that despite a diligent search, her notes cannot be found. Under the circumstances, the failure to consider petitioner's sentencing minutes does not serve as grounds to annul the parole determination. Apart from the foregoing, a review of the plea taken on April 3, 1989 reveals that County Court Judge Abbey L. Boklan indicated that as part of the plea agreement he would take no position with respect to petitioner's release when the petitioner came before the Parole Board.

With respect to petitioner's argument that he has served time in excess of the parole 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]; Matter of Rodriguez v Evans, 82 AD3d 1397 [3d Dept., 2011]). Thus, the Court finds that this does not serve as a basis to overturn the Board's decision.

With regard to the petitioner's claim that the Parole Board relied on erroneous

information that he was convicted of raping the victim of the instant offense, the Court finds this argument to be without merit. The transcript of the parole interview clearly reveals that the Parole Board was aware that kidnaping first degree is the only offense to which petitioner pleaded guilty. The questioning during the parole interview regarding the rape of his victim is a result of the Board's proper consideration of information contained in petitioner's presentence investigation report (see Matter of Cox v New York State Division of Parole, 11 AD3d 766, 767-768 [3rd Dept., 2004]; Matter of Carter v Evans, 81 AD3d 1031 [3rd Dept., 2011]). Additionally, the petitioner admitted the rape during the parole interview, saying, "I'm deeply regretful to [the victim's] father [] and her family for my callous behavior toward her. I am a father and a grandfather now. I have a 21-year-old daughter and two granddaughters. If someone was to kidnap and rape them, as I did to [the victim], I would feel deep pain, disgust, anger, helplessness and sorrow, knowing that there was nothing I can do to help them." Petitioner also said, "I objectified (sic) and I had no respect for women. I viewed women as sex objects. In looking back now, I raped [the victim] long before I crossed her path that day because of my thoughts and my views." In considering the presentence investigation report and the petitioner's own statements at the hearing, the Parole Board did not base their determination upon erroneous facts and/or a misapprehension of the facts.

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, irrational or arbitrary and capricious. 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.

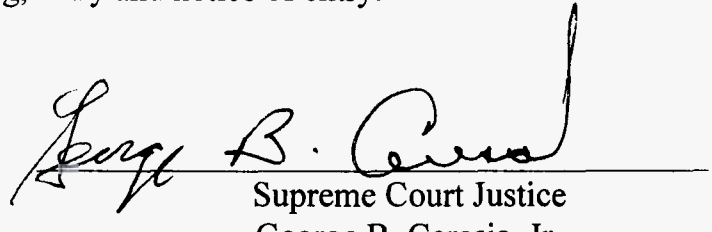
Accordingly, it is

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 29, 2010
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 8, 2011, Supporting Papers and Exhibits