September 2021

Decision in Art. 78 proceeding - Smith, David (2015-10-13)

Matter of Smith v Stanford
2015 NY Slip Op 32004(U)
October 13, 2015
Supreme Court, Clinton County
Docket Number: 2015-620
Judge: S. Peter Feldstein

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

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In the Matter of the Application of
DAVID SMITH, #82-A-3278,
Petitioner,

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

DECISION AND JUDGMENT
RJI #09-1-2015-0224.08
INDEX #2015-620
ORI #NY009013J

-against-

TINA M. STANFORD, Chairwoman,
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 David Smith, verified on April 7, 2015 and filed in the Clinton County Clerk's office on April 28, 2015. Petitioner, who is an inmate at the Clinton Correctional Facility Annex, is challenging the August 2014 determination denying him discretionary parole release and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on May 4, 2015 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on June 16, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated June 16, 2015. No Reply thereto has been received from petitioner.

On June 25, 1982 petitioner was sentenced in Supreme Court, Kings County, as a second violent felony offender, to a controlling indeterminate sentence of 25 years to life upon his convictions of the crimes of Murder 2° (two counts), Attempted Robbery 1°, Assault 2° and Criminal Possession of a Weapon 2°. After having been denied discretionary parole release on five previous occasions, petitioner made his sixth appearance before a Parole Board on August 19, 2014. Following that appearance a decision was issued again

denying him discretionary parole release and directing that he be held for an additional 24 months. The August 2014 parole denial determination reads as follows:

> "FOLLOWING CAREFUL REVIEW AND DELIBERATION OF YOUR RECORD AND INTERVIEW, THIS PANE[L] CONCLUDES THAT DISCRETIONARY RELEASE IS NOT PRESENTLY WARRANTED DUE TO CONCERN FOR THE PUBLIC SAFETY AND WELFARE, THE FOLLOWING FACTORS WERE PROPERLY WEIGHED AND CONSIDERED; YOUR INSTANT OFFENSES IN BROOKLYN, IN DECEMBER 1980, INVOLVED MURDER 2ND, ATT. ROBBERY 1ST, CPW 2ND, AND ASSAULT 2ND.
>
> YOUR CRIMINAL HISTORY INDICATES YOU WERE ON PAROLE AT THE TIME FROM A 1977 ROBBERY 1ST.
>
> YOUR INSTITUTIONAL PROGRAMING INDICATES PROGRESS AND ACHIEVEMENT WHICH IS NOTED TO YOUR CREDIT.
>
> YOUR DISCIPLINARY RECORD APPEARS CLEAN SINCE 2008 WHICH IS LIKEWISE NOTED.
>
> YOU HAVE APPROXIMATELY FIVE (5) FELONIES.
>
> THIS IS YOUR SECOND (2) STATE BID.
>
> REQUIRED FACTORS IN THE FILE HAVE BEEN CONSIDERED.
>
> REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, INCLUDING YOUR RISK TO THE COMMUNITY, REHABILITATION EFFORTS AND YOUR NEEDS FOR SUCCESSFUL COMMUNITY RE-ENTRY.
>
> YOUR DISCRETIONARY RELEASE, AT THIS TIME, WOULD THUS NOT BE COMPATIBLE WITH THE WELFARE OF SOCIETY AT LARGE, AND WOULD TEND TO DEPRECATE THE SERIOUSNESS OF THE INSTANT OFFENSE(S), AND UNDERMINE RESPECT FOR THE LAW."

The document perfecting petitioner's administrative appeal from the August 2014 parole denial determination was received by the DOCCS Board of Parole Appeals Unit on December 5, 2014. The Appeals Unit, however, failed to issue its findings and recommendation within the four-month time frame set forth n 9 NYCRR §8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §38-f-1, effective March 31, 2011, 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 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 . . ."

To the extent petitioner initially asserts that the August 2014 parole denial determination was not supported by substantial evidence in the record, the Court simply notes that discretionary parole denial determinations are not subject to judicial review under the substantial evidence standard. *See Tatta v. Dennison*, 26 AD3d 663, *lv denied* 6 NY3d 714 and *Valderrama v. Travis*, 19 AD3d 904. Rather,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, *Hamilton v. New York State Division of Parole,* 119 AD3d 1268, *Vasquez v. Dennis*on, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. 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 Jackson v. Evans,* 118 AD3d 701*, Nankervis v. Dennison,* 30 AD3d 521 and *Zane v. New York State Division of Parole*, 231 AD2d 848.

Petitioner argues, in effect, that the Parole Board focused "almost exclusively" on the serious nature of the crimes underlying his incarceration, as well as his prior criminal record, without adequate consideration of other statutory factors. 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 Montane v. Evans,* 116 AD3d 197*, lv granted* 23 NY3d 903*, app dismissed* 24 NY3d 1052*, Valentino v. Evans,* 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. 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 Parole Board Report (Reappearance August 2014) and transcript of petitioner's August 19, 2014 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including

petitioner's therapeutic/vocational programing record, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record (clean since 2008) and release plans/community support in addition to the circumstances of the crimes underlying his incarceration[1], including the fact that such crimes were committed while petitioner was at liberty under parole supervision frm a previous conviction of a violent felony offense (Robbery 1°), and his prior criminal record. The Court, moreover, finds nothing in the transcript to suggest that the Parole 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 Pearl v. New York State Division of Parole,* 25 AD3d 1058 and *Zhang v. Travis*, 10 AD3d 828. 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 boarding on impropriety as a result of the emphasis placed by the Board on the serious nature of the crimes underlying petitioner's incarceration, including the fact that such crimes were committed while petitioner was at liberty under parole supervision from a previous conviction of a violent felony offense (Robbery 1°), and his prior criminal record. *See Jones v. New York State*

[1] The description of the criminal offenses underlying petitioner's incarceration, as set forth in the Parole Board Report (reappearance August 2014) is as follows: "On 12/27/80, subject [petitioner] and three accomplices approached the two male victims who were in a parked car with two prostitutes, injuring one and killing the other. The subject opened the passenger door and fired a single shot at one victim, striking him in the leg. While firing, the subject stated 'Give me your money, where is your money?' The deceased victim, who was out of the car initially, tried to get back in to drive away. At least five more shots were fired . . . Subject was on parole at the time of the instant offense . . ."

Parole Board, 127 AD3d 1327*, Olmosperez v. Evans,* 114 AD3d 1077*, lv granted* 23 NY3d 907*, Dalton v. Evans,* 84 AD3d 1664 and *Marcus v. Alexander*, 54 AD3d 476.

To the extent petitioner purports to rely on *King v. New York State Division of Parole*, 190 AD2d 423, *aff'd* 83 NY2d 788, the Court finds such reliance misplaced. In *King* the Appellate Division, First Department, not only determined that the Parole Board improperly considered matters not within its purview (penal policy with respect to convicted murders) but also that the Parole Board failed " . . . to consider and fairly weigh all of the information available to them concerning petitioner that was relevant under the statute, which clearly demonstrates his extraordinary rehabilitative achievements and would appear to strongly militate in favor of granting parole." *Id* at 433. The appellate-level court in *King* went on to note that the only statutory criterion referenced by the Board in the parole denial determination was the seriousness of the crime underlying Mr. King's incarceration (felony murder of an off-duty police officer during the robbery of a fast food restaurant). According to the Appellate Division, First Department, "[s]ince . . . the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself." *Id* at 433.

This Court (Supreme Court, Clinton County) first notes that although the nature of the crime underlying Mr. King's incarceration was similar in nature to one of the crimes underlying petitioner's incarceration (Murder 2°), Mr. King had no prior contacts with the law (*id*. 426) while petitioner had a significant prior criminal record (the 1982 sentences were imposed upon petitioner as a second violent felony offender) and he committed the crimes underlying his 1982 convictions/sentences while at liberty under parole supervision

from a prior violent felony offense (Robbery 1°). These distinguishing features appear to meet the First Department's requirement that a parole denial determination be supported by aggravating circumstances beyond the inherent seriousness of the underlying crime. In any event, however, in July of 2014 the Appellate Division, Third Department - whose precedent is binding on this Court - effectively determined that the above-referenced "aggravating circumstances" requirement enunciated by the First Department in *King* does not represent the state of the law in the Third Department. *See Hamilton v. New York State Division of Parole,* 119 AD3d 1268. In *Hamilton* it was noted that the Third Department " . . . has repeatedly held - both recently and historically - that, so long as the [Parole] Board considers the factors enumerated in the statute [Executive Law §259-i(2)(c)(A)] it is 'entitled . . . to place a greater emphasis on the gravity of [the] crime' (*Matter of Montane v. Evans,* 116 AD3d 197, 203 (2014), *lv granted* 23 NY3d 903 (2014) [internal quotation marks and citations omitted]' . . ." *Id* at 1271 (other citations omitted). After favorably citing nine Third Department cases decided between 1977 and 2014, the *Hamilton* court ended the string of cites as follows: " . . . *but see Matter of King v. New York State Div. of Parole,* 190 AD2d 423, 434 (1993), *aff'd on other grounds* 83 NY2d 788[2] (1994) [a First Department case holding, in conflict with our precedent, that the Board [of Parole] may not deny discretionary release based solely on the nature of the

[2] The Court of Appeals in *King* only referenced the fact that " . . . one of the [Parole] Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place. Consideration of such factors is not authorized by Executive Law §259-i." 83 NY2d 788, 791. The Court of Appeals, however, did not address that aspect of the Appellate Division, First Department, decision in *King* holding that a parole denial determination must be based upon a showing of some aggravating circumstances beyond the inherent seriousness of the underlying crime.

crime when the remaining statutory factors are considered only to be dismissed as not outweighing the seriousness of the crime]." 119 AD3d 1268, 1272. The *Hamilton* court continued as follows:

> "Particularly relevant here, we have held that, even when a petitioner's institutional behavior and accomplishments are 'exemplary,' the Board may place 'particular emphasis' on the violent nature or gravity of the crime in denying parole, as long as the relevant statutory factors are considered (*Matter of Valderrama v. Travis,* 19 AD3d at 905). In so holding we explained that, despite [the *Valderrama*] petitioner's admirable educational and vocational accomplishments and positive prison disciplinary history, '[o]ur settled jurisprudence is that a parole determination made in accordance with the requirements of the statutory guidelines is not subject to further judicial review unless it is affected by irrationality bordering on impropriety' (*id*. [internal quotation marks and citations omitted]). We emphasize that this Court [Appellate Division, Third Department] has repeatedly reached the same result, on the same basis, when reviewing denials of parole to petitioners whom we recognized as having exemplary records and as being compelling candidates for release." 119 AD3d 1268, 1272 (additional citations omitted).

The Court therefore rejects petitioner's argument on this point.

Executive Law §259-c(4) was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, to provide 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 may be released to parole supervision . . ."[3] To the extent petitioner argues that the Parole Board failed to adopt rules or regulations implementing the above-

[3]Prior to the amendment the statute had 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 . . ."

referenced amendment to Executive Law §259-c(4), the Court finds that the promulgation of a certain October 5, 2011 memorandum from Andrea W. Evans, then Chairwoman, New York State Board of Parole, satisfied the Parole Board's obligations with respect to the 2011 amendments to Executive Law §259-c(4). *See Partee v. Evans*, 117 AD3d 1258, *lv denied* 24 NY3d 901, and *Montane v. Evans*, 116 AD3d 197, *lv granted* 23 NY3d 903, app dismissed 24 NY3d 1052.

In paragraph 16 of the petition the following argument is advanced: "During petitioner's parole board hearing one of the Commissioner's [sic] stated that there is 'low risk for felony violence arrest or [a]bsconding - if you were on parole.' [W]ith this statement the board admitted that if petitioner is released he will live and remain at liberty without violating the law." (Reference to exhibit omitted). A review of the transcript of petitioner's August 19, 2014 Parole Board appearance, however, reveals that the Parole Commissioner in question, after referencing petitioner's COMPAS risk assessment instrument, merely observed that " . . . the computer assessment has you at a low risk for felony violence, arrest or absconding." Thus, the statement alluded to by petitioner did not represent the personal assessment of the Parole Commissioner but, rather, the quantified results of the COMPAS instrument. This Court notes, moreover, that although the Appellate Division, Third Department, has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* 112 AD3d 1056*, Malerba v. Evans,* 109 AD3d 1067, *lv denied* 22 NY3d 858 and *Garfield v. Evans*, 108 AD3d 830), there is nothing in such cases, or the amended version of Executive Law §259-c(4), to suggest that the quantified risk assessment determined through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Parole Board to determine, based upon its consideration of the factors set forth in

Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. The "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS instrument and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A) including, as here, the serious nature of the crimes underlying petitioner's incarceration, including the fact that such crimes were committed while petitioner was at liberty under parole supervision from a previous conviction of a violent felony offense (Robbery 1°), as well as his prior criminal record. *See Rivera v. New York State Division of Parole*, 119 AD3d 1107 and *Partee v. Evans*, 40 Misc 3d 896, *aff'd* 117 AD3d 1258, *lv denied* 24 NY3d 901.

The Court also finds that the August 2014 parole denial determination, predicated upon the statutory (Executive Law §259-i(2)(c)(A)) considerations that petitioner's release " . . . WOULD . . . NOT BE COMPATIBLE WITH THE WELFARE OF SOCIETY AT LARGE, AND WOULD TEND TO DEPRECATE THE SERIOUSNESS OF THE INSTANT OFFENSE(S), AND UNDERMINE RESPECT FOR THE LAW" and based upon the seriousness of the crimes underlying petitioner's incarceration (including the fact that such crimes were committed while petitioner was at liberty under parole supervision from a prior Robbery 1° conviction, as well as petitioner's prior criminal record, is in compliance

with statutory and judicial standards. *See Comfort v. New York State Division of Parole*, 68 AD3d 1295. *Cf. Vaello v. Parole Board Division of State of New York*, 48 AD3d 1018. *See also Ek v. Travis*, 20 AD3d 667, *lv dis* 5 NY3d 862.

Although petitioner correctly asserts that a Transitional Accountability Plan (TAP) was not prepared in conjunction with the discretionary parole release consideration process, the Court finds that this does not constitute a basis to overturn the August 2014 parole denial determination. As part of the same legislative enactment wherein Executive Law §§259-c(4) and 259-i(2)(c)(A) were amended (L 2011, ch 62, Part C, subpart A), a new Correction Law §71-a was added, as follows:

> "Upon admission of an inmate committed to the custody of the department [DOCCS] under an indeterminate or determinate sentence if imprisonment, the department shall develop a transitional accountability plan. Such plan shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the inmate. The purpose of such plan shall be to promote the rehabilitation of the inmate and their successful and productive reentry and reintegration into society upon release. To that end, such plan shall be used to prioritize programming and treatment services for the inmate during incarceration and any period of community supervision."

While Correction Law §71-a became effective on October 1, 2011, the Court finds nothing in the legislative enactment to suggest that it was intended to mandate the preparation of TAPs with respect to inmates - such as petitioner - already in DOCCS custody prior to the effective date of the statute. *See Tran v. Evans,* 126 AD3d 1196 and *Rivera v. New York State Division of Parole*, 119 AD3d 1107.

Finally, this Court finds that there is no statutory, regulatory or judicial requirement mandating the Parole Board to provide guidance as to how an inmate might improve his/her chances of securing discretionary parole release at a future Board appearance. *See Freeman v. New York State Division of Parole*, 21 AD3d 1174.

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

ADJUDGED, that the petition is dismissed.

Dated: October 13, 2015 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice