September 2021

Decision in Art. 78 proceeding - Smith, Robert (2013-02-04)

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

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In the Matter of the Application of
ROBERT SMITH, #80-A-1942,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2012-0415.100
INDEX # 2012-897
ORI #NY016015J

BRIAN FISCHER, Commissioner,
NYS Corrections and Community Supervision,
and **ANDREA EVANS**, Chairwoman, NYS
Board of Parole,

Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Robert Smith, verified on August 28, 2012 and filed in the Franklin County Clerk's office on October 2, 2012. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the February, 2012 determination denying him parole and directing he be held for an additional 24 months. An Order to Show Cause was issued on October 4, 2012. The Court has since received and reviewed respondents' Answer, including Confidential Exhibits C and E, verified on November 20, 2012 and supported by the November 20, 2012 Affirmation of Keith A. Muse, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's Reply thereto, sworn to on December 11, 2012 and filed in the Franklin County Clerk's office on December 18, 2012.

On June 23, 1980 petitioner was sentenced in Supreme Court, Bronx County, to an indeterminate sentence of 21 years to life upon his conviction of the crime of Murder

2°. After having been denied discretionary parole release on at least six previous occasions, petitioner made his seventh appearance before a Parole Board on February 8, 2012. Following that appearance a decision was rendered again denying petitioner parole and directing that he be held for an additional 24 months. The parole denial determination reads as follows:

> "AFTER A CAREFUL REVIEW OF YOUR RECORD, A PERSONAL INTERVIEW, AND DELIBERATION, PAROLE IS DENIED. YOUR INSTITUTIONAL ACCOMPLISHMENTS AND RELEASE PLANS ARE NOTED. REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, INCLUDING YOUR RISK TO THE COMMUNITY, REHABILITATION EFFORTS, AND YOUR NEEDS FOR SUCCESSFUL REINTEGRATION INTO THE COMMUNITY. THIS PANEL REMAINS CONCERNED, HOWEVER, ABOUT THE SERIOUS AND VIOLENT NATURE OF THE INSTANT OFFENSE OF MURDER 2ND, WHICH, WHEN CONSIDERED WITH REQUIRED AND RELEVANT FACTORS, LEADS TO THE CONCLUSION, THAT IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW, AND YOUR RELEASE AT THIS TIME IS INCOMPATIBLE WITH THE WELFARE AND SAFETY OF THE COMMUNITY."

The document perfecting petitioner's administrative appeal from the parole denial determination was received by the DOCCS Parole Appeals Unit on March 13, 2012. Although the Appeals Unit failed to issue its findings and recommendation within the 4-month time frame set forth in 9 NYCRR §8006.4(c), a belated decision on administrative appeal was, in fact, issued on or about October 4, 2012, after the commencement of this proceeding. Petitioner's argument to the contrary notwithstanding, the failure of the Appeals Unit to timely issue its findings and recommendation does not serve to invalidate the underlying parole denial determination. *See Rosario v. New York State Division of Parole,* 80 AD3d 1030 and *Graham v. New York State Division of Parole*, 269 AD2d 628, *lv den* 95 NY2d 753. The sole consequence of such failure is to allow the petitioner to deem his administrative remedies to have been exhausted and immediately seek judicial

review of the underlying determination without an exhaustion defense being raised. *See* 9 NYCRR §8006.4(c).

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, 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 . . ."

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.

In this proceeding petitioner asserts, in effect, that there was no evidence supporting the Board's conclusion that if he were released there would be a reasonable probability he would not live and remain at liberty without violating the law and that such release would be incompatible with the welfare and safety of the community. In this regard petitioner alleges that he was very young (26 years old) at the time the underlying crime was committed and that he " . . .still maintain[s] his innocence and feel[s] remorse . . ." Petitioner also asserts that he served " . . . 33 years plus with no criminal record, an excellent institutional adjustment, exemplary behavioral record and more than satisfactory release plans, and completion of all therapeutic programs as well as all other mandated and recommended programs . . ." According to petitioner, the parole denial determination was flawed in that it focused solely on the seriousness of the underlying crime.

A Parole Board 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 February 8, 2012 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors including petitioner's therapeutic/vocational programming, academic achievements, release plans and favorable disciplinary record, in addition to the disturbing nature of the violent crime underlying his incarceration and prior criminal record.[1] *See Zhang v. Travis*, 10 AD3d 828. The Court finds, moreover, nothing in the parole appearance 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. Indeed, before closing the record of the parole interview Commissioner Hagler asked the petitioner if there was " . . . anything we have not discussed here that you want to put here on the record." In response to that open-ended invitation petitioner responded as follows: "I can't change my past, but I can change my future and, you know, I'm deeply regretful

[1] The Court notes the particularly brutal and bizarre circumstances associated with the crime underlying petitioner's incarceration. As set forth on page two of the Inmate Status Report prepared in anticipation of petitioner's February 2012 Board appearance (Exhibit D annexed to respondents' Answer), "[t]he instant offense is described as the inmate causing the death of the victim by repeatedly striking her in the head with a hammer . . . The inmate is also reported to have been engaged in anal intercourse with the victim as she lay dead or dying." When questioned during the Parole Board appearance as to the accuracy of such description, petitioner was unable to confirm or deny the details. According to petitioner he had been drinking/taking pills at the time of the incident and " . . . basically blacked out." The Court also notes that petitioner's assertions that he led a "law-abiding life" prior to committing this crime (Paragraph 14 of the Petition) and that he had no prior criminal record (Paragraph 17 of the Petition) are belied by the record before the Parole Board. Petitioner's Criminal History printout, annexed to the Inmate Status Report prepared in anticipation of petitioner's initial April 2000 Parole Board appearance and annexed to the respondents' Answer as part of Exhibit D thereof, reveals multiple criminal convictions during the 1970's prior to the 1980 Murder 2° conviction.

what happened to my family, her family. You know, I feel very bad about this. I've been holding it in a lot of years. I just want to let this out."

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 of the crime underlying petitioner's incarceration. *See Veras v. New York State Division of Parole,* 56 AD3d 878, *Garofolo v. Dennison,* 53 AD3d 734, *Serrano v. Dennison*, 46 AD3d 1002, *Schettino v. New York State Division of Parole*, 45 AD3d 1086 and *Farid v. Travis*, 17 AD3d 754, *app dis* 5 NY3d 782.

Finally, to the extent petitioner asserts in his Reply that this matter should be transferred to the Appellate Division for disposition of the "substantial evidence" issue, the Court finds that parole denial determinations are not subject to judicial review under the substantial evidence standard. *See Tatta v. Dennison*, 26 AD3d 663 and *Valderrama v. Travis*, 19 AD3d 904.

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: February 4, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice