September 2021

Decision in Art. 78 proceeding - Smith, William (2015-02-03)

Matter of Smith v New York State Bd. of Parole
2015 NY Slip Op 30430(U)
February 3, 2015
Supreme Court, Albany County
Docket Number: 5331-14
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of WILLIAM SMITH,

Petitioner,

-against-

NEW YORK STATE BOARD 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 # 01-14-ST6226 Index No. 5331 -14

Appearances: William Smith
Inmate No. 97-B-0647
Petitioner, Pro Se
Collins Correctional Facility
P.O. Box 490, Middle Road
Collins, NY 14034-0490

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently housed at Collins Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated December 11, 2013 to deny petitioner discretionary release on parole. Petitioner is

serving a term of 16 years to life, as a persistent violent felony offender, upon conviction of the crime of assault 1st degree. Among the many arguments set forth in the petition, petitioner indicates that he has completed the following programs during his current incarceration: aggression replacement training; alternatives to violence project; Phase III; Prison Fellowship Ministries. He lists the following under the heading "educational/vocational accomplishments": a general equivalency diploma; electronics tester; salvage laborer; and inventory clerk. He indicates that he has received a letter of acceptance for the re-entry program sponsored by the Back to Basics Outreach Ministry which, he says, assists newly released inmates in adjusting to life in the community. The petitioner argues that the Division of Parole has failed to comply with the provisions of Executive Law § 259-c (4) by reason that it has not published written procedures for its use in making parole decisions (see Executive Law § 259-c). He maintains that Commissioner Ludlow gave only cursory consideration of his COMPAS Risk and Needs Assessment. In petitioner's view, proper consideration and application of the COMPAS Instrument would compel the Board to conclude that he be should be released. As part of his argument, the petition criticizes the Board for not identifying the specific risk that the petition still poses to the safety and welfare of the community. The petitioner further maintains that the respondent has not documented his positive acts through preparing what is known as a "commendable behavior report" pursuant to DOCCS Directive 4006.

The petitioner argues that the determination violated his substantive and procedural rights to due process. He maintains that the parole interview was unfair; that the Parole Board had a hostile and adversarial attitude towards him; and that they improperly considered

the instant offense and his prior criminal history. He contends that the Parole Board paid no attention to his rehabilitative efforts; and that the determination constituted an unauthorized re-sentencing. The petitioner further maintains that the Parole decision was predetermined, as evidenced by the fact that most of the parole interview focused on his criminal offense. He asserts that the Parole Board erred in not providing him guidance with regard to how he could improve his chances for parole in the future. The petitioner also maintains that the Parole Board was under the incorrect impression that his victim had died, when in reality the victim had survived the assault.

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

> "Denied, hold for 24 months. Next appearance date: December 2015.
>
> "Following careful review and deliberation of your record and interview, this panel 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 offense in Buffalo in March 1996 involved assault first. Your criminal history includes unauthorized use of a motor vehicle, stolen property, assault and drug related offenses. Your institutional programming indicates progress and achievement which is noted to your credit. Your disciplinary record reflects approximately five (5) Tier 2 Reports.
>
> "You have approximately three felonies and seven misdemeanors. This is your third state bid. 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, and undermine respect for the law."

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of Delrosario v Evans, 121 AD3d 1152, 1152-1153 [3d Dept., 2014]; Matter of Williams v New York State Division of Parole, 114 AD3d 992 [3d Dept., 2014; Matter of Campbell v Evans, 106 AD3d 1363, 1363-1364 [3d Dept., 2013]). 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]; see also Matter of Graziano v Evans, 90 AD3d 1367, 1369 [3d Dept., 2011]). 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]).

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. It was noted that the petitioner has completed all recommended programs. The petitioner mentioned that if released, although he had family members residing in the Buffalo area, he would prefer to reside in a "more structured" release setting. Inquiry was made with regard to intentions with respect to employment. The petitioner responded by indicating that he has electrical, roofing, carpentry and mechanics training. He further indicated, however, that he would really prefer to work with young people as a professional counselor. Commissioner Ludlow mentioned the finding in the COMPAS Instrument that he was at low risk for felony violence, arrest or absconding. There is no evidence in the record that the Parole Board pre-determined the disposition. Nor is

there evidence of any bias or an adversarial attitude on the part of the Commissioners.

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. 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]). 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 Williams v New York State Division of Parole, supra; Matter of Matos v New York State Board of Parole, 87 AD3d 1193 [3d Dept., 2011]; 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 Davis v Evans, 105 AD3d 1305 [3d Dept., 2013]; Matter of MacKenzie v Evans, 95 AD3d 1613 [3d Dept., 2012]; Matter of Matos v New York State Board of Parole, supra; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [3rd Dept., 2010]). 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 resentencing, 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., West. Co., 2006]; Matter of Kalwasinski v Paterson, 80 AD3d 1065, 1066 [3d Dept., 2011]; Matter of Carter v Evans, 81 AD3d 1031, 1031 [3d Dept., 2011]; Matter of Valentino v Evans, 92 AD3d 1054 [3d Dept., 2012]). 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 Gomez v New York State Division of Parole, 87 AD3d 1197 [3d Dept., 2011]; 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 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.

As relevant here, the 2011 amendments to the Executive Law (see L 2011 ch 62, Part C, Subpart A, § 38-b, et seq.) made two changes with respect to how parole determinations are made. First, Executive Law § 259-c was revised to eliminate mention of Division of Parole guidelines (see 9 NYCRR 8001.3 [a]), in favor of requiring the Division of Parole to rely upon criteria that would place greater emphasis on assessing the degree to which inmates have been rehabilitated, and the probability that they would be able to remain crime-free if released (see Executive Law 259-c [4]). Said section now recites: "[t]he state board of parole shall [] (4) 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" (Executive Law 259-c [4], enacted in L 2011 ch 62, Part C, Subpart A, § 38-b). This amendment was made effective six months after its adoption on March 31, 2011, that is, on October 1, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49-[f]). In the second change, Executive 259-i (2) (c) was amended to incorporate into one section the eight factors which the Parole Board was to consider in making release determinations (see L 2011 ch 62, Part C, Subpart A, § 28-f-1). This amendment was effective immediately upon its adoption on March 31, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49). However, it did not result in a substantive change in the criteria which the Parole Board should consider in rendering its decision.

The respondent issued a memorandum to Board members, dated October 5, 2011, specifically addressing the amendment to Executive Law § 259-c (4) and providing instruction concerning application of the statutory guidelines in light of the changes effectuated by the amendment. The memorandum directed that henceforth, the Parole Board must also consider the "steps an inmate has taken toward . . . rehabilitation" and "the likelihood of . . . success once released". The memorandum directed that the Parole Board, in its review process, utilize a "transition accountability plan" ("TAP") which incorporates risk and needs principles, as well as a COMPAS Risk and Needs Assessments instrument. The Appellate Division, in Matter of Montane v Evans (116 AD3d 197, 200-303 [2014], lv granted 23 NY3d 903 [2014], appeal dismissed ___ NY3d ___ [Dec. 16, 2014]) found no

error with regard to the manner in which the Division of Parole implemented the provisions of Executive Law § 259-c (4), including use of the COMPAS Risk and Needs Assessment instrument. The Court specifically found no error in the alleged failure of the Division of Parole to promulgate regulations pursuant to Executive Law § 259-c (4) (see id.; see also Matter of Singh v Evans, 118 AD3d 1209, 1210 [3d Dept., 2014]).

Here, the Parole Board properly engaged in a risk and needs assessment as required under Executive Law § 259-c (4), including review of the COMPAS instrument (see Matter of Delrosario v Evans, 121 AD3d 1152, supra; Matter of Partee v Evans, 117 AD3d 1258, 1259 [3d Dept., 2014], lv denied 24 NY3d 901 [2014]). "The COMPAS instrument, however, is only one factor that the Board was required to consider in evaluating petitioner's request" (Matter of Matter of Rivera v New York State Div. of Parole, 119 AD3d 1107, 1109 [3d Dept., 2014]).

With regard to Commissioner Ludlow's reference that petitioner's victim "was slashed pretty good based on the autopsy". The Court observes that the petitioner failed to correct the Commissioner during the parole interview at a time when the issue could be addressed by the Board (see Matter of Morrison v Evans, 81 AD3d 1073, at 1073-1074 [3d Dept., 2011]). Moreover, a review of respondent's determination (supra) reveals that the Parole Board correctly understood petitioner's role in the crime for which he stands convicted. There is nothing to demonstrate that the alleged factual inaccuracy resulted in a violation of petitioner's constitutional rights or involved matters that would have affected respondent's decision to deny parole (see, Matter of Brazill v New York State Bd. of Parole, 76 AD2d 864; Matter of Rossney v New York State Board of Parole, 267 AD2d 648, 649

[3rd Dept., 1999]; see also, Matter of Richburg v New York State Division of Parole, 284 AD2d 685, 686 [3rd Dept., 2001]).

To address any issue with regard to respondent's alleged failure to prepare a transitional accountability plan ("TAP") as required under Correction Law § 71-a, "[t]he language of the statute clearly applies only to newly admitted prisoners and is prospective in nature" (see Matter of Matter of Rivera v New York State Div. of Parole, 119 AD3d 1107, 1108-1109 [3d Dept., 2014]). Correction Law § 71-a was enacted on March 31, 2011 and was effective six months thereafter (see L 2011, ch 62, § 1, part C, § 1, subpart A, §§ 16-a, 49 [h]; Rivera v New York State Div. of Parole, supra). In this instance, the petitioner was received into custody by DOCCS 1997. As such, the respondent was not required to prepare a TAP.

Lastly, the Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see Matter of Campbell v Evans, 106 AD3d 1363, supra, at 1364, citing Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604 [2002]).

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: February 3, 2015
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated October 30, 2014, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated January 8, 2015, Supporting Papers and Exhibits
3. Affirmation of William B. Gannon, Esq., dated November 19, 2014, Supporting Papers and Exhibits
4. Affirmation of Joshua E. McMahon, Assistant Attorney General, dated January 8, 2015

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of WILLIAM SMITH,

Petitioner,

-against-

NEW YORK STATE BOARD 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 # 01-14-ST6226 Index No. 5331-14

SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera* review in connection with the above matter, namely, respondent's Exhibit B, Presentence Investigation Report, and respondent's Exhibit D, Confidential Portions of Parole Board Report, and Exhibit F, COMPAS Reentry Risk Assessment - Unredacted, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: February 3, 2015
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice