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Matter of Suba v New York State Bd. of Parole
2009 NY Slip Op 30002(U)
January 2, 2009
Supreme Court, Albany County
Docket Number: 2382-08
Judge: George B. Ceresia
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This opinion is uncorrected and not selected for official publication.

[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of
CURTIS SUBA, 81-A-5059,

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 # 01-08-ST8873 Index No. 2382-08

Appearances:

Curtis Suba
Inmate No. 81-A-5059
Petitioner, Pro Se
Coxsackie Correctional Facility
P.O. Box 200
Route 9W
West Coxsackie, New York 12051

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Shoshanah V. Asnis, Esq.
Assistant Attorney General
of Counsel)

DECISION and JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Coxsackie Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination by respondent New York State

[* 2]

Board of Parole denying his request for discretionary release. Respondent opposes the petition seeking its dismissal.

Currently, the petitioner is serving an indeterminate prison sentence of 15 years to life upon a plea of guilty to Murder in the second degree. The underlying offense that occurred in 1980 involved the petitioner, in concert with others, robbing a victim at knife-point and then stabbing the victim to death. The petitioner was approximately 20 years old at the time he committed the underlying offense.

On July 18, 2007, the petitioner appeared for the seventh time before the Parole Board, having served almost 27 years in prison. The petitioner noted during the interview that he had a prior criminal record, including a conviction for arson. He also acknowledged that he had stabbed the victim and, prior to the underlying crime, had been taking part in robberies in the area where the crime occurred.

In addition to discussing the underlying crime, the petitioner discussed with the Parole Board his proposed plans upon release. The Parole Board noted its concern regarding the petitioner's admitted drug use and the fact that he had only been drug free for less than a year. The petitioner informed the Parole Board that he hoped, upon release, to be admitted to an inpatient drug program to help with his adjustment into society after such a long period of incarceration. If that does not work, the petitioner explained that his parents will let him live with them while he gets some much needed education. Also, the petitioner discussed his positive involvement in the Alcohol and Substance Abuse Treatment Program. The Parole Board noted that the petitioner had not had a Tier II ticket since 2004. The Parole Board also afforded the petitioner an opportunity to inform it of any other matters he thought important

to his application for discretionary release.

Subsequently, the Parole Board denied the petitioner's application for discretionary release, holding him for 24 months. That denial provided:

> "You continue to serve a 15 year to life term for murder in the 2nd degree. You and others stabbed a male victim to death during an apparent robbery. The crime both continued and escalated your previous pattern of criminal conduct which dated back to the 1970's. At interview you admitted your history of drug abuse in the community. The panel remains concerned about your drug abuse as your disciplinary history while incarcerated demonstrates repeated instances of drug use over the years. Any relapse on your part would subject the community to a risk of harm. Therefore, while the panel notes your extensive incarceration the panel concludes that if release[d] at this time there exists a reasonable probability that you will not live and remain at liberty without further violating the welfare and safety of the community and would so deprecate the severity of the offense as to undermine respect for the law. Prior to your next appearance date, continue to program as recommended and maintain appropriate discipline by refraining from disciplinary infractions" (Parole Board Release Decision Notice [dated 7-23–07], Answer, Exhibit F).

The petitioner administratively appealed the parole determination, but no decision was issued regarding that appeal. Petitioner then commenced this CPLR article 78 proceeding for review of that determination.[1] In this proceeding, petitioner argues, inter alia, that Parole Board's determination should be annulled because in reaching it the Parole Board failed to consider (1) that the petitioner has already served time way in excess of his minimum

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[1]When, such as here, a determination regarding an administrative appeal is not timely issued, a petitioner's administrative remedies are deemed exhausted (see 9 NYCRR 8006.4 [c]; Matter of Grune v New York State Bd. of Parole, 31 AD3d 919, 919 [3d Dept 2006]).

sentence; (2) the petitioner's exemplary institutional programming and strong community support; (3) the petitioner's acceptable post-release plans; (4) the sentencing minutes; and (5) the petitioner's equal protection rights.

Executive Law § 259-i (2) (c), in relevant part, provides that the following factors shall be considered by the Board in making a decision regarding discretionary parole release:

> "(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 while in the custody of the department of correctional services . . . ; and (v) any statement made to the board by the crime victim or the victim's representative . . ."

Further, where, such as here, a petitioner's minimum period of imprisonment was not fixed pursuant to the provisions of Executive Law § 259-i (1), but rather by the sentencing Court, the Board must also consider the following factors from Executive Law § 259-i (1) (a) (emphasis supplied):

> "(i) 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 pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest and prior to confinement; and (ii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement. . . . " (see also Matter of Santos v New York State Div. of Parole, 234 AD2d 840, 840 [3d Dept 1996]).

"It is well settled that parole decisions are discretionary and will not be disturbed so

long as the statutory requirements set forth [above] are met" (Matter of Turner v Dennison, 24 AD3d 1074, 1074 [3d Dept 2005]; see Matter of Mendez v New York State Bd. of Parole, 20 AD3d 742, 742 [3d Dept 2005]). Moreover, "[j]udicial intervention is warranted only when there is a 'showing of irrationality bordering on impropriety'" (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 Matter of Cartagena v New York State Bd. of Parole, 20 AD3d 751, 752 [3d Dept 2005], lv dismissed 6 NY3d 741; Matter of Farid v Travis, 17 AD3d 754, 754 [3d Dept 2005], lv dismissed 5 NY3d 782).

Here, a review of the record establishes that the Parole Board, except for one notable exception referred to below, considered the relevant statutory factors in exercising its discretion to deny petitioner parole (see Matter of Abascal v New York State Bd. of Parole, 23 AD3d 740, 741 [3d Dept 2005]). The Parole Board may properly consider the seriousness of the underlying crime, which in this instance is murder in the second degree, and the Board is "not required to give equal weight to the statutory factors it considered in reaching its discretionary determination" (Matter of Freeman v New York State Div. of Parole, 21 AD3d 1174, 1175 [3d Dept 2005]). Both the interview transcript and the record before the Parole Board demonstrate that the Board also considered, inter alia, the petitioner's institutional achievements, his disciplinary record, post-release plans, his institutional adjustment and the pre-sentence report (see Matter of Watford v Travis, 16 AD3d 850, 851 [3d Dept 2005]). Notably, the Parole Board discussed at length with the petitioner his drug use history. In addition, the Parole Board gave the petitioner an opportunity to highlight or discuss any matter he felt warranted the Board's attention (see Matter of Serna v New York State Div.

of Parole, 279 AD2d 684, 684-685 [3d Dept 2001]). Thus, the record does not substantiate the petitioner's claim that the Board only considered the seriousness of the underlying crime in denying his application for discretionary release.

In addition, in the Matter of Freeman v New York State Div. of Parole (21 AD3d 1174 [3d Dept 2005]), the Third Department expressly rejected the argument that an inmate was deprived of due process because "the Board failed to indicate areas in which petitioner fell short of qualifying for parole" (id. at 1175). That Court explained: "'Executive Law § 259-i does not create an entitlement to release on parole and therefore does not create interests entitled to due process protection'" (id., quoting Paunetto v Hammock, 516 F Supp 1367, 1367-1368 [1981]; see Matter of Russo, 50 NY2d at 75-76). Moreover, the Court is not persuaded by the "petitioner's equal protection claim alleging that the Board treated him differently from other inmates" who have also appeared before it (Matter of Valderrama v Travis, 19 AD3d 904, 905 [3d Dept 2005]). "Inasmuch as the Board's ruling in this instance bears a rational relationship to the legitimate objective of community safety and respect for the law," that claim must be dismissed (id.).

Turning to the failure of the Parole Board to consider the sentencing minutes, the Court is mindful of cases which have vacated parole determinations where the Parole Board failed to consider the inmate's sentencing minutes (see Matter of McLaurin v New York State Board of Parole, 27 AD3d 565 [2nd Dept., 2006], lv to appeal denied 7 NY3d 708; Matter of Standley v New York State Division of Parole, 34 AD3d 1169 [3rd Dept., 2006]; and Matter of Lovell v New York State Division of Parole, 40 AD3d 1166 [3rd Dept., 2007]).

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In this instance, the respondent has submitted a document dated August 8, 2008 from Maureen O'Connell, County Clerk and Clerk of the Supreme Court of Nassau County, in which Ms. O'Connell certifies that the minutes of petitioner's sentencing on October 16, 1981 cannot be located after a thorough search.

The Court is thus confronted with a situation where the Division of Parole has failed in its obligation, apparently over a substantial number of years, to obtain a copy of the petitioner's sentencing minutes. What renders the situation all the more egregious is that the sentencing minutes are no longer available and can not be obtained. In the Court's view the determination of the Parole Board was procedurally flawed in that it did not consider the sentencing minutes; and was not informed that the sentencing minutes are no longer available. The Court finds that the matter should be remanded to the Parole Board for a *de novo* parole interview. The Parole Board should be advised of the foregoing. It should make a finding with regard to whether the sentencing minutes are no longer available and can not be obtained. In the event that the Parole Board finds that the sentencing minutes are no longer available and can not be obtained, then it should make a separate finding, if it be the case, that there is no evidence in the record which indicates that the sentencing judge made a sentencing recommendation adverse to the petitioner.

The Court has reviewed petitioner's remaining arguments and finds them to be without merit.

Accordingly, it is

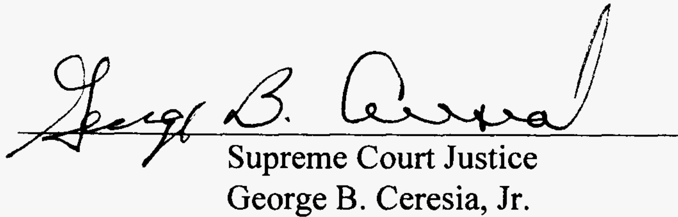
ORDERED and ADJUDGED, that the petition be and hereby is granted to the extent

that the matter be and hereby is remanded to the Parole Board for a *de novo* parole interview in keeping with this decision.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the Respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: January 2, 2009
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order to Show Cause signed April 23, 2008;
2. Petition verified March 13, 2008, with accompanying Exhibits A-J;
3. Answer verified August 18, 2008, with accompanying Exhibits A-M;
4. Affirmation of Shoshanah V. Asnis, Esq., affirmed August 18, 2008.