September 2021

Decision in Art. 78 proceeding - Sutherland, Patrick (2008-12-02)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of PATRICK SUTHERLAND,

Petitioner,

-against-

GEORGE B. ALEXANDER, CHAIRMAN OF THE 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-ST9019 Index No. 4114-08

Appearances: Patrick Sutherland
Inmate No. 90-T-4120
Petitioner, Pro Se
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

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The Capitol
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Shawangunk Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated August 21, 2008 to deny petitioner discretionary release on parole. The petitioner was convicted of

two counts of Burglary in the first degree, criminal possession of a weapon in the second degree, two counts of attempted assault in the second degree, attempted escape in the first degree and criminal possession of a weapon in the third degree. Among the many arguments set forth in the petition, the petitioner contends that the Parole Board relied upon erroneous information. He maintains that he is over the guideline range (see 9 NYCRR 8001.3 [c]). He criticizes the Parole Board for failing to consider the criteria set forth in Executive Law § 259-i. The petitioner points out that he has completed several institutional programs including Transitional Services, the Osborne Association, sobriety, basketball, legal research, HIV/AIDS/ ART and the SYPHUS program. He has worked as a legal general clerk, paralegal assistant, porter, and food service group porter. He maintains that the Parole Board failed to discuss the foregoing. In his view the Parole Board was interested in punishing him for his prior criminal convictions. He also maintains that the Parole Board failed to consider his institutional history or his plans upon being released. In the petitioner's view, the Parole Board improperly focused on petitioner's prior criminal convictions. The petitioner argues that the Parole Board's determination was the result of an executive policy implemented by former Governor George Pataki to deny parole to violent felony offenders. The petitioner contends that as a result of the foregoing, his constitutional right to due process was violated. He accuses the Parole Board of being highly prejudiced against him, and maintains that the Board was unwilling to give him a fair and impartial analysis of his suitability for parole. This attitude, in his view, "stripped petitioner of any semblance of his rights to due process...".

The reasons for the respondent's determination to deny petitioner release on parole

are set forth as follows:

> "Parole is denied. After a careful review of your record, your personal interview, and due deliberation, it is the determination of this panel that, if released at this time, there is a reasonable probability that you would not live at liberty without violating the law. Your release at this time is incompatible with the welfare and safety of the community and will so deprecate the seriousness of the crime as to undermine respect for the law. This decision is based upon the following factors: You appear before this panel with serious instant offenses of burglary first, two counts; attempted assault second, two counts; criminal possession of a weapon third, two counts; and attempted escape first. While on parole only about four months, you shot at three victims with a handgun. You struck one victim in the arm. You have an extensive criminal history which include convictions for manslaughter first, robbery second and attempted assault second. You have a poor record of adjustment in prison which includes multiple Tier III infractions for prison misconduct. Consideration has been given to any program completion. However, your release at this time is denied."

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 Sinopoli v New York State Board of Parole,189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v. New York State Bd. of Parole, 157 AD2d 944). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (see Ristau v. Hammock, 103 AD2d 944 [3rd Dept., 1984]). 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 Parole Board took time to review a number of letters of support which were a part of his record. He was given ample opportunity to provide comments in support of his 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]). 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 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 claim that the Parole Board relied upon erroneous information relates to the following comment made by the Parole Board in its decision: "While on parole only

about four months, you shot at three victims with a handgun. *You struck one victim in the arm*" (emphasis supplied). The facts supporting the latter comment (that one victim was struck in the arm) are found in petitioner's pre-sentence investigation report. The petitioner, however, has submitted evidence which appears to establish that charges with respect to the alleged shooting victim, identified as Manuel Pacheco, were dismissed by the trial court before verdict. The Court observes that the petitioner never called this matter to the attention of the Parole Panel during the parole interview, although the shooting was specifically mentioned. It is well settled that the Parole Board is entitled to rely upon the facts set forth in the inmate's pre-sentence report (see Matter of Cox v New York State Division of Parole, 11 AD3d 766, 767-768 [3rd Dept., 2004]; see also Matter of Champion v Dennison, 40 AD3d 1181, 1182 [3rd Dept., 2007], where it was held that such an issue is "foreclosed from review" where the inmate did not challenge the erroneous facts before the sentencing court). Moreover, a review of the record before the Court reveals, quite clearly, that this factor was not the sole basis of the Parole Board's determination (see Matter of Nunez v Dennison, 51 AD3d 1240, 1214 [3rd Dept., 2008]; Matter of Fransua v Alexander, 52 AD3d 1140, 1141 [3rd Dept., 2008]). There were many other factors cited by the Parole Board which supported the determination which it reached.

The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New York Division of Parole, 294 AD2d 726 [3rd Dept., 2002]; Matter of Jones v Travis, 293

AD2d 800, 801 [3rd Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3rd Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3rd Dept., 2006]; Matter of Motti v Dennison, 38 AD3d 1030, 1031 [3rd Dep., 2007]; Matter of Garofolo v Dennison, 53 AD3d 734 [3rd Dept., 2008]; Matter of MacKenzie v Dennison, ___ AD3d ___ [3rd Dept., October 23, 2008]).

With respect to petitioner's argument that he has served time in excess of the 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]). Thus, the Court finds that this does not serve as a basis to overturn the Board's decision.

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.

In addition, 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 Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

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.

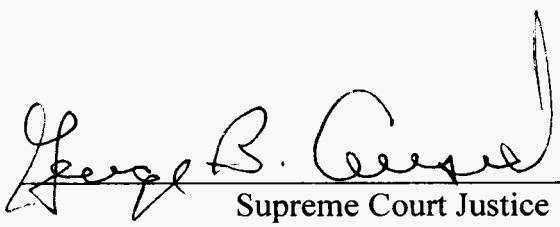
Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. 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: December 2, 2008
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated June 3, 2008, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated July 24, 2008, Supporting Papers and Exhibits
3. Reply Affidavit sworn to August 5, 2008