September 2021

Decision in Art. 78 proceeding - Thomas, Theron (2015-04-15)

Matter of Thomas v Stanford
2015 NY Slip Op 30749(U)
April 15, 2015
Sup Ct, Franklin County
Docket Number: 2014-341
Judge: S. Peter Feldstein

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

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In the Matter of the Application of
THERON THOMAS, #93-A-9430,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2014-0178.36
INDEX # 2014-341
ORI #NY016015J

-against-

TINA STANFORD, Chairwoman,
NYS Board of Parole, and **ANTHONY J. ANNUCCI**, Commissioner, NYS Department of Corrections and Community Supervision,
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 Theron Thomas, verified on April 22, 2014 and filed in the Franklin County Clerk's office on May 7, 2014. Petitioner, who is an inmate at the Otisville Correctional Facility, is challenging the May 2013 decision denying him discretionary parole release and directing that he be held for an additional 18 months. The Court issued an Order to Show Cause on May 13, 2014 and has received and reviewed respondents' Answer and Return, including *in camera* materials, verified on August 1, 2014 and supported by the August 1, 2014 Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General, as well as by the Affirmation of Terrence X. Tracy, Esq., Counsel, New York State Board of Parole, dated June 18, 2014.

By document verified on August 18, 2014 and received directly in chambers on August 22, 2014, petitioner purported to amend his original Petition. In a Letter Order dated September 4, 2014 the Court directed respondents to serve and mail answering papers with respect to the Amended Petition on or before September 26, 2014 and

directed petitioner to mail his original Reply to such answering papers on or before October 17, 2014. Notwithstanding the foregoing, petitioner's Reply to the respondents' original answering papers, verified on September 4, 2014, was received directly in chambers on September 10, 2014. The Court also received and reviewed petitioner's amended Answer and Return, verified on September 24, 2014 and supported by the Amended Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General, dated September 24, 2014. Finally, the Court has received and reviewed petitioner's additional Reply, verified on October 15, 2014 and received directly in chambers on October 20, 2014.

On November 19, 1993 petitioner was sentenced in Supreme Court, Queens County, to a controlling indeterminate sentence of 20 years to life upon his convictions, following jury verdicts, of the crimes of Murder 2°, Conspiracy 2° and Criminal Possession of a Weapon 3°. Petitioner's convictions/sentencings were affirmed on direct appeal to the Appellate Division, Second Department. *People v. Thomas*, 231 AD2d 749, *lv denied* 89 NY2d 868.

After having been denied discretionary parole release at his initial Parole Board appearance, petitioner reappeared before a Board on May 1, 2013. Following that reappearance a decision was rendered again denying petitioner discretionary parole release and directing that he be held for an additional 18 months[1]. The May 2013 parole denial determination reads as follows:

> "Denied 18 months. Next appearance 11/2014. Parole is denied. After a careful review of your record, a 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

[1] Although the 18-month hold should have produced a reappearance date in November of 2014, there is nothing in the record to suggest that petitioner has reappeared before a Parole Board since May 1, 2013.

> the law, and your release at this time is incompatible with the welfare and safety of the community and would so deprecate the seriousness of the crime as to show disrespect for the law. This decision is based on the following: You stand convicted of the serious offenses of murder in the second degree, conspiracy in the second degree, and criminal possession of a weapon in the second degree, in which you acting in concert with two others shot the victim six times causing his death. This was a vicious and senseless crime which took the life of someone's son over a money debt. Prior to the instant offense you had been adjudicated a youthful offender for a drug charge. You had also been adjudicated a juvenile delinquent and placed in a Division for Youth facility. Note is made of your recent good behavior. Continue to maintain a clean disciplinary record. Consideration has been given to all required statutory factors including your efforts at rehabilitation, your risk to the community and your needs for successful reintegration in the community. However, your release at this time is denied. All Commissioners concur."

The document perfecting petitioner's administrative appeal from the May 2013 parole denial determination was received by the DOCCS Board of Parole Appeals Unit on August 29, 2013. Although the Appeals Unit apparently failed to issue its findings and recommendation within the four-month time frame set forth in 9 NYCRR §8006.4(c), a belated decision on administrative appeal was, in fact, issued on or about May 23, 2014, after this proceeding had been commenced.

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, *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 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.

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 . . ."[2] To the extent petitioner

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[2]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 . . ."

argues that the Parole Board failed to adopt rules or regulations implementing the above-referenced amendment to Executive Law §259-c(4), the Court finds that the promulgation of the 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 dis* 24 NY3d 1052.

Although petitioner also asserts that no Transitional Accountability Plan (TAP) was prepared in conjunction with the discretionary parole release consideration process, the Court finds that this does not constitute a basis to overturn the May 2013 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 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 September 30, 2011, the Court finds nothing in the legislative enactment to suggest that it was intended to mandate the preparation of TAP's 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.

Petitioner also argues that " . . . other than commissioner Ross['] cursory question regarding petitioner's current work assignment and GED status, and acknowledgment of his clean disciplinary record, the Board completely failed to consider petitioner[']s prior work assignments, academic, vocational, educational and therapeutic achievements." 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 dis* 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 May 2011 initial Inmate Status Report and May 2013 reappearance Inmate Status Report prepared in anticipation of petitioner's May 2013 reappearance, as well as the transcript of petitioner's May 1, 2013 Parole Board reappearance interview, reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's therapeutic/vocational/educational programing records, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record and release plans/community support in addition to the circumstances of the crime underlying his incarceration and prior criminal record. In this regard the

Court notes that under the INSTITUTIONAL ADJUSTMENT heading in the May 2011 initial Inmate Status Report the following is stated:

> "Inmate Thomas was received into the Corrections system in December 1993. Over time, he has completed Phase I of Transitional Services as well as the vocational Sheet Metal Fabrication course, IPA [Inmate Program Aide] training, the Electrical Trades program, ART [Aggression Replacement Training], ASAT [Alcohol and Substance Abuse Therapy], and completed Food Service training. The inmate also obtained an equivalency diploma in 1994. Thomas has had numerous duty assignments over time, including Commissary and Storehouse Clerk, Food Service, Soap Shop, Painter's Helper, Laundry Department, Porter, Inmate Mobility Assistant, and Tailor Shop."

In the May 2013 reappearance report, moreover, it is noted that since his initial May 2011 Parole Board appearance petitioner " . . . had no program completions. He continues to program appropriately as a group leader in the laundry. There are no program refusals or removals to be noted." In addition, petitioner's claim to the contrary notwithstanding, the Court finds nothing in the hearing 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. Before the May 1, 2013 Parole Board reappearance was concluded one of the presiding commissioners asked petitioner the following open-ended question: "Okay. Sir, anything else you want to say?" Petitioner proceeded to discuss his social circumstances prior to and at the time of the commission of the underlying offenses but did not add any additional details with respect to his rehabilitative accomplishments while in DOCCS custody. 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.

Petitioner also appears to argue that the parole denial determination was improperly based solely upon the nature of the crimes underlying his incarceration without any showing of aggravating circumstances surrounding such offenses. In *King v. New York State Division of Parole*, 190 AD2d 423, *aff'd* 83 NY2d 788, 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.

In July of 2014, however, 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 (citations omitted). After favorably citing nine cases decided by it between 1977 and 2014, the Appellate Division, Third Department, in *Hamilton* ended that 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[3] (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 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

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[3] The decision of 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.

> 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).

Accordingly, this Court finds no merit in petitioner's argument that the parole denial determination was fatally flawed simply because the Parole Board identified no aggravating circumstances associated with his underlying criminal offense beyond the obvious serious nature of such offense. Since, as noted previously, the requisite statutory factors were considered, and given the narrow scope of judicial review 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 nature of the crimes underlying petitioner's incarceration. *See Olmosperez v. Evans*, 114 AD3d 1077, *lv granted*, 23 NY3d 907, *Shark v. New York State Division of Parole Chair*, 110 AD3d 1134, *lv dis* 23 NY3d 933, *Serrano v. Dennison*, 46 AD3d 1002 and *Schettino v. New York State Division of Parole*, 45 AD3d 1086.

Under the petition heading designated “AS AND FOR A THIRD CAUSE OF ACTION,” petitioner argues that the COMPAS ReEntry Risk Assessment instrument prepared in anticipation of his May 2013 discretionary parole release consideration “ . . . contained damaging discrepancies at odds with petitioner's institutional accomplishments and adjustments.” In this regard heasserts that in the “Work and Financial” section of the COMPAS instrument it is stated that he “ . . . is neither job ready, has no plans for employment, and has no skills or trades that are employable.” Petitioner also asserts that the “Client Strength” section of the COMPAS instrument “ . . . fails to list any of his vocations or educational completions as a strength.” He goes on to suggest that these entries, rather than any other factor such as his age, contributed to the COMPAS

assessment that he represents a medium arrest risk (although a low risk for felony violence or absconding).

A review of the COMPAS instrument reveals that in response to the question of whether petitioner is "job ready (skilled, semi-skilled, or professionally skilled)"a negative response was entered. In addition the COMPAS instrument indicates that petitioner has "[n]o employment plan" nor does he have "a skill, trade or profession" at which one usually finds work. Within the context of his third cause of action petitioner does not set forth the basis of his conclusion that the COMPAS entries with respect to his work readiness/employability are erroneous. The Court notes, however, that in paragraphs 95 through 97 of the original petition (under the heading "AS AND FOR A SECOND CAUSE OF ACTION") the following is asserted:

> " . . .[P]etitioner took advantage of numerous opportunities to better himself in prison. In 1994 he earned a GED[.] [P]etitioner completed courses and earned certificates for numerous titles and vocations such as: Electrical Residential assistance, electricians tool room clerk and Electrical trades teachers aide. A plus Computer repair, Industrial Food Handler, Machine Shop Worker, Sheet Metal Fabrication, Mobility assistant for the physically handicapped. And in February of 2013 Earned a Certificate of Achievement from the New York State Department of Health and Aids Institute as a Hiv\Aids Peer educator . . . [P]etitioner has also been employed by DOCCS in numerous work assignments such as: Administrative Commissary Clerk, Food Service Worker, Facility Store house worker, Physical Education student, Facility Laundry Operater, State Shop Worker, Gym Porter, Housing block porter and block painter/helper . . . Petitioner has also worked in DOCCS Industries Program as a soap shop assembly line worker and learned to operate and craft various textiles on an array of machines in the tailor shop."

Notwithstanding all of the above, during the course of the May 1, 2013 Parole Board interview petitioner was asked what he would do for work if released. He responded as follows: " . . . I plan on going back to school, either it'll be through VESID or a federal work study or TAP whatever, I'm going back to school. I figure I need to learn something,

technology, I'm going back to school. I'm definitely going to go back to school. I have to, because I don't know anything about this stuff. I'm just at a loss."

The Court finds nothing fundamentally erroneous or irrational with respect to the COMPAS entries relating to petitioner's work readiness/employability. In this regard it is noted that petitioner was 17 years old when he committed the underlying criminal offense on September 11, 1991 and has been continuously incarcerated since that date. While his attainment of a GED and participation in various prison-based vocational/therapeutic programs are commendable, it is not unreasonable to conclude that when petitioner is ultimately released from DOCCS custody he will confront formidable hurdles in the employment field. In any event, the COMPAS entries with respect to petitioner's work readiness/employability notwithstanding, the Court finds nothing in the record before it to suggest that the parole denial determination was based, even in part, upon such entries. The Court similarly finds no basis to conclude that petitioner's age constituted one of the factors underlying the parole denial determination.

Finally, although the Court has concerns regarding the questioning of petitioner at the May 1, 2013 Parole Board interview with respect to the details of the plea bargain he was offered and the reason(s) why he nevertheless went to trial, it concludes that there is nothing in the record to suggest that petitioner's decision to reject the plea bargain played any role in the parole denial determination.

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: April 15, 2015 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice