September 2021

Decision in Art. 78 proceeding - Torres, George (2015-12-31)

[*1]

Matter of Torres v Stanford
2015 NY Slip Op 51931(U) [50 Misc 3d 1207(A)]
Decided on December 31, 2015
Supreme Court, Franklin County
Feldstein, J.
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Decided on December 31, 2015

Supreme Court, Franklin County

In the Matter of the Application of George Torres, Petitioner,

against

Tina Stanford, Chairwoman, NYS Board of Parole, Respondent.

2015-281
S. Peter Feldstein, J.

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of George Torres, verified on March 19, 2015 and filed in the Franklin County Clerk's office on March 27, 2015. Petitioner, who is now an inmate at the Great Meadow Correctional Facility, is challenging the April 2014 determination denying him discretionary parole release and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on April 3, 2015 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on May 27, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated May 27, 2015, and further supported by the Affirmation of William B. Gannon, Esq., Assistant Counsel, New York State Board of Parole, dated May 20, 2015. No Reply has been received from petitioner.

On April 29, 1993 petitioner was sentenced in Supreme Court, Bronx County, to a controlling, aggregate indeterminate sentence of 15 to 45 years upon his convictions of the crimes of Attempted Murder 2° (three counts), Criminal Possession of Weapon 2° and Manslaughter 1°. The criminal acts underlying those convictions/sentencings were committed on May 19, 1991. Also on April 29, 1993 petitioner was sentenced in Supreme Court, Bronx County, to a concurrent indeterminate sentence of 5 to 15 years upon his conviction, following a plea, of the crime of Attempted Murder 2°. The criminal act underlying this conviction/sentencing was committed on July 20, 1991.

After having been denied discretionary parole release on four previous occasions, petitioner reappeared before a Parole Board on April 30, 2014. Following that appearance petitioner was again denied discretionary parole release and it was directed to that he be held for an additional 24-months. The parole denial determination reads, in relevant part, as follows:

> "AFTER A REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAD DETERMINED THAT IF RELEASED AT THIS TIME THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND [*2]YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY AND WOULD SO DEPRECATE THE SERIOUS NATURE OF THE CRIME AS TO UNDERMINE RESPECT FOR THE LAW. THIS DECISION IS BASED ON THE FOLLOWING FACTORS: YOUR I.O.'S ARE: MANSLAUGHTER 1ST, ATTEMPTED MURDER 2ND (2 CTS) AND CPW 2ND IN WHICH YOU ACTED IN CONCERT WITH OTHER[S] AND YOU SHOT A VICTIM IN THE BACK OF THE HEAD AND CAUSED HIS DEATH AND YOU ALL SHOT AT 4 OTHERS, HITTING 3 OF THEM, 2 MONTHS LATER YOU AGAIN ACTED IN CONCERT AND SHOT 2 PEOPLE. NOTE IS MADE OF YOUR SENTENCING MINUTES, COMPAS RISK ASSESSMENT, REHABILITATIVE EFFORTS, RISKS, NEEDS, LETTERS OF SUPPORT, CLEAN DISCIPLINARY

> RECORD, LACK OF REMORSE, LACK OF INSIGHT, PAROLE PLAN, AND ALL OTHER FACTORS REQUIRED BY LAW. YOUR BRUTAL AND MERCILESS VIOLENCE CLEARLY INDICATES THE RISK YOU POSE. PAROLE IS DENIED."

The document perfecting petitioner's administrative appeal from the April 2014 parole denial determination was received by the DOCCS Board of Parole Appeals Unit on August 12, 2014. 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 6, 2015, 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 Jackson v. Evans*, 118 AD3d 701, *Nankervis v. Dennison,* 30 AD3d 521 and *Zane v. New York State Division of Parole*, 231 AD2d 848.

Petitioner first asserts that the Parole Board failed to give proper consideration to the COMPAS risk assessment instrument prepared in anticipation of discretionary release consideration. In this regard it is noted that during the course of the April 30, 2014 Parole Board interview one of the presiding commissioners noted that "[t]he [COMPAS] results for you [petitioner] are favorable. They rank you in the low category across the board for the risk of future violence, even though the have you as a number five in that category. They also rank you as a low risk for arrest and absconding . . ."

Although the Appellate Division, Third Department, has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* 112 AD3d 1056, *Malerba v. Evans,* 109 AD3d 1067, *lv denied* 22 NY3d 858 and *Garfield v. Evans*, 108 AD3d 830), there is nothing in such cases, or Executive Law §259-c(4), to suggest that the quantified risk assessment determined through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Parole Board to determine, based upon its consideration of the factors set forth in Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. The "risk and need principles" that must be incorporated pursuant to Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . *assist* members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A) including, as here, the serious and disturbing nature of the separate crimes underlying petitioner's incarceration. *See Rivera v. New York State Division of Parole,* 119 AD3d 1107 and *Partee v. Evans*, 40 Misc 3d 896, *aff'd* 117 AD3d 1258, *lv denied* 24 NY3d 901.

Although petitioner correctly asserts that a Transitional Accountability Plan (TAP) was not prepared in conjunction with the discretionary parole release consideration process, the Court finds that this does not constitute a basis to overturn the April 2014 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 [*3]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 of the inmate and their successful and productive reentry and reintegration 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 next argues that the COMPAS risk assessment instrument, as well as "other materials" in the Parole Board record, "...relied on information that was either faulty, or otherwise incorrect." Where erroneous information serves as a basis for a parole denial determination such determination must be vacated and a new hearing ordered. *See Smith v. New York State Board of Parole,* 34 AD3d 1156, *Hughes v. New York State Division of Parole,* 21 AD3d 1176 and *Lewis v. Travis,* 9 AD3d 800. Notwithstanding the foregoing, the presence of erroneous information in the record before a Parole Board does not serve as the basis for a new hearing where there is nothing in the record to suggest that the erroneous information served as a basis for the parole denial determination. *See Sutherland v. Evans,* 82 AD3d 1428 and *Restivo v. New York State Board of Parole,* 70 AD3d 1096.

Petitioner's first assertion under the "erroneous information" heading does not really represent an erroneous information claim. According to petitioner, "...[t]he COMPAS Case Plan (TAP) was not reviewed on the record, and it is unknown whether it was even prepared by DOCCS." To the extent petitioner is referring to the COMPAS risk assessment instrument, it is clear that such instrument was, in fact, prepared and referenced by one of the presiding commissioners at petitioner's April 30, 2014 Parole Board interview. There is no requirement that the COMPAS instrument be reviewed on the record. To the extent petitioner's first "erroneous information" claim addresses the TAP, the Court simply notes that DOCCS/parole officials were under no obligation to prepare a TAP for petitioner since he was received into DOCCS custody prior to the effective date of the legislation establishing the TAP requirement. *See Tran v. Evans,* 126 AD3d 1196 and *Rivera v. New York Division of Parole,* 119 AD3d 1107.

Petitioner's second assertion under the "erroneous information" heading, like his first assertion, does not really constitute an erroneous information claim. Petitioner merely asserts that "[t]he defense attorney official statement was defective, in that it did not appear to be authentic, nor did it appear that it was even sent by the petitioner's attorney on record. There is no address confirming the statement. (***see,*** Exhibit III)." (Emphasis in original). Exhibit III, annexed to the petition, is a copy of a May 7, 2003 letter from a parole officer at the Sing Sing Correctional Facility to the "Legal Aid Society Bronx County" soliciting a "statement and/or recommendation" in anticipation of the initial consideration of petitioner for discretionary parole release. There is nothing in the record to suggest that [*4]the petitioner's defense counsel (dating back to the April 29, 1993 sentencing) ever submitted such a statement and/or recommendation. Notwithstanding the foregoing, the Court has reviewed the sentencing minutes (annexed to respondent's Answer and Return as Exhibit thereof) and finds that defense counsel expressed no parole recommendation. Whatever issues there might be with respect to the May 7, 2003 letter purporting to solicit a "statement and/or recommendation" (more than 10 years after petitioner's sentencing), the Court is not aware of any regulatory, statutory or judicial authority mandating that parole/DOCCS officials actively solicit a parole recommendation from defense counsel years, or even decades, after sentencing.

Petitioner third, and final, assertion under the "erroneous information" heading is that the COMPAS risk assessment instrument "...was incomplete and contained erroneous information..." More specifically, petitioner calls into question the COMPAS screener's assessment that he/she was "[u]nsure" as to whether petitioner appeared to have "notable disciplinary issues[.]" (See question 19 in the COMPAS instrument). This Court notes - as did one of the parole commissioners during the April 30, 2014 interview - that petitioner had incurred no disciplinary tickets since his previous Board appearance and that his last Tier III infraction dated back to August of 2011. During the course of petitioner's incarceration in DOCCS custody, however, he incurred 16 Tier III violations and 9 Tier II violations. With this in mind the Court finds nothing erroneous in the COMPAS screener's uncertainty. In any event, there is nothing in

the record to suggest the petitioner's disciplinary history was relied upon, in a negative sense, as an underlying basis for the April 2014 parole denial determination.

Petitioner also asserts various challenges to the accuracy of certain information set forth in the COMPAS risk assessment instrument with respect to the assessment of his job readiness. In this regard petitioner highlights the findings of the COMPAS screener with respect to questions 27, 31, 33 and 34 of that instrument, wherein it is indicated that petitioner is not job ready (skilled, semi-skilled, or professionally skilled), that he does not have a skill, trade or profession at which persons usually find work, that he only has "[f]air" prospects of success on the job and that it will be "[h]arder" for him than others to find work above minimum wage. In challenging the accuracy of these findings petitioner asserts as follows: "The petitioner's record indicates that he has completed **ALL** mandatory programs, including Vocational Training, and other non-mandatory programs like: The HIV/STD Peer Educator Training Certificate. These programs would put the petitioner as a **MORE** likely person to succeed in society, instead of what DOCCS has determined." (Emphasis in original).

Petitioner's arguments to the contrary notwithstanding, the Court notes that he was a 17-year old high school drop out, without significant work history, at the time he was originally taken into custody in connection with the various charges underlying his ongoing incarceration. Notwithstanding his commendable vocational programming record (and apparent attainment of a GED), the Court finds no basis to find that the COMPAS screener was arbitrary in his/her assessment that upon petitioner's release from DOCCS custody he will be at a competitive disadvantage in today's job market. In any event, the Court finds nothing in the record to suggest that the April 2014 parole denial determination was based, even in part, upon petitioner's lack of job readiness.

Finally, to the extent petitioner argues that the April 2014 parole denial [*5]determination employed conclusory language and focused heavily on the serious nature of the crimes underlying his incarceration (committed when he was only 17-years of age), the Court, for the reasons set forth below, rejects such arguments.

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 Montane v. Evans,* 116 AD3d 197, *lv granted* 23 NY3d 903, *app dismissed* 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 Parole Board Report (Reappearance May 2014) and transcript of petitioner's April 30, 2014 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's prior criminal record, his vocational, educational and therapeutic programing records, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, clean disciplinary record since August of 2011 and release plans, in addition to information with respect to the circumstances of the crimes underlying his incarceration. It is also clear that the Parole Board was well-aware of the fact that the petitioner was 17 years of age at the time he committed the offenses underlying his ongoing incarceration in DOCCS custody. The Court, moreover, 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. Indeed, just prior to the close of petitioner's April 30, 2014 Parole Board interview one of the presiding commissioners inquired as follows: "Mr. Torres, last word is yours, sir. Anything that we don't have here that's not mentioned on the record that you want to tell us today?" Petitioner responded in the negative.

In view of the foregoing, 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. 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 boarding on impropriety as a result of the emphasis placed by the Board on the serious, violent nature of the separate crimes underlying petitioner's incarceration, as well as his

perceived lack of insight and/or remorse. *See Veras v. New York State Division of Parole,* 56 AD3d 1086 and *Farid v. Travis*, 17 AD3d 754, *app dis* 5 NY3d 782.

To the extent petitioner purports to rely on *King v. New York State Division of Parole,* 190 AD2d 423, *aff'd* 83 NY2d 788, the Court finds such reliance to be misplaced. In *King* the Appellate Division, First Department, not only determined that the Parole [*6]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. In July of 2014 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.

This Court (Supreme Court, Franklin County) first notes that although the nature of the crime underlying Mr. King's incarceration (Murder 2°) was somewhat similar in nature to some of the crimes underlying petitioner's incarceration (Manslaughter 1° and Attempted Murder 2°), Mr. King had no prior contacts with the law (id. At 426) and his conviction stemmed from a single criminal act. Petitioner, on the other hand, had previously been convicted of a felony-level offense (Criminal Possession of a Weapon 3°) and his various April 29, 1993 convictions stemmed from two separate, violent criminal acts occurring more than two months apart.

In July of 2014, 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 (other citations omitted). After favorably citing nine Third Department cases decided between 1977 and 2014, the *Hamilton* court ended the 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[**[FN1]**] (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 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).

The Court therefore rejects petitioner's argument on this point.

The Court also finds that the April 2014 parole denial determination is sufficiently detailed to inform petitioner of the reasons underlying the denial and to facilitate judicial review thereof. *See Comfort v. New York State Division of Parole,* 68 AD3d 1295 and *Ek v. Travis*, 20 AD3d 667, *lv dis* 5 NY3d 862.

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: December 31, 2015 at
Indian Lake, New York.

_____
S. Peter Feldstein
Acting Supreme Court Justice

Footnotes

Footnote 1: 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.

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