September 2021

Decision in Art. 78 proceeding - Turner, Afi (2009-06-24)

[*1]

Matter of Turner v New York State Bd. of Parole
2009 NY Slip Op 51274(U) [24 Misc 3d 1205(A)]
Decided on June 24, 2009
Supreme Court, New York County
Braun, J.
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Decided on June 24, 2009

Supreme Court, New York County

In the Matter of Afi Turner, Petitioner,

against

New York State Board of Parole, Respondent.

405431/07

Petitioner's attorney is Richard M. Greenberg, Esq., Office of the Appellate Defender, 11 Park Place, Suite 1601, New York, New York 10007, (212) 402-4100.

Respondent's attorney is Andrew M. Cuomo, Attorney General, by Jeb Harben, Assistant Attorney General, 120 Broadway, 24th Floor, New York, New York 10271, (212) 416-6185.

Richard F. Braun, J.

In this article 78 proceeding, petitioner initially challenged an April 3, 2006 determination by respondent denying her release on parole. The article 78 proceeding was denied due to the nonappearance of petitioner's attorney for oral argument. By so ordered stipulation, the default was vacated, and the proceeding recalendared. Petitioner then had another parole release hearing on April 3, 2008, and she was again denied parole. Pursuant to a June 19, 2008 stipulation, the proceeding was adjourned pending the exhaustion of an administrative appeal by petitioner, and an amendment of the petition was permitted if desired by her. No appellate decision came forth after four months, so she had the right to deem exhausted her appellate administrative remedy and pursue judicial review of the April 2008 parole hearing decision (9 NYCRR 8006.4 [c]). She did so by serving and filing a supplemental petition, which incorporated by reference all the allegations of the original petition. By a March 12, 2009 stipulation, the parties agreed that petitioner only challenges the April 2008 parole hearing decision.

On August 28, 1990, the then 17 year old petitioner pled guilty to first degree manslaughter and second degree attempted murder. The Supreme Court, Criminal Term, trial judge imposed the promised consecutive sentences of 8 to 24 years for manslaughter and 2 ½ to 7 ½ years for the attempted murder, which constituted an aggregate term of 10 ½ to 31 ½ years.

Horrible things were done to petitioner, and terrible things were done by her, which led to [*2]the criminal charges against her. The following are some of the allegations in the petition and supplemental petition.

When petitioner was eight years old, her then 16 year old cousin, Danny Crawford, sexually abused her. In spite of her reporting the abuse to her mother, petitioner was not believed by her mother. By the time that petitioner was eleven years old, she was being regularly raped by both Danny and his younger brother, Lamont, with whom she resided. Except for times when she lived elsewhere, the sexual abuse of her continued until she was 17 years old.

On January 9, 1990, Danny again demanded that petitioner have sexual relations with him and threatened her with a gun (at the time, there was a warrant outstanding for his arrest because he had not appeared in court to be sentenced for another crime that he had committed). She refused and told him that she was going to disclose his years of sexual abuse. He then moved toward her. She grabbed his gun off the table where he had placed the gun and shot him to death. She then went downstairs and shot Lamont when he was sleeping. She said that she then tried to shoot herself, but the gun was out of bullets. She tossed the gun in a dumpster outside, but it was never found.

Petitioner was not a suspect in the shootings. During an interview by the police, she said that Danny had argued with a drug dealer who was the one that shot Danny, because she did not want to admit that she had done "something like this". Petitioner might have been able to evade being charged with the shootings, but, while the police showed her a photo array including the drug dealer, petitioner exclaimed that she could not blame an innocent man and confessed to the shootings. She stated that she shot Danny to avoid being raped again, and that she did not even remember shooting Lamont, which occurred when she was in shock.

Her criminal defense trial attorney encouraged her to go to trial so that a jury could evaluate the circumstances that led to the shootings. She declined to follow his advise because she felt that she could not handle the stress of a trial and, more importantly to her, was concerned about the effects on her family if her experiences were revealed publicly in the courtroom. She has consistently expressed remorse for the shootings, including at her sentencing and parole board hearings. Another younger cousin of petitioner's confirmed her expressions of remorse for what she did and for the effects of her actions on their family. Yet another younger cousin sent a letter to petitioner's counselor in prison stating that he had witnessed the sexual abuse perpetrated upon petitioner by her two older cousins, that they had encouraged him to participate in the sexual abuse in a more limited manner, and that he was ashamed that he did not tell anyone at the time what was happening, because doing so could have prevented the ultimate terrible events.

Petitioner has been in jail for more that half of her life now. She has served more than eight years beyond her minimum sentence of 10 ½ years. Although she did receive some disciplinary tickets and unusual incident reports in the earlier period of her incarceration, she has not received any in the last several years. Petitioner has had an exemplary record since then. She obtained a high school equivalency diploma early in her imprisonment, has taken many college courses while incarcerated, and has been involved with a very large number of in-prison programs. She submitted copies of 49 certificates evidencing her activities while incarcerated. Among many other commendable roles, earlier this decade petitioner initiated and became a facilitator for a program that counsels younger inmates in order to help them improve themselves for their future after they are released, has been an inmate coordinator for a program for children who spend a week with their incarcerated mothers, and has facilitated groups for inmates who are HIV positive. Upon her release [*3]from prison, she intends to continue her work as an HIV counselor.

She believes that, given what happened, she could not go back to living with her family but would move into Providence House, which apparently has accepted her contingent on her obtaining parole release. Many people and organizations have submitted letters in support of her release, including a college professor who taught petitioner, the coordinator of the HIV prison-based, peer-led program in which petitioner has worked, and a television reporter for WABC-TV who interviewed her in prison.

Respondent takes the position that petitioner has not shown that she is entitled to a new parole hearing before her next scheduled date: April 2010. Respondent's attorney **[FN1]** opines that respondent properly considered all the relevant factors in determining that petitioner was not entitled to parole release.

Pursuant to Executive Law § 259-i (2) (c) (A), release on parole is discretionary (*see People ex rel. Herbert v New York State Bd. of Parole*, 97 AD2d 128, 131 [1st Dept 1983]), and respondent must consider various factors under that Executive Law provision:

... 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 ... 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; ... (iii) release plans including community resources, employment, education and training and support services available to the inmate;.... Notwithstanding the provisions of this section, in making the parole release decision for persons whose minimum period of imprisonment was not fixed [by respondent], in addition to the factors listed in this paragraph the board shall consider the factors listed in paragraph (a) of subdivision one of this section.

Executive Law § 259-i (1) (a) provides in relevant part:

... all information with regard to such persons referred to in subdivision three of section two hundred fifty-nine-c of this article.... Such guidelines shall include (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; ....

Executive Law § 259-c (3) provides in pertinent part:

... further investigation of the background of such inmate ... together with all other information [*4]compiled by the division [of parole] pursuant to subdivision one of section two hundred fifty-nine-a and the complete criminal record and family court record of such inmate to be filed ...

Executive Law § 259-a (1) provides in relevant part:

... information as complete as may be obtainable with regard to each inmate who is received in an institution under the jurisdiction of the state department of correctional services. Such information shall include a complete statement of the crime for which the inmate has been sentenced, the circumstances of such crime, all presentence memoranda, the nature of the sentence, any orders of protection or temporary orders of protection issued against the inmate at the time of sentencing, the court in which he was sentenced, the name of the judge and district attorney and copies of such probation reports as may have been made as well as reports as to the inmate's social, physical, mental and psychiatric condition and history.

Respondent's April 3, 2008 decision was as follows:

AFTER A REVIEW OF THEIR RECORD AND INTERVIEW, PAROLE IS AGAIN DENIED. YOU CONTINUE TO SERVE SENTENCES FOR MANSLAUGHTER 1ST DEGREE AND ATTEMPTED MURDER 2ND DEGREE. THIS INVOLVED YOU SHOOTING 2 VICTIMS MULTIPLE TIMES, CAUSING THE DEATH OF ONE OF THE VICTIMS. THE PANEL NOTES YOUR CONTINUED PROGRAMMING AND CLEAN DISCIPLINARY RECORD SINCE YOUR LAST APPEARANCE BEFORE THE BOARD, WHICH IS TO YOUR CREDIT. HOWEVER, THE PANEL FINDS MORE COMPELLING THE EXTREME VIOLENCE EXHIBITED IN THE INSTANT OFFENSES AND FINDS YOUR RELEASED (*sic*) AT THIS TIME INCOMPATIBLE WITH THE PUBLIC WELFARE AS IT WOULD SO DEPRECATE THE SERIOUSNESS OF YOUR OFFENSES AS IT UNDERMINES (*sic*) RESPECT FOR THE LAW.

The transcript of the hearing does show that respondent considered factors other than those mentioned in its decision, including petitioner's release plans, although not all of the types required.

Particularly, nothing in respondent's decision or the hearing transcript shows that respondent considered whether there is a reasonable possibility that, if petitioner is released, she "will live and remain at liberty without violating the law", as Executive Law § 259-i (2) (c) (A) mandates. Although respondent is not required to discuss every factor in its decision (*Matter of King v New York State Div. of Parole*, 83 NY2d 788, 791 [1994]; *Matter of Walker v Travis*, 252 AD2d 360, 362 [1st Dept 1998]), the Court of Appeals stated in *Matter of Silmon v Travis* (95 NY2d 470, 477 [2000]) that at the inmate petitioner's parole release hearing respondent was "required to assess whether he presented a danger to the community, or whether there was a reasonable probability that he could live at liberty without repeating his offense." For a denial of parole to be set aside by a court, respondent must have acted irrationally "bordering on impropriety ...." (*Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77 [1980].) Petitioner has to show that respondent did

not consider all relevant factors (*Matter of Garcia v New York State Div. of Parole*, 239 AD2d 235, 239 [1st Dept 1997]). If respondent determined the above factor under Executive Law § 259-i (2) (c) (A) based only on the seriousness of the crimes of which petitioner was convicted, that would be "irrational bordering on impropriety", and respondent's determination would have to be vacated (*see Matter of Wallman v Travis*, 18 AD3d 304, 311 [1st Dept 2005]). [*5]

Here, there is no statement or showing in the transcript of the hearing that respondent considered that required factor at all. The sole reason stated by respondent in its decision denying petitioner parole was the seriousness of the crimes of which petitioner was convicted and that her release would be incompatible with the welfare of the public because her release would deprecate the seriousness of her crimes so as to undermine respect for the law, which are other factors that respondent has to consider under Executive Law § 259-i (2) (c) (A). Quite possibly, respondent did not speak to the required factor because at this point in time respondent very well could not state that petitioner is a danger to the community and that there is not a reasonable probability that she can live free outside jail without again violating the law.

Therefore, by this court's separate June 18, 2009 decision, order, and judgment, the petition has been granted to the extent of directing respondent to hold a de novo parole release hearing forthwith. It is for respondent to exercise its discretion to grant parole release, not this court. Upon the new hearing, respondent should, and must, consider whether petitioner has evidenced through her behavior during her last several years in prison that she has redeemed herself and, in reasonable probability, can now live in society without violating the law. We, as a civilized society, must remain hopeful that those who break the law can rehabilitate themselves, with help while in prison, before their maximum sentencing period is reached. Petitioner has spent much more time incarcerated than her minimum sentence, and has significantly utilized the time to benefit herself and others in many ways. Petitioner herself said at her April 2008 parole release hearing that, although she could never change what happened on the day of the shootings, she is a changed person, and, if she is given the opportunity, she would be "a good member of society" and start her life over again. She stated that she wants a chance. It will be up to respondent to give her that chance, and to her if she is given the opportunity, to use that chance to live a better life, for her sake and the sake of those she encounters in life.

Dated: New York, New York

June 24, 2009Richard F. Braun, J.S.C.

Footnotes

Footnote 1: This court disclosed that respondent's attorney, the assistant attorney general, had been a law student intern for this court several years ago. No objection was raised to this court continuing to preside over this proceeding. As former Chief Judge Kaye directed us judges to do, with which this court agrees, attorneys (and litigants) should use gender-neutral language. In paragraph 37 of respondent's verified answer, respondent's attorney says "his" when referring to "an inmate" generally. Even if slightly unwieldy, it really is not that hard to state "his or her" or "her or his" when referring to people generally rather than to a specific person (*see Carter-Clark v Random House*, 2002 NY Slip Op 50464(U) [Sup Ct, NY County]).

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