September 2021

Decision in Art. 78 proceeding - Utsey, Charles (2013-07-05)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of CHARLES UTSEY,

Petitioner,

-against-

ANDREA EVANS, Chairwoman,
N.Y.S. 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 # 01-13-ST4329 Index No. 6331-12

Appearances:

Charles Utsey
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Petitioner, Pro Se
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Altona Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated April 17, 2012

to deny him discretionary release on parole. Petitioner is serving a term of 1 1/3 to 4 years upon conviction of attempted robbery in the third degree. Among the many arguments set forth in the petition, the petitioner maintains that the determination was not made in accordance with the parole review procedures implemented in 2011, which requires a risk and needs assessment (see Executive Law 259-i [4]). He argues that the reasons given for determination were conclusory. He contends that the Parole Board erred in not providing guidance or additional reasons for its ruling. He points out that he received an earned eligibility certificate; and, as indicated during the parole interview, he intends to return to his pre-incarceration employment upon release. He indicates that he has a spotless disciplinary record. He maintains that the Parole Board's determination was based upon an improper standard of review, that his release must be in the best interest of society. In his view, the Parole Board erred in not questioning him about his prior criminal history, thereby precluding him from explaining his criminal past. In a related argument, he contends that the Parole Board improperly focused solely on his current offense and criminal past, to the exclusion of other factors. Petitioner asserts that the 24 month hold was excessive, beyond the release guideline range, and constitutes a re-sentencing, in violation of law. In his view the determination was irrational bordering on impropriety. The petitioner indicates that he has participated in institutional programs, including Parenthood and Anger Replacement. He was working as a gym porter at the time of the parole interview. He has worked in the Facility storehouse, worked as a recreation yard aid, and he completed his G.E.D. in July 2012.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Parole is denied. Hold 24 months. Next Appearance 4/2014. Despite an earned eligibility certificate, parole is denied. After a personal interview, record review and 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. You appeared before this panel for the serious instant offense of attempted robbery in the 3rd degree. Your criminal record reflects prior unlawful behavior. This repeated unlawful behavior is a concern for this panel. Consideration has been given to an assessment of your risk and needs for success on parole. The panel also notes your programming, good disciplinary record, and release plans and your educational achievements. However, despite these accomplishments, when considering all relevant factors, discretionary release is not warranted."

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of De La Cruz v Travis, 10 AD3d 789 [3d Dept., 2004]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3d Dept., 2001]). 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]; see also Matter of Graziano v Evans, 90 AD3d 1367, 1369 [3d Dept., 2011]). 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 possession of an earned eligibility certificate, his institutional programming, his disciplinary record, and his plans upon release, including returning to his previous job at Crisifulli, where he worked for fifteen years. The Board inquired with regard to his family. The Board discussed with him a portion of the COMPAS ReEntry Narrative Assessment Summary developed pursuant to the provisions of Executive Law § 259-c (4).

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 Matos v New York State Board of Parole, 87 AD3d 1193 [3d Dept., 2011]; 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 MacKenzie v Evans, 95 AD3d 1613 [3d Dept., 2012]; Matter of Matos v New York State Board of Parole, supra; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [3rd Dept., 2010]; 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).

It is well settled that receipt of a certificate of earned eligibility does not serve as a guarantee of release (Matter of Dorman v New York State Board of Parole, 30 AD3d 880 [3rd Dept., 2006]; Matter of Pearl v New York State Division of Parole, 25 AD3d 1058 [3rd Dept., 2006]).

Petitioner's claims that the determination to deny parole is tantamount to a resentencing, in violation of the double jeopardy clauses's prohibition against multiple punishments are conclusory and without merit (see Matter of Bockeno v New York State Parole Board, 227 AD2d 751 [3rd Dept., 1996]; Matter of Crews v New York State Executive Department Board of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A, [Sup. Ct., West. Co., 2006]; Matter of Kalwasinski v Paterson, 80 AD3d 1065, 1066 [3d Dept., 2011]; Matter of Carter v Evans, 81 AD3d 1031, 1031 [3d Dept., 2011]; Matter of Valentino v Evans, 92 AD3d 1054 [3d Dept., 2012]). The fact that an inmate has served his or her minimum sentence does not confer upon the inmate a

protected liberty interest in parole release (see Matter of Motti v Alexander, 54 AD3d 1114, 1115 [3rd Dept., 2008]). The Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the fact that the sentencing court set the minimum term of petitioner's sentence (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000]; Matter of Gomez v New York State Division of Parole, 87 AD3d 1197 [3d Dept., 2011]; Matter of Cody v Dennison, 33 AD2d 1141, 1142 [3rd Dept., 2006] lv denied 8 NY3d 802 [2007]; Matter of Burress v Dennison, 37 AD3d 930 [3rd Dept., 2007]).

As relevant here, the 2011 amendments to the Executive Law (see L 2011 ch 62, Part C, Subpart A, § 38-b, et seq.) made two changes with respect to how parole determinations are made. First, Executive Law § 259-c was revised to eliminate mention of Division of Parole guidelines (see 9 NYCRR 8001.3 [a]), in favor of requiring the Division of Parole to rely upon criteria that would place greater emphasis on assessing the degree to which inmates have been rehabilitated, and the probability that they would be able to remain crime-free if released (see Executive Law 259-c [4]). Said section now recites: "[t]he state board of parole shall [] (4) 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" (Executive Law 259-c [4], enacted in L 2011 ch 62, Part C, Subpart A, § 38-b). In the second change, Executive 259-i (2) (c) was amended to incorporate into one section the eight factors which the Parole Board was to consider in making release determinations (see L 2011 ch 62, Part C, Subpart A, § 28-f-1).

This amendment was effective immediately upon its adoption on March 31, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49). However, it did not result in a substantive change in the criteria which the Parole Board should consider in rendering its decision.

With regard to petitioner's arguments with respect to alleged the Parole Board's non-compliance with Executive Law § 259-c (4), as noted, the Parole Board had before it petitioner's COMPAS ReEntry Narrative Assessment Summary dated April 9, 2012, which contained a comprehensive evaluation of his risk and needs. The Parole Board determination (supra) expressly mentions consideration of petitioner's risk and needs in rendering its determination. The Court finds that the argument has no merit.

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).

Petitioner's argument that the Parole Board is required to advise petitioner and/or provide guidance with regard to the programs he should take, or rehabilitative efforts he should engage in to increase his chance for release at a future parole interview has no merit (see Executive Law § 259-i [2] [a]; 9 NYCRR § 8002.3; Matter of Francis v New York State Division of Parole, 89 AD3d 1312 [3d Dept., 2011]; Boothe v Hammock, 605 F2d 661 [2nd Cir, 1979]; Matter of Freeman v New York State Division of Parole, 21 AD3d 1174 [3rd Dept., 2005]).

With respect to petitioner's argument that he has served time in excess of the parole 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]; Matter of Rodriguez v Evans, 82 AD3d 1397 [3d Dept., 2011]). Thus, the Court finds that this does not serve as a basis to overturn the Board's decision.

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.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

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. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: July 5, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated December 21, 2012, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated February 28, 2013, Supporting Papers and Exhibits
3. Petitioner's Letter dated March 4, 2013
4. Petitioner's Letter dated June 6, 2013