September 2021

Decision in Art. 78 proceeding - Wiley, Tonie (2015-04-09)

Matter of Wiley v State of N.Y. Dept. of Corrections & Community Supervision
2015 NY Slip Op 30785(U)
April 9, 2015
Supreme Court, Albany County
Docket Number: 5000-14
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of TONIE WILEY,

Petitioner,

-against-

STATE OF NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

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 # 01-14-ST6335 Index No. 5000-14

Appearances:

Tonie Wiley
Inmate No. 89-C-0389
Petitioner, Pro Se
Collins Correctional Facility
Middle Road
P.O. Box 340
Collins, NY 14034-0490

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Justin L. Engel,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently housed at Collins Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent

dated October 9, 2013 to deny petitioner discretionary release on parole. The petitioner is serving a controlling term of 25 years to life upon conviction of murder 2nd degree, criminal possession of stolen property 4th degree, grand larceny 4th degree, and reckless endangerment 1st degree. Among the numerous arguments set forth in the petition, petitioner indicates that he has completed several institutional programs including Aggression Replacement Training, Alcohol and Substance Abuse Treatment and Alternative to Violence. He maintains that he now has a new way of thinking which he did not have in the 1980s. He maintains that he has a deep sense of remorse for his crimes. He argues that he has attempted to rehabilitate himself. For example he indicates that while institutionalized he enrolled in the Plumbers Apprentice Program, and obtained an Associates Degree in Applied Sciences from Corning Community College. He indicates that he has had a clean disciplinary record since 1997. He criticizes the Parole Board for not considering his rehabilitative efforts, including the foregoing. He indicates has family support from his mother, brother and sister; and that upon being release he would get a job in his son's contracting business. He would also comply with supervision requirements, and attend all treatment programs.

The petitioner contends that the respondent failed to establish written procedures which incorporated risk and needs principles for making parole decisions, as required under Executive Law § 259-c (4). He mentions that the Parole Board failed to prepare a Transitional Accountability Plan ("TAP") for him. In his view, the Parole Board violated his right to Due Process. As part of this argument he maintains that the parole decision was "conclusory, arbitrary and impermissible". In petitioner's view, nothing in the record supports the Parole Board's conclusion that he is likely to re-offend if released. He also argues that the Parole Board failed to consider the statutory factors under Executive Law §

259-i. He asserts that the Parole Board was improperly focused on the past, rather than looking forward to the future; and that the Parole Board "continue[d] a pattern of [] denying parole solely because of his criminal record" which, he maintains, constitutes an unlawful re-sentencing. He contends that the Parole Board adopted a hostile attitude towards him; and "impermissibly considered the heinous nature of the offense", which did not, in his view, warrant a sentence of 25 years to life.

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

> "Denied - Hold 24 until October 2015
>
> "Parole is denied. After a review of the record and interview, the panel has 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 your release would be incompatible with the welfare of society. This decision is based on the following factors. Your instant offenses are murder second, reckless endangerment first, grand larceny fourth, and criminal possession of stolen property fourth, wherein you caused the death of a female by placing a bag over her head. You then stole her property which included a german shepherd puppy, her vehicle and household items. You were on parole at the time of the instant offense. You record dates back to 1976 and includes: felonies, misdemeanors, prior violence, prior prison and/or jail, and failure at prior community supervision. You clearly failed to benefit from prior efforts at rehabilitation. Note is made by this Board of your sentencing minutes, COMPAS Risk Assessment, rehabilitative efforts, risks, needs, parole plan, disciplinary record, remorse, positive presentation and all other required factors."

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of Delrosario v Evans, 121 AD3d 1152, 1152-1153 [3d Dept., 2014]; Matter of Williams v New York State Division of Parole, 114 AD3d 992 [3d Dept., 2014; Matter of Campbell v Evans, 106 AD3d 1363, 1363-1364 [3d Dept., 2013]).

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]).

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, his clean disciplinary record since 1997, support of his family, and his plans upon release. The Board noted that the COMPAS Risk Assessment ranked him as low risk of violence, arrest and absconding, but that his history of violence was high.

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. 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 Williams v New York State Division of Parole, supra; 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 Davis v Evans, 105 AD3d 1305 [3d Dept., 2013]; 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]). 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 claims that the determination to deny parole was tantamount to a resentencing, 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]).

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.

Petitioner's contention regarding respondent's failure to promulgate regulations

pursuant to the 2011 amendments to Executive Law § 259-c (4) has been reviewed by other courts and found to be of no merit (see Matter of Montane v Evans, 116 AD3d 197, 200-303 [2014], appeal dismissed 24 NY3d 1052 [2014]; see also Matter of Singh v Evans, 118 AD3d 1209, 1210 [3d Dept., 2014]).

Here, the Parole Board properly engaged in a risk and needs assessment as required under Executive Law § 259-c (4), including review of the COMPAS instrument (see Matter of Delrosario v Evans, 121 AD3d 1152, supra; Matter of Partee v Evans, 117 AD3d 1258, 1259 [3d Dept., 2014], lv denied 24 NY3d 901 [2014]). "The COMPAS instrument, however, is only one factor that the Board was required to consider in evaluating petitioner's request" (Matter of Matter of Rivera v New York State Div. of Parole, 119 AD3d 1107, 1109 [3d Dept., 2014]).

With regard to petitioner's argument that the respondent failed to prepare a transitional accountability plan ("TAP") as required under Correction Law § 71-a, "[t]he language of the statute clearly applies only to newly admitted prisoners and is prospective in nature" (see Matter of Matter of Rivera v New York State Div. of Parole, 119 AD3d 1107, 1108-1109 [3d Dept., 2014]). Correction Law § 71-a was enacted on March 31, 2011 and was effective six months thereafter (see L 2011, ch 62, § 1, part C, § 1, subpart A, §§ 16-a, 49 [h]; Rivera v New York State Div. of Parole, supra). In this instance, the petitioner was received into custody by DOCCS on April 10, 1989. As such, the respondent was not required to prepare a TAP.

Lastly, 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 Campbell v Evans, 106 AD3d 1363, supra, at 1364, citing Matter of Tatta v State of New

York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604 [2002]).

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: April 9, 2015
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated October 9, 2014, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated December 19, 2014, Supporting Papers and Exhibits
3. Affirmation of Terrence X. Tracy, Esq., dated December 8, 2014, Supporting Papers and Exhibits