September 2021

Decision in Art. 78 proceeding - Wilson, Kevin (2015-09-11)

Matter of Wilson v Stanford
2015 NY Slip Op 31819(U)
September 11, 2015
Supreme Court, St. Lawrence County
Docket Number: 145378
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
KEVIN WILSON,#96-A-0242,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2015-0174.07
INDEX #145378
ORI # NY044015J

-against-

TINA STANFORD, Chairwoman,
NYS Board of Parole,

Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Kevin Wilson, verified on January 7, 2015 and filed in the St. Lawrence County Clerk's office on March 13, 2015. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging the October 2013 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 March 18, 2015 and has received and reviewed respondent's Answer and Return, including Confidential Exhibits B, C and H, verified on May 15, 2015. The Court has also received and reviewed petitioner's Reply thereto, verified on June 2, 2015 and filed in the St. Lawrence County Clerk's office on June 5, 2015.

On December 18, 1995 petitioner was sentenced in Ulster County Court, upon a plea, to an indeterminate sentence of 15 years to life upon his conviction of the crime of Murder 2°. After having been denied discretionary parole release on two prior occasions petitioner made his third appearance before a Parole Board on October 23, 2013. Following that appearance a decision was issued again denying petitioner discretionary

parole release and directing that he be held for an additional 24 months. The October 2013 parole denial determination reads as follows:

> "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 (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: THE INSTANT OFFENSE IS MURDER 2ND WHEREIN YOU CONSPIRED TO COMMIT A BURGLARY WHICH RESULTED IN YOUR CO-DEFENDANT BEATING THE VICTIM TO DEATH WITH A FIRE EXTINGUISHER. NOTE IS MADE BY THIS BOARD OF YOUR SENTENCING MINUTES, COMPAS RISK ASSESSMENT, REHABILITATIVE EFFORTS, RISKS, NEEDS, PAROLE PLAN, LETTERS OF SUPPORT, DISCIPLINARY RECORD AND ALL OTHER REQUIRED FACTORS."

The document perfecting petitioner's administrative appeal from the October 2013 parole denial determination was received by the DOCCS Board of Parole Appeals Unit on or about June 5, 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 April 1, 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-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 argues, in effect, that the Parole Board focused excessively on the serious nature of the crime underlying his incarceration without adequate consideration of his rehabilitative efforts. 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 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 Inmate Status Report (October 2013 Reappearance) and transcript of petitioner's October 23, 2013 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's lack of any prior criminal record, therapeutic/vocational programing records, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record (no infractions "in about 10 years") and release plans/community support in addition to the circumstances of the crime underlying his incarceration[1]. The Parole Board record also indicates that the Board was aware of petitioner's after-the-fact cooperation with authorities and his expressions of remorse for the loss of life. The Court, moreover, finds nothing in the transcript of the October 23, 2013 parole interview to suggest that the Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries. Indeed,

[1] Although petitioner actively participated in the conspiracy to commit the burglary in order to obtain cash to purchase drugs, the Parole Board was clearly aware that petitioner was not present when the burglary was committed and, therefore, did not directly participate in the assault that resulted in the victim's death.

before the interview was concluded one of the presiding commissioners inquired of petitioner as follows: "All right, Mr. Wilson, the last word is yours. Is there anything else you want this Panel to know?" The following colloquy then occurred:

"A [Petitioner]:	Well, I mean, like you stated, this is my third Board and, you know, I think that it's important to know some of the states that brings you up to [sic]. Like you can see, I was 35 years old when this unfortunate thing happened. I don't have a prior criminal history. I'm not a prior criminal. Yes, I have used drugs but drug business wasn't my life. I worked every day. I supported my family. But at the time that, you know, this happened, there was a succession of things that happened in my life that, you know, I had given up. And I'm not trying to make excuses. I'm just saying that there's times in your life where things happen, where you just give up on yourself and things and that's where I was at that time. So I was easy to manipulate into doing something I knew I was wrong [sic]. And, again, like I said, I'm not making excuses for it but, you know, we all go through a time in our life when, you know, things just mount up, and we give up.
Q [Parole Commissioner]:	But the difference is when that happens to people, they don't resort to criminal behavior which, ultimately, causes somebody else's death.
A:	No question, not making excuses."

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. 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 nature of the crime underlying petitioner's incarceration. *Hamilton v. New York State Division of Parole,* 119 AD3d 1268*, Cruz v. New York State Division of Parole,* 39 AD3d 1060*, Sanchez v. Dennison,* 21 AD3d 1249 and *Rivera v. Travis,* 289 AD2d 829.

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 misplaced. In *King* 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 (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[2] (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

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[2] 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.

> 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 petitioner specifically argues that the Parole Board improperly evaluated his risk assessment, as developed through utilization the COMPAS Re-Entry Risk Assessment Instrument. In this regard he notes that the instrument indicated " . . . a low abscond, arrest, and felony violence risk . . . It also indicated that [petitioner] has a low history of violence, prison misconduct, and criminal involvement . . . However, in spite of this assessment, the Parole Board still considered that [petitioner] was unable to live and remain at liberty without again violating the law . . ." (References to exhibits omitted). This Court nevertheless finds that 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 the amended version of 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 the amended version of 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 nature of the crime underlying his 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. *See also Lackwood v. New York State Division of Parole*, 127 AD3d 1495.

Finally, petitioner notes four apparently erroneous entries in his COMPAS Re-Entry Risk Assessment Instrument wherein his "Prison Admission Status" is repeatedly identified as "Parole Violator." Citing the unreported September 26, 2014 Decision and Order/Judgment of the Supreme Court, Albany County, in *Karlin v. New York State Board of Parole* (Albany County Index No. 543-14), petitioner argues that such erroneous entries entitle him to *de novo* parole release consideration since the Parole Board relied on the COMPAS instrument. The Court finds, however, that petitioner failed to exhaust administrative remedies with respect to this issue since he did not raise it on administrative appeal. *See Nicoletta v. New York State Division of Parole*, 74 AD3d 1609, *lv dismissed* 15 NY3d 867. In any event, there is nothing in the record to suggest

that the erroneous entries negatively affected the relevant COMPAS Criminogenic Need Scales nor is there any evidence in the record to suggest that the Parole Board labored under the mistaken belief that petitioner had previously been returned to DOCCS custody as a parole violator.

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: September 11, 2015 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court