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[*1]

Matter of Winchell v Evans
2010 NY Slip Op 51006(U) [27 Misc 3d 1232(A)]
Decided on June 9, 2010
Supreme Court, Sullivan County
LaBuda, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 9, 2010

Supreme Court, Sullivan County

<p>IN THE MATTER OF THE APPLICATION OF Craig Winchell, Petitioner,</p> <p>against</p> <p>Andrea W. Evans, CHAIRMAN OF THE NEW YORK STATE DIVISION OF PAROLE, STATE DIVISION OF PAROLE and STATE BOARD OF PAROLE., Respondents.</p>

0513-2010

APPEARANCES: David Lenefsky, Esq.

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Frank J. LaBuda, J.

Petitioner seeks Article 78 relief to overturn his seventh parole hearing arguing that the parole board violated his constitutional rights by failing to adhere to the legal criteria for parole release.

Petitioner, now 45 years of age, has been imprisoned for twenty-seven years pursuant to [*2]an 18-to-life sentence following his conviction for Murder in the Second Degree. [FN1]

Petitioner appeared before the Parole Board at Woodbourne Correctional Facility for his seventh parole hearing on April 7, 2009. Parole was denied.

Petitioner filed his notice of appeal to the administrative appeals board on April 10, 2009. The appeal was perfected on July 15, 2009.

The administrative appeals board failed to issue a decision by November 15, 2009, the required statutory four month time period. **See, 9 NYCRR 8006.4(c).**

Petitioner argues that the parole board failed to comply with the mandatory obligations of Executive Law §259-I and denied his parole in a pre-determined decision which was conclusory in nature and failed to take into account any of petitioner's positive rehabilitation. The parole board stated, orally after the parole hearing and in its written decision, that their decision was based on the petitioner failing to show remorse for the victim or her family and nor appearing to understand the seriousness of his crime. **See, transcript, parole hearing, April 7, 2009 and written decision dated May 18, 2009.**

During his imprisonment petitioner has been a "model prisoner," and has accomplished impressive and substantial educational achievements and earned program certificates while in prison for almost three decades are examples of his efforts for rehabilitation and reform. This includes a two year college degree along with numerous certificates of achievement and appreciation as well as letters of support [EN2]. Moreover, petitioner has been offered a full-time position at a local construction company and a part time position in a financial service company, to which he would start upon release. [EN3] [*3]

Executive Law 259-i(2)(a) requires the parole board, upon a denial of parole, to issue a written determination of the factors and reasons for such denial in detail and in non-conclusory terms.

The parole board failed to follow its obligation under the law and its parole denial seems to this Court to have been predetermined. The parole determination eluded to, two issues; the seriousness of the crime and the petitioner showing no remorse or acceptance of responsibility for the crime.

It is interesting to note two issues in regard to the parole board's reasons for denial. First, the board failed to ask the petitioner about the seriousness of the crime or if he had any remorse at the parole hearing. Second, the commissioners made reference to the prior parole hearing where the petitioner had demonstrated remorse and acceptance of responsibility for the homicide he had committed. Consequently, the board contradicted its own determination on these two issues.

In addition, it cannot be disputed by anyone that petitioner is well trusted by the Department of Corrections. The petitioner's family lives in close proximity to the correctional institution in which petition is housed. Petitioner has been granted day passes to dispose of environment waste. Usually, day passes are not granted when loved ones live in such close proximity to the prisoner's institution because of the temptation of escape. Petitioner has had passes for an extended period of time [EN4] and has a devoted family.

Directly on point is *In the Matter of Coaxum v. New York State Board of Parole*, 14 Misc 3d 661, 2006 NY Slip Op 26493. In that case, the petitioner had been incarcerated for 21 years for murder in the second degree and robbery I the first degree. Her institutional record was exemplary. So too were her psychological insights of her guilt and shame as well as her remorse for her criminal actions. The court took note of the petitioner's devoted family, her elderly mother, children and grandchildren. Yet, petitioner was denied parole four times since her minimum 15 year sentence elapsed. The parole board's decision cited the brutality of the murder - tying the hands and feet of an 80 year old victim. Petitioner was 28 years old at the time. The Board concluded her criminal act was extremely brutal and heinous that to release the petitioner at this time would deprecate the seriousness and undermine respect for the law. The Court granted the petition holding that while parole is not to be granted merely as a reward for positive conduct and rehabilitative achievements, these factors must be considered. The Court found that the Board's decision "accorded *no weight and no emphasis whatsoever to any factor apart from the seriousness of the petitioner's offense.*"

The instant matter is also on point with *Matter of South v NYS Division of Parole*, NYLJ, col. 3, Vol.239, 4/18/2008 and NYLJ, col. 1, Vol. 239, 4/23/2008. In this case the Hon. [*4]Emily Jane Goodman, Supreme Court, New York County overturned a parole board decision and granted a *de novo* parole hearing on facts eerily similar hereto.

The parole board's decision in the instant matter is inconsistent with both with *Coaxum* and *South*.

Furthermore, the instant Board failed to set forth its reasoning in denying parole which cannot be based on offenses alone. *Wallman v. Fravis*, 18 AD3d 304, 307-08 (1st Dept., 2005).

The established maximum standards for a parole hearing were not met (see Executive Law §259-i(2)(c)(A). Still, one is left with the impression that the State's position is that because of this man's past crimes, there would, in essence, never be a time that he would be suitable for release, no matter what he has accomplished in twenty-seven years of imprisonment, even though the lengthy confinement and punishment are not in accord with cases of similar seriousness.

The Court is mindful that Executive Law §259-i(2)(c)(A) provides that "[d]iscretionary 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 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 accord with the above, not each element of the Executive Law must be analyzed as pertains to the pending application, nor given equal weight. *Matter of Leopold Siao-Pao v. Dennison*, 2008 NY App Div LEXIS 2010 [1st Dept., March 11, 2008]).

Pursuant to Article 78, Section 7803, respondents have failed to perform the duties as to Petitioner Craig Winchell enjoined upon them by law. They have made their determinations in violation of lawful procedure, their determination has been arbitrary and capricious and they have abused their discretion. The Petitioner has been deprived of his entitlement under the Constitution of this State of the United State to due process of law in the instant parole hearing.

Based upon the above, it is

ORDERED, that the Petition is granted to the extent that the Parole board shall afford the petitioner herein a *de novo* Parole hearing and decision forthwith, not less than sixty (60) days from receipt of this Decision and Order.

This shall constitute the Decision and Order of this Court. [*5]

Dated: June 9, 2010

Monticello, NY _____

Hon. Frank J. LaBuda

Acting Supreme Court Justice

Footnotes

Footnote 1: On August 8, 1981, the petitioner, then a 16 years old youth, strangled his 16 year old girlfriend. He hid her body under a garage where it remained for ten days until discovered by police. Petitioner was then arrested, indicted and convicted for Murder in the Second Degree.

Footnote 2: Petitioner's accomplishments in prison include the following: Outside passes, full time employment upon release, part time employment upon release, three Certificates of Achievement and Certificate of Appreciation, eleven letters of support including one from a former Commissioner of Corrections, Institutional Program accomplishments, academic achievements and degrees, vocational education, eighteen honors, certificates or letters regarding positive educational and training assignments, nine institutional work assignments including team leader, coordinator or positions of responsibility in various prison activities or programs, letters regarding interpersonal relationships with prison staff and inmates and detailed release plans .

Footnote 3: Mill Hook Enterprise, Inc. and Coombe Financial Services.

Footnote 4: First pass approved on December 9, 2008.

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