September 2021

Decision in Art. 78 proceeding - Wise, Anthony F. (2007-12-31)

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
ANTHONY F. WISE, #78-A-3134,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

-against-

DECISION AND JUDGMENT
RJI #16-1-2007-0309.076
INDEX # 2007-0746
ORI # NY016015J

NEW YORK STATE DIVISION OF PAROLE
Respondent.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Anthony F. Wise, verified on May 15, 2007, and stamped as filed in the Franklin County Clerk's office on June 5, 2007. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the December 2006, determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on June 18, 2007, and has since received and reviewed respondent's Answer and Return, including *in camera* materials, verified on July 27, 2007, together with a Letter Memorandum of that date. The Court has also received and reviewed petitioner's Reply thereto filed in the Franklin County Clerk's Office on August 10, 2007.

On September 27, 1978, petitioner was sentenced in County Court, Dutchess County, as a second felony offender, to two indeterminate terms of 25 years to life each upon his conviction, after a verdict, of two counts of Murder 2° and to two indeterminate terms of 12 ½ to 25 years each upon his conviction, after a verdict, of Robbery 1° and Burglary 1°. All sentences were to run concurrently with each other.

Petitioner appeared before his third parole board on December 6, 2006. The board again denied petitioner release and directed that he be held for an additional 24 months. The parole denial determination reads as follows:

> "FOLLOWING A CAREFUL REVIEW OF YOUR RECORD, PERSONAL INTERVIEW, PAROLE IS DENIED. BASED ON THE FOLLOWING FACTORS. YOU, IN CONCERT WITH TWO OTHERS, BURGLARIZED THE RESIDENCE OF THREE ELDERLY SISTERS, ROBBED THEM, RANSACKED THE PREMISES. IN THE COURSE OF THIS CRIME, THE VICTIMS WERE TIED HAND AND FOOT, BEATEN, AND THE YOUNGER DIED OF STRANGULATION. YOU HAD A PRIOR HISTORY AS A YOUTHFUL OFFENDER AND A PRIOR STATE TERM. THE TERROR YOU INFLICTED ON YOUR VICTIMS, DEATH, LACK OF CONCERN FOR THEIR WELL BEING, MAKE YOUR RELEASE INAPPROPRIATE AT THIS TIME. AS TO RELEASE YOU NOW WOULD DEPRECATE THE SERIOUSNESS OF THE OFFENSE, UNDERMINE RESPECT FOR THE LAW."

Petitioner filed an administrative appeal, but the Appeals Unit failed to issue its findings and recommendations within the time prescribed in 9 NYCRR 8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A) 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 law. In making the parole release decision, the guidelines 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

interpersonal relationships with staff and inmates . . . [and] (iii) release plans including community resources, employment, education and training and support services available to the inmate . . .” In addition to the above, where the minimum period of imprisonment was established by the sentencing court, the Board must also consider the seriousness of the underlying offense and the inmate’s prior criminal record. *See* Executive Law §259-i(2)(c)(A) and §259-i(1)(a). 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, *Vasquez v. Dennis*on, 28 AD3d 908, *Webb v. Travis*, 26 AD3d 614 and *Coombs v. New York State Division of Parole*, 25 AD3d 1051. 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 Nankervis v. Dennison,* 30 AD3d 521*, Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

Petitioner contends that the parole denial determination was focused solely on the serious nature of the instant offense and past priors; that respondent’s denial *en masse* of parole to those convicted of homicide and manslaughter offenses is the result of irrational decision making allegedly as a result of the previous governor’s campaign to eliminate parole for all violent felony offenders; that he was denied due process because there was no substantial evidence to show his release would not be appropriate because of the serious nature of the crime; that the board violated Executive Law § 259-i(2)(a) by issuing vague and conclusory reasons for its decision, failing to provide a reasoned rational explanation for its decision, and failing to provide guidance as to how he could earn parole

release at his next appearance; and that he was denied equal protection by being denied parole when similarly situated persons were granted parole.

Respondent contends that judicial intervention with respect to parole decisions is warranted only when there is a showing of irrationality bordering on impropriety; that the board's emphasis on the serious nature of the petitioner's crime does not by itself demonstrate such irrationality; that there is nothing in the board's decision to support the claim that the decision was the result of an informal executive policy to deny parole to violent felons; that the standard for parole release is not substantial evidence but is discretionary and will not be disturbed absent a showing of irrationality bordering on impropriety; that the board sufficiently detailed its decision to permit intelligent judicial review of the grounds for the denial; that there is no due process right to have an explanation of what one may do to improve one's chances for parole in the future; and that the equal protection argument fails when the board's determination bears a rational relationship to the objective of community safety and respect for the law.

Petitioner in his Reply essentially raise the same arguments set forth in his Verified Petition, adding, *inter alia,* that he has completed every program assigned and requested of him by the Department of Correctional Services, that prisoners should be given detailed reasons for denial of parole, that if other similarly situated persons have been granted parole, he too should be granted parole, and that a review of the record will show that the board's failure to weigh all relevant statutory factors was arbitrary and capricious.

The Court initially observes that a parole denial determination is not subject to judicial review under the substantial evidence standard. *See Valderrama v. Travis*, 19 AD3d 904. Rather, as noted previously, discretionary parole determinations made in

accordance with statutory requirements are not subject to judicial review unless affected by irrationality bordering on impropriety. *See Silmon v. Travis*, 95 NY2d 470.

Although it may be argued the board placed particular emphasis on the heinous nature of petitioner's underlying crimes, the board is not required to give equal weight to the statutory factors it considered in reaching its determination. *See Freeman v. New York State Division of Parole*, 21 AD3d 1174 and *Sterling v. Dennison*, 38 AD3d 1145. The Board is also not required to enumerate each of the statutory factors, or to discuss each factor it considered. *See Farid v. Travis*, 239 AD2d 629. The record discloses that the board did not deny petitioner parole release based solely upon the violent nature of his crimes. Rather, at the hearing it considered the relevant factors set forth in Executive Law §259-i, including petitioner's prior criminal history, his clean prison disciplinary record since 2004, and his post-release plans. Petitioner's claim the seriousness of the instant offense was the sole basis for the denial of release is, therefore, without merit.

Petitioner's contention that the determination was premised on an alleged executive policy to deny parole to violent felons has not been established and thus is rejected. *See Motti v. Dennison*, 38 AD3d 1030 and *Wood v. Dennison*, 25 AD2d 1056. Petitioner's contention that he was deprived of due process and a meaningful parole hearing because the board failed to indicate the areas in which petitioner fell short of qualifying for parole is likewise unavailing. "Executive Law § 259-i does not create an entitlement to release on parole and therefore does not create interests entitled to due process protection." *Freeman v. New York State Division of Parole,* 21 AD3d 1174, 1175, *citing*, *inter alia, Paunetto v. Hammock*, 516 F.Supp. 1367, 1367-1368 (other citations omitted). Notwithstanding petitioner's contention to the contrary, there is no

requirement that the Board provide petitioner with guidelines to improve his chance of securing parole at his next parole appearance. *See Freeman, supra*. In addition, the Court finds that the parole denial determination was sufficiently detailed to permit intelligent appellate review and was otherwise in compliance with statutory mandates. *See Ek v. Travis*, 20 AD3d 667, *rev'g* 7 Misc 3d 1031 (A), *app dis* 5 NY3d 862. Finally, the Court is unpersuaded by petitioner's conclusory equal protection claim that certain unnamed "similarly situated" inmates were granted parole. *See Tatta v. Dennison*, 26 AD3d 663 and *Valderrama v. Travis*, 19 AD3d 904.

The decision of the board and the record of the hearing establishes that the petitioner's criminal history, the instant offense, disciplinary record, and post-release plans were considered, thereby satisfying the requirements of Executive Law §259-i. *See Davis v. New York State Board of Parole,* 35 AD3d 1112. Inasmuch as the record establishes that petitioner was denied parole based upon the applicable statutory factors and there is no showing of "irrationality bordering on impropriety" further judicial review is not warranted.

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: December 31 , 2007, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice