November 2021

Decision in Art. 78 proceeding - Smith, Lavonne (2018-10-09)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of
LAVONNE SMITH,

Petitioner,

-against -

TINA M. STANFORD, Chairwoman
of the New York State Board of Parole,

Respondent,

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

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DECISION & ORDER

Index No. 50127/2018

WATSON, A.J.S.C.

The following papers, were considered in connection with petitioner's proceeding, pursuant to Article 78 of the Civil Practice Law and Rules, seeking an Order annulling the parole board's denial of parole release and ordering a *de novo* interview:

PAPERS[1]
Notice of Petition
Verified Petition
Chachkes Affidavit in Support of Petition
Exhibits 1 - 17
Memorandum of Law

Respondent's Verified Answer & Return
Exhibits 1 - 11

Reply Affirmation
Exhibit 1
Reply Memorandum of Law

In 1994, when petitioner was 16 years old, his bicycle was stolen. His 30-year old uncle concocted a scheme in which the petitioner, petitioner's 17-year old brother and 15-year old friend

[1]The Court also reviewed, *in camera*, confidential documents submitted by Respondent.

would rob a bike store and steal a few bikes. The ill-fated plan was to bring an inoperable gun to scare the employees, tie them up and ride away on the stolen bikes. However, unbeknownst to petitioner, his uncle brought a nine-millimeter semi-automatic pistol, and his brother brought an inoperable pellet gun to the store. The scheme quickly went awry as the manager noticed the four acting suspiciously and asked another person to call the police. Before the police arrived, petitioner and his friend tied up the manager and a store employee. Upon noticing the police approach the store, petitioner's brother posed as a store employee and told the police everything was fine. Then, petitioner's uncle opened fire, fatally shooting one of the responding officers. The other officer returned fire, killing petitioner's uncle.

As a result of this incident, petitioner was charged with Murder in the Second Degree, two counts of Robbery in the First Degree, one count of Criminal Possession of a Weapon in the Second Degree and one count of Criminal Possession of a Weapon in the Fourth Degree. After a two week jury trial, on January 31, 1996, petitioner was found guilty of the two Robbery counts and Criminal Possession of a Weapon in the Fourth Degree. He was acquitted of murder and the greater weapon possession charge. The petitioner was sentenced to two consecutive 8 1/3 to 25 year sentences, with a one-year sentence on the weapon's charge to run concurrently. Petitioner's maximum release date is in 2034.

On April 10, 2017, petitioner appeared before the Parole Board ("the Board").[2] The Board denied petitioner parole release and ordered him held for an additional 24 months, as follows:

> This Panel has concluded that your release to supervision is not compatible with the welfare of society and therefore parole is denied. This finding is made following a personal interview, record review and deliberation.
>
> Of significant concern is your course of conduct related to the instant offense of Robbery 1st (2 counts) that you said had been contemplated when your bicycle was stolen. The factors considered include that an in-concert robbery of a bicycle shop was planned. You state you brought tape to bind occupants of the store. The plan escalated to where your codefendant (uncle) exchanged gunfire with police resulting in an officer and your

[2]The Appeals Unit explained that a meeting with the Board for parole release consideration is properly referred to as an interview, not a hearing (Affirmation in Support at Ex 14, fn 2).

uncles [sic] death. We note your youth, lack of prior arrests and subsequent program accomplishments and growth, we also have reviewed your case plan, COMPAS report and document submissions.

Required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community reintegration. While your behavior since March 2007 has improved, your prior misbehavior reports are noted. This Panel also has considered official statements, and the clear intent to act criminally you displayed.

To grant your release at this time would so deprecate the seriousness of your offense as to undermine respect for the law.

Petitioner appealed this determination on the grounds that: (a) the Board focused almost exclusively on the instant offense; (b) the Board failed to consider the significance of petitioner's youth at the time of the offense; (c) the Board ignored petitioner's rehabilitative accomplishments, release plans and community support; (d) the Board failed to provide petitioner with an opportunity to read a prepared statement at the interview in violation of his due process rights; (e) the Board failed to comply with the Executive Law; (f) the Board failed to comply with the Amended 2011 legislation in Executive Law §259; and (g) the Board's determination was arbitrary and capricious (*id.* at Ex 13). The Appeals Unit recommended that the Board's decision be affirmed (*id.* at Ex 14).

Petitioner now challenges his denial of parole, asserting that (a) the Board relied on erroneous information; (b) the Board focused almost exclusively on the nature of the instant offense while ignoring his significant accomplishments, family support, and release plan; (c) the Board's perfunctory decision precludes intelligent judicial review; (d) the Board violated petitioner's due process rights by refusing to allow him to read a prepared statement at the interview; (e) the Board failed to comply with the Executive Law; and (f) the Board's determination violates petitioner's Eighth Amendment rights by failing to consider the mitigating factor of petitioner's age at the time of the instant offense. Respondent opposes the petition.

The Parole Board's release decisions are discretionary in nature. ***Davis v. New York State***

Division of Parole, 114 AD2d 412 (2nd Dept. 1985). Where the Parole Board renders a decision denying an application for parole, "[j]udicial intervention is warranted only when there is a 'showing of irrationality bordering on impropriety.'" ***Matter of LeGeros v. New York State Bd. Of Parole***, 139 A.D.3d 834 (2nd Dept. 2016); ***Silmon v. Travis***, 95 NY2d 470 (2000). This Court is not convinced that the Board's decision is unsupported by the record thereby rendering its decision arbitrary and capricious nor does the record support that the Parole Board violated its Constitutional and statutory obligations or was conclusory in its decision.

A review of the transcript reveals that the Board did not rely solely on the serious nature of the instant offense in its determination. There was discussion regarding petitioner's accomplishments (including asking the petitioner which programs he found most beneficial); his educational accomplishments while incarcerated; post release employment and living arrangements; his age at the time of the offense and currently; as well as his disciplinary history and infractions while incarcerated. "While the relevant statutory factors must be considered, the weight to be accorded to each of the factors lies solely within the discretion of the Parole Board." ***Phillips v. Dennison***, 41 AD3d 17 (1st Dept. 2007). "The Board is not required to discuss every factor considered, ..., and it need not accord every factor equal weight." ***Graziano v. Evens***, 90 AD3d 1367 (3rd Dept. 2011).

The transcript also reflects that the Board did not deny the petitioner an opportunity to make a statement. The petitioner explained that, due to his nervousness and emotional state, he had written some items down that he wanted to share with the Board. The Board indicated that he could use the writing as a guide so they didn't miss anything and that it would then be faxed to the Board as well. The petitioner then stated that ". . .I would rather have them fax this to you."

Petitioner further contends that the Board relied on erroneous information contained in the community opposition letters. While the letters refer to the petitioner as a cop-killer, there is no

indication in reviewing the transcript that the Board was mistaken about the nature of the petitioner's convictions or that it agreed with those characterizations of the petitioner by the letter writers.

The Board need not discuss all of the factors considered in making its decision and may make a finding to deny release based on a finding that "there is a reasonable probability that, if ... released, [the inmate] will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society". See ***Matter of Walker v. Russi***, 176 AD2d 1185 (3rd Dept. 1991), ***appeal dismissed***, 79 NY2d 897 (1992).

The Court has reviewed the record, including the transcript of the Parole hearing and the confidential information submitted for *in camera* review and finds that petitioner has failed to make a convincing showing that the Board of Parole acted improperly. Additionally, the record reflects that the Board considered the COMPAS prepared for its review. Therefore, the determination denying him parole is not subject to judicial review (Executive Law § 259-i (5)). Absent a convincing demonstration to the contrary, it is presumed that the Board of Parole acted properly in accordance with statutory requirements. See ***Bouknight v. Russi***, 242 AD2d 329 (2nd Dept. 1997).

NOW therefore, it is

ORDERED that the petition is dismissed and the relief requested therein is in all respects denied.

The foregoing constitutes the decision and order of the Court.

The materials submitted by the Board for *in camera* review are being returned to counsel.

Dated: Poughkeepsie, New York
October 9, 2018

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