November 2021

Decision in Art. 78 proceeding - Wilson, Gregory (2019-07-01)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of

GREGORY WILSON,

Petitioner

- against –

TINA M. STANFORD, CHAIR OF THE NEW YORK STATE PAROLE BOARD,

Respondent.

DECISION, ORDER, and JUDGMENT

Index No.: 2019-50770

FORMAN, J., Acting Supreme Court Justice

The following papers were read and considered in deciding this petition:

	Papers Numbered
Notice of Petition	**1**
Petition	**2**
Exhibits (A-G)	**3-9**
Answer and Return	**10**
Exhibits (1-12)	**11-22**
Reply Affirmation	**23**

This Article 78 proceeding challenges a decision of the New York State Board of Parole (the "Board") denying Petitioner's application for release to parole supervision. Specifically, Petitioner seeks a judgment vacating and reversing the Board's determination. Petitioner also seeks judgment ordering the Board to conduct a *de novo* hearing before a different interview panel. For the reasons stated herein, the Petition is denied.

BACKGROUND

On June 6, 1983, Petitioner was convicted, upon a jury verdict, of Murder in the Second Degree and Assault in the First Degree. On June 30, 1983, Petitioner was sentenced, as a second felony offender, to consecutive terms of incarceration of 25 years to life and 7 and ½ to 15 years.

Petitioner was convicted for the murder of his wife, Dorothy Johnson, and the stabbing of a third-party who came to his wife's aid. On December 2, 1981, Petitioner went to his estranged wife's place of employment where he pretended to be a deliveryman in order to get his wife to come out and speak with him. When his wife came out into the lobby, Petitioner pushed her into a small hallway and, after a verbal argument, stabbed her to death. When a bystander attempted to intervene, Petitioner attempted to stab the bystander, striking him in the hand causing permanent injury to his hand. Petitioner subsequently fled New York and was later extradited from the State of Arkansas.

Petitioner's application for release to parole supervision was heard by the Board on May 22, 2018[1]. During that interview, the Board engaged in an extended conversation with Petitioner. During this interview, the Board reviewed the circumstances and severity of Petitioner's crime, his institutional and disciplinary record, his program accomplishments, letters of support, and his release plan. The Board also reviewed and considered the COMPAS risks and needs assessment, stating "your risk levels are low, so that's positive." At the conclusion of the interview, the Board advised Petitioner that it was "going to look at everything" and would provide its determination in writing in a matter of days.

[1] In 2016, the Board denied Petitioner's prior application for release.

Ultimately, the Board denied Petitioner's application for release to parole supervision. Specifically, the Board acknowledged: Petitioner's rehabilitative efforts, including his completion of ASAT; his well-prepared parole packet, including letters of support; and his low-risk COMPAS. However, the Board also gave consideration to the violent nature of Petitioner's crime, the escalation of his criminal history and record on community supervision, including offenses in both New York and Illinois, and Petitioner's disciplinary record, which includes a Tier II infraction since the time of his last Board interview. The Board also stated that:

> The Panel was struck with your perfunctory recitation of the facts surrounding your wife's death. It was only in your closing statement that you expressed any statement of remorse, leading the Panel to conclude that your expression was shallow.

After weighing all of the relevant statutory factors, the Board denied Petitioner's application for release to parole supervision, stating:

> After deliberating, this Panel is not convinced that you would live and remain at liberty without violating the law. Furthermore, your release is not compatible with the welfare of society, and would so deprecate the serious nature of your crime as to undermine respect for the law.

On September 21, 2018, Petitioner perfected his administrative appeal from that denial. On November 28, 2018, the Appeals Unit denied Petitioner's appeal. This Article 78 proceeding ensued.

DISCUSSION

"A parole determination may be set aside only when the determination to deny the petitioner release on parole evinced 'irrationality bordering on impropriety.'" *Matter of Goldberg v. New York State Board of Parole*, 103 AD3d 634, 634 (2d Dept. 2013) quoting *Matter of Martinez v. New York State Division of Parole,* 73 AD3d 1067, 1067 (2d Dept. 2010) *see also*

Matter of Silmon v. Travis, 95 NY2d 470, 476 (2000); *Matter of Russo v. New York State Bd. of Parole,* 50 NY2d 69, 77 (1980). "The burden is on the petitioner to make a convincing demonstration of entitlement to such relief." *Matter of Duffy v. New York State Division of Parole*, 74 AD3d 965, 966 (2d Dept. 2010); *see also Matter of Goldberg v. New York State Board of Parole*, 103 AD3d 634, 635 (2d Dept. 2013); *Matter of Midgette v. New York State Division of Parole*, 70 AD3d 1039, 1040 (2d Dept. 2010).

There is no merit to Petitioner's claims that the Board improperly denied his application based solely on the facts underlying his conviction, and that the Board failed to properly consider the COMPAS risk and needs assessment. Pursuant to Executive Law § 259–i(2)(c), the Board "is required to consider a number of statutory factors in determining whether an inmate should be released on parole." *Matter of Goldberg, supra* at 634 (quoting *Matter of Gelsomino v. New York State Board of Parole,* 82 AD3d 1097 [2d Dept. 2011]). "The Parole Board is not required to give equal weight to each statutory factor, and it is not required to 'articulate specifically each factor in its determination.'" *Matter of Stanley v. New York State Div. of Parole*, 92 AD3d 948, 948 (2d Dept. 2012) (quoting *Matter of Huntley v. Evans,* 77 AD3d 945 [2d Dept. 2010]); *see also Matter of Thomches v. Evans*, 108 AD3d 724, 724 (2d Dept. 2013); *Matter of Angel v. Travis*, 1 AD3d 859, 860 (3d Dept. 2003) ("It should be noted that although the Board articulated the most compelling factors influencing its decision, it was under no obligation to discuss every factor it considered"). "Notably, parole need not be granted as a reward for good conduct, nor as a quid pro quo for participation in recommended DOCS programs." *People ex rel. Germenis v. Cunningham*, 73 AD3d 1297, 1298 (3d Dept. 2010); *see also Matter of Mentor v. New York State Division of Parole*, 87 AD3d 1245, 1246 (3d Dept. 2014); *Matter of Gutkaiss v. New York State Division of Parole*, 50 AD3d 1418, 1418 (3d Dept. 2008).

The Board is also "entitled to place greater emphasis on the serious nature of the crimes over the other factors" [*Matter of Vigliotti v. State Executive Division of Parole*, 98 AD3d 789, 790-91 (3d Dept. 2012)], including the violent nature of that crime. *Matter of Angel*, *supra* at 860 [quoting *Matter of Lue-Shing v. Pataki*, 301 AD2d 827 (3d Dept. 2003)]; *see also Matter of Patterson v. Evans*, 106 AD3d 1456 (4th Dept. 2013); *Matter of MacKenzie v. Evans*, 95 AD3d 1613, 1614 (3d Dept. 2012), *lv app denied*, 19 NY3d 815 (2012). It is also within the Board's discretion to conclude that the severity of an inmate's offense outweighs an inmate's positive institutional record and his letters of support. *Matter of Cardenales v. Dennison*, 37 AD3d 371, 371 (1st Dept. 2007) (denial of application for release to parole supervision was not arbitrary and capricious, even though the petitioner had an exemplary institutional record and had received many letters of support, including a letter of support from the victim's mother); *see also Matter of Anthony v. New York State Division of Parole*, 17 AD3d 301 (1st Dept. 2005); *Matter of Kirkpatrick v. Travis*, 5 AD3d 385 (2d Dept. 2004).

Here, the Board properly considered and reviewed the circumstances and severity of Petitioner's crimes, his institutional record, his program accomplishments, his release plan, and his letters of support. Contrary to Petitioner's assertions, the Board also properly incorporated the COMPAS risk and needs assessment in its determination as required by Executive Law §259-c(4) and §259-i(2)(c)(A). *Matter of Wade v. Stanford*, 148 AD3d 1487 (3d Dept. 2017). However, Petitioner's COMPAS scores are not dispositive. *Matter of Dawes v. Annucci*, 122 AD3d 1059, 1060-61 (3d Dept. 2014) ("Although petitioner's COMPAS Risk and Needs Assessment Instrument indicated that he was at a low risk for violence, rearrest and absconding, the COMPAS instrument is only one factor that the Board is required to consider"); *see also Matter of Rivers v. Evans*, 119 AD3d 1188 (3d Dept. 2014); *Matter of Rivera v. New York State Division of Parole*,

119 AD3d 1107 (3d Dept. 2014); *Matter of Williams v. New York State Division of Parole*, 114 AD3d 992 (3d Dept. 2014).

It is also well settled that Executive Law §259-i includes a strong rehabilitative component that may be given effect by considering an inmate's remorse and insight into the underlying offense. *Matter of Silmon, supra* at 477; *see also Matter of Graziano v. Evans*, 90 AD3d 1367 (3d Dept. 2011); *Matter of Dobranski v. Evans*, 83 AD3d 1355 (3d Dept. 2011), *lv app denied*, 17 NY3d 709 (2011); *Matter of Jones v. New York State Division of Parole*, 24 AD3d 827 (3d Dept. 2005). These factors are especially relevant when the inmate was a productive citizen and model prisoner who, nevertheless, committed a serious crime. *Matter of Silmon, supra* at 477-78.

Ultimately, "whether the Board considered the proper factors and followed the proper guidelines are questions that should be assessed based upon the 'written determination evaluated in the context of the parole hearing transcript.'" *Matter of Jackson v. Evans*, 118 AD3d 701 (2d Dept. 2014) (quoting *Matter of Siao-Pao v. Dennison*, 11 NY3d 777 [2008]); *see also Matter of Fraser v. Evans*, 109 AD3d 701 (2d Dept. 2013); *Matter of Galbreith v. New York State Division of Parole*, 58 A.D.3d 731 (2d Dept. 2009). In the context of that transcript, there is no merit to Petitioner's claim that the Board failed to provide a sufficient explanation of the reasons supporting its determination *Matter of Jackson, supra* at 702; *Matter of Fraser, supra; Matter of Galbreith supra*.

Petitioner's claim that the Board's failure to obtain and consider the minutes of Petitioner's sentencing proceeding entitles him to relief is without merit. *Midgettte, supra* at 1040 ("In the absence of any indication that the unavailable sentencing minutes contained any recommendation as to parole, the failure of the Board to obtain and consider those minutes did not prejudice the petitioner"); *see also Duffy v. New York State Div. of Parole*, 74 AD3d 965 (2d Dept. 2010); *Porter*

v. Alexander, 63 AD3d 945 (2d Dept. 2009). Furthermore, the evidence submitted by Respondent [*see* Affidavit of Keith Olarnick, Exhibit 10 to Affirmation of Elizabeth Gavin] indicates that a search was conducted for the sentencing minutes but they were unable to be located. "[T]he Board is not responsible for the failure of the Supreme Court, [Kings] County, to preserve the minutes." *Midgette, supra* at 141.

Based upon the foregoing, the Board's denial of Petitioner's application for release from confinement was neither arbitrary nor capricious [*see Matter of Fraser, supra*; *Matter of Ramos v. Heath*, 106 AD3d 747 (2d Dept. 2013)], nor has Petitioner sustained his burden of demonstrating that the challenged determination of the parole board was irrational to the point of bordering on impropriety. *Campbell v. Stanford*, _____ AD3d ____, 2019 NY Slip Op 04936 (2d Dept. June 19, 2019); *Matter of Marszalek v. Stanford*, 152 AD3d 773 (2d Dept. 2017); *Esquilin v. New York State Bd. Of Parole*, 144 AD3d 797 (2d Dept. 2016); *Matter of LeGeros v. New York State Board of Parole*, 139 AD3d 1068 (2d Dept. 2016); *Matter of Rodriguez v. Evans*, 102 AD3d 1049, 1050 (3d Dept. 2013); *Matter of Cruz v. New York State Division of Parole*, 39 AD3d 1060, 1062 (3d Dept. 2007) (stating that while the court found the petitioner's "academic and institutional achievements exemplary," and that the court considered the petitioner to be "a prime candidate for parole release," the Board's decision to deny parole would be upheld because it did not exhibit "irrationality bordering on impropriety").

Finally, there is no merit to Petitioner's claim that his procedural and substantive due process rights were violated. *Matter of Freeman v. New York State Division of Parole*, 21 AD3d 1174 (3d Dept. 2005). Because Petitioner's remaining contentions are also without merit, it is hereby

ORDERED, ADJUDGED AND DECREED that the Petition is denied, and that this Article 78 proceeding is dismissed.

The foregoing constitutes the Decision, Order, and Judgment of this Court.

Dated: July 1, 2019
Poughkeepsie, New York

Hon. Peter M. Forman, A.J.S.C.

To: Kathy Manley, Esq.
Attorney for Petitioner
26 Dinmore Road
Selkirk, New York 12158

Elizabeth Gavin, Esq.
Office of the Attorney General
Attorneys for Respondent
One Civic Center Plaza
Poughkeepsie, New York 12601