February 2022

Decision in Art. 78 proceeding - Ek, John A. (2005-01-25)

Good Save me

THE STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALBANY

In the Matter of the Application of
JOHN A. EK, 77-A-0724

Petitioner,

-against-

Index #3540-04
RJI #01-04-ST4796

Decision, Order and Judgment

BRION TRAVIS, CHAIRMAN, NEW YORK
STATE DIVISION OF PAROLE,

Respondent.

(Supreme Court, Albany County, Special Term, October 15,2004)
(Justice Edward A. Sheridan, Presiding)

APPEARANCES:

JOHN EK, Pro-Se
Arthur Kill Correctional Facility
2911 Arthur Kill Road
Staten Island, New York 10309

HON. ELIOT SPITZER
Attorney General of he State of New York
(Kelly L. Munkwitz, Esq. of Counsel)
Attorney for Respondent
The Capitol
Albany, New York 12224

SHERIDAN, J:

In this proceeding pursuant to CPLR Article 78, petitioner, an inmate at Arthur Kill Correctional Facility, seeks review of respondent's denial of his application for parole release following his fifth re-appearance before the Parole Board on August 11, 2003.

Petitioner is serving an indeterminate sentence of incarceration of 20 years to life, upon a judgment of conviction of Murder in the Second Degree, entered upon a jury verdict in New York County in December 1976. The conviction relates to an October 1975

incident wherein the petitioner and three co-defendants entered an apartment to rob a purported drug dealer. One of the co-defendants was armed with a sawed off shot gun. Petitioner and another were armed with loaded handguns. The three armed participants forced their way into the apartment. A struggle ensued, the shotgun wielded by a co-defendant discharged and the father of the alleged drug dealer was shot and subsequently died. Petitioner and his co-defendants fled the apartment without taking any property. Some three weeks later, petitioner was arrested at a motel in Florida where he had fled accompanied by one of the co-defendants.

At the re-appearance interview, the commissioners inquired as to the circumstances of the underlying offense; petitioner's criminal history, including alleged violations of parole; petitioner's release plans and employment prospects. It was noted that petitioner had only one Tier II ticket.

Parole was denied and petitioner was ordered held for twenty-four months. The Board concluded:

> The instant offense, murder second degree, demonstrates a continued propensity to commit violent crimes. A review of your record reveals robbery, weapon and assault convictions. Your criminal history documents criminality that spans six decades in three states.
>
> The instant offense involved you and two co-defendants shooting a male victim causing his death. This panel notes an extensive juvenile record and multiple violations of parole. The instant offense represent (sic) three state and federal prison sentences.
>
> All factors considered, this board finds discretionary release is inappropriate at this time.
>
> Guidelines are unspecified. Crime involved weapons usage, caused death of victim.

Upon administrative appeal, the decision denying parole was affirmed and petitioner

commenced this special proceeding.

Petitioner contends, inter alia, that the decision should be vacated because the Board for a fifth time improperly relied exclusively on the nature of the instant offense and petitioner's past criminal history to the exclusion of other statutorily mandated factors; that the adverse determination was plainly pre-determined; that the Board effectively re-sentenced the petitioner in violation of separation of powers and double jeopardy principles of the United States and State Constitutions; that automatically denying parole release to inmates convicted of violent crimes violates due process; and that the Board's repeated denial of release while granting release to select inmates with underlying offenses more egregious than petitioner's is discriminatory and violative of his constitutional rights.

Respondent opposes the petition and contends that the Board properly considered petitioner's entire record; that the Board acted properly in accordance with statutory requirements; that the fact that the Board afforded greater weight to petitioner's criminal history than to an alleged positive institutional adjustment does not render the denial of parole irrational or improper; that petitioner's claim that the denial of parole release constitutes mandatory re-sentencing is without merit; that petitioner's claim that the Board holds under-privileged inmates longer than affluent inmates is unsupported and meritless; that petitioner sets forth no facts that would give rise to an equal protection claim; and that the petition should be dismissed in its entirety.

By statute, the Board determines the release date for an inmate serving an indeterminate sentence. Its determination is deemed a judicial function and is not reviewable if done in accordance with law (Executive Law, §259-i[5]). That is to say, parole release is inherently discretionary within broad statutory guides. But the Board's discretion is not unbridled. The Board is not a re-sentencing authority. Sentencing is a function of the Court within legislatively enacted sentence ranges as approved and enacted into law by the Executive. The role of the Board is to decide when an inmate may safely and appropriately be returned to society. ". . . 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 depreciate the seriousness of his crime as to undermine respect for law" (Executive Law §259-i[2].

In an indeterminate sentence structure the minimum sentence as set by the Court presumptively establishes a threshold release date assuming appropriate institutional adjustment and rehabilitative effort. Denial of release at the threshold or, as here nearly six years beyond the minimum, should be individualized, reasoned and particularized within statutory guidelines. Preclusion of parole release based exclusively or principally on seriousness of the offense must be grounded in ". . . some significantly aggravating or egregious circumstances surrounding commission of the crime" (Matter of King v New York State Div. Of Parole, 90AD2d 423, 432, affd. 83NY2d 788). Moreover, unreasoned or pro forma denial undermines the rehabilitative ideal which is the keystone of indeterminate sentencing (see Matter of Silmon v Travis, 95 NY2d 470, 477) under which thousands of inmates remain incarcerated in this State.

A review of statutory factors applicable to petitioner reveals positive adjustment to incarceration and an exceptional disciplinary record with only one Tier II proceeding. He continues to actively program and has completed DOCS required therapeutic programs, including Alternatives to Violence Project, Narcotics Anonymous Treatment Program, I.P.A. On the Job Training and Alcoholics Anonymous. Educational programs include Computer Application Instructor Apprenticeship and attainment of an Associate's Degree in Computer Information Systems at Sullivan County Community College.

On this record, the Board's statement of reasons for denial is flawed and cannot stand. The Court notes that petitioner's criminal conviction history spans three decades not six and two states not three. The Board's observation "instant offense represent [sic] three state and federal prison sentences" is unexplained and cannot be reconciled to the criminal history. With respect to the Board's recitation of "an extensive juvenile record and

multiple violations of parole", the Court notes one adult parole violation, in 1966 (use of heroin on a commitment under the Youth Correction Act on a forged check charge) not multiple violations. True, there is petitioner's juvenile record, characterized as "extensive" by the Board, comprising five entries, including two intoxication offenses, one malicious mischief at age 14 and one violation of probation. The last juvenile entry (assault and battery) for this 61 year old inmate occurred more than 40 years ago.

Without explication or reasoned application to the facts and circumstances of the instant offense, the Board's cryptic and conclusory statement "discretionary release . . . inappropriate at this time", "[c]rime involved weapons usage, caused death of victim" hardly suffices for a "detailed" statement of reasons for denial required by statute (Executive Law, §259-i[2][a]) and derogates the rehabilitative component underlying indeterminate sentencing.

Moreover, the parole statutes do not exclude the instant offense from parole eligibility. As best can be gleaned from the record of this now 28 year old conviction, the charge was an accessory to felony murder involving accidental discharge of a weapon by an accomplice. While we do not have the benefit of the sentencing Judge's sentence remarks, having heard all the testimony and being in the best position to evaluate and punish relative culpability, he imposed upon petitioner less than the maximum indeterminate term, a sentence now effectively altered by the Board. Retention after a fifth re-appearance requires a more reasoned and detailed elaboration by the Board to satisfy statutory requirements consistent with State policy underlying indeterminate sentencing.[1]

Accordingly, it is

ORDERED, that the petition is Granted, the determination denying parole is

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[1]. . . [P]arole is a vital element of the indeterminate sentencing process . . ." and plays a "critical role . . : in the administration of justice . . ." (L1977, c 904, §1)..

annulled, and the matter is remanded to the Board of Parole for a prompt re-hearing before a new panel and a decision not inconsistent with this Court's decision.

This memorandum shall constitute the Decision, Order and Judgment of this Court.

All papers, including this Decision, Order and Judgment, are being sent to respondents' attorney. The signing of this Decision, Order and Judgment shall not constitute entry or filing. Counsel is not relieved from the applicable provisions of the CPLR respecting filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated: Albany, New York
January 25, 2005

Edward A. Sheridan, A.J.S.C.

PAPERS CONSIDERED:

(1) Verified Petition, sworn to June 14, 2004, with Exhibits A-L;
(2) Verified Answer, verified October 6, 2004;
(3) Affirmation of Kelly L. Munkwitz, Esq., affirmed October 6, 2004, with Exhibits A-H.