February 2022

Decision in Art. 78 proceeding - Scharff, Lewis (2020-04-20)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of

LEWIS SCHARFF,

Petitioner

- against –

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, ACTING COMMISSIONER, and TINA M. STANFORD, CHAIRWOMAN, BOARD OF PAROLE,

Respondents.

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

DECISION, ORDER, and JUDGMENT

Index No.: 2019-53460

FORMAN, J., Acting Supreme Court Justice

The following papers were read and considered in deciding Petitioner's application pursuant to CPLR Article 78 for judicial review of the denial of his release to parole supervision:

NYSCEF Docket Numbers 1-20, 56-83

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 a judgment ordering the Respondents to produce copies of certain documents considered by the Board during Petitioner's interview. For the reasons stated herein, the Petition is denied.

BACKGROUND

On July 10, 1995, Petitioner was sentenced to concurrent terms of 25 years to life on his conviction for Murder in the Second Degree and eight and one-third to 25 years on his conviction for Conspiracy in the Second Degree.

Petitioner was convicted for the murder of his 23-year-old step-daughter. On the day of the offense, Petitioner went to his estranged wife's residence in disguise in order to follow her. When he entered the stairwell of the apartment building, he encountered his step-daughter, who immediately recognized him through his glasses and false mustache. After an argument, Petitioner stabbed his step-daughter repeatedly about her head, neck, and body, ultimately causing her death. Petitioner fled from the scene but was arrested some time thereafter. While incarcerated awaiting trial on the Murder charge, Petitioner was indicted for conspiracy when he enlisted his son to hire a hitman to kill one of the witnesses against him in the Murder prosecution.

Petitioner's application for release to parole supervision was heard by the Board on October 23, 2018. During that interview, the Board engaged in an extended conversation with Petitioner. 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, noting that he was scored as a low risk and low need in all categories.

Ultimately, the Board denied Petitioner's application for release to parole supervision. Specifically, the Board acknowledged: Petitioner's rehabilitative efforts, including his completion of numerous required and voluntary programs; letters of support; good disciplinary record; low COMPAS scores; and good case plan. However, the Board also gave consideration to the violent nature of Petitioner's crime, the sentencing minutes containing statements from the victim's family,

and opposition from the Office of the District Attorney. After weighing all of the relevant statutory factors, the Board denied Petitioner's application for release to parole supervision, stating:

> After much deliberation, this panel is mindful that discretionary release shall not be granted merely for the efficient performance of duties while confined, but only after consideration as to whether your release would so deprecate your offense as to undermine respect for the law as well as careful consideration of the factors relevant to your case. It is the opinion of this panel that your discretionary release at this time does not meet this necessary threshold.

Petitioner timely perfected his administrative appeal from that denial. On or about June 28, 2019, the Appeals Unit denied Petitioner's appeal. This Article 78 proceeding ensued.

DISCUSSION

The Parole Board's release decisions are discretionary and, if made in accordance with statutory requirements, are not subject to judicial review [*see* Executive Law §259-i[2][c][A]*; see also Matter of Banks v. Stanford*, 159 AD3d 134 (2d Dept. 2018)]. Petitioner bears the heavy burden of proving that this Court must intervene [*Matter of Duffy v. New York State Division of Parole*, 74 AD3d 965 (2d Dept. 2010)]. Judicial intervention is only appropriate in rare instances when the Board has acted in a manner that demonstrates a showing of "irrationality bordering on impropriety" [*Silmon v. Travis*, 95 NY2d 470, 476 (2000) (quoting *Matter of Russo v. New York State Bd. of Parole*, 50 NY2d 69, 77 [1980]); *Matter of Goldberg v. New York State Board of Parole*, 103 AD3d 634 (2d Dept. 2013)]. Accordingly, a court may only review a Parole Board's denial of parole when such denial is arbitrary and capricious [*id.*]. "While the Parole Board is required to consider the relevant statutory factors, it is not required to address each factor in its decision or accord all of the factors equal weight" [*Matter of Coleman v. New York State Department of Corrections and Community Supervision*, 157 AD3d 672, 672 (2d Dept. 2018) (citations omitted); *see also Matter of Stanley v.*

New York State Div. of Parole, 92 AD3d 948 (2d Dept. 2012)]. The Board need not give the COMPAS Risk and Needs Assessment instrument any greater weight or consideration than the other statutory factors [*Lewis v. Stanford*, 153 AD3d 1478 (3d Dept. 2017)].

The Board is also entitled to place greater emphasis on the severity of Petitioner's crimes [*see Matter of Campbell v. Stanford*, 173 AD3d 1012 (2d Dept. 2019); *Matter of Crawford v. New York State Bd. of Parole*, 144 AD3d 1308 (3d Dept. 2016), *lv app denied* 29 NY3d 901 (2017)], including the violent nature of the crimes [*Matter of Applegate v. New York State Board of Parole*, 164 AD3d 996, 997 (3d Dept. 2018) (the Board was "free to place emphasis on the brutal nature of the crime and was not required to give equal weight to each statutory factor"); *Matter of Angel v. Travis*, 1 AD3d 859 (3d Dept. 2003)]. 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), *lv app denied* 5 NY3d 708 (2005); *Matter of Kirkpatrick v. Travis*, 5 AD3d 385 (2d Dept. 2004)].

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, 702 (2d Dept. 2014) (quoting *Matter of Siao-Pao v. Dennison*, 11 NY3d 777, 778 [2008]); *see also Matter of Fraser v. Evans*, 109 AD3d 913, 914-915 (2d Dept. 2013)]. 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*].

Here, the submission before this Court, including the materials submitted for *in camera* review, discloses that the Board considered the relevant statutory factors in reaching its determination, including the circumstances and severity of Petitioner's crimes, his institutional record, his program accomplishments, his release plan, and his letters of support. The Board was plainly aware of Petitioner's positive program participation and the various letters of support but found that these positive factors were outweighed by the serious and brutal nature of the Petitioner's crimes. It was also proper for the Board to consider a letter in opposition to release from the District Attorney [*Matter of Applegate*, 164 AD3d at 997] and statements made by the victim's family in the sentencing minutes [*see Matter of Platten v. New York State Board of Parole*, 153 AD3d 1509 (3d Dept. 2017); *Matter of Bush v. Annucci*, 148 AD3d 1392 (3d Dept. 2017)].

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) [*see Matter of Wade v. Stanford*, 148 AD3d 1487 (3d Dept. 2017)]. However, Petitioner's low 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")]. Furthermore, Petitioner's argument that the Board violated its own regulations [*see* 9 NYCRR §8002.2(a)] by failing to provide individualized reasons for its departure from Petitioner's COMPAS scores is without merit. A reading of the parole interview transcript and the Board's decision indicates that the decision denying release to parole was not impacted by a departure from a COMPAS scale. The Board did not find a reasonable probability that

Petitioner would not live and remain at liberty without violating the law. Rather, the Board decided, despite low risk scores, that release would be inappropriate under the other two statutory standards [Executive Law §259-i(2)(c)(A)].

Petitioner's argument that the Board improperly relied on community opposition letters is also unavailing. First, it does not appear from the transcript of the parole interview or the Board's decision that the Board did, in fact, rely on community opposition letters. Second, even if the Board had relied on community opposition, it was entitled to do so in making its determination [*see Matter of Applewhite v. New York State Bd. of Parole*, 167 AD3d 1380, 1381 (3d Dept. 2018) ("Contrary to Petitioner's contention, we do not find that [the Board's] consideration of certain unspecified 'consistent community opposition' to his parole release was outside the scope of the relevant statutory factors that may be taken into account in rendering a parole release determination"), *appeal dismissed*, 32 NY3d 1219 (2019); *see also Matter of Campbell*, 173 AD3d at 1016].

Petitioner's allegations of bias are not supported by the record, nor is there a basis to find that the Board was predisposed to deny Petitioner's application [*Matter of Gonzalvo v. Stanford*, 153 AD3d 1021 (3d Dept. 2017); *Matter of Hernandez v. McSherry*, 271 AD2d 777 (3d Dept. 2000), *lv app denied*, 95 NY2d 769 (2000); *Garcia v. New York State Div. of Parole*, 239 AD2d 235, 240 (1st Dept. 1997) ("Simply because the Board found that the severity of the crime was enough to deny petitioner parole does not mean the board was biased")].

Finally, Petitioner's claims that portions of Petitioner's parole file were improperly withheld is without merit. Petitioner was not entitled to a copy of the District Attorney's letter to the Board [*Grigger v. New York State Division of Parole*, 11 AD3d 850 (3d Dept. 2004), *lv app denied* 4 NY3d 704 (2005); *Matter of Ramahlo v. Bruno*, 273 AD2d 521 (3d Dept. 2000), *lv app denied* 95 NY2d

767 (2000)], or unredacted copies of community opposition letters [Executive Law §259-i(2)(c)(B); 9 NYCRR 8000.5(c)(2); *see also Matter of Applewhite*, 167 AD3d at 1382].

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 [*Matter of Campbell*, *supra*; *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 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")]. Because Petitioner's remaining contentions are 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: April 20, 2020
Poughkeepsie, New York

Peter M. Forman

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

To: All Counsel of Record via NYSCEF