Decision in Art. 78 proceeding - Intzar, Hussain (2023-01-30)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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In the Matter of INTZAR HUSSAIN, Index # E2022-2445
Petitioner,

-against- Decision and Order

Tina M. Stanford, Chair of the
New York State Parole Board,
Respondent.

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Appearances: Kathy Manley, Esq.
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Hon. Letitia James
NYS Attorney General
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By Joseph E. Scolavino, Esq., Assistant Attorney General

Papers Considered: Petition and Notice of Petition, with Exhibits, filed November 28, 2022
Answer, with Exhibits, filed December 20, 2022
Hard Copy Submission, notice filed December 20, 2022

Present: Galligan, J.

Petitioner is incarcerated as a result of his convictions, pursuant to Kings County Supreme Court Indictment 3892 of 2002, of two counts of Rape in the First Degree, one count of Attempted Rape in the First Degree, and one count of Sexual Abuse in the First Degree. The record reveals that petitioner was convicted, following jury trial, of multiple separate violent sex crimes against three separate women at different times, all of which were committed while petitioner operated a livery cab. Petitioner was sentenced, on or about May 25, 2004, upon his convictions for Rape in the First Degree, to consecutive indeterminate terms of incarceration of twelve and a half to twenty five years, to be served consecutively to an indeterminate term of incarceration of seven and a half to fifteen years imposed upon his conviction for Attempted Rape in the First Degree, to run concurrently with an indeterminate term of incarceration of three and a half to seven years imposed upon his conviction for Sexual Abuse in the First Degree.[1] His convictions were upheld on appeal. *People v Hussain*, 35 AD3d 504 [2d Dept 2006], *lv denied* 8 NY3d 946 [2007]. Post-conviction relief, both in state and federal court, was further denied.

[1] The sentencing court's imposition of an aggregate indeterminate sentence of incarceration of thirty-two and a half to sixty-five years is modified by operation of law to an aggregate indeterminate term of incarceration of twenty-five to fifty years. Penal Law § 70.30(1)(e)(vi).

People v Hussain, 44 AD3d 1073 [2d Dept 2007], *lv denied* 10 NY3d 766 [2008]; *Hussain v Woods*, 2011 US Dist Lexis 42231, 2011 WL 1486555 [East. Dist. NY Apr 19, 2011].

Petitioner appeared for an initial Parole Board Release Interview on May 20, 2022, following which discretionary release was denied and petitioner was ordered held for an additional twenty-four months; petitioner's subsequent administrative appeal of that determination was dismissed on November 8, 2022. Petitioner now seeks Article 78 relief from this Court, advancing three arguments in support of his Petition.

First, petitioner contends that respondent wrongly based its decision "almost solely" upon the seriousness of the offenses committed by petitioner. Second, petitioner argues that respondent's decision did not adequately explain its departure from what petitioner characterizes as a low COMPAS risk assessment score. Finally, petitioner asserts that respondent did not adequately consider petitioner's deportation order in reaching its determination. For the foregoing reasons, the Petition is denied.

Judicial review of a Parole Board determination is narrowly circumscribed. *See* Executive Law § 259-i[5]; *Matter of Briguglio v New York State Bd of Parole*, 24 NY2d 21 [1969]. Judicial intervention is warranted only where there is a "showing of irrationality bordering on impropriety." *Silmon v Travis*, 95 NY2d 470, 476 [2000]. The Board may not rest its determination solely upon the serious nature of a person's underlying crime or crimes of conviction and must set forth a non-conclusory explanation for a determination of denial. *Matter of Rivera v Stanford*, 172 AD3d 872 [2d Dept 2019]; *Matter of King v New York State Div. of Parole*, 190 AD2d 423 [1st Dept 1993], *affirmed* 83 NY2d 799 [1994]. However, the Board is not "required to give equal weight to or specifically discuss each factor it consider[s] in making [its] determination." *Matter of Betancourt v Stanford*, 148 AD3d 1497 [3d Dept 2017]; *see also Matter of Lewis v Stanford*, 153 AD3d 1478 [3d Dept 2017]; *Matter of Blasich v New York State Dept. of Corr. & Comm. Supervision*, 68 AD3d 1339 [3d Dept 2009]; *Matter of Freeman v Alexander*, 65 AD3d 1429 [3d Dept 2009]; *Henderson v N.Y. State Div. of Parole*, 7 AD3d 898 [3d Dept 2004].

Here, the Board, in making a record of its determination, set forth petitioner's crimes of conviction, observing that petitioner was convicted of "three separate violent sexual assaults involving three separate women, on three separate dates, each of whom testified at trial," said offenses having been committed by petitioner while he was unlawfully within the United States. The Board noted that, in reaching its determination, it considered the requisite "statutory factors, including discipline, program participation, [petitioner's] risk and needs assessment, and [petitioner's] needs for a successful re-entry into the community."

The Board properly considered more than the seriousness of the offenses committed by petitioner in reaching its determination. Respondent set forth petitioner's multiple Tier II infractions, including for fighting, violating a direct order, possession of contraband, creating a disturbance and possession of an altered item, and petitioner's Tier III infraction for creating a disturbance, which have resulted in Special Housing Unit and keep-lock sanctions.

Respondent further considered petitioner's "parole packet, Sentencing Minutes, Case Plan, and PSI." The Board set forth petitioner's completion of required programs, with TS III to be completed by petitioner.

Respondent recognized petitioner's low risk scores pursuant to a COMPAS Risk Assessment; however, the Board departed from the low favorable scores for arrest and absconding, setting forth its analysis of petitioner's sentencing interview as well as an indication in the history of this case that petitioner committed criminal offenses of a sexual nature in Canada after his commission of the instant offenses and before his extradition back to the United States to face trial on the instant crimes of conviction.

The Board set forth its analysis of petitioner's characterization of his culpability for his crimes of conviction, informing petitioner: "You continue to qualify your guilt in the instant offense. Today's statements present significant contrast to your statements of innocence at sentencing. Your victims were strangers and represented varied ages, were not prostitutes yet in the interview you again stated that they were. Your insight is limited and remorse ingenuine." Having so found, the Board denied petitioner discretionary release.

Petitioner's argument that respondent's determination was based "almost solely" upon the serious nature of the crimes committed by petitioner is unsupported by the record. While it is clear that the serious nature of petitioner's crimes was a factor in the Board's determination, it is likewise clear that the nature of petitioner's offenses was not the sole factor considered by the Board in rendering its determination.

Respondent properly considered petitioner's 2021 Tier II violation, as well as four other Tier II violations and respondent's Tier III violation, for which he was sanctioned at the Special Housing Unit. The record reveals that respondent further considered and conferred with petitioner as to his education, including his religious education, his employment, his faith, the COMPAS risk assessment result, petitioner's goals while incarcerated, petitioner's aspirations upon his anticipated return to Pakistan, petitioner's family, and petitioner's prospective living arrangements were he not deported from the United States. The Board considered the sentencing court's minutes. The Board considered a letter from petitioner's mother. The Board noted its receipt of professional opposition to petitioner's release.

Respondent further properly considered the evidence before it with respect to petitioner's purported acceptance of responsibility for his violent crimes. Petitioner's crimes of conviction include rape, attempted rape and sexual abuse; during his parole interview, however, petitioner maintained that the sex acts which resulted in his convictions were consensual and that his convictions stem only from his failure to render payment to his victims, falsely characterized by petitioner as prostitutes.[2] Thus, petitioner unjustifiably limited his acceptance of responsibility to this fabricated breach of a purported contract, rather than to violent sexual assaults committed by him while he was in a position of relative power as the operator of a for-hire vehicle within which his victims were located. In contradictory fashion, petitioner maintains that he has

[2] As set forth by the US District Court, the facts at trial established that petitioner put a knife to one victim's back and ordered her into his livery cab, whereupon he drove a short distance, ordered the woman out and raped her. As to the second victim of the instant offenses, petitioner drove his victim in his cab to an empty lot near a factory, rather than to her destination; petitioner locked the cab's doors, put a knife to the woman's neck and demanded that she remove her pants. While still holding the knife, petitioner raped her. As to the third victim of the instant offenses, who was a passenger in petitioner's cab, petitioner offered to pay her for a sex act; when she refused, he drove to a deserted street, stopped the cab, entered the back seat and tried to penetrate her, but she was able to fight him off. *Hussain v Woods*, *supra*, 2011 US Dist. Lexis 42231. While this Court declines to consider any allegations with respect to the two rape offenses of which petitioner was acquitted, the facts established beyond a reasonable doubt within the record of this case may explain the sentencing judge's remark that petitioner is a serial rapist.

accepted responsibility for his offenses, while simultaneously maintaining that the testimony of his victims was not true.

Further undermining defendant's claimed acceptance of responsibility is his admission to having received advice from other inmates that "[it] doesn't matter if you did the crime or not, if you take responsibility and show remorse most of the time the Commissioner will let you go." After having so stated, petitioner expressed remorse whilst denying his commission of violent, forcible rapes. When questioned as to why he would not reoffend if he were released, petitioner again falsely characterized his victims as sex workers and blamed the devil for his failure to render payment.

Respondent acted rationally when it determined a minimized acceptance of responsibility is not a genuine acceptance of responsibility. Further, Respondent acted rationally when it concluded a genuine acceptance of responsibility is a significant factor in a release determination. *Silmon v Travis*, 95 NY2d 470 [2000].[3] Respondent is authorized to consider factors such as remorse and insight into the offenses committed, although not enumerated in the statute, as these considerations are nonetheless relevant to an assessment of whether an inmate presents a danger to the community. *See Matter of Payne v Stanford*, 173 AD3d 1577 [3d Dept 2019]; *Matter of Crawford v N.Y.S. Bd. of Parole*, 144 AD3d 1308 [3d Dept 2016]; *Matter of Pulliam v Bd. of Parole, Dept. of Corr. & Comm. Supervision*, 197 Ad3d 1495 [3d Dept 2021]; *Cruz v Alexander*, 67 AD3d 1240 [3d Dept 2009]. In addition to its other considerations, having determined that petitioner's professed acceptance of responsibility was not genuine and that petitioner likewise lacks insight into his violent criminal conduct sufficient to warrant his release, respondent's determination was not based solely upon petitioner's crimes of conviction

This Court is mindful that petitioner's COMPAS risk assessment scores, as received by the Board, were largely favorable to him; therefore, in departing therefrom, respondent was required to "specify which scale of the assessment it is departing from and provide individualized reasons for such departure." 9 NYCRR 8002.2-a. Here, the Board specified that its determination to depart applied to petitioner's likelihood of arrest and absconding. Moreover, respondent reiterated its concern for petitioner's claimed innocence, his insistence that his victims were sex workers, and his connection to familiar places to abscond, noting petitioner's commission of sex offenses in Canada after his commission of the instant offenses and before his extradition back to the United States for trial. Petitioner's apparent justification for his offenses, inherent in his repeated and false assertions that his victims are merely unpaid prostitutes, his commission of violent sexual offenses in secluded locations while he was in a position of trust as a livery driver and his departure from the United States to Canada, where he continued to sexually offend before his eventual apprehension, adequately support respondent's departure from the presumptively lower COMPAS scores assessed prior to petitioner's appearance before the Board.

This Court is likewise mindful that defendant faces deportation upon his prospective release from incarceration. Respondent is not required to order petitioner's release upon the existence of a final deportation order. *Matter of Brown v Board of Parole*, 197 AD3d 1424 [3d Dept 2021]; *Matter of Espinal v N. Y. Bd. of Parole*, 172 AD3d 1816, 1817 [3d Dept 2019]. While the Board must consider "any deportation order issued by the federal government against

[3] In *Silmon*, the Court of Appeals held that "it was neither arbitrary nor capricious for the Board to consider remorse and insight into the offense following petitioner's *Alford* plea." 95 NY2d at 477.

[an] incarcerated individual" (Executive Law § 259-i(2)(c)(A)(iv)), the existence thereof is simply one factor relevant to the Board's consideration. Respondent properly considered petitioner's deportation, engaging in colloquy with petitioner as to his status in the United States, and inquired of petitioner with respect to what plans petitioner would assume were he not deported. Therefore, the record amply demonstrates that both petitioner and respondent were aware of the deportation order and that the Board properly considered the existence thereof in deliberating upon petitioner's release. *See Matter of Abbas v N. Y. S. Div. of Parole*, 61 AD3d 1228 [3d Dept 2009].

Petitioner's remaining contentions have been examined and are found unpersuasive.

Respondent's decision to deny petitioner's release is sufficiently support by the record; it is therefore

ORDERED that the Petition is denied and dismissed with prejudice.

The foregoing constitutes the Decision and Order of the Court. The signing of this Decision and Order shall not constitute entry or filing pursuant to CPLR § 2220 and does not relieve counsel from any applicable provisions of that rule regarding notice of entry.

Dated: Monticello, New York
January 30, 2023

E N T E R :

HON. MEAGAN K. GALLIGAN, J.S.C.

Pursuant to CPLR § 5513, an appeal as of right must be taken within thirty (30) days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty (30) days thereof.