December 2020

Administrative Appeal Decision - Sweet, David (2019-02-06)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Sweet, David **Facility:** Altona CF

NYSID: [redacted] **Appeal Control No.:** 08-077-18 B

DIN: 96-B-0121

Appearances: David Sweet, 96-B-0121
Altona CF
555 Devils Den Road
P.O. Box 3000
Altona, NY 12910-2090

Decision appealed: July 2018 decision denying discretionary release and imposing a hold of 24-months.

Board Member(s) who participated: **Drake, Coppola**

Papers considered: Appellant's Letter-brief received December 3, 2018

Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

Records relied upon: Pre-Sentence Investigation Report, Parole Board Report, Interview Transcript, Parole Board Release Decision Notice (Form 9026), COMPAS instrument, Offender Case Plan.

Final Determination: The undersigned determine that the decision appealed is hereby:

_____ ___ **Affirmed** ___ **Vacated, remanded for de novo interview** ___ **Modified to** _____
Commissioner

_____ ___ **Affirmed** ___ **Vacated, remanded for de novo interview** ___ **Modified to** _____
Commissioner

_____ ___ **Affirmed** ___ **Vacated, remanded for de novo interview** ___ **Modified to** _____
Commissioner

If the Final Determination is at variance with Findings and Recommendation of Appeals Unit, written reasons for the Parole Board's determination must be annexed hereto.

This Final Determination, the related Statement of the Appeals Unit's Findings and the separate findings of the Parole Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 2/6/19 66.

Distribution: Appeals Unit – Appellant - Appellant's Counsel - Inst. Parole File - Central File
P-2002(B) (11/2018)

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant was sentenced to 23 years to life upon his conviction of Murder in the second degree and Manslaughter in the first degree. In the instant appeal, Appellant challenges the July 2018 determination of the Board denying release and imposing a 24-month hold following his initial appearance on the following grounds: (1) the decision is arbitrary and capricious in view of Appellant's release plans and the fact that he had no prior criminal history; (2) the Board erroneously concluded he lacked accountability and minimized his drug use while incarcerated; (3) the decision is arbitrary and capricious insofar as the Board relied on his disciplinary record; (4) the decision is arbitrary and capricious insofar as the Board relied on his claim of innocence and gave no weight to victim impact material in support; and (5) the decision violates due process because the Board improperly focused on the instant offense and considered matters outside the scope of the statute and applicable regulations. These arguments are without merit.

As an initial matter, discretionary release to parole is not to be granted "merely as a reward for good conduct or efficient performance of duties while confined but after 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 deprecate the seriousness of his crime as to undermine respect for the law." Executive Law § 259-i(2)(c)(A) (emphasis added); accord Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). Executive Law § 259-i(2)(c)(A) requires the Board to consider criteria which is relevant to the specific inmate, including, but not limited to, the inmate's institutional record and criminal behavior. People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983).

In 2011, the law was amended to further require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259–c(4). The Board satisfies this requirement in part by using the COMPAS instrument. Matter of Montane v. Evans, 116 A.D.3d 197, 202, 981 N.Y.S.2d 866, 870 (3d Dept. 2014); see also Matter of Hawthorne v. Stanford, 135 A.D.3d 1036, 1042, 22 N.Y.S.3d 640, 645 (3d Dept. 2016); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). Notably, the 2011 amendments did not eliminate the requirement that the Board conduct a case-by-case review of each inmate by considering the statutory factors, including the instant offense. The amendments also did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole. Executive Law § 259-i(2)(c)(A). Thus, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether the three standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108, 990 N.Y.S.2d 295 (3d Dept. 2014); accord Matter of Dawes v. Annucci, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017).

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While consideration of the statutory factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000). Thus, it is well settled that the weight to be accorded the requisite factors is solely within the Board's discretion. See, e.g., Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); Matter of Hamilton, 119 A.D.3d at 1271, 990 N.Y.S.2d at 717; Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239, 657 N.Y.S.2d 415, 418 (1st Dept. 1997). The Board need not explicitly refer to each factor in its decision, nor give them equal weight. Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017); Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016). In the absence of a convincing demonstration that the Board did not consider the statutory factors, it must be presumed that the Board fulfilled its duty. Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945, 550 N.Y.S.2d 204, 205 (3d Dept. 1990).

Here, the record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense wherein Appellant caused the death of his fiancé's three year old daughter by blunt force trauma; that it is his only conviction of record; his institutional record including completion of ART, [redacted] and discipline reflecting recent struggles including drug use; and release plans to pursue transfer to Minnesota to be with family or alternatively reside in a rental property owned by his ex-wife in New York and work. The Board also had before it and considered, among other things, the sentencing minutes, an official DA statement, Appellant's case plan, the COMPAS instrument, and Appellant's parole packet and letters of support therein, including a letter from his ex-wife who is the mother of the victim.

After considering all required factors and principles, the Board acted within its discretion in determining release would not satisfy the standards provided for by Executive Law § 259-i(2)(c)(A). In reaching its conclusion, the Board permissibly relied on the instant offense involving the death of a three-year old child by blunt force trauma to the abdomen causing lacerations to her liver and pancreas, Appellant's disciplinary record with very recent drug use tickets in various facilities as well as violent conduct and fighting, and his lack of accountability and minimization of his drug use. See Matter of Robinson v. New York State Bd. of Parole, 162 A.D.3d 1450, 81 N.Y.S.3d 235 (3d Dept. 2018); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017); Matter of Abascal v. New York State Bd. of Parole, 23 A.D.3d 740, 741, 802 N.Y.S.2d 803, 804 (3d Dept. 2005). While acknowledging the COMPAS instrument scored Appellant as "unlikely" for re-entry substance abuse, the Board disagreed based on Appellant's admission that he began using drugs in prison and for the duration of approximately five years. 9 NYCRR § 8002.2(a). In addition, the Board permissibly relied on Appellant's claim of innocence for the heinous crime. See Matter of Crawford,

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144 A.D.3d 1308, 46 N.Y.S.3d 228; Matter of Romer v. Dennison, 24 A.D.3d 866, 868, 804 N.Y.S.2d 872, 874 (3d Dept. 2005).

Contrary to Appellant's claim, the reasons stated in the decision are sufficient to support the Board's determination. That the instant offense is Appellant's only conviction of record and he has release plans did not preclude the Board from finding, based other considerations, that there is a reasonable probability that he would not live and remain at liberty without violating the law if released and that release at this time would be incompatible with the welfare of society. See generally Matter of Mullins, 136 A.D.3d 1141, 25 N.Y.S.3d 698. The decision also supported the finding that release would so deprecate the serious nature of the crime as to undermine respect for the law. See Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

The Board also rationally concluded Appellant lacked accountability and minimized his drug use. During the interview, Appellant attributed his drug use to the people he was hanging out with – the same people he stated he was around for many years – and curiosity while also indicating he convinced himself Suboxone was safe because no one had overdosed. When pressed further on the root cause of his using drugs after so many years in prison and using in several different facilities despite knowing it was prohibited, he attributed his use to putting himself in an environment of risk and expressed uncertainty if it was curiosity and a desire to be accepted. When a Commissioner opined that his answer was insufficient and speculated he would not have accepted it if offered by a participant in the youth assistance program, Appellant agreed. (Tr. at 14-18, 24.)

In addition, the Board's statements during the interview did not render reliance on Appellant's disciplinary record irrational. While a Commissioner noted Appellant "really [doesn't] have much disciplinary," she proceeded to observe "but it seems like over the past five years or so you have been struggling" and then inquired about his drug use. (Tr. at 14.) The Board's concern is supported by the record, which reflects three infractions for drug use at three different facilities in the five years before the Board appearance with the last infraction in July 2017 as well as infractions for fighting and violent conduct.

The Board also committed no error by relying on Appellant's claim of innocence that it found less than convincing. "[T]here is a strong rehabilitative component in the statute that may be given effect by considering remorse and insight." Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000). Remorse and insight are relevant not only to rehabilitative progress but also to whether release would deprecate the severity of the offense. Matter of Phillips v. Dennison, 41 A.D.3d 17, 23, 834 N.Y.S.2d 121, 125 (1st Dept. 2007). Thus, the Board may consider an inmate's continued claim of innocence. See Matter of Silmon, 95 N.Y.2d 470, 718 N.Y.S.2d 704; Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690, 691, 897 N.Y.S.2d 726, 727 (2d Dept.

2010); Matter of Romer, 24 A.D.3d at 868, 804 N.Y.S.2d at 874; see also Matter of Crawford, 144 A.D.3d 1308, 46 N.Y.S.3d 228; Matter of Webb v. Travis, 26 A.D.3d 614, 810 N.Y.S.2d 233 (3d Dept. 2006); Matter of Okafor v. Russi, 222 A.D.2d 920, 635 N.Y.S.2d 340 (3d Dept. 1995). In addition, the Board considered Appellant's letters of support, including the letter from his ex-wife (the victim's mother) that was discussed during the interview. However, the weight to be accorded applicable factors is within the Board's discretion. See, e.g., Matter of Hamilton, 119 A.D.3d at 1271, 990 N.Y.S.2d at 717. We further note it is not the Board's role to reevaluate a claim of innocence. Matter of Copeland v. New York State Bd. of Parole, 154 A.D.3d 1157, 63 N.Y.S.3d 548 (3d Dept. 2017) (quoting Matter of Silmon, 95 N.Y.2d at 477, 718 N.Y.S.2d at 708). The Board is obligated to rely upon an inmate's conviction and assume his guilt in making its determination. Executive Law § 259-i; 9 N.Y.C.R.R. §§ 8001.3 and 8002.1, et seq.; Matter of Silmon, 95 N.Y.2d at 476-77, 718 N.Y.S.2d at 707-708; Matter of Vigliotti v. State Executive Div. of Parole, 98 A.D.3d 789, 950 N.Y.S.2d 619 (3d Dept. 2012).

Insofar as Appellant appears to raise a due process claim, an inmate has no Constitutional right to be conditionally released on parole before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 2104 (1979); Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980). The New York State parole scheme "holds out no more than a possibility of parole" as Appellant acknowledges and thus does not create a protected liberty interest implicating the due process clause. Matter of Russo, 50 N.Y.2d at 75-76, 427 N.Y.S.2d at 985; see also Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001).

As for the specific allegations, the Board complied with Executive Law § 259-i(2)(c)(A) by considering each applicable factor. As the weight to be assigned each factor is within the Board's discretion, it may emphasize the severity of an inmate's offense over the other factors considered. See Matter of Robinson v. New York State Bd. of Parole, 162 A.D.3d 1450, 81 N.Y.S.3d 235 (3d Dept. 2018); Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016); Matter of Hamilton, 119 A.D.3d at 1273-74, 990 N.Y.S.2d at 719. We nonetheless note the Board's determination also was based on additional considerations.

Appellant's additional allegation that the Board improperly considered factors outside the scope of the statute and applicable regulations is without merit. There is no record support (and Appellant identifies none) for Appellant's claim that the Board considered "the imposition of life sentences of individuals convicted of murder or felony murder, and the consequences to society if life sentences are not imposed." The mere fact that the Board found release would so deprecate the serious nature of the crime as to undermine respect for the law – as it was entitled to do – does not demonstrate consideration of improper matters. Executive Law § 259-i(2)(c)(A); Matter of

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Hamilton, 119 A.D.3d at 1273-74, 990 N.Y.S.2d at 719. And any suggestion that Appellant was entitled to parole release after serving his minimum term is mistaken. See Matter of Russo, 50 N.Y.2d 69, 427 N.Y.S.2d 982; Matter of Warren v. New York State Div. of Parole, 307 A.D.2d 493, 493, 761 N.Y.S.2d 883 (3d Dept. 2003). The appellant was sentenced to a maximum term of life, and the Board was vested with discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the Court. Matter of Burress v. Dennison, 37 A.D.3d 930, 829 N.Y.S.2d 283 (3d Dept. 2007); Matter of Cody v. Dennison, 33 A.D.3d 1141, 1142, 822 N.Y.S.2d 677 (3d Dept. 2006), lv. denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698 (2007).

In conclusion, Appellant has failed to demonstrate the Board's decision was not made in accordance with the pertinent statutory requirements or was so irrational as to border on impropriety.

Recommendation: Affirm.