December 2020

Administrative Appeal Decision - Lugo, Elvin (2019-02-27)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Lugo, Elvin **Facility:** Gowanda CF

NYSID: [redacted] **Appeal Control No.:** 09-162-18 B

DIN: 76-A-0367

Appearances: John Ferrara, Esq.
548 Broadway
Monticello, New York 12701

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

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

Papers considered: Appellant's 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:

_____ Commissioner — ✓ **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** _____

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 2/27/19 EC.

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 20 years to life upon his conviction of Murder (degreeless), Murder in the second degree (two counts), and Criminal Possession of a Weapon in the third degree. Appellant challenges the September 2018 determination of the Board denying release and imposing a 24-month hold on the following grounds: (1) the Board abused its discretion by denying parole release based on the instant offenses, without any aggravating factors, when other factors weigh in favor of release; (2) the Board failed to consider the factors required by statute inasmuch as many weigh in Appellant's favor; (3) the Board did not review the sentencing minutes; and (4) in view of past holds, the denial constitutes an unauthorized resentencing and demonstrates the decision was predetermined. 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).

While consideration of these 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 LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d 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 McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994); 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 offenses wherein Appellant brutally murdered three gay men in their apartments after meeting them in bars; that the offenses represent

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Appellant's only convictions of record; his institutional record including educational accomplishments, participation in the PACE program and the SOP, and "remarkable" discipline; and [redacted] and work with reentry programs. The Board also had before it and considered, among other things, Appellant's case plan, the COMPAS instrument, and Appellant's parole packet and letters of support/assurance therein.

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 senseless loss of life Appellant caused his multiple victims, that Appellant sought out gay men for his crimes and committed brutal murders, and that he demonstrated a cold and callous disregard for human life. As the weight to be assigned each statutory factor is within the Board's discretion, it committed no error by emphasizing the severity of the inmate's offenses over other factors. See Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004); Matter of Walker v. Travis, 252 A.D.2d 360, 676 N.Y.S.2d 52 (1st Dept. 1998). The Board is permitted to consider, and place greater emphasis on, the brutal and heinous nature of an inmate's offense. Executive Law § 259-i(2)(c)(a); Matter of Olmosperez v. Evans, 114 A.D.3d 1077, 1078, 980 N.Y.S.2d 845, 846 (3d Dept. 2014), affd 26 N.Y.3d 1014, 21 N.Y.S.3d 686 (2015); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239-40, 657 N.Y.S.2d 415, 418 (1st Dept. 1997).

While the Board may place greater weight on the nature of the offenses without the existence of any aggravating factors, Matter of Hamilton, 119 A.D.3d 1268, 990 N.Y.S.2d 714, there are aggravating factors present here. In particular, Appellant sought out a particular group of individuals for his crimes and brutally killed multiple victims. The inmate's crimes went "well beyond the 'unjustifiable taking and tragic loss of life'" that describes every murder. Matter of Phillips v. Dennison, 41 A.D.3d 17, 22, 834 N.Y.S.2d 121, 125 (1st Dept. 2007) (citation omitted). That the Board found Appellant's postconviction activities and release plans were outweighed by the serious nature of his crimes does not constitute convincing evidence that the Board did not consider them, see Matter of McLain, 204 A.D.2d 456, 611 N.Y.S.2d 629, or render the decision irrational, see Matter of Almeyda, 290 A.D.2d 505, 736 N.Y.S.2d 275.

While asserting as apparent error that the Board did not review the sentencing minutes, Appellant acknowledges the minutes are unavailable. There is no basis to disturb the Board's decision if the Board makes a diligent effort to obtain sentencing minutes and/or the sentencing minutes are unavailable, whereas here, there are affidavits and correspondence from the court indicating the minutes cannot be located. See Matter of Andreo v. Alexander, 72 A.D.3d 1178, 898 N.Y.S.2d

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690, 691 (3d Dept. 2010); Matter of LaSalle v. New York State Div. of Parole, 69 A.D.3d 1252, 893 N.Y.S.2d 706 (3d Dept.), lv. denied, 14 N.Y.2d 709, 901 N.Y.S.2d 142 (2010); Matter of Santiago v. New York State Div. of Parole, 78 A.D.3d 953, 911 N.Y.S.2d 436 (2d Dept. 2010). Appellant is not entitled to a presumption that the sentencing minutes contained a favorable parole recommendation. Matter of Geraci v. Evans, 76 A.D.3d 1161, 907 N.Y.S.2d 726 (3d Dept. 2010); Matter of Midgette v. New York State Div. of Parole, 70 A.D.3d 1039, 895 N.Y.S.2d 530 (2d Dept. 2010); Matter of Lebron v. Alexander, 68 A.D.3d 1476, 892 N.Y.S.2d 579 (3d Dept. 2009). Furthermore, that the sentencing court did not impose the maximum sentence is not an indication that the court made a favorable parole recommendation. Matter of Duffy v. New York State Div. of Parole, 74 A.D.3d 965, 903 N.Y.S.2d 479 (2d Dept. 2010).

Appellant's additional assertion that the denial of parole release amounted to an improper resentencing also is without merit inasmuch as the Board fulfilled its obligation to determine the propriety of release per Executive Law § 259-i(2)(c)(A) and after considering the factors set forth therein. Executive Law § 259 et seq.; Penal Law § 70.40; Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011); Matter of Crews v. New York State Exec. Dept. Bd. of Parole Appeals Unit, 281 A.D.2d 672, 720 N.Y.S.2d 855 (3d Dept. 2001). 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). The appellant has not in any manner been resentenced. Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142, 25 N.Y.S.3d 698 (3d Dept. 2016). And contrary to Appellant's claim, there is no evidence the Board's decision was predetermined. Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190, 814 N.Y.S.2d 414 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899, 695 N.Y.S.2d 622 (3d Dept. 2000).

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.