December 2020

Administrative Appeal Decision - Williams, Erwin (2018-12-28)

STATE OF NEW YORK – BOARD OF PAROLE

Administrative Appeal Decision Notice

Inmate Name: Williams, Erwin **Facility:** Marcy Correctional Facility

NYSID No.: [redacted] **Appeal Control No.:** 07-170-18B

DIN: 90-C-1288

Appearances:
For the Board: The Appeals Unit

For Appellant: Erwin Williams, 90-C-1288
9000 Old River Road
P.O. Box 5000
Marcy, New York 13403-5000

Board Member(s) who participated in appealed from decision: **Coppola, Crangle**

Decision appealed from: 7/2018 Denial of Discretionary Release with a 21-Month Hold.

Pleadings considered: Brief on behalf of the appellant received on October 22, 2018
Statement of the Appeals Unit's Findings and Recommendation

Documents relied upon: Presentence Investigation Report, Parole Board Report, Interview Transcript, Board Release Decision Notice (Form 9026), COMPAS instrument, Offender Case Plan.

Final Determination: The undersigned have determined that the decision from which this appeal was taken be and the same is hereby

_____ Commissioner ✓ **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____

_____ Commissioner ✓ **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____

_____ Commissioner **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____

If the Final Determination is at variance with findings and recommendation of Appeals Unit, the written reasons for such determination shall be annexed hereto.

This Final Determination, the related Statement of the Appeals Unit's Findings and separate findings of the Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 12/28/18 LB.

Distribution: Appeals Unit – Inmate - Inmate's Counsel - Inst. Parole File - Central File

P-2002(B) (5/2011)

STATE OF NEW YORK - BOARD OF PAROLE

STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

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DIN: 90-C-1288 **Appeal Control No.:** 07-170-18B

Findings: (Page 1 of 3)

Appellant was sentenced to 16 years, 8 months to 50 years upon his conviction of Attempted Murder in the second degree, Rape in the first degree, Assault in the first degree (two counts), CPW in the third degree, and Unlawful Imprisonment in the first degree. In the instant appeal, Appellant challenges the Board of Parole's July 2018 decision to deny discretionary release to parole with a 21-month hold on the following grounds: (1) the Board's consideration of his refusal to take the current sex offender program – after he satisfied his original program requirements – was improper, denied him a fair "hearing" and violated due process; (2) the Board's decision was arbitrary and capricious because the Board placed improper reliance on, and penalized him for, his program refusal after he was program-satisfied and failed to properly weigh and consider other required factors; and (3) the Board's 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 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 Fuchino v. Herbert, 255 A.D.2d 914, 914, 680 N.Y.S.2d 389, 390 (4th Dept. 1998); 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).

STATE OF NEW YORK - BOARD OF PAROLE

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DIN: 90-C-1288 **Appeal Control No.:** 07-170-18B

Findings: (Page 2 of 3)

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense wherein a woman jogging was forced off a trail, raped, stabbed 11 times, tied and staked to the ground, and left for dead; Appellant's denial of participating in the rape and attribution of his other behavior to being young and stupid; that the offense is Appellant's only felony of record; his institutional record including completion of his GED, ART, and SOP, refusal to take the current SOP, and discipline clean since 2014; and release plans to live with his daughter. The Board also had before it and considered, among other things, the sentencing minutes, an official statement from the District Attorney, Appellant's case plan, the COMPAS instrument, and letters of support.

After considering all required factors, 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 serious, violent and deviant nature of Appellant's offense reflecting a callous disregard for human life, pain and suffering and the senseless physical and emotional harm he caused his victim. See Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240 (3d Dept. 2018); Matter of Jones v. New York State Dep't of Corr. & Cmty. Supervision, 151 A.D.3d 1622, 57 N.Y.S.3d 265 (4th Dept. 2017); Matter of Kenefick v. Sticht, 139 A.D.3d 1380, 31 N.Y.S.3d 367 (4th Dept. 2016); Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016). And while acknowledging Appellant previously completed a sex offender program, the Board also noted Appellant's refusal to participate in the current program as required by DOCCS. See Matter of Allen v. Stanford, 161 A.D.3d 1503, 1506, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (2018); Matter of Bockeno v. New York State Parole Bd., 227 A.D.2d 751, 642 N.Y.S.2d 97 (3d Dept. 1996).

Contrary to Appellant's claim, the Board committed no error by considering his refusal to take the current sex offender program. The Board is required to consider, among other factors, Appellant's institutional record including programming. Executive Law § 259-i(2)(c)(A)(i). That Appellant completed a prior program did not preclude DOCCS from requiring him to take the current program, nor did it preclude the Board from considering his refusal. The Board clearly understood that Appellant previously had completed a sex offender program and did not rely on erroneous information. However, Appellant's program refusal did not preclude his consideration for discretionary release, nor (as Appellant claims) did the Board suggest otherwise. Rather, the interview transcript reveals the Board simply discussed the possible consequences of program refusal on Appellant's CR date, which, as the Board indicated, is distinct from discretionary release by the Board. The Board expressly acknowledged its discretion to let him out at that

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Findings: (Page 3 of 3)

time, and the record reflects the Board properly exercised its discretion in his case following its consideration of all applicable factors.

Contrary to Appellant's claim, the transcript as a whole does not support Appellant's contention that the parole interview was conducted improperly or that he was denied a fair interview. See Matter of Mays v. Stanford, 55 N.Y.S.3d 502, 150 A.D.3d 1521 (3d Dept. 2017); Matter of Rivers v. Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 1071, 820 N.Y.S.2d 661, 662 (3d Dept. 2006). There also is no evidence the Board's decision was predetermined. See 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).

As for an alleged due process violation, 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); Matter of Vineski v. Travis, 244 A.D.2d 737, 664 N.Y.S.2d 391 (3d Dept. 1997). The New York State parole scheme "holds out no more than a possibility of parole" 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); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005).

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:

It is the recommendation of the Appeals Unit that the Board's decision be affirmed.