December 2020

Administrative Appeal Decision - Wilcox, Maurice (2019-03-22)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Wilcox, Maurice **Facility:** Woodbourne CF

NYSID: [redacted] **Appeal Control No.:** 10-117-18 B

DIN: 00-A-4263

Appearances: Steven Zeidman, Esq.
CUNY School of Law
2 Court Square West
Long Island City, New York 11101

Decision appealed: October 2018 decision, denying discretionary release and imposing a hold of 18 months.

Board Member(s) who participated: Berliner, Drake, Davis

Papers considered: Appellant's Brief received January 22, 2019

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 3/22/19 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 challenges the October 2018 determination of the Board, denying release and imposing a 18-month hold. The very lengthy Board interview was conducted by three Commissioners, and a wide variety of issues were discussed in detail.

Appellant was convicted by guilty plea of Murder in the second degree, and Attempted Murder in the first degree. These two sentences, which are being served concurrently, each carry a Life sentence. After serving 18 years in State prison on both of these Life sentences, Appellant seeks immediate release back into the community.

One of the crimes of conviction involve Appellant, while wearing a bandana over his face, shooting an off-duty auxiliary police officer in the abdomen with a shotgun in a public place, pursuing his victim, and then firing two more shots into his victim's back. His victim died from these multiple gunshot wounds. His victim was only 24 years of age, thereby robbed of a full and productive life in the community.

The other crime of conviction involved Appellant entering into a McDonald's with his accomplices, and ordering at gunpoint many individuals inside the restaurant to lie down on the floor. The female manager was ordered at gunpoint to open the safe, at which time Appellant and his accomplices stole money, dozens of tokens, and a change envelope. An alarm had been triggered, and police arrived. Appellant and his accomplices fled from police when they arrived. Appellant got behind the wheel of a car, having lowered his bandana from his face to his neck. When again approached by police, he again fled from the police – this time speeding away in his car. While his vehicle was being pursued by police, one of the occupants of his car fired three to four rounds at the patrolling police officers. Appellant then recklessly and dangerously rammed his car into a parked vehicle while fleeing police pursuit. When his car became disabled from the wreck he caused, he again fled from police, this time on foot.

Appellant raises the following issues in his brief: (1) the Board's decision to deny his immediate release back into the community was arbitrary and capricious and irrational, relied too heavily on the very serious crimes of conviction, and was made in violation of lawful procedure; (2) Appellant's release plans, certain COMPAS scores, and "exemplary disciplinary history" (which, as explained, is not "exemplary") were not provided sufficient weight by the Board; (3) the Board's decision lacked sufficient detail; (4) the Board's decision was predetermined; (5) the Board's decision was tantamount to a resentencing of Appellant; (6) the provisions of the Hawkins case should apply to Appellant; (7) the Board relied on erroneous information when making its determination; (8) certain confidential records should have been provided to Appellant; (9) the Board's decision was made in violation of Appellant's due process rights; and (10) the Board is not permitted to pause an interview.

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The transcript of the interview reveals that the Board discussed and considered a host of issues during the very lengthy interview, including but not limited to: Appellant's family life growing up; his upbringing and lifestyle; that he resided with his uncle, a "gangster" who "inflicted terror on people"; his observation that his uncle was "a person of popularity" who "enjoyed" "notoriety on the street"; Appellant's "animalistic frame of thinking"; his work with "Bad Boy Records" and "Henchman Records"; his "stripper" girlfriend and that he "liked the attention" this relationship brought; that this relationship also "brought problems" including troubling issues involving a young child.

After the circumstances of the crimes of conviction were discussed, together with Appellant's upbringing, schooling, family life, institutional record, sentencing minutes, accomplishments and desire to be noticed, and a number of other factors, Appellant stated he looks forward to being released back into the community and voting.

As to the first and second issues, 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). "Although these standards are no longer repeated in the [Board's] regulation, this in no way modifies the statutory mandate requiring their application." Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. A conclusion that an inmate fails to satisfy **any one** of the considerations set forth in Executive Law § 259-i(2)(c)(A) is an independent basis to deny parole. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386 (4th Dept. 2014); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268; Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

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. 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; 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

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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); Matter of Phillips v. Dennison, 41 A.D.3d 17. 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 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); People ex rel. Herbert, 97 A.D.2d 128.

In 2011, the law was amended to require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259–c(4); 9 N.Y.C.R.R. §8002.2(a). 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 LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d 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. See Executive Law § 259-i(2)(c)(A). Thus, the COMPAS instrument cannot mandate a particular result. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016). Rather, 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). Furthermore, declining to afford the COMPAS controlling weight does not violate the 2011 amendments. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016).

As to the second issue, Appellant's disciplinary record while serving time on his sentences is simply not "exemplary" as he states in his brief. He has incurred multiple Tier 2 and Tier 3 disciplinary tickets during his confinement for the following activities: violent conduct; harassment; sexual misconduct; contraband; harassment; threats; smuggling; assault on an inmate; and creating disturbances. While the Board did find that his recent prison conduct was "good", to characterize his disciplinary record as "exemplary" is not accurate.

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As to the third issue, the Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(d), as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole. 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 Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 968 N.Y.S.2d 87 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698, 788 N.Y.S.2d 628 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002); 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).

As to the fourth issue, there is a presumption of honesty and integrity that attaches to judges and administrative fact-finders. See People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914 (3d Dept. 1992). The Board is presumed to have followed applicable statutory requirements and internal policies when making decisions regarding the suitability of an inmate's possible release to parole supervision. See Garner v. Jones, 529 U.S. 244 (2000). There is no evidence that the Board's decision was predetermined. See Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899 (3d Dept. 2000).

As to the fifth issue, Appellant's assertion that the denial of parole release amounted to an improper resentencing 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. See 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). 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).

As to the sixth issue, Appellant infers that the mandates set forth in the Hawkins case apply to him even though he was 18 years of age at the time he committed the first of his two crimes of conviction. However, the Hawkins case applies only to those inmates who are serving a maximum sentence of life imprisonment for a crime committed prior to attaining the age of 18, in which limited case "the Board must consider youth and its attendant circumstances in relationship to the commission of the crime at issue." Hawkins v. New York State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34, 30 N.Y.S.3d 397, 400 (3d Dept. 2016), aff'g in relevant part 51 Misc. 3d 1218(A) (Sup. Ct. Sullivan Co. 2015). Specifically, in those instances, the Board shall consider (i) the diminished culpability of youth, and (ii) growth and maturity since the time of the offense. The Hawkins case does not apply to Appellant because he was 19 years of age at the time of commission of the instant offenses. See, e.g., Cobb v. Stanford, --- N.Y.S.3d ----, 2017 WL 4171234 (3d Dept.

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2017). Notwithstanding, the Board had all information compiled by the Department of Corrections and Community Supervision, and the complete criminal record of Appellant before it at the time of the interview which included, and was not limited to, his COMPAS instrument, Case Plan, parole packet, letters of support, sentencing records, Parole Board Report, and a number of other records. In addition, as discussed above, the Board also discussed a wide variety of important issues with Appellant during the very lengthy interview.

As to the seventh issue, the panel stated that Appellant's attorney (the same author of Appellant's brief) had written the Board asking that certain modifications be made to Appellant's COMPAS instrument. The panel noted that modifications had been made. If Appellant perceived any remaining errors in the COMPAS instrument, or any other record before the Board at the time of the interview, he could have raised these issues at that time. Appellant was provided the opportunity to discuss with the Board during the interview any issues of interest, and cannot now be heard to complain that certain issues were not discussed, or the extent to which certain issues were discussed. See Matter of Serna v. New York State Division of Parole, 279 A.D.2d 684, 719 N.Y.S. 2d 166 (3d Dept. 2001); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 657 N.Y.S.2d 415 (1st Dept. 1997).

As to the eighth issue, the Board permissibly considered letters in opposition to the parole application submitted by public officials. Matter of Rivera v. Stanford, 53 N.Y.S.3d 404, 149 A.D.3d 1445 (3d Dept. 2017), aff'g Matter of Rivera v. Evans, Index No. 0603-16, *Decision & Order* dated July 5, 2016 (Sup. Ct. Sullivan Co.)(LaBuda A.J.S.C.); Williams v. New York State Board of Parole, 220 A.D.2d 753 (2d Dept. 1995); Confoy v. New York State Division of Parole, 173 A.D.2d 1014 (3d Dept. 1991); Walker v. New York State Board of Parole, 218 A.D.2d 891 (3d Dept. 1995); Porter v. Alexander, 63 A.D.3d 945 (2d Dept. 2009); Delman v. New York State Board of Parole, 93 A.D.2d 888 (2d Dept. 1983); Porter v. Alexander, 63 A.D.3d 945 (2d Dept. 2009). The Board may designate certain parole records as confidential. See Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017) (citing Public Officers Law § 87(2)(a), (f); Executive Law § 259-k(2); 9 N.Y.C.R.R. 8000.5(c)(2)(i)(a), (b)). The Board is authorized to treat records as confidential if their release "could endanger the life or safety of any person". Matter of Justice v. Comm'r of New York State Dep't of Corr. & Cmty. Supervision, 130 A.D.3d 1342 (3rd Dept. 2015) (citing Public Officers Law § 87(2)(a), (f); Executive Law § 259-k(2); 9 N.Y.C.R.R. 8000.5(c)(2)(i)(a)(3)). Appellant is not entitled to an official statement by the District Attorney. Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850, 783 N.Y.S.2d 689 (3d Dept. 2004); Matter of Ramahlo v Bruno, 273 A.D.2d 521, 708 N.Y.S.2d 206 (3d Dept. 2000), lv. denied 95 N.Y.2d 767 (2000). Cf. Matter of Mingo v. New York State Div. of Parole, 244 A.D.2d 781, 666 N.Y.S.2d 244 (3d dept. 1997) (official letters in another inmate's file were inter-agency material exempted from disclosure).

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As to the ninth issue, an inmate has no Constitutional right to be released on parole before expiration of a valid sentence as a person's liberty interest is extinguished upon conviction. 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). At most, inmates may have "minimal due process rights" that are limited to not being denied parole for constitutionally arbitrary or impermissible reasons, which requires a showing of egregious official conduct. Graziano v. Pataki, 689 F.3d 110 (2d Cir. 2012); accord Bottom v. Pataki, 610 Fed. Appx. 38 (2d Cir. 2015); Borrell v. Superintendent of Wende Corr. Facility, No. 12-CV-6582 CJS MWP, 2014 WL 297348, at *7 (W.D.N.Y. Jan. 27, 2014), appeal dismissed (Oct. 31, 2014). "[D]enial is neither arbitrary nor capricious when the Board relies on factors defined by New York statute." Siao-Paul v. Connolly, 564 F. Supp. 2d 232, 242 (S.D.N.Y. 2008) (citations omitted).

As to the tenth issue, the Board is permitted to pause an interview and go off the record to accomplish ministerial matters. In addition, we note that there is no due process requirement that the internal deliberations or discussions of the Board appear on the record. Matter of Barnes v. New York State Div. of Parole, 53 A.D.3d 1012, 862 N.Y.S.2d 639 (3d Dept. 2008); Matter of Borcsok v. New York State Div. of Parole, 34 A.D.3d 961, 823 N.Y.S.2d 310 (3d Dept. 2006); Matter of Collins v. Hammock, 96 A.D.2d 733, 465 N.Y.S.2d 84 (4th Dept. 1983).

Recommendation: Affirm.