December 2020

Administrative Appeal Decision - Copeland, Phillip (2019-10-11)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Copeland, Phillip **Facility:** Wende CF

NYSID: [redacted] **Appeal Control No.:** 02-048-19 B

DIN: 89-A-5229

Appearances: Stephen K. Underwood, Esq.
1395 Union Rd.
West Seneca, NY 14224

Decision appealed: February 2019 decision, denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: Coppola, Crangle

Papers considered: Appellant's Brief received June 10, 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:

_____ ✓ **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 10/11/19 cc.

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

Name: Copeland, Phillip **DIN:** 89-A-5229

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Findings: (Page 1 of 5)

Appellant challenges the February 2019 determination of the Board, denying release and imposing a 24-month hold. Appellant contends: (1) the Board's denial of release was error in light of the COMPAS instrument scales; (2) the Offender Case Plan considered by the Board fails to comport with the requirements of Correction Law § 71-a; (3) the Board's determination was bases solely on the severity of the offense and, therefore, was arbitrary and capricious; (4) the Board failed to consider all factors required by statute and, therefore, was arbitrary and capricious; (5) the Board's decision was insufficiently detailed; and (6) appellant was denied due process because the Board's deliberations were not recorded.

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 are 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); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

Here, the record reflects that, during the interview, the Board discussed the instant offence, which involved the murder of a police officer guarding a witness to the sale of drugs by the criminal organization to which appellant belonged. The officer's presence had been necessitated by death threats and the firebombing of the witness's home in retaliation for complaining to the police about drug dealing in front of his residence. The police placed the witness under 24-hour protection. After the police arrested the individuals responsible for these crimes, the head of appellant's organization ordered a retaliatory "hit" upon the police. Thereafter, appellant and his

codefendants planned and committed the murder of a police officer stationed in a patrol car in front of the witness's residence. Appellant and his codefendants approached the vehicle from the rear and shot the 22-year-old victim multiple times, killing him before he was able to act to protect himself.

The record further reflects that the Board considered, in addition to the severity of the offense, appellant's institutional record, including his disciplinary history, vocational training and program participation, as well as appellant's Case Plan and his COMPAS risk and needs assessment. The Board also considered appellant's character references, and release plans. The record further reflects consideration of statements made supporting release and statements made opposing release. The statements opposing release included multiple statements of the District Attorney and of the Sentencing Court. In particular, the District Attorney has strenuously opposed release and the Sentencing Court made a "recommendation to the parole board that you are never paroled" at sentencing, a recommendation which has been reiterated in subsequent letters to the Board.

In its decision, the Board noted appellant's relatively good disciplinary history, his program participation and his low scores on the COMPAS risk and needs assessment, but concluded that the gravity of the offense was such that release would not be appropriate, noting the presence of significant aggravating factors. In particular, the Board highlighted the callousness of the murder and the fact that this murder was committed in retaliation for legitimate police activity in protecting a witness terrorized by a criminal organization. Thus, the Board determined that, because release would be "incompatible with the welfare of society" and would "so deprecate the seriousness of his crime as to undermine respect for law," denial was warranted. Executive Law § 259-i (2)(c)(A).

Appellant now challenges the Board's decision denying release and imposing a 24-month hold.

Appellant's first contention, that the Board's determination denying parole despite appellant's low scores on the COMPAS instrument failed to comply with the 2011 amendments to Executive Law § 259-c (4), is without merit.

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 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). That is exactly what occurred here.

Appellant's second contention, the Offender Case Plan considered by the Board fails to comport with the requirements of Correction Law § 71-a, is without merit. "Correction Law § 71-a specifically directs DOCCS, not the Board, to develop a TAP to facilitate an inmate's eventual transition back into society. The Board is then expected to utilize the TAP, 'where available,' as part of its evaluation in determining an inmate's suitability for parole release." Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d at 1108-09, 990 N.Y.S.2d at 296, quoting Matter of Montane v. Evans, 116 A.D.3d 197, 203, 981 N.Y.S.2d 866 (3d Dept.), appeal dismissed 24 N.Y.3d 1052, 1053, 999 N.Y.S.2d 360 (2014). Thus, the Board satisfied its obligation to consider the available case plan.

Appellant's third contention, that the Board's decision was improperly based solely on the severity of the offense, is without merit.

As discussed above, the Board properly considered the applicable factors, including extreme gravity of the crime; the execution of a police officer stationed outside the home of a witness who had been subjected to death threats and the firebombing of his residence as a result of reporting the illegal activity of the organization to which appellant belonged. 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 offense over the other factors it properly 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 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 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).

While the Board does not agree that aggravating factors are always necessary to support reliance on an inmate's crime, (Matter of Hamilton, 119 A.D.3d 1268, 990 N.Y.S.2d 714), there are multiple aggravating factors present here; appellant'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 at 22, 834 N.Y.S.2d at 125. Appellant's offense represented an attempt by a criminal organization to retaliate against the police for acting to thwart the organization's attempts to intimidate a witness to its crimes. Thus, the crime represented an attack on the rule of law as well as a particularly cold-blooded murder in its own right.

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It should also be noted that a significant portion of discussion of the instant offense was occupied by appellant's claims of innocence and his complaints regarding conduct of the criminal proceedings. While appellant is free to pursue whatever further challenges to the underlying convictions are still available, at the present moment these claims are contradicted by the results his direct appeal of the conviction (People v. Copeland, 197 A.D.2d 629, 602 N.Y.S.2d 683, (2d Dept. 1993), lv denied 82 N.Y.2d 903, 610 N.Y.S.2d 170 (1993)) and his federal habeas corpus challenge (Copeland v. Walker, 258 F. Supp. 2d 105 (E.D.N.Y. 2003)). Moreover, as the Third Department noted in its rejection of appellant's prior challenge to a Board determination, "'it is generally not [respondent's] role to reevaluate a claim of innocence'" Matter of Copeland v. N.Y. State Bd. of Parole, 154 A.D.3d 1157, 1158, 63 N.Y.S.3d 548, 550 (3d Dept. 2017.), quoting Matter of Silmon v. Travis, 95 N.Y.2d at 477, 718 N.Y.S.2d 704.

Thus, the Board properly based its account of the instant offense on the Pre-Sentence Investigation Report, upon which it is entitled to rely. Executive Law § 259-i(2)(c)(A); 9 N.Y.C.R.R. § 8002.2(d)(7); Matter of Carter v. Evans, 81 A.D.3d 1031, 1031, 916 N.Y.S.2d 291, 293 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011). See also Matter of Dolan v. New York State Bd. of Parole, 122 A.D.3d 1058, 1059, 995 N.Y.S.2d 850, 852 (3d Dept. 2014) (finding no "indication that respondent erroneously considered petitioner's presentence investigation report, given that petitioner did not timely challenge the accuracy of any of the information in that report"), lv. denied, 24 N.Y.3d 915, 4 N.Y.S.3d 601 (2015).

Appellant's fourth contention, the Board failed to properly consider all factors required by statute, is similarly without merit. As discussed above, the record reflects that the Board considered all applicable factors. That the Board found Appellant's postconviction activities outweighed by the serious nature of his crimes does not constitute convincing evidence that the Board did not consider them (see Matter of McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994)), or render the decision irrational (see Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d at 239-40, 657 N.Y.S.2d at 418).

Appellant's fifth contention, that the Board's decision was insufficiently detailed, is without merit. 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, particularly when evaluated in the context of the interview transcript. Matter of Siao-Pao v. Dennison, 11 N.Y.3d 777, 778, 866 N.Y.S.2d 602, 602 (2008); 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).

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Appellant sixth contention, that he was denied due process because the Board's deliberations were not disclosed or recorded, is without merit. Contrary to his assertion, the Board is not required to record its internal deliberations or discussions. 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).

Consequently, appellant's challenge the Board's decision denying release is unavailing.

Recommendation: Affirm.