May 2021

Administrative Appeal Decision - Tisdale, Joshua (2020-03-25)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Tisdale, Joshua **Facility:** Wyoming CF

NYSID: [redacted] **Appeal Control No.:** 08-072-19 B

DIN: 98-B-2227

Appearances: Norman Effman Esq.
Wyoming County Legal Aid
18 Linwood Avenue
Warsaw, New York 14569

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

Board Member(s) who participated: Crangle, Coppola

Papers considered: Appellant's Brief received November 8, 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 3/25/2020 (AH.)

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 July 2019 determination of the Board, denying release and imposing a 24-month hold. Appellant's instant offense involved him shooting the victim, who was his friend, in the head, killing her, and stealing her money. Appellant raises the following issues: 1) the decision is arbitrary and capricious, and irrational bordering on impropriety, in that the Board failed to consider and/or properly weigh the required statutory factors. 2) the Board decision failed to provide any details. 3) the Board failed to list any facts in support of the statutory standard cited. 4) the Board violated his constitutional liberty interest in a legitimate expectation of early release. 5) the Board should have released him because he committed the instant offense when he was a youth and its attendant characteristics. 6)the Board did not have his sentencing minutes. 7) the Board failed to comply with the 2011 amendments to the Executive Law in that the COMPAS is defective per se, the attempted departure was not done in compliance with the regulation, and the statutes are future focused.

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

The Board is permitted to consider, and place greater emphasis on, the brutal nature of the offense. Executive Law § 259-i(2)(c)(a); 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 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

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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); Matter of Wiley v. State of New York Dept. of Corr. & Cmty. Supervision, 139 A.D.3d 1289, 32 N.Y.S.3d 370 (3d Dept. 2016); Matter of Garofolo v. Dennison, 53 A.D.3d 734, 735, 860 N.Y.S.2d 336, 338 (3d Dept. 2008); Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); Matter of Partee v. Evans, 117 A.D.3d 1258, 1259, 984 N.Y.S.2d 894 (3d Dept.), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014); Matter of Marcus v. Alexander, 54 A.D.3d 476, 476, 862 N.Y.S.2d 414, 415 (3d Dept. 2008); Matter of Wellman v. Dennison, 23 A.D.3d 974, 975, 805 N.Y.S.2d 159, 160 (3d Dept. 2005).

The Board placing particular emphasis on the callous nature of the offense does not demonstrate irrationality bordering on impropriety. Olmosperez v Evans, 114 A.D.3d 1077, 980 N.Y.S.2d 845 (3d Dept. 2014); Garcia v New York State Division of Parole, 239 A.D.2d 235, 657 N.Y.S.2d 415 (1st Dept. 1997).

The Board may acknowledge the senseless and violent nature of the crime. Sanchez v Dennison, 21 A.D.3d 1249, 801 N.Y.S.2d 423 (3d Dept. 2005); Dorman v New York State Board of Parole, 30 A.D.3d 880, 816 N.Y.S.2d 765 (3d Dept. 2006).

There is no requirement in the law that the board place equal or greater emphasis on appellant's present commendable conduct than on the gravity of his offense. People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 133, 468 N.Y.S.2d 881, 884 (1st Dept. 1983). The Board was not required to give each factor equal weight and could place greater emphasis on the gravity of the inmate's offense. Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); 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 Rivera v. Stanford, 53 N.Y.S.3d 404, 149 A.D.3d 1445 (3d Dept. 2017); Matter of Furman v. Annucci, 138 A.D.3d 1269, 28 N.Y.S.3d 352 (3d Dept. 2016); Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016); Matter of Copeland v. New York State Bd. of Parole, 154 A.D.3d 1157, 63 N.Y.S.3d 548 (3d Dept. 2017).

The Board may take note of the inmate's disregard for the life of another human being. Hakim v Travis, 302 A.D.2d 821, 754 N.Y.S.2d 600 (3d Dept 2003); Angel v Travis, 1 A.D.3d 589, 767 N.Y.S.2d 290 (3d Dept 2003). The Board may consider the inmate's blatant disregard for the law and the sanctity of human life. Campbell v Stanford, 173 A.D.3d 1012, 105 N.Y.S.3d 461 (2nd Dept. 2019).

The Board may consider the inmate's prior fleeing the area after the commission of his crime. Larmon v Travis, 14 A.D.3d 960, 787 N.Y.S.2d 918 (3d Dept 2005).

Insight is a permissible factor. Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000); 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) (minimization of crimes); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016) (lack of insight and failure to accept responsibility), lv. denied, 29 N.Y.3d 901 (2017); Matter of Phillips v. Dennison, 41 A.D.3d 17, 23, 834 N.Y.S.2d 121 (1st Dept. 2007) (limited insight and remorse); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002) (limited insight into why crime committed).

That the Board "did not recite the precise statutory language of Executive Law § 259-i (2)(c)(A) in support of its conclusion to deny parole does not undermine its conclusion." 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) (citation omitted); accord Matter of Reed v. Evans, 94 A.D.3d 1323, 942 N.Y.S.2d 387 (3d Dept. 2012). The language used by the Board was "only semantically different" from the statute. Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690, 691–92, 897 N.Y.S.2d 726, 727 (2d Dept. 2010); Matter of James v. Chairman of New York State Div. of Parole, 19 A.D.3d 857, 858, 796 N.Y.S.2d 735, 736 (3d Dept. 2005); see also 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) (upholding decision that denied release as "contrary to the best interest of the community"); Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011) (Board provided adequate statutory rationale).

The Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a), 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).

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).

Nothing in the due process clause requires the Parole Board to specify the particular evidence on which rests the discretionary determination an inmate is not ready for conditional release. Duemmel v Fischer, 368 Fed.Appx. 180, 182 (2d Cir. 2010). There is no due process requirement

that the Parole Board disclose its release criteria. Haymes v Regan, 525 F.2d 540 (2d Cir. 1975). The due process clause is not violated by the Board's balancing of the statutory criteria, and which is not to be second guessed by the courts. Mathie v Dennison, 2007 WL 2351072 (S.D.N.Y. 2007); MacKenzie v Cunningham, 2014 WL 5089395 (S.D.N.Y. 2014).

Parole is not constitutionally based, but is a creature of statute which may be imposed subject to conditions imposed by the state legislature. Banks v Stanford, 159 A.D.3d 134, 71 N.Y.S.3d 515 (2d Dept. 2018). Parole release is a statutory grant of a restricted form of liberty prior to the expiration of a sentence. Johnson v Superintendent Adirondack Correctional Facility, 174 A.D.3d 992, 106 N.Y.S.3d 408 (3d Dept. 2019).

That appellant qualified as a youth at the time of the crime does not mean he is entitled to automatic release. The case precedent did not abrogate the requirements of Executive Law § 259-i. Thus, the Board must consider an inmate's youth and subsequent growth and maturity in addition to other relevant factors and principles, such as disciplinary records and programming, the risks and needs assessment, recommendations from relevant parties, as well as the underlying offense. See, e.g., Matter of Allen v. Stanford, 161 A.D.3d 1503, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (2018).

Denial of parole is neither arbitrary nor capricious when the Parole Board relied on the factors defined by the New York statute. Hodge v Griffin, 2014 WL 2453333(S.D.N.Y. 2014) citing Romer v Travis, 2003 WL 21744079. An arbitrary action is one without sound basis in reason and without regard to the facts. Rationality is what is reviewed under an arbitrary and capricious standard. Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. Ward v City of Long Beach, 20 N.Y.3d 1042 (2013). Denial 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); Hanna v New York State Board of Parole, 169 A.D.3d 503, 92 N.Y.S.3d 621 (1st Dept. 2019).

The appellant has failed to demonstrate that the Parole Board's determination was affected by a showing of irrationality bordering on impropriety. Matter of Silmon v Travis, 95 N.Y.2d 470, 718 N.Y.S.2d 704 (2001); Matter of Russo v New York State Board of Parole, 50 N.Y.2d 69, 77, 427 N.Y.S.2d 982 (1980).

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, 468 N.Y.S.2d 881.

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There is no dispute that the Board neither had nor considered the sentencing minutes. However, since the appellant's appearance before the Board, the Appeals Unit has been able to obtain and review the subject's sentencing minutes. A review of the sentencing minutes reveals that the court opposed appellant's possible release to parole supervision. That the Parole Board had not considered the sentencing minutes, when they contain a recommendation in against an inmate's possible release to parole supervision constitutes harmless error and does not provide a basis for setting aside the appealed from decision. Schettino v New York State Division of Parole, 45 A.D.3d 1086, 845 N.Y.S.2d 569 (3d Dept. 2007); Motti v Alexander, 54 A.D.3d 1114 (3d Dept. 2007); Valerio v New York State Division of Parole, 59 A.D.3d 802, 872 N.Y.S.2d 606 (3d Dept. 2009); Abbas v New York State Division of Parole, 61 A.D.3d 1228, 877 N.Y.S.2d 512 (3d Dept. 2009); Cruz v Alexander, 67 A.D.3d 1240, 890N.Y.S.2d 656 (3d Dept. 2009); Davis v Lemons, 73 A.D.3d 1354, 899 N.Y.S.2d 919 (3d Dept. 2010); Ruiz v New York State Division of Parole, 70 A.D.3d 1162, 894 N.Y.S.2d 582 (3d Dept. 2010).

Appellant's claim that the Board failed to comply with the 2011 amendments to the Executive Law is rejected. Dolan v New York State Board of Parole, 122 A.D.3d 1058, 995 N.Y.S.2d 850 (3d Dept. 2014); Tran v Evans, 126 A.D.3d 1196, 3 N.Y.S.3d 633 (3d Dept. 2015); Boccadisi v Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015). Furthermore, the 2011 Executive Law amendments have been incorporated into the regulations adopted by the Board in 2017. The 2017 amended regulations don't create any substantive right to release, but rather, merely increase transparency in the final decision. Courts must defer to the Parole Board's interpretation of its own regulations so long as it is rational and not arbitrary nor capricious. Brown v Stanford, 163 A.D.3d 1337, 82 N.Y.S.3d 622 (3d Dept. 2018); Peckham v. Calogero, 12 N.Y.3d 424, 883 N.Y.S.3d 751 (2009); Henry v. Coughlin, 214 A.D.2d 673, 625 N.Y.S.2d 578 (2d Dept. 1995).

The 2011 amendments to the Executive Law, as well as the state regulations governing parole, do not create a legitimate expectancy of release that would give rise to a due process interest in parole. Fuller v Evans, 586 Fed.Appx. 825 (2d Cir. 2014) cert.den. 135 S.Ct. 2807, 192 L.Ed2d 851.

Contrary to Appellant's claim, the 2011 amendments and 9 NYCRR § 8002.2(a) as amended do not represent a forward-looking shift requiring the COMPAS to be the fundamental basis for release decisions. This proposition is not supported by the language of the statute itself, considering the relatively modest change to Section 259-c(4) and the absence of any substantive change to Section 259-i(2), which governs the discretionary release consideration process. In 2011, the Executive 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). 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, 139 A.D.3d 1068, 30 N.Y.S.3d 834; Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559,

985 N.Y.S.2d 386, 387 (4th Dept. 2014). However, the COMPAS is not predictive and was never intended to be the sole indicator of risk and needs as the Board gets risk and needs information from a variety of sources, including the statutory factors and the interview. 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. Executive Law § 259-i(2)(c)(A); Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. 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 instrument cannot mandate a particular result. Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether all three statutory 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). Amended 9 NYCRR § 8002.2(a) did not alter this approach. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2 (reaffirming "any [risk and needs] instrument used is not dispositive"). Indeed, the COMPAS does not (and cannot) supersede the Board's authority to determine, based on members' independent judgment and application of section 259-i(2)(c)(A)'s factors, whether an inmate should be released. See 2011 N.Y. Laws ch. 62, § 1, part C, § 1, subpart A, § 1; Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. The amended regulation was intended to increase transparency in the Board's decision making by providing an explanation if and when the Board departs from scales in denying an inmate release. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2.

The COMPAS instrument brings the Board into compliance with the 2011 amendments to Executive Law 259-c(4). Robles v Fischer, 117 A.D.3d 1558, 985 N.Y.S.2d 386 (4th Dept. 2014); Hawthorne v Stanford, 135 A.D.3d 1036, 22 N.Y.S.3d 640 (3d Dept. 2016).

The Board decision did not depart from the COMPAS as it not required to state any specific scale it is departing from. Plus, the execution style method of killing in the instant offense, plus lack of insight, are extra factors. The Board did not find a reasonable probability that Petitioner will not live and remain at liberty without violating the law but rather concluded, *despite* low risk scores, release would be inappropriate under the other two statutory standards. This is entirely consistent with the Board's intention in enacting the amended regulation.

The Board's decision to hold an inmate for the maximum period of 24 months is within the Board's discretion and within its authority pursuant to Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b). Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 737 N.Y.S.2d 163 (3d Dept. 2002), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); see also

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Matter of Campbell v. Evans, 106 A.D.3d 1363, 965 N.Y.S.2d 672 (3d Dept. 2013). In the absence of impropriety, the reconsideration date set by the Board will not be disturbed. Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 908, 737 N.Y.S.2d 163 (3d Dept. 2002); accord Matter of Evans v. Dennison, 13 Misc. 3d 1236(A), 831 N.Y.S.2d 353 (Sup. Ct. Westchester Co. 2006) (rejecting challenge to 24-month hold). Appellant has failed to demonstrate that a hold of 24 months for discretionary release was excessive or improper.

Recommendation: Affirm.