Matter of Batista v NYS Dept. of Corr. & Community Supervision

2013 NY Slip Op 31111(U)

March 4, 2013

Sup Ct, Albany County

Docket Number: 2628-12

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of HECTOR BATISTA,

Petitioner,

-against-

NYS DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION (NYS BOARD OF PAROLE),

Respondent,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-12-ST3646 Index No. 2628-12

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DECISION/ORDER

George B. Ceresia, Jr., Justice

The petitioner, an inmate in the custody of the New York State Department of Corrections and Community Supervision, commenced the instant CPLR Article 78 proceeding to review a determination dated April 5, 2011 in which he was denied release on

parole. On December 8, 1993 he was sentenced for the following crimes: murder in the second degree, robbery in the first degree[1], criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree. He was sentenced to a term of fifteen years to life on the murder charge, one and one third to four years on the robbery charge, one and one half to four and one half years on the second degree criminal possession of a weapon charge, and two and one third to seven years on the third degree criminal possession of a weapon charge. Among the arguments set forth in the petition, the petitioner contends that the respondent failed to perform a risk and needs assessment as required under Executive Law § 259-i as amended in 2011. The petitioner asserts that the respondent failed to review and consider defense attorney's official statements; and considered erroneous information. He maintains that the respondent erred in not reviewing petitioner's sentencing minutes on the record, and did not make proper reference to his juvenile robbery case minutes. He contends that the Parole Board determination was conclusory, and improperly based solely on the serious nature of his crimes, to the exclusion of all other positive factors. The petitioner argues that the Parole Board erred in not considering all mitigating factors attendant to petitioner's crimes, including petitioner's age at the time of the offenses.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Parole is denied. After a careful review of your record, a personal interview, and due deliberation, it is the determination of this panel that, if released at this time, there is a reasonable

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[1]The robbery charge was a prior conviction for which the petitioner had apparently been granted probation as a youthful offender. He was found to have violated the terms of probation by reason of the other convictions.

> probability that you would not live at liberty without violating the law, and your release at this time is incompatible with the welfare and safety of the community and would so deprecate the seriousness of the crime as to show disrespect for the law.
>
> "This decision is based on the following: you stand convicted of the following serious offenses of murder2d, cpw 3d, robbery 1st, cpw 2nd in which in the first instance, you shot a 16 year old male causing his death. In another instance, you were found in a taxi with a loaded pistol and wearing a body armor vest and lastly took a 16 year old's beeper while flashing a gun. These crimes show your willingness to put you own needs above those of society and also your lack of respect for human life. Consideration has been given to your program completion and satisfactory behavior, however your release at this time is denied."

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of De La Cruz v Travis, 10 AD3d 789 [3d Dept., 2004]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3d Dept., 2001]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]; see also Matter of Graziano v Evans, 90 AD3d 1367, 1369 [3d Dept., 2011]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's institutional programming, including participation in the ART

program, and his employment as a porter. It was noted that he had no disciplinary infractions over the last few years. Mention was made of his release plans, which included residing with his fiancé, and working as a furniture mover. Commissioner Ross noted that the petitioner had submitted letters from various individuals in support of his release. The petitioner was afforded an opportunity to speak on his own behalf.

The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Siao-Pao, 11 NY3d 773 [2008]; Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Matos v New York State Board of Parole, 87 AD3d 1193 [3d Dept., 2011]; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see Matter of MacKenzie v Evans, supra; Matter of Matos v New York State Board of Parole, supra; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [3rd Dept., 2010]; Matter of Wise v New York State Division of Parole, 54 AD3d 463 [3rd Dept., 2008]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give

considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

As pointed out by the petitioner, under Executive Law § 259-i (2) (c) (A) (vii) the Parole Board is required to consider the recommendations of the sentencing court and recommendations of the attorney for the inmate. With regard to recommendations of the sentencing court, the transcript of the December 8, 1993 sentencing was a part of the record before the Parole Board. With regard to the robbery charge, however, which was a re-sentencing after the petitioner was found to have violated the terms of probation, the petitioner argues that the respondent failed to consider the judge's recommendations from the initial sentencing which placed the petitioner on probation. In the Court's view, the operative sentence here is the one which resulted in petitioner's state incarceration, not the initial sentence. This is particularly so since there would be no reason for the Court to make a recommendation for or against parole release in imposing a sentence of probation.

Apart from the foregoing, from the documentary evidence in the record, it does not appear that the petitioner was sentenced on December 8, 1993 as a juvenile offender. This being said, the record is replete with references to petitioner's age at the time these offenses

which inmates may be released to parole supervision" (L 2011 ch 62, Part C, Subpart A, § 38-b). This amendment was made effective six months after its adoption on March 31, 2011, that is, on October 1, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49-[f]). In the second change, Executive 259-i (2) (c) was amended to incorporate into one section the eight factors which the Parole Board was to consider in making release determinations (see L 2011 ch 62, Part C, Subpart A, § 28-f-1). This amendment was effective immediately upon its adoption on March 31, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49). However, it did not result in a substantive change in the criteria which the Parole Board should consider in rendering its decision.

With regard to the issue of retroactivity of the 2011 legislation, as noted, the parole determination here was made on January 25, 2011, well before the legislation was enacted, and well before the effective date of the amendment to Executive Law 259-c (4). Generally speaking, statutory amendments " are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated" (Matter of Gleason v Michael Vee Ltd., 96 NY2d 117, 122 [2001], citing People v Oliver, 1 NY2d 152, 157). While remedial legislation often will be applied retroactively to carry out its beneficial purpose, this is not the case where the Legislature "has made a specific pronouncement about retroactive effect" (see Matter of Gleason v Michael Vee Ltd., supra, at 122). In this instance, as the Court observed in Matter of Hamilton v New York State Division of Parole (943 NYS2d 731, Platkin, Richard M., Sup. Ct., Albany Co., 2012), "the State Legislature considered the question of the effectiveness of the 2011 Amendments and determined that the new procedures contemplated by the amendments to Executive Law § 259-c (4) should

not be given effect with respect to administrative proceedings conducted prior to October 1, 2011." This Court agrees. Under such circumstances, there clearly was no Legislative intent that said amendments be applied retroactively to parole determinations rendered prior to October 1, 2011 (see id.; see also Matter of Tafari v Evans, 2012 NY Slip Op 51355U [Sup. Ct., Franklin Co., 2012])

Lastly, the Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

The Court has reviewed petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The petition must therefore be dismissed.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this

decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: March 4, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Petitioner's Order To Show Cause dated May 8, 2012, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated December 21, 2012, Supporting Papers and Exhibits
3. Petitioner's Reply dated December 27, 2012

STATE OF NEW YORK
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SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit B, Presentence Investigation Report, Exhibit D, Official Letters To the Criminal Defense Attorney, and respondent's Exhibit F, Confidential Portion of Inmate Status Report, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: March 4, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice