Matter of Swindell v New York State Bd. of Parole
2013 NY Slip Op 32085(U)
September 3, 2013
Supreme Court, Albany County
Docket Number: 2461-13
Judge: George Ceresia

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of DARRYL SWINDELL,

Petitioner,

-against-

NEW YORK STATE 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 # 01-13-ST4709 Index No. 2461-13

Appearances: Darryl Swindell
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Petitioner, Pro Se
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Sing Sing Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated April 3 2012 to deny petitioner discretionary release on parole. The petitioner was sentenced in 1992 to the

following crimes: one count of attempted murder in the 1st degree having an indeterminate term of 20 years to life, one count of attempted murder in the 2nd degree having an indeterminate term of 12 ½ to 25 years, one count of criminal possession of a weapon in the 2nd degree having an indeterminate term of 5 years to 15 years, and one count of assault in the 2nd degree having an indeterminate term of 2 1/3 years. To 7 years.

The petitioner argues, inter alia, that the Parole Board's action denying release was predetermined, and violated the parole guideline range (see 7 NYCRR 8002.3). In his view, the Parole Board improperly focused on the severity of the crimes for which he was incarcerated, to the exclusion of other factors. He asserts that the Parole Board's risk and needs findings were erroneous, arbitrary and capricious, and violated his constitutional right to due process.[1] He maintains that he is innocent of the crimes for which he was convicted. He indicates that because of a medical disability[2], he has not been able to complete many institutional programs. In petitioner's view, the Parole Board failed to consider the statutory factors (see Executive Law § 259-i, 2, [c]), failed to consider that he has changed his life for the better, and overlooked the fact that he has acquired the necessary skills to find employment.

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

"Denied - Hold for 24 months, Next appearance date: 04/2014

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[1]A risk and needs analysis is required under Executive Law § 259-c (4). DOCCS has carried out this provision through development of a transition accountability plan ("TAP"), coupled with use of what is referred to as the COMPAS Risk and Needs Assessment tool.

[2]"Bacterial poisoning from medication, that has affected his brain".

> "Following careful review and deliberation of your record and interview, this panel concludes that discretionary release is not presently warranted due to concern for the public safety and welfare. The following factors were properly weighed and considered. Your instant offense in December 1988 involved your illegal possession of a handgun. You were afforded probation, and thereafter in August 1990 you and a co-defendant fired shots at an off-duty police officer. Your history indicates you were on probation at the time of the August 1990 offenses. Your institutional programing indicates progress and achievement which is noted to your credit. Your disciplinary record reflects four tier II reports. Required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community re-entry. Your discretionary release at this time would thus not be compatible with the welfare of society at large, and would tend to deprecate the seriousness of the instant offense9s) and undermine respect for the law."

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of Campbell v Evans, 106 AD3d 1363, 1363-1364 [3d Dept., 2013]; 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 giving consideration to the instant offense, attention was also given to petitioner's claim of misidentification and innocence. The Commissioners indicated that they would consider petitioner's COMPAS ReEntry Narrative Assessment Instrument, which is a part of the record. The Commissioners also inquired why the petitioner had been treated at a nearby hospital for a bullet wound in his foot on the evening of the day of the crimes for which he was convicted.[3] Attention was also given, during the parole interview, to the petitioner's institutional programming, and the reasons why he was unable to complete ASAT or obtain a GED degree. Pursuant to a question posed by one of the Commissions concerning his medical condition, the petitioner indicated that he suffers from short term memory loss, extensive stressing, laziness, tiredness and an inability to concentrate on academic readings and studies. Inquiry was made by the Commissioners with regard to petitioner's vocational accomplishments. It was noted that he had four Tier II disciplinary violations. Attention was paid to his release plans, including residing with a sister in Mount Vernon; and his intention to pursue work in computer designs and car designs. He was given ample opportunity to make a presentation in support of his release.

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.,

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[3]During the parole interview, the petitioner indicated that he had submitted his record to the Innocence Project to review DNA evidence which, he claims, would have excluded him from any role in the crimes for which he was convicted.

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 Davis v Evans, 105 AD3d 1305 [3d Dept., 2013]; Matter of MacKenzie v Evans, 95 AD3d 1613 [3d Dept., 2012]; 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]). 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).

The record does not support petitioner's assertion that the decision was predetermined

consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New York Division of Parole, 294 AD2d 726 [3rd Dept., 2002]; Matter of Jones v Travis, 293 AD2d 800, 801 [3rd Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3rd Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3rd Dept., 2006]; Matter of Motti v Dennison, 38 AD3d 1030, 1031 [3rd Dep., 2007]; Matter of Garofolo v Dennison, 53 AD3d 734 [3rd Dept., 2008]; Matter of MacKenzie v Dennison, 55 AD3d 1092, 1193 [3rd Dept., 2008]).

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court first observes that there is no inherent right to parole under the constitution of either the United States or the State of New York (see Greenholtz v Inmates of the Nebraska Penal and Correctional Complex, 442 US 1, 7 [1979]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 73, supra). It has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate expectation of, release; therefore, no constitutionally protected liberty interests are implicated by the Parole Board's exercise of its discretion to deny parole (see Barna v Travis, 239 F3d 169, 171 [2d Cir., 2001]; Marvin v Goord, 255 F3d 40, 44 [2d Cir., 2001]; Boothe v Hammock, 605 F2d 661, 664 [2d Cir., 1979]; Paunetto v Hammock, 516 F Supp 1367, 1367-1368 [SD NY, 1981]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 75-76, supra, Matter of Gamez v Dennison, 18 AD3d 1099 [3rd Dept., 2005]; Matter of Lozada v New York State Div. of Parole, 36 AD3d 1046, 1046 [3rd Dept., 2007]). The Court, accordingly, finds no due process violation.

As relevant here, the 2011 amendments to the Executive Law (see L 2011 ch 62, Part C, Subpart A, § 38-b, et seq.) made two changes with respect to how parole determinations are made. First, Executive Law § 259-c was revised to eliminate mention of Division of Parole guidelines (see 9 NYCRR 8001.3 [a]), in favor of requiring the Division of Parole to rely upon criteria that would place greater emphasis on assessing the degree to which inmates have been rehabilitated, and the probability that they would be able to remain crime-free if released (see Executive Law 259-c [4]). Said section now recites: "[t]he state board of parole shall [] (4) establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision" (Executive Law 259-c [4], enacted in 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. In this instance, as noted, a risk assessment instrument is included in the record and was considered by the Parole Board. The Court finds that the respondent adequately fulfilled its responsibilities

under Executive Law § 259-c (4).

With respect to petitioner's argument that he has served time in excess of the parole guideline range (see, 9 NYCRR 8001.3), the guidelines "are intended only as a guide, and are not a substitute for the careful consideration of the many circumstances of each individual case" (see 9 NYCRR 8001.3 [a]; Matter of Tatta v State of New York Division of Parole, 290 AD2d 907, 908 [3rd Dept., 2002]; Matter of Rodriguez v Evans, 82 AD3d 1397 [3d Dept., 2011]). Thus, to the extent that such guidelines may still be applicable, the Court finds that this does not serve as a basis to overturn the Board's decision.

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 Campbell v Evans, 106 AD3d 1363, supra, at 1364, citing Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604 [2002]).

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: September 3, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated May 20, 2013, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated July 15, 2013, Supporting Papers and Exhibits
3. Affirmation of Colleen d. Galligan, Assistant Attorney General, dated July 15, 2013