Matter of Mance v Evans
2013 NY Slip Op 32580(U)
October 17, 2013
Sup Ct, New York County
Docket Number: 141392
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
VICTOR MANCE,#97-A-5925,

Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

DECISION AND JUDGMENT
RJI #44-1-2013-0382.21
INDEX #141392
ORI # NY044015J

ANDREA W. EVANS, Chairwoman,
NYS Board of Parole,

Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Victor Mance, verified on June 5, 2013 and filed in the St. Lawrence County Clerk's office on June 7, 2013. Petitioner, who is an inmate at the Cape Vincent Correctional Facility, is challenging the April 2012 determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on June 10, 2013 and has received and reviewed respondent's Answer and Return, including confidential Exhibits B and C, verified on July 26, 2013. The Court has also received and reviewed petitioner's Reply thereto (denominated Petitioner's Opposition in Response to Respondent's Verified Answer and Return), verified on August 14, 2013 and filed in the St. Lawrence County Clerk's Office on August 20, 2013.

August 28, 1997 petitioner was sentenced in Supreme Court, Bronx County, as a persistent violent felony offender, to an indeterminate sentence of 15 years to life upon his conviction of the crime of Robbery 2°. Petitioner's conviction was affirmed on direct appeal to the Appellate Division, First Department. *People v. Mance,* 273 AD2d 34, *lv den* 95 NY2d 906.

[* 2]

After having been denied discretionary parole release on one previous occasion petitioner made his second appearance before Parole Board on April 24, 2012. Following that appearance a decision was rendered again denying petitioner parole and directing that he be held for an additional 24 months. The parole denial determination reads as follows:

> "THIS PANEL HAS CONCLUDED THAT YOUR RELEASE TO SUPERVISION IS NOT COMPATIBLE W/ THE WELFARE OF SOCIETY AND THEREFORE PAROLE IS DENIED. THIS FINDING IS MADE FOLLOWING A PERSONAL INTERVIEW, RECORD REVIEW AND DELIBERATION. OF SIGNIFICANT CONCERN IS YOUR RECEIPT OF MULTIPLE DISCIPLINARY VIOLATIONS SINCE YOUR LAST PAROLE HOLD. THIS CONTINUES YOUR POOR COMPLIANCE WITH DOCCS RULES. POSITIVE FACTORS CONSIDERED INCLUDE YOUR COMMUNITY SUPPORT AND DOCUMENT SUBMISSIONS. IN ADDITION, YOUR I.O. [Instant Offense] INVOLVED AN IN-CONCERT ROBBERY. PAST ROBBERY RELATED CRIMES HAVE RESULTED IN YOUR IMPRISONMENT IN NEW YORK AND THE FEDERAL PRISON SYSTEM. TO GRANT YOUR RELEASE AT THIS TIME WOULD SO DEPRECATE THE SERIOUSNESS OF YOUR OFFENSE AS TO UNDERMINE RESPECT FOR THE LAW."

The document perfecting petitioner's administrative appeal from the parole's denial determination was received by the DOCCS Parole Appeals Unit on October 19, 2012. Although the Appeals Unit failed to issue its findings and recommendation within the 4-month time frame set forth in 9 NYCRR §8006.4(c), a belated decision on administrative appeal was, in fact, rendered on or about July 9, 2013, after the commencement of this proceeding.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, provides, in relevant part, as follows:

> "Discretionary release on parole shall not 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. In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate . . . (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement . . ."

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5)) unless there has been a showing of irrationality bordering on impropriety. *See Silmon v. Travis,* 95 NY2d 470, *Vasquez v. Dennis*on, 28 AD3d 908, *Webb v. Travis*, 26 AD3d 614 and *Coombs v. New York State Division of Parole*, 25 AD3d 1051. Unless the petitioner makes a "convincing demonstration to the contrary" the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Nankervis v. Dennison,* 30 AD3d 521*, Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

Executive Law §259-c(4) was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, to provide that the New York State Board of Parole shall "... 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 . . ."[1]

A significant portion of the petition is focused, in one way or another, upon the assertion that the Parole Board placed undue emphasis on the nature of the crime underlying petitioner's incarceration as well as his criminal history. Petitioner argues that the Board, in doing so, failed to give adequate consideration to other relevant statutory factors such as " . . . his community support, numerous certificates and extensive programing (and without mentioning his COMPAS report). . ." A Parole Board, however, need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole determination, nor is it required to expressly discuss each of those factors in its written decision. *See Martin v. New York State Division of Parole*, 47 AD3d 1152, *Porter v. Dennison*, 33 AD3d 1147 and *Baez v. Dennison,* 25 AD3d 1052, *lv den* 6 NY3d 713. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination ". . . is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior." *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

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[1]Prior to the amendment the statute had provided, in relevant part, that the Board of Parole shall ". . . establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."

In the case at bar, reviews of the Inmate Status Report and transcript of the Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors including petitioner's therapeutic and vocational programming record, prison disciplinary record, release plans and family support as well as the circumstances of the crime underlying his incarceration and prior criminal record. *See Zhang v. Travis*, 10 AD3d 828. The Court, moreover, finds nothing in the hearing transcript to suggest that the Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries.

Although the COMPAS risk and needs assessment instrument prepared in conjunction with the Board's consideration of petitioner for discretionary release was not referenced in the written parole denial determination, Parole Commissioner Smith noted during the course of the April 24, 2012 parole interview that the Board " . . . had a chance to review your [petitioner's] COMPAS re-entry risk assessment." Commissioner Smith also noted that the COMPAS instrument indicated petitioner's " . . . high level of both [history of] violence and prison misconduct." This Court notes that said instrument also indicated "Low" under the headings "Risk of Felony Violence," "Arrest Risk," "Abscond Risk" and "Criminal Involvement."

Notwithstanding the fact that the Appellate Division, Third Department has indicated that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 discretionary parole release determinations (*see Garfield v. Evans*, 108 AD3d 830), this Court finds nothing in *Garfield* or the amended statute to suggest that the quantified risk assessment determined through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Board of Parole to determine whether there is a reasonable probability that a prospective parolee would, if released, live and remain

at liberty without violating the law, whether the release of the prospective parolee would be compatible with the welfare of society and/or whether the release of the prospective parolee would so deprecate the seriousness of his/her crime as to undermine respect for the law. In this regard it is noted that the "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, are only intended to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS risk assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A). *See Partee v. Evans*, 40 Misc 3d 896 (Sup Ct, Albany Co., June 28, 2013). In the case at bar the Board ultimately concluded that a denial of parole was warranted based upon the nature of the crime underlying petitioner's incarceration, his prior criminal record and his problematic prison disciplinary record.

In view of the foregoing, the Court finds no basis to conclude that the parole board failed to consider the relevant statutory factors. *See McAllister v. New York State Division of Parole* 78 AD3d 1413, *lv den* 16 NY3d 707, and *Davis v. Lemons,* 73 AD3d 1354. In addition, since the requisite statutory factors were considered, and given the narrow scope of judicial review of discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality bordering on impropriety as a result of the emphasis placed by the Board on

the nature of the crime underlying petitioner's incarceration, his prior criminal record and his problematic disciplinary record. *See McAllister v. New York State Division of Parole,* 78 AD3d 1413*, lv den* 16 NY3d 707*, Hall v. New York State Division of Parole,* 66 AD3d 1322 and *White v. Dennison,* 29 AD3d 1144.

Turning to other arguments advanced by petitioner in this proceeding, the Court first finds the written parole denial determination to be sufficiently detailed to inform petitioner of the reason(s) underlying the denial and to facilitate judicial review thereof. *See Ek v. Travis*, 20 AD3d 667, *lv dis* 5 NY3d 862 and *Zhang v. Travis*, 10 AD3d 828. The Court also finds that there is no statutory, regulatory or judicial requirement mandating the Parole Board to provide guidance as to how an inmate might improve his/her chances of securing discretionary parole release at a future Board appearance. *See Francis v. New York State Division of Parole,* 89 AD3d 1312 and *Freeman v. New York State Division of Parole*, 21 AD3d 1174.

As far as the underlying sentencing minutes are concerned, the Court finds nothing in the record to suggest that such minutes were unavailable to the Parole Board. In this regard it is noted that on the first page of the Inmate Status Report prepared in anticipation of petitioner's April 2012 Parole Board reappearance (Exhibit C annexed to respondent's Answer and Return) the "SENTENCING MINUTES" entry has been checked "YES." In any event, a copy of the August 28, 1997 sentencing minutes is annexed to the respondent's Answer and Return as Exhibit H and a review thereof reveals no parole recommendations by the sentencing court. Accordingly, even if the Board had erroneously failed to consider petitioner's sentencing minutes the error would be harmless. *See Abbas v. New York State Division of Parole,* 61 AD3d 1228*, Motti v. Alexander*, 54 AD3d 1114 and *Schettino v. New York State Division of Parole*, 45 AD3d 1086.

To the extent petitioner, citing 9 NYCRR §8002.3(b), argues that neither the nature of the crime underlying his incarceration nor his criminal history should have been considered by the Parole Board, the Court rejects such argument. *See Hall v. New York State Division of Parole,* 66 AD3d 1322*, Guerin v. New York State Division of Parole*, 276 AD2d 899 and *Flecha v. Travis*, 246 AD2d 720. Finally, the Court rejects petitioner's argument that the 24-month hold imposed by the Board was excessive. *See Campbell v. Evans,* 106 AD3d 1363*, Wright v. Alexander,* 71 AD3d 1270 and *Tatta v. State of New York Division of Parole*, 290 AD2d 907, *lv den* 98 NY2d 604.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: October 17, 2013 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice