Matter of Rhames v New York State Bd. of Parole
2017 NY Slip Op 30143(U)
January 20, 2017
Supreme Court, Franklin County
Docket Number: 2016-471
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
KEITH RHAMES, #90-T-3317,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2016-0303.62
INDEX #2016-471

-against-

NEW YORK STATE 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 Keith Rhames, verified on July 16, 2016 and filed in the Franklin County Clerk's Office on August 3, 2016. Petitioner, who is currently an inmate at the Collins Correctional Facility, challenges the denial of discretionary parole rendered while he was an inmate at the Bare Hill Correctional Facility.

The Court issued an Order to Show Cause on August 8, 2016. The Court has received and reviewed the Answer and Return together with a Letter-Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated October 21, 2016, as well as confidential materials for *in camera* review. No Reply has been received.

On October 17, 1990, petitioner was sentenced as a Second Felony Offender to an indeterminate term of incarceration for twenty-five (25) years to life upon the conviction following trial for the crime of Murder in the Second Degree, as well as concurrent terms of seven and one-half (7½) to fifteen (15) years for the crime of Criminal Possession of a Weapon in the Second Degree and three and one-half (3½) to seven (7) years for the crime of Criminal Possession of a Weapon in the Third Degree. On December 1, 2015, petitioner re-appeared before the Parole Board for his second appearance having completed more

than 25 years in custody. The Parole Board denied parole and made the following determination:

> "Parole is denied. After a review of the record and interview, the panel has determined that if released at this time there is a reasonable probability that you would not live at liberty without again violating the law.
>
> This decision is based on the following factors:
>
> The instant offense of Murder 2nd, and Criminal Possession of a Weapon 2nd, and Criminal Possession of a Weapon 3rd, wherein you did cause the death of an individual by shooting him.
>
> Your record dates back to approximately 1985. It includes felonies and misdemeanors as well as prior jail and failure at community supervision. You have failed to benefit from prior efforts at rehabilitation.
>
> Note is made by this board of your sentencing minutes, COMPAS Case Plan, COMPAS Risk Assessment, rehabilitative efforts, letters of support and/or reasonable assurance, disciplinary record, and all other required factors.
>
> Additionally, your release at this time would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law."

Petitioner filed a timely appeal and the Parole Board's determination was upheld by the Administrative Appeals Unit in a written decision on or about June 13, 2016. Petitioner timely commenced the instant action and argues that the Parole Board's determination was an abuse of its statutory discretion. Specifically, the petitioner alleges that the Parole Board relied upon erroneous information regarding his underlying crime, to wit: that he followed the victim into the building before shooting the victim and that the building in which the crime occurred was a residence or apartment. The petitioner further argues that the Parole Board failed to consider other statutory factors in making its determination while relying to heavily upon the instant offense. The petitioner also asserts that the Parole Board's decision holding him an additional 24 months constitutes an improper re-sentencing.

Respondent argues that the petition should be dismissed. Respondent asserts that while the petitioner alleges that the Parole Board relied upon erroneous information, the Parole Board relied upon the Pre-Sentence Report which it is mandated to do and the

petitioner should have challenged the contents therein at the time of sentencing. *See* Executive Law §259-i(2)(c)(A). Respondent also asserts that "the Court's role 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.' " *Matter of Comfort v. New York State Div. of Parole*, 68 AD3d 1295 *citing Matter of Hamilton v. New York State Div. of Parole*, 119 AD3d 1268. Respondent argues that the Board considered all of the statutory guidelines, including the COMPAS Risk Assessment instrument as indicated in the Board's decision. Finally, the respondent argues that the 24 month hold does not constitute a re-sentencing as the petitioner was sentenced to an indeterminate term of incarceration as the Board is vested with discretion to determine if and when parole would be appropriate.

As relates to the petitioner's argument that the Parole Board relied upon erroneous information, the petitioner expressed his disagreement with the factual recitation during the hearing. Accordingly, the Parole Board did not include the factual recitation into the determination. Nonetheless, if the petitioner contests the information in the Pre-sentence Investigation Report, neither the Parole Board nor this Court can amend such report.

> "Turning to petitioner's argument that the Board relied upon erroneous information in denying his request for parole release, we note that the Board was entitled to rely on the information contained in the presentence investigation report, and petitioner is foreclosed from challenging the accuracy of that report here, inasmuch as he failed to raise such a challenge before the sentencing court." *Carter v. Evans*, 81 AD3d 1031, 1031.

It is noted that during the Parole Board interview the petitioner clearly communicated that while he did indeed shoot the victim, thereby causing his death, the petitioner asserts that he did so in self-defense. Resp. Ex. F [3:8-9]. Additionally, the petitioner denied that he followed the victim into the "housing project" and instead the

petitioner alleged that the victim brandished a gun first. Resp. Ex. F [3:12-25; 4:1-11]. It is further noted that at sentencing, the petitioner expressed his innocence as well as indicated that he acted in self-defense. Resp. Ex. B [20:12-21]. Nonetheless, it does not appear that the details of whether the petitioner followed the victim or if it occurred in an apartment or housing project were relevant to the Parole Board's determination as such facts were not stated in the decision nor would the different details substantially alter the underlying narrative of the crime for purposes of the parole hearing. *See Carter v. Evans*, at 1032.

Petitioner alleges that the respondent failed to consider the statutory factors contained in Executive Law §259-i(c)(A) and only focused on the petitioner's underlying crime. The petitioner further alleges that the Parole Board failed to specify the reasons for denial and he asserts that the Parole Board failed to adequately explain how the record before them showed the likelihood of the petitioner re-offending. The petitioner argues that he will never be granted parole based upon the Parole Board's reliance solely on the nature of the instant offense and the Parole Board refused to advise him what, if anything, he would need to do for future appearances before the Board as this is the second time he was denied for the same reasoning.

Executive Law §259-i(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 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 had been a showing of irrationality bordering on impropriety. *See Silmon v. Travis*, 95 NY2d 470; *Hamilton v. New York State Division of Parole*, 119 AD3d 1268; *Vasquez v. Dennison*, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. 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 Jackson v. Evans*, 118 AD3d 701, *Nankervis v. Dennison*, 30 AD3d 521 and *Zane v. New York State Division of Parole*, 231 AD2d 848.

The petition focuses upon the argument that the Parole Board failed to adequately consider/properly weigh all of the required statutory factors and instead relied excessively on the nature of the crimes underlying Petitioner's incarceration as well as his prior criminal record. A Parole Board 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 Montane v. Evans*, 116 AD3d 197; *see also Valentino v Evans*, 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. 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 (internal citations omitted)." *Comfort v. New York State Division of Parole*, 68 AD3d 1295, 1296.

In the case at bar, a review of the Parole Board Report and transcript of Petitioner's December 1, 2015 appearance before the Parole Board reveal that the Board had before it information with respect to the appropriate statutory factors, including Petitioner's educational and therapeutic programming records, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record and letters of support regarding release, as well as information with respect to the circumstances of the crimes underlying his incarceration and prior criminal record. The Court, moreover, finds nothing in the hearing transcript to suggest that the Parole Board denied the Petitioner an opportunity to answer questions or provide insight into how and why he believed that he would be a good candidate for release. However, the Parole Board also expressly considered that in the two years since the last Parole Board appearance, the petitioner had received two (2) Tier III violations and one (1) Tier II violation. In addition, while the petitioner had previously completed the ART program, following the Tier III violations, the petitioner refused to complete the ART program again despite the potential benefit of same before the Parole Board interview.

In view of the foregoing, the Court finds no basis to conclude that the Parole Board failed to consider the relevant statutory factors. *See Pearl v. New York State Division of Parole*, 25 AD3d 1058 and *Zhang v. Travis*, 10 AD3d 828. Since the requisite statutory factors were considered, and given the narrow scope of judicial review of the 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 crimes underlying Petitioner's incarceration and that the petitioner while he stated he was remorseful, still claimed innocence. *See Neal v. Stanford,* 131 AD3d 1320 and *Confoy v. New York State Division of Parole*, 173 AD2d 1014; *see also Graziano v. Evans*, 90 AD3d 1367, 1369 [" 'while the Board may not consider [ ] factors outside the scope of the applicable statute, including penal philosophy', it can consider factors—such as remorse and insight into the offense—that are not enumerated in the statute but nonetheless relevant to an assessment of whether an inmate 'present[s] a danger to the community.' "]

Notwithstanding the petitioner's argument that the Parole Board's denial of parole is tantamount to re-sentencing, the argument is without merit. "[W]hile petitioner argues that the Board improperly extended his 20-year minimum period of incarceration by denying him parole, the Board was vested with the discretion to determine whether release was appropriate notwithstanding the fact that the sentencing court set this as the minimum term of petitioner's sentence (*see Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000])." *Cody v. Dennison*, 33 AD3d 1141, 1142.

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: January 20, 2017 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice