Matter of Piagentini v New York State Bd. of Parole
2018 NY Slip Op 30708(U)
April 20, 2018
Supreme Court, Albany County
Docket Number: 02156-18
Judge: Richard M. Koweek
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of

DIANE PIAGENTINI,

Petitioner,

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

-against-

NEW YORK STATE BOARD OF PAROLE, and
TINA M. STANFORD, in her official capacity as
Chairwoman of the Board of Parole,

Respondents.

Index No. 02156-18
RJI No. 01-18-ST9498

DECISION AND ORDER

In this Article 78 proceeding, the widow of a murdered New York City police officer seeks to compel the New York State Board of Parole (Respondent) to reconsider its decision to release Herman Bell, who was convicted of Murder in the First Degree of her husband. Mr. Bell, at age of 70, has spent more than 40 years in prison. For the reasons that follow, this Article 78 Petition is dismissed.

BACKGROUND

Mr. Bell had been convicted by a jury, in 1975, with two others, of the cold

blooded murder of two New York City police officers, Joseph Piagentini, and Waverly Jones. He was sentenced on May 12, 1975, to 25 years to life for each conviction. The sentencing Judge directed that the sentences be served concurrently with one another but consecutive to any other sentence he might receive from any other Court. He has appeared approximately every two years before the Parole Board seeking release since 2008. His most recent appearance was his eighth before the Parole Board. The Parole Board rendered a decision on March 13, 2018, to conditionally release Herman Bell to parole supervision.[1]

Although not directly relevant, Mr. Bell was also convicted in California for bank robberies and served five years in Federal Prison prior to being placed into New York custody in 1979. In 2009, Mr. Bell was also convicted of manslaughter for the murder of a San Francisco police officer. He received one year in jail and five years' probation.

Following Mr. Bell's Parole Board hearing in February 2018, the Parole Board rendered a written decision on March 13, 2018, granting parole, with an earliest release date of April 17, 2018.[2] The Petitioner, through counsel, sought a suspension of the release date pending a rescission hearing pursuant to 9NYCRR 8002(b) [2] [I] upon the

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[1]The specific chronology of his appearances is set forth in paragraph 15 of the Affirmation of Kathleen M. Kiley, Esq., Counsel to DOCCS and is not in dispute.

[2]The vote was 2 to 1.

grounds that the Parole Board failed to consider the sentencing minutes and the victim impact statement of the Petitioner.[3] A supplement to those arguments was sent by letter of March 28, 2018.

The Parole Board held a second meeting on March 21, 2018, and took into account the sentencing minutes. They adhered to their prior decision. The Petitioner thereafter commenced this proceeding and obtained a Temporary Restraining Order on April 4, 2018, from the Court, in an Order to Show Cause (O'Connor, J), which was returnable April 13, 2018, before the undersigned.

Oral arguments were heard on that date and the Court reserved.

This Decision and Order follows.

ARGUMENT

For any petitioner to commence an Article 78 proceeding against a body or officer, they/he/she must be entitled to the relief sought. Therefore, the threshold question is: may the widow of a slain police officer properly challenge a decision of a Parole Board after it

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[3]Petitioner's letter dated March 21, 2018.

has considered her position as a victim representative, and after the Parole Board has complied with the statutory factors governing its decision-making function. (Executive Law 259-i). Otherwise stated, does this Petitioner have standing?

Petitioner argues that because she was entitled to be heard by the Parole Board as a victim representative pursuant to Executive Law §259-i (2)(c)(A)(v), she must, therefore, have standing to challenge any subsequent decision by the Parole Board that is contrary to her position. She cites, in support of this assumption, the case of McNamara v. Coughlin, 165 Misc. 2d 397 (Sup. Ct. New York County, 1995), aff'd 228 A.D.2d 356 (1st Dept. 1996). She also seeks to distinguish the following two cases cited by Respondents: Hancher v. Travis, 1 Misc.3d 903 (A) (Supreme Court, Westchester County, 2003) and Matter of Police Benevolent Association of New York State Troopers, Inc. v. New York State Board of Parole, (Sup. Ct. Albany County, February 2, 2018, unreported). Finally, she contends that she has sustained "injury in fact" as opposed to generalized heightened feelings of vulnerability.

As further justification for her claim, she contends that the Parole Board failed to properly consider the factors required by Executive Law §259-i(2). She then asks, rhetorically, who else but her can speak for the victim if the Parole Board is not doing its job?

In their Answer, Respondents raise Objections in Point of Law as follows: Petitioner lacks standing; Herman Bell is a necessary party who has not been joined; the Petition fails to state a cause of action pursuant to CPLR 3211(7); a defense is founded upon documentary evidence pursuant to CPLR 3211(a)(1); and, the Parole Board decision was lawful both procedurally and not affected by error or law, nor was it arbitrary and capricious or an abuse of discretion. (CPLR 7803(3)).

The Attorney General argues that the statutes that bestow upon a crime victim or representative a right to be heard, both at sentencing (CPL 380.50(2)(b)), and prior to Parole Board hearings (Executive Law 259-i(2)(c)(A)) do not confer standing to a victim who desires to challenge a subsequent determination. No legislative history is advanced to suggest a contrary conclusion. The mere fact that such a proceeding is not expressly prohibited does not mean it is permitted. Matter of Ayers v. Coughlin, 72 N.Y.2d 346, 354-55 (1988).

Moreover, the Parole Board properly considered the factors set forth in Executive Law 259-i (2)(c)(A), including the consideration of the victim statement (attached as Exhibit "P", in camera, for the Court's review). Furthermore, although the original decision to release on parole was made without reviewing the sentencing minutes, the error was harmless since it made no mention of parole recommendations. In Re Almonte

v. New York State Board of Parole, 145 A.D.3d 1307 (3d Dept. 2016). To address this issue, the Parole Board met a second time on March 21, 2018, expressly acknowledging the sentencing minutes and reaffirmed, by the same 2 to 1 vote, their previous decision for release.

To the extent that the Court wishes to consider the Parole Board's decision on its merits, Respondents contend that the Parole Board's decision was neither arbitrary and capricious nor an abuse of discretion. Any individual challenging a court decision bears a heavy burden, especially where, as here, he or she "seeks to obtain judicial review on the ground that the court did not properly consider all of the relevant factors, or that an improper factor was not considered." Garcia v. New York State Division of Parole, 239 A.D.2d 235, 239 (1st Dept. 1997). Absent failure by the Parole Board to comply with the mandates of Executive Law Article 12-B, judicial intervention is warranted only when there is a showing of irrationality bordering on impropriety. Hamilton v. New York State Division of Parole, 119 A.D.3d 1268, 1269 (3d Dept. 2014).

Since here, the Court in fact considered the Petitioner's victim impact statement (9 NYCRR 8002.4) and eventually reviewed Mr. Bell's sentencing minutes, it has, in fact, complied with the statutory mandate. Its ultimate decision is discretionary. Matter of Silmon v. Travis, 95 N.Y.2d 470, 477 (2000). It was not irrational, nor did it border on

impropriety. Therefore, it must be upheld.

Finally, Respondents contend the Petition should be dismissed because Petitioner has failed to join a necessary party, i.e. Mr. Bell. If the Petitioner were successful, the effect of this Court's decision could result in rescission of his previously granted parole. Even though a prisoner has no constitutional right to parole, they contend he is entitled to due process in connection with a proceeding that could result in rescission of previously granted parole release. Victory v. Pataki, 814F.3d 47, 60 (2016).

For all of the foregoing reasons, the Respondents' argue that the Petition should be dismissed.

In reply, Petitioner argues Mr. Bell is not a necessary party. He has no constitutional right to parole. Russo v. New York State Board of Parole, 50 N.Y.2d 69 (1980). Further, his absence would not preclude complete relief because the relief sought is a new parole hearing before a new Board.

DISCUSSION

CPLR §7802, although captioned "parties" does not deal with the threshold

question of who qualifies as a proper petitioner in an Article 78 proceeding. This is an issue of standing, an aspect of justiciability that must be resolved if the objection is raised at the outset of litigation. Dairylea Cooperative, Inc. v. Walkey, 38 N.Y.2d 6, 9 (1975). The Petitioner's capacity to sue is a related but conceptually distinct concept.

The Court of Appeals has instructed that a party seeking judicial review must be "aggrieved". In Dairylea Cooperative Inc., supra, the Court of Appeals set forth a three-part test to determine standing: (1) the petitioner must suffer "injury in fact" from the challenged act; (2) the petitioner must be "arguably within the zone of interests" protected by a constitutional, statutory or regulatory scheme in question; (3) there is no clear legislative intent to preclude review. Id. at 9-11.

> The existence of an injury in fact - an actual legal stake in the matter being adjudicated - ensures that the party seeking review has some concrete interest in prosecuting the action which cast the dispute "in a form traditionally capable of judicial resolution". Society of Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 772 (1991).

Both sides agree that under the factual circumstances of this case, there is a dearth of decided cases addressing this specific topic. The two cases, cited by Respondents, hold that victims of crimes do not have a statutory right to challenge a decision of a Parole Board. Thus, for example, in the matter of Hancher v. Travis, 1 Misc.3d 903 (A)

(Westchester County, 2003) (unreported decision) the Court held: "a petitioner must show that their proposed action will have a harmful effect upon them which is different from that suffered by the public at large and that the alleged injury falls within the zone of interests sought to be promoted or protected by the statute under which the government agency has acted." (Citations omitted) (Id. at page 3 of the decision.) It considered CPL §380.50 and Executive Law §259-i. It found that neither statute authorized any further participation in the process by a crime victim or crime victim representative.

Similarly, the more recent case of Matter of Police Benevolent Association of New York State Trooper's, Inc. v. New York State Board of Parole (unreported Decision), while considering the question of an organization's standing, also found that petitioner has not established that any of the individual state police officers that form its membership have suffered any injury in fact as results of the Parole Board's determination. Id. at pages 5-6 of the decision.

The case cited by the Petitioner, McNamara v. Coughlin, supra is distinguishable. The petitioner there was the brother of a homicide victim. He sought an order declaring that Department of Corrections and Community Supervision (hereinafter "DOCCS") grant of permission to Bonzio (the man convicted of manslaughter) access to participate in temporary work release, furlough and other rehabilitation programs be revoked as an

abuse of discretion; limiting Bonzio's participation in any such programs so that his absences from any correctional facility conform to periods that do not exceed the mandates of the Correction Law; declaring that the Day Reporting Center Program be in conflict with the Correction Law; and directing DOCCS to notify petitioner and family before any temporary releases of Bonzio.

Significantly, in that case petitioner alleged that Bonzio threatened his (petitioner's) life, a witness to the killing and an undercover police officer associated with the prosecution of the case. Id. at 399.

The lower court, faced with those allegations, referred to the Court of Appeals case of In Re Sun-Brite Car Wash Inc. v. Board of Zoning Appeals of the Town of Hempstead, 69 N.Y.2d 406 (1987). It quoted an excerpt from that case as follows:

"Because the welfare of the entire community is involved...there is much to be said for permitting judicial review at the request of any citizen, resident or taxpayer... "

In that case, the trial court found that the Corrections Law 857 conferred upon any person the right to point out to the Commissioner abuses concerning temporary release programs. It was in that context that the trial court said:

> The provisions of notice to and a hearing of the victims of a crime at the time of its perpetrators parole hearing would **seem to confer** a similar standing on such victims (citation omitted) as do the respondents' own rules and regulations which govern the administration of the temporary release program (7 NYCRR Part 1900 et seq)... Id. at 400. (Emphasis supplied)

Obviously that Court was confronting a different question of standing by a person who had been threatened by the defendant and who was seeking to bring to the Commissioner's attention apparent abuses of various furlough and work release programs of a convicted violent felon connected to a crime syndicate. The next four pages of the decision are devoted to details of claimed abuses of these programs. It concluded that Bonzio is not entitled to the extent of liberty that had been accorded him despite having been denied parole three times. It found that Bonzio's virtual freedom from incarceration under the guise of temporary work release placed DOCCS in violation of the statute and their own rules and regulations. Id. at 404. Viewed in that context, the Court's offhanded comments about standing before Parole Boards may safely be viewed as dicta. Similarly, the Appellate Division's affirmance of this decision, McNamara v. Coughlin, 228 A.D.2d 356 (1st Dept. 1996), especially the sentence:

"We have considered respondents' other arguments, including that petitioner lacks standing to challenge their determination to place Bonzio in temporary release programs,

and find them to be without merit" is read to refer to the determination of standing under the challenged work release programs contained in 7 NYCRR1900, et seq., to which specific statutory authority is conferred upon others, and not to victims challenging Parole Board decisions.

Both trial Courts, like this one, understand the emotional component to the position taken by the Petitioner. This, however, does not rise to the level of an injury in fact, such that would confer upon this petitioner standing to challenge the determination granting parole release. The Petitioner's recourse may lie in the legislative arena.

In view of the foregoing, Petitioner's lack of standing requires dismissal of the Petition and, therefore, the Court need not consider the remaining arguments raised by the parties. Even if this Court were to consider the Parole Board's decision on its merits, it would still rule against the Petitioner. It is well-settled that the scope of court review of all determinations is extremely limited, and intervention is permitted only when there is a showing of the irrationality bordering on impropriety. Matter of Silmon v. Travis, 95 N.Y.2d 474, 76 (2000). Nothing that is supplied in this case persuades this Court that the actions of the Parole Board meet that standard, so as to justify Court intervention.

Therefore, the Temporary Restraining Order is lifted and the Petition is dismissed.

This Court stays the implementation of its own Order until 5:00 p.m. on April 27, 2018.

The original Decision and Order is being mailed to Joshua F. McMahon, Assistant Attorney General. The original Motion papers are being sent to the Albany County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220.

Counsel is not relieved from the provision of that rule regarding the filing, entry, or notice of entry.

This is the Decision and Order of this Court.

DATED: April 20, 2018
Hudson, New York

RICHARD M. KOWEEK
Acting Supreme Court Judge

Papers Considered:

1. Order to Show Cause dated April 4, 2018; Affirmation of Mitchell Garber in Support of Temporary Restraining Order and Preliminary Injunction dated April 4, 2018; together with Exhibits "A" through "F"

2. Verified Petition of Diane Piagentini dated April 4, 2018, and verified on April 3, 2018; Attorney Certification; together with Exhibits "A" through "F"

3. Petitioner's Memorandum of Law in Support of Article 78 Petition of Mitchell Garber, Esq., dated April 4, 2018

4. Affirmation of Kathleen M. Kiley, Esq., Counsel to the Board of Parole, dated April 9, 2018; together with Exhibits "A" through "P"

5. Memorandum of Law in Support of Respondents' Answer of Joshua E. McMahon, Esq., Assistant Attorney General, dated April 9, 2018; together with attachment

6. Verified Answer of Joshua E. McMahon, Esq., dated April 9, 2018

7. Reply Affirmation of Mitchell Garber, Esq., dated April 11, 2018