SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

IN THE MATTER OF THE APPLICATION OF

JUDITH CLARK,

Petitioner,

FOR A JUDGMENT PURSUANT TO CPLR ARTICLE 78

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

Index No. 160965/2017

DECISION AND ORDER

HON. JOHN J. KELLEY

Petitioner Judith Clark's Article 78 petition challenging the denial of her application for parole release by Respondent New York State Board of Parole ("Parole Board") is granted.

Ms. Clark is incarcerated due to a 1982 conviction based on her role as a driver in an armed robbery of a Brinks armored truck in Rockland County that resulted in the death of three people, two of whom were police officers. Considering herself a revolutionary in conflict with the government, Ms. Clark represented herself at trial and, in rejecting the court's authority, mounted no real defense to the charges against her. Her participation at the trial was limited to opening and closing statements and calling a single witness. She even failed to oppose the district attorney's heightened sentence recommendation, thus paving the court's way to imposing three consecutive 25-years-to-life sentences. In sentencing Ms. Clark, the court expressed the view that, given her crimes and conduct during the trial, she was irredeemable.

By most accounts, however, Ms. Clark has undergone a remarkable transformation over the three decades during which she has been incarcerated. Ms. Clark has taken responsibility for her actions, expressed remorse, and tried to improve the lives of her fellow prisoners, as well as many others. In December 2016, Governor Andrew M. Cuomo granted Ms. Clark clemency

based on her "exceptional strides in self-development and improvement." In doing so, Governor Cuomo commuted Ms. Clark's sentence by reducing its minimum term to 35 years, thus making her eligible for parole for the first time in 2017.

On April 5 and April 6, 2017, Ms. Clark appeared before the Parole Board for an interview that lasted approximately eight hours. The topics of discussion included all aspects of Ms. Clark's case, such as her early life, her criminal history, the subject crime, her trial, her sentencing, her institutional history, and her record of achievement and service since her incarceration. On April 20, 2017, the Parole Board issued its decision denying Ms. Clark's parole application. The Parole Board acknowledged, and did not depart from, Ms. Clark's favorable risk assessment as documented by her achievements, good work, and expressions of remorse for her actions; nonetheless, the Parole Board stated that it "reviewed boxes of public support and boxes of opposition" and was "persuaded against release by opposing information that includes statements from former and current officials, and statements from survivors and affected parties found in pre-sentence records, sentencing minutes and other public records." In this regard, the Parole Board stated:

> "We do not depart from your favorable risk assessment; however, we do find that your release at this time is incompatible with the welfare of society as expressed directly by relevant officials and thousands of its members, and that it would deprecate the seriousness of your crimes as to undermine respect for the law. You are still a symbol of violent and terroristic crime. Perhaps the transcript of our interview will allow parties, whose statements we must consider, to read about your ongoing personal evaluation for the first time."

Although the Parole Board acknowledged that Governor Cuomo granted Ms. Clark clemency, it seemed to give little weight to the Governor's commutation of her sentence in light of the Parole Board's assertion that it considered substantial additional information that "was created and submitted pursuant to [its] unique process."

On December 11, 2017, Ms. Clark initiated this Article 78 proceeding, arguing that the Parole Board's decision is arbitrary, capricious, and contrary to established law. In opposition, the Parole Board argues that it properly considered all the relevant factors that the Executive Law requires.

The Executive Law enumerates eight statutory factors to determine whether an inmate should be released on parole, five of which are relevant to this case:

> "(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 ...; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated ...; (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 pre-sentence 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" (Executive Law § 259-i [2] [c] [A]).

A parole board must consider all eight factors, but it need not give equal weight to each factor (*see Matter of King v NYS Div. of Parole*, 190 AD2d 423, 431 [1st Dept 1993], *affd* 83 NY2d 788 [1994]). In addition, a parole board is obligated to ensure that only the relevant guidelines and factors are considered (*id.* at 791).

Although a parole board must consider the seriousness of the crime, it must, nevertheless, do so in conjunction with the other factors enumerated in the statute, and it must conduct a risk assessment analysis to determine if an inmate has been rehabilitated and is ready for release (*see* Executive Law § 259-c [4]). The legislative intent behind the Executive Law is to base parole board determinations on a forward-looking paradigm, rather than a backward-looking approach that focuses on the severity of the crime (*see Platten v NYS Bd. of Parole*, 47 Misc 3d 1059, 1062

[Sup Ct, Sullivan Cty. 2015]). Thus, a parole board may not deny parole based solely on the seriousness of the offense (*see Matter of Rossakis v NYS Bd. of Parole*, 146 AD3d 22 [1st Dept 2016]; *Matter of Ramirez v Evans*, 118 AD3d 707 [2d Dept 2014]; *Matter of Gelsomino v NYS Bd. of Parole*, 82 AD3d 1097, 1098 [2d Dept 2011]). Rather, a parole board must be guided by risk and needs principles, and it must explain its reasons with particularity if it departs from a risk-assessment analysis. (Division of Parole Regulations § 8002.2 [a]). If the record indicates that a parole board may have considered factors not permitted under the statute and related regulations, the court must remand the matter for a new interview before a new parole board (*King*, 83 NY2d at 791).

Ms. Clark asserts that the Parole Board (1) failed to abide by the statutory Executive Law factors by focusing almost exclusively on the severity of her crime and her conduct during her arrest and trial, and (2) improperly considered factors outside the scope of the statute and applicable regulations when it considered, *inter alia*, penal philosophy, the imposition of life sentences on those convicted of murder or felony murder, and the consequences to society if life sentences are not imposed.

Under the unique factual circumstances presented here, this court finds that the Parole Board acted arbitrarily and capriciously in its determination of Ms. Clark's parole application. For instance, instead of considering the views of the sentencing court, as is required by Executive Law § 259-i (2) (c) (A), the Parole Board impermissibly considered a letter from a different jurist who sits in the Ninth Judicial District. The Parole Board treated this letter as if it were from the sentencing court; however, this jurist did not preside over Ms. Clark's trial or sentencing. Instead, this jurist was assigned by the administrative judge to provide the "sentencing court's" view of Ms. Clark's parole eligibility because the sentencing judge retired

in 2008. The letter, which relied on hearsay from the trial judge and other unknown sources, strongly advocated against Ms. Clark's release:

> "[t]o release this defendant now, after the decades of suffering by the families of the victims, the verdict of a jury in a fair trial and the lawful, logical, appropriate and just sentence by the trial judge, who was conversant with all the facts, would make our judicial system the mockery that the defendant claimed it was all those years ago. Is it now the standard that a defendant who expresses remorse after no matter how many decades and no matter how heinous the crime, should then qualify for release, even though the harm and suffering caused by her acts still exist?"

The Parole Board should not have considered this letter. The Executive Law's reference to the sentencing court's recommendations means the recommendations of the judge who imposed the original sentence, not a jurist who did not participate in the original trial or sentencing. In this regard, although the sentencing judge may have retired, his opinion can be found in the same sentencing minutes that the Parole Board referenced in its interview with Ms. Clark and in its subsequent decision.

Moreover, in light of Governor Cuomo's grant of clemency, even the sentencing judge's opinion, similar to other aggravating circumstances from decades ago, has very limited value. The Governor's decision to exercise his constitutional authority to grant clemency, by its nature, removes the evaluation of Ms. Clark's original sentence from typical Executive Law considerations. This is because the Governor, in granting clemency, determined that in the 35 years after Ms. Clark's sentencing, circumstances developed that rendered the original sentence unduly harsh, such as her remorse and rehabilitation, which are things the sentencing judge could not have foreseen when he imposed the original 75-years-to-life sentence. This is not to say that commuting Ms. Clark's sentence minimizes the seriousness of her crimes, but it serves as a strong counterweight to both the views of the sentencing court, as expressed over 35 years ago, and the significance of the original sentence.

Further, the Parole Board erroneously considered letters that it wholesale failed to disclose to Ms. Clark in advance of her interview or subsequent administrative appeal. Subject to certain specific exceptions, an inmate is entitled to all the information contained in his or her parole case record (*see* Division of Parole Regulations § 8000.5 [c] [1]). The Executive Law provides that "[w]here a crime victim or victim's representative ... or other person submits to the parole board a written statement concerning the release of an inmate, the parole board shall keep that individual's *name and address* confidential" (Executive Law § 259-i [2] [c] [B]) (emphasis added). Section 259-k of the Executive Law allows the Parole Board to make rules to maintain the confidentiality of such records. Under this authority, Division of Parole Regulations (9 NYCRR) § 8000.5 (c) (2) (i) (a) (3) provides that access to case records can be restricted or withheld only to the extent that the records contain "any information which if disclosed might result in harm, physical or otherwise, to any person." Although the regulation provides a basis to redact or withhold records that could potentially endanger someone, no evidence in the record suggests that the Parole Board undertook any analysis to determine whether making appropriate redactions and thereafter disclosing the substance of these letters to Ms. Clark would have harmed anyone, let alone the community at large.[1] Without making such an analysis, it appears that the Parole Board arbitrarily decided to withhold all the letters that were submitted by the community. Doing so is contrary to both the letter and the spirit of the Executive Law and its regulations.

[1] Even if the information that the Parole Board relied on could have been properly designated as confidential, the Parole Board still was required by Division of Parole Regulations § 8000.5 to notify Ms. Clark of its intent to rely on such information (*see West v NYS Bd. of Parole*, 41 Misc 3d 1214[A] [Sup Ct, Albany Cty. 2013] (holding that confidential information, even when properly protected by the law, "certainly should not trump the statutory requirement that the [Parole] Board's decision reveal the factors and reasons it considered in reaching its decision, particularly when such consideration is mandated by statute"); *Matter of Almonor v NYS Bd. of Parole*, 16 Misc 3d 1126[A] [Sup Ct, NY Cty. 2007] ("Even though, on some occasions, 9 NYCRR 8000.5 allows respondent to consider materials ... protected from a parole applicant's review, respondent would not have the right to keep the fact of their consideration secret from the applicant").

As it stands, the Parole Board's decision provides few specifics about the details or content of the letters. For example, the Parole Board indicated that it considered a strong letter in opposition from a legislative body that sits more than 300 miles away from both the place of the crime and the current location of Ms. Clark's incarceration. Such a letter, sent to the Parole Board in what only can be presumed as being in an official capacity, should fall outside the scope of reasonable community opposition; yet, the Parole Board read it into the record and appeared to have given it serious weight, nonetheless (*see* Appendix 168-169). Furthermore, at a minimum, the Parole Board has not explained why the numerous letters of support from those who personally know Ms. Clark are outweighed by the opposition letters submitted by the community. The Parole Board must be careful not to be swayed by appeals that include considerations outside the scope of the factors outlined in the Executive Law (*see e.g. King*, 83 NY2d at 791). Without the court knowing the substance of these letters, the Parole Board's own words and stated reliance on letters from public officials and others opposed to Ms. Clark's release strongly signals that the Parole Board considered factors that are impermissible under the statute, such as penal philosophy. As a result, this court finds from this record that the Parole Board's decision was arbitrary, capricious, and contrary to law.

Accordingly, it is hereby

ORDERED that the petition is granted to the extent of setting aside the determination by the Parole Board denying Ms. Clark's parole; and it is further,

ORDERED that the matter is remitted to the respondent for a new interview before a new panel of the Parole Board; and it is further,

ORDERED that said interview must be conducted within 60 days of the date of this court's decision and order, and the Parole Board is directed to issue a parole decision within 30 days of the date of that interview.

Dated: April 26, 2018

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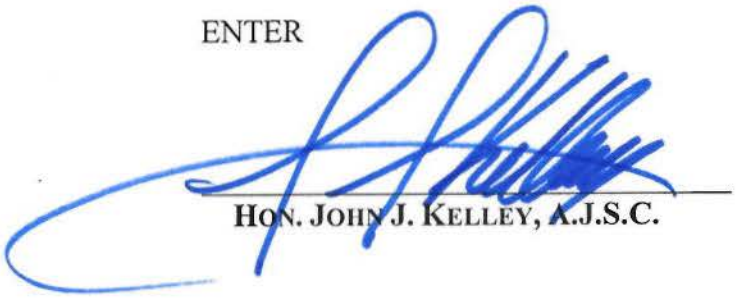

HON. JOHN J. KELLEY, A.J.S.C.