Matter of Nestman v New York State Dept. of Corr. & Community Supervision
2017 NY Slip Op 31987(U)
September 6, 2017
Supreme Court, Franklin County
Docket Number: 2017-48
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
ROBERT NESTMAN, #95-A-2547,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2017-0024.05
INDEX #2017-48

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,
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 Robert Nestman, verified and supported by the Petitioner's Affidavit in Support of Order to Show Cause, both sworn to on January 2, 2017. Both of these documents were filed in the Franklin County Clerk's Office on January 23, 2017. Petitioner, who is an inmate at the Bare Hill Correctional Facility, appears to be challenging the denial of release to parole supervision.

The Court previously issued an Order to Show Cause on January 30, 2017. The Court received and reviewed respondent's Answer and Return verified on April 18, 2017, including confidential Exhibit B. In response thereto and in further support of the petition, the Court reviewed the Reply received on June 12, 2017[1].

On March 29, 1995, following his guilty plea of two counts of Murder in the Second Degree, the Ulster County Court sentenced petitioner to an indeterminate term of incarceration of twenty (20) years to life. The petitioner re-appeared before the Parole

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[1] By letter dated April 24, 2017, petitioner requested an adjournment to reply and same was granted by letter-order dated May 1, 2017.

Board on July 12, 2016.[2] Following that appearance, Petitioner was denied discretionary parole release and it was directed that he be held for an additional 24 months. The parole denial determination reads as follows:

> "Parole is denied. After a personal interview, record review and deliberation, it is the determination of this panel that your release is incompatible with the welfare and safety of the community. This panel has reviewed your instant offenses of Murder 2nd - 2 counts, wherein you in-concert killed your father and your father's neighbor. Your actions were a total disregard for human life.
>
> This panel notes your positive institutional record, release plans, case plan, as well as an assessment of your risk and needs for succes (*sic*) on parole.
>
> However, when considering all relevant factors, discretionary release is not warranted. Your release would so deprecate the serious nature of your crime as to undermine respect for the law. The panel notes your remorse and insight, however, shooting your father and his neighbor was a brutal and selfish act." Resp. Ex. H.

An appeal of the Parole Board's determination was filed by the petitioner on August 1, 2016. Thereafter, the Board of Parole Appeals Unit upheld the determination on November 30, 2016.

Petitioner challenges the denial of parole release alleging that the Parole Board's determination was arbitrary and capricious, as well as irrational bordering on impropriety. The petitioner argues that the Parole Board must give the inmate guidance in adjusting his future behavior and that the Parole Board failed to do so. The petitioner argues that the Parole Board failed to consider any of the other criteria pursuant to Executive Law §259-i, including the COMPAS risk assessment, and instead focused solely on the instant offense.

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[2] The petitioner's initial appearance before the Parole Board was in July of 2014. After administrative review, a *de novo* hearing was ordered. The petitioner appeared again in August of 2015. After administrative review, a *de novo* hearing was again ordered. The petitioner appeared again in April of 2016 prior to appearing on July 12, 2016.

The petitioner asserts that while there is no constitutional right to parole, that there is a liberty interest created by the expectation of early release from prison. The petitioner further argues that he is unable to change the underlying offense for which he was sentenced, but by the Parole Board failing to consider anything other than the instant offense, it creates a situation for which the petitioner will never be released. The petitioner further asserts that the successive parole denials is tantamount to a resentencing. In addition, the petitioner argues that the Parole Board failed to sufficiently detail the determination for purposes of knowing what they based the decision on.

Preliminarily, the respondent argues that inasmuch as the petitioner failed to raise his argument that the Parole Board failed to provide adequate future guidance in his administrative appeal, such argument is waived in this matter. "It is a basic tenant of administrative law that one who objects to the actions of an administrative agency must exhaust available administrative appeals prior to seeking judicial relief." *See, Matter of Smith v. Vann*, 16 Misc.3d 1132(A) *citing Watergate II Apartments v. Buffalo Sewer Authority*, 46 NY2d 52.

Further, respondent argues that the petition should be dismissed in its entirety insofar as the Parole Board is afforded great discretion in determining parole release provided that the Board considers the relevant factors as described in Executive Law §259-i(c)(A). Respondent argues that there is no requirement that the Parole Board give equal weight to each factor nor does an inmate's exemplary institutional record compel parole release. The respondent argues that the petitioner's maximum sentence was life and therefore, the time between Parole Board appearances is not excessive nor tantamount to a resentencing. Finally, the respondent asserts that there is a presumption that the Parole Board will comply with the statutory guidelines and the petitioner has not met the burden

of proving that the Parole Board's decision was an abuse of discretion, arbitrary and capricious, or irrational.

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.

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, reviews of the Parole Board Report and transcript of petitioner's July 12, 2016 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's institutional behavioral history, vocational and therapeutic programming records. It was noted that the COMPAS ReEntry Risk Assessment Instrument score was relatively low for prison misconduct and family support, which means he is a high risk without support. The Board took note of the petitioner's sentencing minutes where the prosecutor specifically addressed the Parole Board (in the future) to express that the petitioner did not show remorse or responsibility. It was noted that the petitioner was 32 years old at the time of the offense. The Parole Board also discussed at length the petitioner's vocational training.

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 crime underlying Petitioner's incarceration, particularly inasmuch as the petitioner describes the two separate homicides accidental. It is noted that the PSI categorized the homicide of the petitioner's father to be an execution, as well as the fact that the petitioner brought the rifle stolen from the second victim, Douglas Pfleger, into Mr. Pfleger's home because he could not obtain a baseball bat to use upon the decedent. In addition, the petitioner finally agreed to academic programming, with his own conditions and stipulations, two weeks prior to the Parole Board appearance despite having had the opportunity to avail himself of offered educational opportunities during the twenty-two (22) years he had been incarcerated. *See Neal v. Stanford,* 131 AD3d 1320 and *Confoy v. New York State Division of Parole*, 173 AD2d 1014.

While the petitioner asserts that the Parole Board's denial of parole is tantamount to a re-sentence, the argument is without merit. *See Shark v. New York State Division of Parole*, 110 AD3d 1134, 1135, *lv dismissed* 23 NY3d 933; *see also Smith v. New York State Division of Parole*, 81 AD3d 1026. The remaining assertions by the petitioner need not be addressed herein.

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: September 6, 2017
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court