Matter of Murphy v Dennison
2007 NY Slip Op 30524(U)
March 30, 2007
Supreme Court, Albany County
Docket Number: 0665106/2007
Judge: George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT   COUNTY OF ALBANY

In The Matter of MICHAEL T. MURPHY,

Petitioner,

-against-

ROBERT DENNISON, CHAIRMAN,
N.Y.S. BOARD OF PAROLE,

Respondent,

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

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-06-ST7207 Index No. 6651-06

Appearances:

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Fishkill Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated March 21, 2006 to deny petitioner discretionary release on parole. Petitioner is serving a term of nine years to life upon conviction of the crime of murder in the second degree. The petitioner points out that he is now thirty five years of age, and has been incarcerated since he was fourteen. He indicates that the crime for which he was convicted occurred on April 12, 1984, when he was thirteen years of age. His victim, ten year old Andrew Pitkin had been playing roughly with his ten year old sister. Petitioner, after hearing his sister yelling, intervened and directed Andrew to walk the dogs. Andrew proceeded to do so. One of the dogs caused Andrew to fall and Andrew allegedly kicked the dog. The petitioner and Andrew started fighting. While they were fighting, the petitioner "lost control", pulled out a farm knife and stabbed Andrew.

Among the many arguments which he raises, petitioner maintains that the Parole Board focused exclusively on the crime for which he was convicted, to the exclusion of all other factors. He asserts that the Parole Board relied upon erroneous information. Specifically, he indicates that parole release decision notice recited that he has served only 171 months in prison, when he has actually served 250 months. He indicates that his incarceration has exceeded the maximum guideline range (see, 9 NYCRR 8001.3 [a]). In his view, the Parole Board failed to consider all statutory factors under Executive Law § 259-i,

and has usurped the function of the sentencing court. He attributes the determination to an informal policy adopted by Governor Pataki to deny parole to violent felony offenders.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Parole is denied due to the violent nature and circumstances of the instant offense, Murder 2nd (JO) wherein you stabbed or slashed your 10 year old victim over 30 times and caused his death. We note your positive programming and disciplinary reward but find more compelling your total disregard for human life, as indicated by your brutal and fatal attack upon this boy. All considered leads us to conclude that parole cannot be granted. To do so would depreciate the serious nature of this offense and undermine respect for the law."

As stated in Executive Law §259-i (2) (c) (A):

> "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 guidelines 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 interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate []; (v) any statement made to the board by the crime victim or the victim's

representative []" (Executive Law §259-i [2] [c] [A]).

"Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable" (Matter of Sinopoli v New York State Board of Parole, 189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v. New York State Bd. of Parole, 157 AD2d 944). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (see Ristau v. Hammock, 103 AD2d 944 [3rd Dept., 1984]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, the Parole Board inquired with regard to what he had accomplished in a positive manner over the past two years. Attention was paid to such factors as his disciplinary record, and his plans upon release. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Whitehead

v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Weir v. New York State Division of Parole, 205 AD2d 906, 907 [3rd Dept., 1994]; Matter of Sinopoli v. New York State Board of Parole, 189 AD2d 960, supra; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see Matter of Farid v Travis, supra; Matter of Moore v New York State Bd. of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3rd Dept., 2001]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New

York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

With respect to petitioner's argument that the Parole Board relied upon erroneous information (that petitioner had been incarcerated for only 171 months when, in reality, he had been incarcerated for at least 250 months), the Court observes that the transcript of the parole interview reveals that the Board was aware that at the time petitioner committed the crime he was age 13, and he is now 35 years of age. In addition, Part I of the Inmate Status Report (which was considered by the Parole Board) indicates that the petitioner was convicted on June 18, 1985; and that he had served 268 months total time. Morever, as pointed out by the respondent, the erroneous reference to 171 months is contained in the parole release decision notice, which post-dates the actual parole determination. In other words, it was never considered by the Parole Board. The Court finds the argument to be without merit.

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing, are conclusory and without merit (see Matter of Bockeno v New York State Parole Board, 227 AD2d 751 [3rd Dept., 1996]; Matter of Crews v New York State Executive Department Board of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A, [Sup. Ct., Westchester Co., 2006]). Moreover, it is well settled that the Parole Board is 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]; Matter of Cody v Dennison, 33 AD2d 1141, 1142 [3rd Dept., 2006] lv denied ___ NY2d ___ [January 16, 2007]).

The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New York Division of Parole, 294 AD2d 726 [3rd Dept., 2002]; Matter of Jones v Travis, 293 AD2d 800, 801 [3rd Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3rd Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3rd Dept., 2006]).

With respect to petitioner's argument that he has served time in excess of the guideline range (see, 9 NYCRR 8001.3), the guidelines "are intended only as a guide, and are not a substitute for the careful consideration of the many circumstances of each individual case" (see, 9 NYCRR 8001.3 [a]; Matter of Tatta v State of New York Division of Parole, 290 AD2d 907, 908 [Third Dept., 2002]). Thus, the Court finds that this does not serve as a basis to overturn the Board's decision.

The Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see, Matter of Tatta v State of New York, Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

The Court has reviewed petitioner's remaining arguments and finds them to be without

merit.

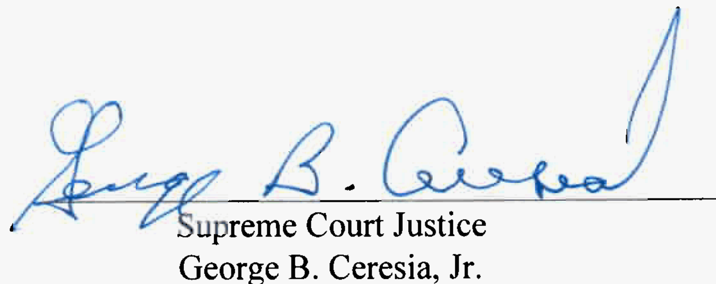
The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The petition must therefore be dismissed.

Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER



Dated: March 30, 2007
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated October 24, 2006, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated January 12, 2007, Supporting Papers and Exhibits