

Matter of Lee v New York State Div. of Parole

2007 NY Slip Op 31816(U)

June 25, 2007

Supreme Court, Albany County

Docket Number: 0017407/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of RAJAHN LEE,

Petitioner,

-against-

NEW YORK STATE DIVISION 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 # 01-07-ST7437 Index No. 174-07

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Camp Georgetown Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated March 28, 2006 to deny petitioner discretionary release on parole. Petitioner is serving a term of 1 ½ years upon a conviction of criminal possession of a controlled substance 5th degree, a second felony offense. Petitioner was on parole at the time he committed the instant offense. The controlling offense and conviction was for criminal sale of a controlled substance 3rd degree for which he received a sentence of five to ten years.

The petitioner contends that the Parole Board's decision contained no factual support or analysis. He maintains that the Parole failed to consider the appropriate factors under Executive Law § 259-i. He argues that he has completed every program and vocation required of him. He asserts that the Parole Board failed to consider the guidelines set forth under 9 NYCRR 8002.3 (a). He describes his crimes as non-violent and victimless. He characterizes himself as "a temperate and insightful individual working hard while in prison to understand his drug addiction and to reign in whatever instincts precipitated his crime." He maintains that the Parole Board failed to consider his extraordinary institutional and rehabilitative record. In petitioner's view a properly functioning Parole Board would have released him. The petitioner also criticizes the Parole Board for not providing guidance so that he could be released on parole in the future. He maintains that the Parole Board improperly relied solely upon the seriousness of his crimes in rendering its determination. He argues that there were no aggravating or egregious factors present here to preclude his

release.

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

“Despite receipt of an Earned Eligibility Certificate, parole is denied for the following reasons: After careful review of your record and this interview, it is the determination of this panel that if released at this time there is a reasonable probability that you would not live and remain at liberty without violating the law and your release at this time is incompatible with the welfare and safety of the community. The decision is based on the following factors: The I.O. represents a continuation of your pattern of drug related offenses resulting in this being your third state term of incarceration. You have violated probation and parole in the past. All factors considered leads this panel to conclude that you are unacceptable (sic) candidate for release to the community.”

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, attention was paid to such factors as petitioner's institutional programming, his disciplinary record, and his plans upon release. Near the end of the interview, the petitioner was afforded an opportunity to make comments on his own behalf, and did so. 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 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).

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 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 8 NY3d 802 [2007]; Matter of Burress v Dennison, 37 AD3d 930 [3rd Dept., 2007]).

It is well settled that receipt of a certificate of earned eligibility does not serve as a guarantee of release (see, People ex rel. Justice v Russi, 226 AD2d 821 [3rd Dept., 1996]; Matter of Flecha v Russi, 221 AD2d 780 [3rd Dept., 1985]; Matter of Walker v Russi, 176 AD2d 1185 [3rd Dept., 1991] lv dismissed 79 NY2d 897). In addition, 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).

Petitioner's argument that the Parole Board is required to advise petitioner and/or provide guidance with regard to the programs he should take, or rehabilitative efforts he should engage in to increase his chance for release at a future parole interview has no merit (see Executive Law § 259-i [2] [a]; 9 NYCRR § 8002.3; Boothe v Hammock, 605 F2d 661 [2nd Cir, 1979]; Matter of Freeman v New York State Division of Parole, 21 AD3d 1174 [3rd Dept., 2005]).

With respect to petitioner's argument concerning 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 [3rd Dept., 2002]). Thus, the Court finds that this does not serve as a basis to overturn the Board's decision.

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.

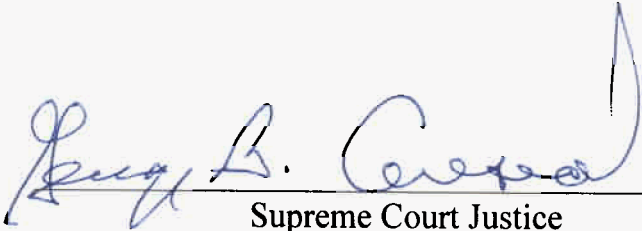
Accordingly, it is

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: June 25, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated January 18, 2007, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated April 6, 2007, Supporting Papers and Exhibits
3. Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General dated April 6, 2007
4. Petitioner's Opposition To Respondent's Motion To Dismiss Petition