

Matter of Brathwaite v Lemons

2009 NY Slip Op 32736(U)

September 10, 2009

Supreme Court, Albany County

Docket Number: 1638-09

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of CHRIS BRATHWAITE,

Petitioner,

-against-

HENRY LEMONS, JR., As the Acting
Chairman and Chief Executive Officer
of the New York State Board and
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 # 01-09-ST0114 Index No. 1638-09

Appearances: Chris Brathwaite
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Hudson Correctional Facility, has commenced the instant

CPLR Article 78 proceeding to review a determination of respondent dated May 5, 2008 to deny petitioner discretionary release on parole. Petitioner is serving a term of four to twelve years for the crime of robbery, second degree and fifteen years to life for the crime of murder, second degree. Among the many arguments set forth in the petition, petitioner contends: (1) that the Parole Board's determination is so arbitrary and capricious that it violated fundamental due process and lawful procedure; (2) that the Parole Board violated its statutory mandate by not fully and fairly examining all of the available and relevant information; (3) that it failed to provide an adequate and meaningful statement of the reasons for its determination; and (4) that he was denied due process and equal protection of the law because a Commission sitting on the Board was not qualified.

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

"Parole is again denied after a review of the record and interview. The panel has determined that your release at this time would so deprecate the serious nature of the crime as to undermine respect for the law.

"You continue to serve time for killing a victim during the course of a robbery. Only a few weeks later you again robbed another victim. Both of these victims were attempting to use an ATM machine at a bank when approached by you and your codefendants. The first victim was left to die in a pool of blood after being shot in the neck.

"The Board notes your program and educational accomplishments as well as your letters of support.

"More compelling, however, is the brutal and violent murder of an unprovoked victim and your callousness in robbing a second victim after committing such a heinous crime. Your crimes show

a disregard for the welfare of society.

“As such, your release at this time is inappropriate.”

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 De La Cruz v Travis, 10 AD3d 789 [3d Dept., 2004]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3d Dept., 2001]). If the parole board's decision is made in accordance with the statutory requirements, the board's determination is not subject to judicial review (Matter of De La Cruz v Travis, supra). 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 and education, 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 Siao-Pao, 11 NY3d 773 [2008]; 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 Wise v New York State Division of Parole, 54 AD3d 463 [3rd Dept., 2008]).

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 regard to petitioner’s arguments concerning the alleged violation of his right to due process, the Court first observes that there is no inherent right to parole under the constitution of either the United States or the State of New York (see Greenholtz v Inmates of the Nebraska Penal and Correctional Complex, 442 US 1, 7 [1979]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 73, supra). It has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate expectation of, release; therefore, no constitutionally protected liberty interests are implicated by the Parole Board’s exercise of its discretion to deny parole (see Barna v Travis, 239 F3d 169, 171 [2^d Cir., 2001]; Marvin v Goord, 255 F3d 40, 44 [2^d Cir., 2001]; Boothe v Hammock, 605 F2d 661, 664 [2^d Cir., 1979]; Paunetto v Hammock, 516 F Supp 1367, 1367-

1368 [SD NY, 1981]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 75-76, *supra*, Matter of Gamez v Dennison, 18 AD3d 1099 [3rd Dept., 2005]; Matter of Lozada v New York State Div. of Parole, 36 AD3d 1046, 1046 [3rd Dept., 2007]). The Court, accordingly, finds no due process violation.

With respect to petitioner's equal protection argument, the Fourteenth Amendment of the Federal Constitution forbids States from denying to any person within their jurisdiction the equal protection of the laws, but does not prevent the States from making reasonable classifications among persons (Western & S.L.I. Co. v Bd. of Equalization, 451 US 648, 68 L Ed 2d 514, 523 101 S Ct 2070 [1981]). Where the action under review does not involve a suspect class or fundamental right, it is not subject to strict judicial scrutiny, but rather is examined using the rational basis standard to determine if the action violated the equal protection clause (see, Massachusetts Bd. of Retirement v Murgia, 427 US 307, 49 L Ed 2d 520, 524, 96 S Ct 2562 and Maresca v Cuomo, 64 NY2d 242, 250). In this instance there is simply no evidence of either selective or disparate treatment or that the respondent's determination was motivated by impermissible considerations (see Giordano v City of New York, 274 F3d 740, 751 [2nd Cir., 2001]). In addition, because "New York courts addressing a state equal protection claim will ordinarily afford the same breadth of coverage conferred by federal courts under the US Constitution in the same or similar matters" (Brown v State of New York, 45 AD3d 15, 20-21 [2007 [3rd Dept., 2007], quoting Brown v State of New York, 9 AD3d 23, 27 [2004]), the Court discerns no violation of NY Const art 1 § 11. The Court finds the argument to have no merit.

Petitioner's contentions concerning Commissioner Arena's qualifications do not operate to undermine her lawful authority as a duly appointed Parole Commissioner under Executive Law § 259-b, and do not demonstrate an infringement of either his due process rights or his right to equal protection under the law.

The Court has reviewed petitioner's remaining arguments and contentions 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.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

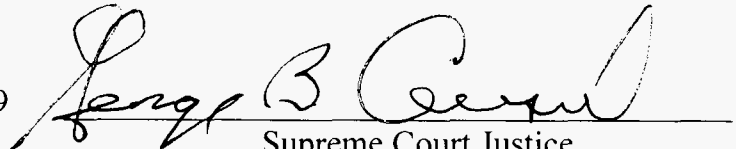
Accordingly, it is

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

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: September 10, 2009
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated March 11, 2009, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated May 12, 2009, Supporting Papers and Exhibits