

Matter of Wilson v New York State Bd. of Parole

2010 NY Slip Op 32662(U)

September 2, 2010

Supreme Court, Albany County

Docket Number: 1410-10

Judge: George B. Ceresia

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STATE OF NEW YORK
 SUPREME COURT COUNTY OF ALBANY

In The Matter of DOMINGO WILSON, 94-A-4488

Petitioner,

-against-

THE NEW YORK STATE 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 # 01-10-ST1335 Index No. 1410-10

Appearances: Domingo Wilson
 Inmate No.94-A-4488
 Petitioner, Pro Se
 Woodbourne Correctional Facility
 99 Prison Road, P.O. Box 1000
 Woodbourne, New York 12788-1000

Andrew M. Cuomo
 Attorney General
 State of New York
 Attorney For Respondent
 The Capitol
 Albany, New York 12224
 Cathy Y. Sheehan,
 Assistant Attorney General
 of Counsel

DECISION/ORDER/JUDGMENT

The petitioner, an inmate at Woodbourne Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated February 10, 2009 to deny petitioner discretionary release on parole. Petitioner is serving a term of two and one half years to life after being sentenced as a persistent violent felony offender for the

crime of attempted criminal possession of a weapon in the third degree. Among the many arguments set forth in the petition, the petitioner contends that the Parole Board did not correctly consider all of the factors set forth in Executive Law § 259-i. He points out that he has been denied parole release on seven prior occasions. He maintains that the Parole Board has improperly re-sentenced him in violation of the double jeopardy clause. In his view his state and federal due process and equal protection rights have been violated. He contends that the Parole Board focused almost exclusively on his past crimes, while giving short shrift to his efforts at rehabilitation. Petitioner states that the Board failed to obtain or consider his sentencing minutes, in violation of Executive Law 259-i (2) (c) (A) . He maintains that the Parole Board failed to provide guidance with regard to what further rehabilitative programs he should complete before his next appearance.

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

“Despite your receiving an earned eligibility certificate, parole is denied. After careful review of your record, your personal interview and due deliberation, it is the determination of this panel that if released at this time there is a reasonable probability that you would not live at liberty without violating the law and your release at this time is incompatible with the welfare and safety of the community. This decision is based upon the following factors: You appear before this panel with a serious instant offense of attempted criminal possession of a weapon in the third degree, wherein you had a loaded revolver and shot it on a public street. This crime was committed while you were on parole. This crime culminates a criminal history dating back to 1980 and includes convictions of attempted murder two and criminal possession of a weapon. In addition, you have a poor record of adjustment while in prison, which includes multiple tier-2 infractions and multiple tier-3 infractions, including three tier-2s since your last board interview. Consideration has been given to your receipt of an

Earned Eligibility Certificate, program completion, and satisfactory behavior; however, your release at this time is denied.”

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 his disciplinary record. 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 Young v New York Division of Parole, 74 AD3d 1681 [3rd Dept., 2010]; 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).

It is well settled that receipt of a certificate of earned eligibility does not serve as a guarantee of release (Matter of Dorman v New York State Board of Parole, 30 AD3d 880 [3rd Dept., 2006]; Matter of Pearl v New York State Division of Parole, 25 AD3d 1058 [3rd Dept., 2006]).

Petitioner’s claims that the determination to deny parole is tantamount to a re-sentencing, in violation of the Double Jeopardy Clauses’s prohibition against multiple punishments 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]). The fact that an inmate has served his or her minimum sentence does not confer upon the inmate a protected liberty interest in parole release (see Matter of Motti v Alexander, 54 AD3d 1114, 1115 [3rd Dept.,

2008]). 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]).

With regard to petitioner's arguments concerning an 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 [2d Cir., 2001]; Marvin v Goord, 255 F3d 40, 44 [2d Cir., 2001]; Boothe v Hammock, 605 F2d 661, 664 [2d 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 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, *supra*, 605 F2d 661 [2nd Cir, 1979]; Matter of Freeman v New York State Division of Parole, 21 AD3d 1174 [3rd Dept., 2005]).

With regard to the Parole Board's failure to consider the minutes of petitioner's sentencing (as required under Executive Law 259-i [2] [c] [A] last sentence, which makes

reference to the provisions of Executive Law § 259-i [1] [a]), the respondent has submitted a copy of the sentencing minutes. Notably, the sentencing judge did not make any recommendation with regard to whether the petitioner should be paroled upon serving his minimum sentence. As such, the failure to consider the sentencing minutes was harmless error (see Davis v. Lemons, 73 AD3d 1354 [3rd Dept., 2009]; Cruz v. Alexander, 67 AD3d 1240 [3rd Dept., 2009]; Valerio v. New York State Div. of Parole, 59 AD3d 802 [3rd Dept., 2009]).

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

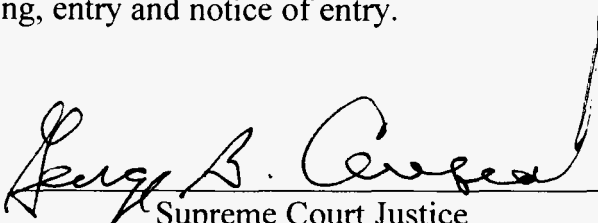
ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

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 2, 2010
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated March 11, 2010, Petition, Supporting Papers, and Exhibits
2. Respondent's Answer dated May 14, 2010, Supporting Papers and Exhibits

STATE OF NEW YORK
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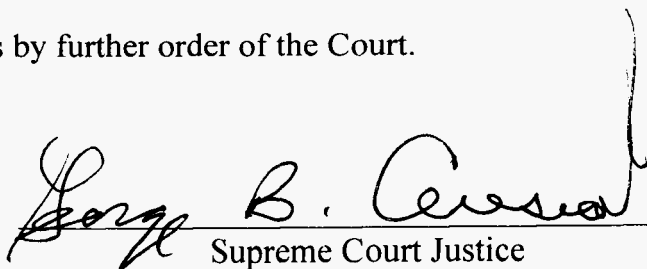
SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit B, Pre-Sentence Investigation Report, respondent's Exhibit E, Confidential Portion of Inmate Status Report, and respondent's Exhibit G, Confidential Portion of Inmate Status Report. For good cause shown, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: September 2, 2010
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.