

Matter of Thomas v New York State Div. of Parole

2011 NY Slip Op 30624(U)

March 1, 2011

Supreme Court, Albany County

Docket Number: 7331-10

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of WILLIAM THOMAS,

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 # 01-10-ST2077 Index No. 7331-10

Appearances: William Thomas
Inmate No. 08-R-4126
Petitioner, Pro Se
Wallkill Correctional Facility
P.O. Box G
Prison Road
Wallkill, NY 12589-0286

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Adam W. Silverman,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Wallkill Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated October 6, 2009 to deny petitioner discretionary release on parole. The petitioner was convicted, as a second

felony offender, of identity theft in the second degree and grand larceny in the fourth degree, each with indeterminate concurrent sentences of one and one half to three years. Among the arguments set forth in the petition, petitioner contends that during his incarceration his overall institutional adjustment has been excellent. He points out that he has received a certificate of earned eligibility. He indicates that he has completed the Alcohol and Substance Abuse training and Transitional Services, Phase 1 Program. He has completed vocational training in Horticulture. He plans to join the Father Young program when released. The petitioner argues that the Parole Board's determination is not supported by the facts. He asserts that the Parole Board improperly relied upon the seriousness of the crimes for which he was convicted, without considering other statutory factors. He criticizes the Parole Board for usurping the role of the sentencing judge in holding him longer than the minimum term of imprisonment. The petitioner contends that the Parole Board gave no consideration to his rehabilitative efforts, and failed to consider the criteria set forth in Executive Law § 259-I (2) (c) (A).

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

“Merit release is denied. Hold 24 months. Next Appearance, 10/11.

“Parole is denied. After a personal interview, record review, and deliberation, this panel finds your release is incompatible with the public safety and welfare of the community. You appeared before this panel for the instant offenses of identity theft 2nd and grand larceny 4th. Your criminal history reflects prior felony convictions. This repeated unlawful behavior is a concern for this panel. The panel notes your positive programming with merit and earned eligibility certificate and fair disciplinary record. However despite these accomplishments, when considering all relevant factors, release

is not warranted at this time. There is a reasonable probability that you would not live a law abiding life.”

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, his disciplinary record, his acquisition of a merit certificate, and his plans upon release. He was afforded ample opportunity during the interview to present his arguments in support of his 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 (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, 1682 [3d 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]).

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).

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

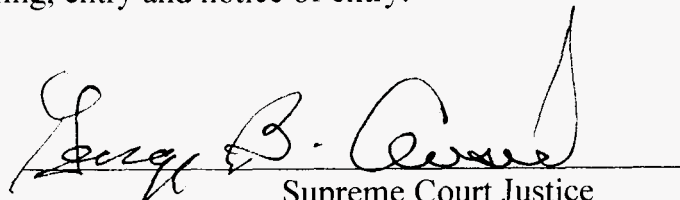
ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

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: March 1, 2011
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated November 4, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated January 4, 2011, Supporting Papers and Exhibits

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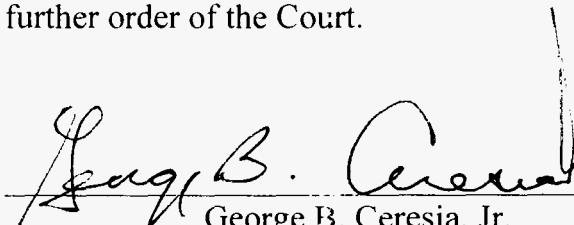
SEALING ORDER

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, Presentence Investigation Report, and respondent's Exhibit D. Confidential Portion of Inmate Status Report, 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: March 1, 2011
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice