Matter of Montgomery v New York State Bd. of Parole
2013 NY Slip Op 31763(U)
July 10, 2013
Supreme Court, Albany County
Docket Number: 6715-12
Judge: George B. Ceresia Jr

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of ARTHUR MONTGOMERY,

Petitioner,

-against-

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 # 01-13-ST4326 Index No. 6715 -12

Appearances: Arthur Montgomery
Inmate No. 83-A-6695
Petitioner, Pro Se
Gouverneur Correctional Facility
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Gouverneur, NY 13642-0370

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Gouverneur Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated October 11, 2011 to deny petitioner discretionary release on parole. The petitioner's current

incarceration is for the following crimes: 2nd degree murder, two counts (each 25 years to life); 1st degree attempted robbery, two counts (each 5 to 15 years); promoting prison contraband, two counts (each 2 ½ to 5 years). All are being served concurrently to each other. Among the many arguments set forth in the petition, petitioner points out that this is his fourth appearance before the Parole Board. He indicates that in 1989 he earned his GED degree while at Green Haven Correctional Facility. He then entered Dutchess Community College. However before he could complete his studies, he was transferred to Auburn Correctional Facility. He then enrolled in Cayuga Community College where, in 1993, he earned an Associates Degree in liberal arts. After being transferred to Sing Sing Correctional Facility he completed two more years of education and earned a Bachelors Degree in behavioral science from Mercy College. In 2007 he completed ASAT and ART, phases one, two and three. In 2008-2009 he worked in the prison law library at Franklin Correctional Facility. He taught HIV classes and worked in the prison tailor shop, and has held various jobs and completed various programs. He indicates that he has written six novels since 2003 and is working on an autobiography and a book on bullying. He submitted what he refers to as a "letter of remorse", which chronicles portions of his life. The petitioner criticizes the Parole Board for failure to consider his many accomplishments. In his view the Parole Board failed to engage in a risk and needs assessment, as required under 2011 amendments to the Executive Law (see L 2011 ch 62, Part C, Subpart A, § 38-b, amending Executive Law 259-c [4]). He indicates that the Parole Board did not have his sentencing minutes before it, but that in any event the sentencing judge did not recommend that he be held beyond the minimum term of his sentence. In his view, the Board failed to consider the appropriate

factors under Executive Law 259-i. Rather, it focused almost entirely on the serious nature of his crimes.

Counsel for the respondent argues that the Parole Board satisfied all of the requirements of Executive Law 259-i (2) (c). He points out that during the parole interview, the Parole Board discussed petitioner's pre-sentence investigation report, the instant offenses, his criminal history, his programming, disciplinary record and plans upon release. He indicates that the inmate status report reviewed the foregoing factors, as well. Counsel maintains that the Parole Board engaged in the equivalent of a risk and needs analysis as required under Executive Law 259-c (4) by evaluating such factors as petitioner's institutional record, program goals, accomplishments, academic achievements, vocational education training, work assignments, therapy, interpersonal relationships with staff and inmates, and release plans. As part of the foregoing argument, it is asserted that the inmate status report, in effect, incorporates risk and needs principles in its analysis of the appropriateness of petitioner's release.

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

> "After a 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, your release at this time is incompatible with the welfare and safety of the community, and will so deprecate the seriousness of this crime as to undermine respect for law. This decision is based upon the following factors: You stand convicted of the following serious offenses of murder in the second degree, two counts, attempted robbery in the first degree, two counts, and promoting prison contraband. In the first instance, you caused the death of a victim by stabbing her numerous times in the neck, chest,

> abdomen, and back. This was a pre-arranged meeting where you intended to steal money and cocaine. You continue to get tickets in prison, the latest being a Tier III for a sex offense. Consideration has been given to you program completion, however, your release at this time is denied."

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]). 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]; see also Matter of Graziano v Evans, 90 AD3d 1367, 1369 [3d Dept., 2011]). 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]).

As relevant here, the 2011 amendments to the Executive Law (see L 2011 ch 62, Part C, Subpart A, § 38-b, et seq.) made two changes with respect to how parole determinations are made. First, Executive Law § 259-c was revised to eliminate mention of Division of Parole guidelines (see 9 NYCRR 8001.3 [a]), in favor of requiring the Division of Parole to rely upon criteria that would place greater emphasis on assessing the degree to which inmates have been rehabilitated, and the probability that they would be able to remain crime-free if released (see Executive Law 259-c [4]). Said section now recites: "[t]he state board of parole shall [] (4) establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to

measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision" (Executive Law 259-c [4], enacted in L 2011 ch 62, Part C, Subpart A, § 38-b). This amendment was made effective six months after its adoption on March 31, 2011, that is, on October 1, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49-[f]). In the second change, Executive 259-i (2) (c) was amended to incorporate into one section the eight factors which the Parole Board was to consider in making release determinations (see L 2011 ch 62, Part C, Subpart A, § 28-f-1). This amendment was effective immediately upon its adoption on March 31, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49). Notably however, it did not result in a substantive change in the criteria which the Parole Board should consider in rendering its decision.

Andrea W. Evans, the Commissioner of DOCCS, implemented the provisions of Executive Law § 259-c (4) through issuance of a DOCCS Memorandum dated October 5, 2011. She indicated in the Memorandum that members of the Parole Board were working with DOCCS staff to develop a transition accountability plan, or "TAP". It is indicated that TAP incorporates risk and needs principles, and will provide a meaningful measurement of an inmate's rehabilitation. According to Commissioner Evans, the TAP instrument would replace the inmate status report. In the same Memorandum, it is indicated that the Parole Board had been trained in usage of the Compas Risk and Needs Assessment tool, so that members of the Board could understand the interplay between the Compas instrument and the TAP instrument.

Of note in this instance, the Third Department Appellate Division recently had

opportunity to rule on a case having close similarities to the case at bar. In Matter of Garfield v Evans (___ AD3d ___, 2013 NY Slip Op 5029, [July 3, 2013]), the inmate's parole interview occurred in October 2011, just after the effective date of Executive Law § 259-c (4). As here, the inmate alleged that the Parole Board failed to utilize the COMPAS Risk and Needs Assessment instrument[1]. The Appellate Division stated:

> "Significantly, Executive Law § 259-c (4) requires that the Board 'establish written procedures for its use in making parole decisions as required by law,' and the Board acknowledges that the statute requires it to incorporate risk and needs principles into its decision-making process. According to the record, the Board was trained in the use of the COMPAS instrument prior to petitioner's hearing. Moreover, the Board acknowledges that it has used the COMPAS instrument since February 2012 and will use it for petitioner's next appearance. Under these circumstances, we find no justification for the Board's failure to use the COMPAS instrument at petitioner's October 2011 hearing. Accordingly, we agree with petitioner that he is entitled to a new hearing.[]" (id.).

The Garfield case is directly applicable to the situation at bar. In this instance, there is no evidence in the record that the Parole Board utilized either the Compas instrument or the TAP instrument. Nor did the Parole Board make mention of a risk and needs analysis, either during the parole interview, or within the parole determination. Thus, in this respect, there is nothing to distinguish the Parole Board's review here from the process generally employed by the Parole Board prior to the 2011 amendment of Executive Law § 259-c (4). The Court concludes that the petition must be granted, the October 11, 2011 determination annulled, and the petitioner granted a new parole interview.

The Court observes that certain records of a confidential nature relating to the

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[1]Referred to in the petition as the " Compass factors".

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 granted; and it is

ORDERED, that the October 11, 2011 determination of the Parole Board is annulled and the matter remitted to the Board of Parole for further proceedings not inconsistent with this Court's decision.

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: July 10, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated December 21, 2012, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated March 1, 2013, Supporting Papers and Exhibits