Matter of Cotto v Stanford
2014 NY Slip Op 33161(U)
May 27, 2014
Supreme Court, St. Lawrence County
Docket Number: 142021
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
ROBERTO COTTO,#91-A-6350,

Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION, ORDER AND JUDGMENT
RJI #44-1-2013-0663.40
INDEX #142021
ORI # NY044015J

-against-

TINA M. STANFORD, Chairwoman,
NYS Board of Parole,

Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Roberto Cotto, verified on September 2, 2013 and filed in the St. Lawrence County Clerk's office on September 13, 2013. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging the March 2013 determination denying him parole and directing that he be held for an additional 24 months.[1] The Court issued an Order to Show Cause on September 24, 2013 and received and reviewed respondent's Notice of Motion to Dismiss, supported by the Affirmation of Alicia M. Lendon, Esq., Assistant Attorney General, dated November 8, 2013. The Court also received and reviewed petitioner's Affidavit in Opposition Motion to Dismiss, dated November 29, 2013 and filed in the St. Lawrence County Clerk's office on December 3, 2013. In addition, the Court received and reviewed petitioner's Notice of Motion for

[1] Although the March 2013 parole denial determination included a 24-month hold, such determination followed a *de novo* parole release interview replacing a December 2011 parole denial determination that was reversed by Decision and Judgment of this Court dated January 22, 2013 under Index No. 139796. Accordingly, the 24-month hold dates back to December of 2011 and petitioner was scheduled to re-appear before a Parole Board for discretionary release consideration in December of 2013.

Leave to Amend Petition, supported by his Affidavit, dated January 6, 2014. In response thereto the Court received the Affirmation in Opposition To Motion For Leave To Amend the Petition of Alicia M. Lendon, Esq., Assistant Attorney General, dated January 24, 2014.

By Decision and Order dated March 19, 2014 respondent's motion to dismiss was denied. In addition, the Court found petitioner's motion for leave to amend his petition unnecessary since the time for him to amend a pleading without leave of court under the provisions of CPLR §3025(a) had not yet passed. The Court further noted in its Decision and Order of March 19, 2014 that counsel for the respondent had already received a copy of the Amended Petition of Roberto Cotto, verified on January 4, 2014, since it had been attached to petitioner's motion papers. Accordingly, respondent was directed to serve answering papers with respect to the Amended Petition.

The Court has since received and reviewed respondent's Notice of Motion to Dismiss, supported by the Affirmation of Alicia M. Lendon, Esq., Assistant Attorney General, dated April 4, 2014. The Court has also received and reviewed petitioner's Affidavit in Opposition to Motion to Dismiss, sworn to on April 15, 2014 and filed in the St. Lawrence County Clerk's office on April 17, 2014.

On July 1, 1991 petitioner was sentenced in Supreme Court, New York County, as a second violent felony offender, to an indeterminate sentence of 3 to 6 years upon his conviction of the crime of Criminal Possession of a Weapon 3°. On June 19, 1992 petitioner was sentenced in the same court to a controlling indeterminate sentence of 17 years to life upon his convictions of the crimes of Murder 2°, Criminal Possession of a Weapon 2°, Robbery 1°, Attempted Murder 2° and Assault 2°.

After having been denied discretionary parole release on one prior occasion, petitioner made his second appearance before a Parole Board on December 13, 2011.

Following that appearance a decision was rendered denying him discretionary release and directing that he be held for an additional 24 months. The December 2011 parole denial determination reads as follows:

> "PAROLE IS DENIED FOR THE FOLLOWING REASONS: AFTER A 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 W/O VIOLATING THE LAW AND YOUR RELEASE AT THIS TIME IS INCOMPATIBLE W/THE WELFARE AND SAFETY OF THE COMMUNITY. THIS DECISION IS BASED ON THE FOLLOWING FACTORS: THE SERIOUS, BRUTAL NATURE OF THE I.O. OF CPW 3RD, MURDER 2ND, CPW 2ND, ROBBERY 1ST, ATT. MURDER 2ND AND ASSAULT 2ND INVOLVED YOU ACTING IN CONCERT UNLAWFULLY ENTERING THE VICTIMS RESIDENCE TO STEAL PROPERTY ONE VICTIM WAS SHOT AND SUSTAINED SERIOUS PHYSICAL INJURY, A 2nd VICTIM WAS SHOT AND KILLED. DURING INTERVIEW YOU LACK [sic] INSIGHT AND REMORSE FOR YOUR ACTIONS. THI[S] IS A CONTINUATION OF YOUR CRIMINAL HISTORY WITH A PROPENSITY FOR EXTREME VIOLENCE. YOUR ACTIONS CLEARLY DEMONSTRATED A CALLOUS DISREGARD FOR THE SANCTITY OF HUMAN LIFE. NOTE IS ALSO MADE OF YOUR POSITIVE PROGRAMING AND DISCIPLINARY RECORD. HOWEVER, DISCRETIONARY RELEASE IS INAPPROPRIATE AT THIS TIME FOR THE PANEL TO HOLD OTHERWISE WOULD SO DEPRECATE THE SEVERITY OF THE OFFENSES AS TO UNDERMINE RESPECT FOR THE LAW."

The document perfecting petitioner's administrative appeal from the December 2011 parole denial determination was received by the DOCCS Parole Appeals Unit on April 30, 2012. Although the Appeals Unit failed to issue its findings and recommendation within the four-month time frame set forth in 9 NYCRR §8006.4(c), a belated decision on administrative appeal was, in fact, issued on or about October 11, 2012.

On September 11, 2012 petitioner commenced a proceeding in this Court under Index No. 139796 challenging the December 2011 parole denial determination. Among the various arguments advanced in the proceeding under Index No. 139796, petitioner,

citing the amended version of Executive Law §259-c(4)[2], asserted that parole authorities failed to establish and/or implement " . . . written procedures . . . [incorporating] risk and needs principals 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 . . ." The respondent's answering papers failed to address the Executive Law §259-c(4) issue and this Court, by Decision and Judgment dated January 22, 2013, therefore found " . . . that the December 2011 parole denial determination was not rendered in accordance with law and must be overturned, with the matter remitted to the Board of Parole for *de novo* discretionary parole release consideration." (Citations omitted).

In response to the Court's Decision and Judgment of January 22, 2013 (Index No. 139796) petitioner re-appeared before a Parole Board on March 6, 2013 for *de novo* release consideration. Following that re-appearance a decision was issued denying petitioner discretionary release and directing that he be held for an additional 24 months, with his next appearance scheduled for December of 2013 (see footnote #1 of this Decision and Judgment). The March 2013 parole denial determination reads as follows:

> "PAROLE IS DENIED. AFTER PERSONAL INTERVIEW, RECORD REVIEW AND 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 W/O VIOLATING THE LAW, YOUR RELEASE IS INCOMPATIBLE W/ THE

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[2] Executive Law §259-c(4), as amended by L 2011, ch 62, part C, subpart A, §38-b, effective September 30, 2011, provides that the New York State Board of Parole shall " . . . 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 . . ." (Emphasis added). Prior to the amendment Executive Law §259-c(4) provided, in relevant part, that the New York State Board of Parole shall " . . . establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risks and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." (Emphasis added).

> WELFARE AND SAFETY OF THE COMMUNITY. YOUR CRIMINAL RECORD REFLECTS PRIOR UNLAWFUL BEHAVIOR, WHICH IS A CONCERN FOR THIS PANEL. CONSIDERATION HAS BEEN GIVEN TO AN ASSESSMENT OF YOUR RISKS AND NEEDS FOR SUCCESS ON PAROLE. THIS PANEL ALSO NOTES YOUR PROGRAMING AND RELEASE PLANS. ALSO, IT IS NOTED THAT YOU HAVE INCURRED INFRACTIONS FOR MISBEHAVIOR. WHEN CONSIDERING ALL RELEVANT FACTORS, DISCRETIONARY RELEASE IS NOT WARRANTED. YOUR RELEASE WOULD SO DEPRECATE THE SERIOUS NATURE OF YOUR CRIME AS TO UNDERMINE RESPECT FOR THE LAW. YOU DEMONSTRATED A TOTAL DISREGARD FOR THE RULES OF SOCIETY AND THE VALUE OF HUMAN LIFE. THIS DECISION IS A DE NOVO HEARING REPLACING THE 12-13-2011 INTERVIEW."

This proceeding (Index No. 142021) ensued.

Two causes of action are set forth in the Amended Petition, as follows:

> "This [Amended] Petition claims that Respondent, Tina M. Stanford and her agency [New York State Board of Parole] failed (1) to adopt lawful new written procedures, pursuant to the amended version of Executive Law §259-c(4), which shall govern members of the Parole Board on how a parole release decision should be made and (2) to develop and utilize the Transitional Accountability Plan ('TAP') component of this risk and needs assessment instrument, as one of the statutory factors that must be incorporated into the decision-making process, as required by law pursuant to Executive Law §259-c(4) and Correction Law §71-a, for consideration by the members of the Parole Board."

Respondent's current motion to dismiss is premised upon the assertion that on March 5, 2014 (adjourned from December of 2013) petitioner again re-appeared before a Parole Board and was again denied discretionary release. According to respondent, such reappearance/parole denial rendered petitioner's instant challenge to the March 2013 parole denial determination moot. Although a reappearance and denial would ordinarily render a challenge to a prior parole denial determination moot, this Court finds that petitioner's argument with respect to the Parole Board's alleged failure to comply with the amended version of Executive Law §259-c(4) represents a substantial issue that continues to evade review. Accordingly, this Court finds that an exception to the mootness doctrine

is presented. *See Standley v. New York State Division of Parole*, 34 AD3d 1169. Since respondent's motion papers go on to address both causes of action set forth in the Amended Petition, on the merits, the Court finds no reason to extend the duration of this proceeding by directing the submission of additional answering papers.

With respect to the amended verison of Executive Law §259-c(4), respondent, citing *Montane v. Evans*, 116 AD3d 197, *lv granted* __ NY3d __, 2014 NY Slip Op 71974, asserts that a certain " . . . October 5, 2011 Memorandum by then Parole Board Chairwoman Andrea Evans sufficiently establishes the requisite procedures for incorporating risk and needs principles, and satisfies the Parole Board's [amended statutory] obligation . . ." This Court agrees. *See Partee v. Evans*, __AD3d __, 2014 NY Slip Op 03567, *aff'g* 40 Misc 3d 896.

Turning to petitioner's second cause of action, the Court notes that as part of the same legislative enactment (L 2011, ch 62, part C, subpart A) wherein Executive Law § 259-c(4) was amended, a new Correction Law § 71-a was added, as follows:

> "Upon admission of an inmate committed to the custody of the department [DOCCS] under an indeterminate or determinate sentence of imprisonment, the department shall develop a transitional accountability plan. Such plan shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the inmate. The purpose of such plan shall be to promote the rehabilitation of the inmate and their successful and productive reentry and reintegration into society upon release. To that end, such plan shall be used to prioritize programming and treatment services for the inmate during incarceration and any period of community supervision."

Although Correction Law §71-a became effective on September 30, 2011, the Court finds nothing in the legislative enactment to suggest that it mandates the preparation of a Transitional Accountability Plan (TAP) with respect to an inmate - like petitioner - already in DOCCS custody prior to the effective date of the statute. To the extent the petitioner

relies on the decision of the Appellate Division, Third Department in *Garfield v. Evans*, 108 AD3d 830, the Court finds such reliance to be misplaced. Although the *Garfield* court overturned an October 2011 parole denial determination based upon the Parole Board's failure to utilize a COMPAS Risk and Needs Assessment instrument in conjunction with a board appearance that took place after the effective date of the amendment to Executive Law §259-c(4), there is nothing in *Garfield* to suggest that any failure on the part of the Parole Board to utilize a TAP was alleged or considered by the court. As noted in paragraph 14 of Assistant Attorney General Lendon's April 4, 2014 Affirmation in support of Motion to Dismiss, moreover, the October 5, 2011 Memorandum of former Parole Board Chairwoman Evans " . . . only mention[s] consideration of a TAP *if it had replaced the Inmate Status Report for a given inmate,* which it indisputedly did not in Petitioner's case at the time of the [March 6th, 2013] hearing." (Emphasis in original). There is no doubt that a COMPAS Risk and Needs Assessment instrument was utilized in conjunction with petitioner's March 6, 2013 Parole Board appearance and the ensuing discretionary parole denial determination.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that respondent's motion to dismiss the petition as moot is denied; and it is further

ADJUDGED, that the petition is dismissed on the merits.

Dated: May 27, 2014 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court