Matter of Dillon v New York State Bd. of Parole
2014 NY Slip Op 33377(U)
December 19, 2014
Supreme Court, Franklin County
Docket Number: 2014-216
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

_____X

In the Matter of the Application of
PAUL DILLON, #07-B-1374,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2014-0111.23
INDEX # 2014-216
ORI #NY016015J

-against-

NEW YORK STATE BOARD OF PAROLE,
Respondent.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Paul Dillon, verified on March 5, 2014 and filed in the Franklin County Clerk's office on March 21, 2014. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the June 2013 determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on April 3, 2014 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on May 21, 2014 and supported by the May 21, 2014 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General, as well as by the Affirmation of William B. Gannon, Esq., Assistant Counsel to the New York State Board of Parole, dated April 16, 2014. The Court has also received and reviewed petitioner's Reply thereto (denominated Answer and Return), sworn to on May 28, 2014 and filed in the Franklin County Clerk's office on June 4, 2014.

On January 17, 2007 petitioner was sentenced in Onondaga County Court, as a second felony offender, to three indeterminate sentences of 3½ to 7 years each upon his convictions of the three counts of the crime of Burglary 3°. The sentencing court directed

that two of the indeterminate sentences run concurrently with respect to each other but that the third runs consecutively with respect to the two concurrent sentences.

Petitioner made his initial appearance before a Parole Board on June 4, 2013. Following that appearance a decision was rendered denying him discretionary release and directing that he be held for an additional 24 months. The parole denial determination reads as follows:

> "DESPITE YOUR HAVING RECEIVED AN EARNED ELIGIBILITY CERTIFICATE, PAROLE WAS DENIED. AFTER A PERSONAL INTERVIEW, A CAREFUL REVIEW OF YOUR RECORD, INCLUDING THE RISK YOU POSE TO THE COMMUNITY, THE REHABILITATIVE EFFORTS YOU HAVE UNDERTAKEN, EDUCATIONAL ACCOMPLISHMENTS, AS WELL AS YOUR LIKELIHOOD OF RECIDIVISM AND AFTER DUE DELIBERATION, IT IS THE DETERMINATION OF THIS PANEL THAT IF YOU WERE RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AT LIBERTY WITHOUT VIOLATING THE LAW, AND THAT YOUR RELEASE AT THIS TIME WOULD BE INCOMPATIBLE WITH THE WELFARE AND SAFETY OF THE COMMUNITY.
>
> YOU APPEARED BEFORE THIS BOARD WITH AN INSTANT OFFENSE OF BURGLARY 3RD (THREE COUNTS) WHEREIN YOU COMMITTED MULTIPLE BURGLARIES AT SEPARATE ESTABLISHMENTS AND STOLE PROPERTY THEREFROM. THIS INSTANT OFFENSE REPRESENTS A CONTINUATION OF A LIFELONG PATTERN OF CRIMINAL BEHAVIOR BEGINNING IN 1979. YOU HAVE HAD MULTIPLE CONVICTIONS AND INCARCERATIONS. YOU HAVE A WELL ESTABLISHED PATTERN OF CRIMINAL BEHAVIOR THAT HAS BEEN UNDETERRED BY PRIOR COURT IMPOSED SENTENCES, AND LENIENCY SHOWN YOU BY THE CRIMINAL JUSTICE SYSTEM, ALL LEADING THIS PANEL TO DENY YOUR DISCRETIONARY RELEASE AT THIS TIME."

The document perfecting petitioner's administrative appeal from the June 2013 parole denial determination was received by the DOCCS Parole Appeals Unit on August 7, 2013. The Appeals Unit, however, failed to issue its findings and recommendation within the four month time frame set forth in 9 NYCRR §8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, provides, in relevant part, as follows:

> "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 the law. In making the parole release decision, the procedures 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 interactions with staff and inmates . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate . . . (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement . . ."

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5) unless there has been a showing of irrationality bordering on impropriety. *See Silmon v. Travis,* 95 NY2d 470, *Hamilton v. New York State Division of Parole,* 119 AD3d 1268, *Vasquez v. Dennis*on, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. Unless the petitioner makes a "convincing demonstration to the contrary" the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Nankervis v. Dennison,* 30 AD3d 521, *Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

One portion of the petition is focused on the assertion that the parole denial determination was improperly based solely on the nature of the crimes underlying

petitioner's incarceration, as well as his prior criminal record, without adequate consideration of other relevant statutory factors. A Parole Board, however, need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole determination, nor is it required to expressly discuss each of those factors in its written decision. *See Montane v. Evans,* 116 AD3d 197*, lv granted* 23 NY3d 903*, Valentino v. Evans,* 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination ". . . is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior." *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

In the case at bar, reviews of the DOCCS Parole Board Report and transcript of petitioner's June 4, 2013 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's receipt of an Earned Eligibility Certificate, his therapeutic/vocational programing records, COMPAS ReEntry Risk Assessment Instrument, sentencing minutes, disciplinary record and release plans/community support in addition to the circumstances of the crimes underlying petitioner's incarceration and his prior criminal record. The Court, moreover, finds nothing in the hearing transcript to suggest that the Parole Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries. Indeed, before the June 4, 2013 Parole Board appearance was concluded one of the presiding commissioners inquired of

petitioner as follows: "Is there anything you would like to say at this point you think we may not have already covered in the interview?" Petitioner responded as follows: "I have done a lot of soul searching and introspection and I asked myself if I was asked why should I be released today, what would I say? The things that really drive me is that I haven't really given up on myself. Sometimes being in these places, being older, many people believe they can't make the transition into mainstream society; I believe I can do that. I still have childhood ambitions and I believe I can make it."

In view of the above, the Court finds no basis to conclude that the Parole Board failed to consider relevant statutory factors. *See Pearl v. New York State Division of Parole,* 25 AD3d 1058 and *Zhang v. Travis*, 10 AD3d 828. Since the requisite statutory factors were considered, and given the narrow scope of judicial review of discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality boarding on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying petitioner's incarceration as well as his prior criminal record dating back almost 35 years. *See Sutherland v. Evans,* 82 AD3d 1428*, White v. Dennision,* 29 AD3d 1144 and *Pearl v. New York State Division of Parole,* 25 AD3d 1058.

Citing *King v. New York State Division of Parole*, 190 AD2d 423, *aff'd* 83 NY2d 788, petitioner specifically argues that the seriousness of the crimes underlying an inmate's incarceration " . . . is not to be the determining factor in considering . . . [such] inmate[']s parole." In *King* the Appellate Division, First Department, not only determined that the Parole Board improperly considered matters not within its purview (penal policy with respect to convicted murders) but also that the Parole Board failed " . . . to consider and fairly weigh all of the information available to them concerning petitioner that was relevant under the statute, which clearly demonstrates his extraordinary rehabilitative

achievements and would appear to strongly militate in favor of granting parole." *Id* at 433. The appellate-level court in *King* went on to note that the only statutory criterion referenced by the Board in the parole denial determination was the seriousness of the crime underlying Mr. King's incarceration (felony murder of an off-duty police officer during the robbery of a fast food restaurant). According to the Appellate Division, First Department, "[s]ince . . . the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself." *Id* at 433.

This Court (Supreme Court, Franklin County) first notes that although the criminal offense underlying Mr. King's incarceration was far more serious than the crimes underlying petitioner's incarceration, Mr. King had no prior contacts with the law (*id* at 426) while the petitioner in the case at bar has a criminal record dating back almost 35 years, thus prompting the Parole Board to underscore his "ESTABLISHED PATTERN OF CRIMINAL BEHAVIOR . . ." This distinguishing factor might, in and of itself, meet the First Department's requirement that a parole denial determination be supported by aggravating circumstances beyond the inherent seriousness of the underlying crime. It is also noted, however, that in July of 2014 the Appellate Division, Third Department - whose precedent is binding on this Court - effectively determined that the above-referenced "aggravating circumstances" requirement enunciated by the First Department in *King* does not represent the state of the law in the Third Department. *See Hamilton v. New York State Division of Parole,* 119 AD3d 1268. In *Hamilton* it was noted that the Third Department " . . . has repeatedly held - both recently and historically - that, so long as the [Parole] Board considers the factors enumerated in the statute [Executive Law §259-i(2)(c)(A)] it is 'entitled . . . to place a greater emphasis on the gravity of [the] crime' (*Matter of Montane v. Evans,* 116 AD3d 197, 203 (2014), *lv granted* 23 NY3d 903 (2014)

(internal quotation marks and citations omitted)' . . ." *Id* at 1271 (citations omitted). After favorably citing nine cases decided by it between 1977 and 2014, the Appellate Division, Third Department, in *Hamilton* ended that string of cites as follows: " . . . *but see Matter of King v. New York State Div. of Parole,* 190 AD2d 423, 434 (1993), *aff'd on other grounds* 83 NY2d 788[1] (1994) (a First Department case holding, in conflict with our precedent, that the Board [of Parole] may not deny discretionary release based solely on the nature of the crime when the remaining statutory factors are considered only to be dismissed as not outweighing the seriousness of the crime)." 119 AD3d 1268, 1272. The *Hamilton* court continued as follows:

> "Particularly relevant here, we have held that, even when a petitioner's institutional behavior and accomplishments are 'exemplary,' the Board may place 'particular emphasis' on the violent nature or gravity of the crime in denying parole, as long as the relevant statutory factors are considered (*Matter of Valderrama v. Travis,* 19 AD3d at 905). In so holding we explained that, despite [the *Valderrama*] petitioner's admirable educational and vocational accomplishments and positive prison disciplinary history, '[o]ur settled jurisprudence is that a parole determination made in accordance with the requirements of the statutory guidelines is not subject to further judicial review unless it is affected by irrationality bordering on impropriety' (*id*. [internal quotation marks and citations omitted]). We emphasize that this Court [Appellate Division, Third Department] has repeatedly reached the same result, on the same basis, when reviewing denials of parole to petitioners whom we recognized as having exemplary records and as being compelling candidates for release . . ." 119 AD3d 1268, 1272 (additional citations omitted).

This Court therefore finds petitioner's reliance on the decision of the Appellate Division, First Department, in *King* to be misplaced.

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[1] The decision of the Court of Appeals in *King* only referenced the fact that " . . . one of the [Parole] Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place. Consideration of such factors is not authorized by Executive Law §259-i." 83 NY2d 788, 791. The Court of Appeals, however, did not address that aspect of the Appellate Division, First Department, decision in *King* holding that a parole denial determination must be based upon a showing of some aggravating circumstances beyond the inherent seriousness of the underlying crime.

Petitioner also argues that the Parole Board improperly evaluated his risk assessment in that he was scored as a low risk for committing a new violent felony offense, for rearrest and/or for absconding. This Court notes, however, that although the Appellate Division, Third Department, has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* 112 AD3d 1056*, Malerba v. Evans,* 109 AD3d 1067, *lv denied* 22 NY3d 858 and *Garfield v. Evans*, 108 AD3d 830), there is nothing in such cases, or the amended version of Executive Law §259-c(4), to suggest that the quantified risk assessment determined through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Parole Board to determine, based upon its consideration of the factors set forth in Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. The "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A). *See Rivera v. New York State Division of Parole,* 119 AD3d 1107 and *Partee v. Evans*, 40 Misc 3d 896, *aff'd* 117 AD3d 1258, *lv denied* 24 NY3d 901.

A Parole Board considering a DOCCS inmate for discretionary release is required to take into account any parole recommendation of the sentencing judge and is therefore ordinarily required to have a copy of the relevant sentencing minutes. *See Standley v. New York State Division of Parole*, 34 AD3d 1169 and *McLaurin v. New York State Board of Parole*, 27 AD3d 565. In the case at bar the Board's receipt of the April 17, 2007 sentencing minutes was noted in the Parole Board Report (Exhibit C annexed to respondent's Answer and Return) and on page two of the transcript of the June 4, 2013 parole interview (Exhibit F annexed to respondent's Answer and Return). In any event, this Court has reviewed the sentencing minutes (Exhibit A annexed to respondent's Answer and Return) and finds nothing therein that would constitute a favorable parole recommendation of the sentencing judge. *See Duffy v. New York State Division of Parole,* 74 AD3d 965 (imposition of less than maximum sentence did not constitute an indication that the sentencing court made a favorable parole recommendation).

Finally, this Court finds no basis to conclude that the Parole Board, by its denial determination, usurped the authority of the judiciary by effectively resentencing petitioner for his crimes. *See Comfort v. New York State Division of Parole*, 68 AD3d 1295, *Smith v. New York State Division of Parole*, 64 AD3d 1030 and *Marsh v. New York State Division of Parole*, 31 AD3d 898.

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

ADJUDGED, that the petition is dismissed.

Dated: December 19, 2014 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice