Matter of Duncan v Stanford
2015 NY Slip Op 30429(U)
January 30, 2015
Supreme Court, Albany County
Docket Number: 5323-14 14
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of ROBERT C. DUNCAN,

Petitioner,

-against-

TINA M. STANFORD, CHAIRWOMAN of the,
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 # 01-14-ST6254 Index No. 5323-14

Appearances: Robert C. Duncan
Inmate No. 13B2467
Petitioner, Pro Se
Groveland Correctional Facility
7000 Sonyea Road
P.O. Box 50
Sonyea, New York 14556-0050

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Attorney General
State of New York
Attorney For Respondent
The Capitol
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(Melissa A. Latino,
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of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently housed at Groveland Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent

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dated March 25, 2014 to deny petitioner discretionary release on parole. Petitioner is serving two concurrent indeterminate terms of 1 to 3 years for convictions of aggravated driving while intoxicated. Among the arguments set forth in the petition, petitioner indicates that he has not been cited for any disciplinary infractions since during his current incarceration. He indicates he is currently in the ASAT program. He has a wife and child and his family resides in Seneca County. He maintains that the Parole Board improperly denied parole based upon the nature of the instant offense, with no consideration of his institutional adjustment and progress. He contends that the Parole Board failed to follow the guidelines set forth in Executive Law § 259-i. He indicates that the Parole Board never mentioned whether or not release would so deprecate the seriousness of the crime as to undermine respect for the law. He criticizes the Parole Board for not advising him with regard to how he can improve his chances of being released. In his view, the Parole Board exceeded its authority to such an extent that it was guilty of performing a judicial function by re-sentencing him to a longer term of imprisonment. He maintains that the Parole Board failed to consider statutory factors favorable to his release.

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

> "Denied - Hold for 24 months, Next appearance date: 03/2016
>
> "Parole is denied for the following reasons. After a careful review of the 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 without violating the law and your release at this time is incompatible

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> with the welfare and safety of the community This decision is based on the following factors: the serious nature of the I.O. of AGG DWI 1st (2 cts) involved you leaving the scene of a hit and run accident while under the influence of alcohol. You were on probation for a prior AGG DWI when you committed the I.O. This is a pattern of your criminal history which includes numerous drinking and driving related offenses. You were removed from ASAT and denied an EEC for overall unacceptable level of program participation. Your positive programming, disciplinary record, risk to the community, rehabilitative efforts, needs for a successful re-entry, sentencing minutes and required factors are also considered. However, discretionary release is not appropriate at this time as you remain a substantial risk to public safety."

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of Delrosario v Evans, 121 AD3d 1152, 1152-1153 [3d Dept., 2014]; Matter of Williams v New York State Division of Parole, 114 AD3d 992 [3d Dept., 2014; Matter of Campbell v Evans, 106 AD3d 1363, 1363-1364 [3d Dept., 2013]). 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]).

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, and his plans upon release. Commissioner Thompson acknowledged receipt of petitioner's COMPAS Risk Assessment, and noted that his risk of felony violence is low, his criminal involvement is medium, but his reentry substance abuse is highly probable. The Board afforded the petitioner ample opportunity to speak on his own behalf. He claimed that he was remorseful for his actions, although he acknowledged that he did not know the identity of the people in the vehicle that he hit, or even the number of people in the vehicle. He provided his own explanation with regard to the reasons why he was removed from the ASAT program. Commission Thompson inquired with regard to programs which he had completed. He responded by indicating that he was attempting to obtain outside clearance, working in the facility recycling program. The petitioner indicated that he has been in the recycling business for a long time. The petitioner also indicated that he planned on marrying his fiancee during the following month, and live with her and her son when released.

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the 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 (see Matter of Williams v New York State Division of Parole, supra; Matter of Matos v New York State Board of

Parole, 87 AD3d 1193 [3d Dept., 2011]; 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 Davis v Evans, 105 AD3d 1305 [3d Dept., 2013]; Matter of MacKenzie v Evans, 95 AD3d 1613 [3d Dept., 2012]; Matter of Matos v New York State Board of Parole, supra; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [3rd Dept., 2010]). 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). In this instance, the petitioner's criminal history includes six prior alcohol-related driving convictions.

Petitioner's claims that the determination to deny parole is tantamount to a

resentencing 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., West. Co., 2006]; Matter of Kalwasinski v Paterson, 80 AD3d 1065, 1066 [3d Dept., 2011]; Matter of Carter v Evans, 81 AD3d 1031, 1031 [3d Dept., 2011]; Matter of Valentino v Evans, 92 AD3d 1054 [3d Dept., 2012]). 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 Gomez v New York State Division of Parole, 87 AD3d 1197 [3d Dept., 2011]; 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]).

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 order 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; Matter of Francis v New York State Division of Parole, 89AD3d 1312, 1313 [3d Dept., 2011]; Boothe v Hammock, 605 F2d 661 [2nd Cir, 1979]; Matter of Freeman v New York State Division of Parole, 21 AD3d 1174 [3rd Dept., 2005]).

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The Parole Board properly engaged in a risk and needs assessment as required under Executive Law § 259-c (4), including review of the COMPAS instrument (see Matter of Delrosario v Evans, supra; Matter of Partee v Evans, 117 AD3d 1258, 1259 [3d Dept., 2014], lv denied 24NY3d 901 [2014]). "The COMPAS instrument, however, is only one factor that the Board was required to consider in evaluating petitioner's request" (Matter of Matter of Rivera v New York State Div. of Parole, 119 AD3d 1107, 1109 [3d Dept., 2014]).

Lastly, 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 Campbell v Evans, 106 AD3d 1363, supra, at 1364, citing Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604 [2002]).

The Court has reviewed and considered 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.

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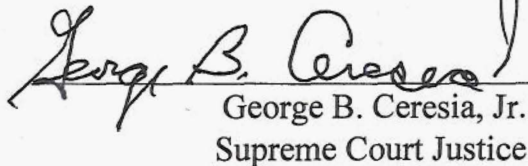
This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this 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: January 30, 2015
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated October 30, 2014, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated January 9, 2015, Supporting Papers and Exhibits
3. Affirmation of William Gannon, Esq., dated December 2, 2014 and Exhibits

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SUPREME COURT COUNTY OF ALBANY

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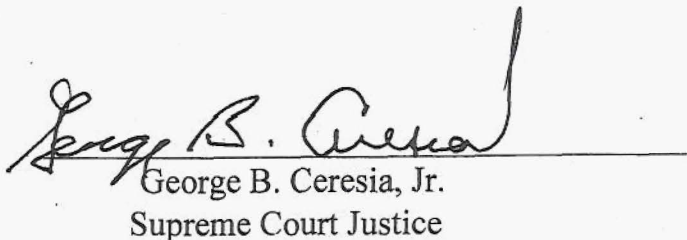
SEALING ORDER

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, Inmate Status Report, Parts II & III and Exhibit F, Compas Reentry Risk Assessment, 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: January 30, 2015
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice