Matter of Kim v Stanford
2015 NY Slip Op 31997(U)
October 19, 2015
Supreme Court, Franklin County
Docket Number: 2014-915
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
JACOB KIM, #13-R-3223,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2014-0501.98
INDEX # 2014-915
ORI #NY016015J

TINA 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 Jacob Kim, verified on November 21, 2014 and filed in the Franklin County Clerk's office on November 26, 2014. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the February 2014 determination denying him discretionary parole release and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on December 2, 2014 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on January 9, 2015 and supported by the Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General, dated January 9, 2015. The Court has also received and reviewed petitioner's Reply thereto, sworn to on January 16, 2015 and filed in the Franklin County Clerk's office on January 23, 2015.

As part of petitioner's Reply he interposed an objection to the respondent's submission of *in camera* materials. After asserting that he never had an opportunity

to inspect such materials for accuracy or validity and that he does not even know the subject matter or nature of the documents, petitioner asserted that " . . . this Court should either (a) strike the 'confidential documents' from the record with prejudice, or (b) compel the respondent to produce these documents to me for inspection forthwith. The 'due process clause' of the Federal constitution requires nothing less."

By Decision and Order dated April 14, 2015 the respondent was " . . . directed to provide chambers with such materials as she deems appropriate setting forth the statutory, regulatory and/or penological bases for not providing petitioner with an unredacted copy of the COMPAS instrument and/or the 'Confidential' portion of the parole report . . ." In response thereto the Court has received and reviewed the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated May 1, 2015.

The Court has examined the un-redacted copy of the 13-page COMPAS risk assessment instrument that was provided to chambers by the respondent for *in camera* review. Although the redacted portions of the COMPAS instrument do not appear to be of major significance vis a vis the February 2014 parole denial determination, the Court ultimately concludes that the redacted material does represent intra-DOCCS communication that is evaluative in nature and designed to assist the Parole Board in determining whether or not petitioner should be granted discretionary parole release. At such, the Court finds that such material was properly redacted from the copy of the COMPAS instrument provided to petitioner. *See Ramahlo v. Bruno*, 273 AD2d 521.

The Court has also examined the two-page "confidential" section of the January 8, 2014 Parole Board Report that was provided to chambers by the respondent for *in camera* review. Although the confidential section of the report, like the redacted portions of the COMPAS instrument, does not appear to be of major significance vis a vis the February 2014 parole denial determination, the Court ultimately concludes that the confidential section references, and is based upon, intra-DOCCS communication that is evaluative in nature and designed to assist the Parole Board in determining whether or not petitioner should be granted discretionary parole release. As such, the Court finds that the confidential section of the Parole Board report was properly withheld from petitioner. *See Ramahlo v. Bruno*, 273 AD2d 521.

On October 31, 2013 petitioner was sentenced in Supreme Court, Queens County, as a second felony offender, to an indeterminate sentence of 1½ to 3 years upon his conviction of the crime of Attempted Promoting Prostitution 3°. At the time petitioner committed the criminal acts underlying his 2013 conviction/sentencing he was on parole from a prior sentence imposed upon his conviction of the crime of Attempted Murder 2°[1]. Petitioner made his first appearance before a Parole Board (after the 2013 conviction) on February 4, 2014. Following that appearance a decision was issued denying him discretionary parole release and directing that he be held for

[1] Since the 2013 sentence was imposed upon petitioner as a second felony offender, DOCCS officials calculated such sentence as running consecutively, rather than concurrently, with respect to the unexpired term of the previous sentence. Thus, the 3-maximum term of the 2013 sentence was aggregated with the 8 years and 9 months (approximately) still owed against the maximum term of the previous sentence. DOCCS official currently calculate the maximum expiration date of petitioner's aggregated multiple sentences as August 12, 2024.

an additional 24 months. The February 2014 parole denial determination reads as follows:

> "AFTER A REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY AND WOULD SO DEPRECATE THE SERIOUS NATURE OF THE CRIME AS TO UNDERMINE RESPECT FOR THE LAW. THIS DECISION IS BASED ON THE FOLLOWING FACTORS: YOUR INSTANT OFFENSE'S ARE: ATT PROM. OF PROST. 3RD IN WHICH YOU ACTED IN CONCERT WITH OTHERS IN A PROSTITUTION BASED CRIMINAL ENTERPRISE AND DID SO AFTER HAVING BEEN DEPORTED AND WHILE ON PAROLE FOR ATT. MURDER.
>
> YOUR RECORD DATES BACK TO A 1992 YO ATT. MURDER: 2 FELONIES, 1 YO, PRIOR VIOLENCE, PRIOR PRISON AND FAILURE AT PRIOR COMMUNITY SUPERVISION.
>
> NOTE IS MADE OF YOUR: SENTENCING MINUTES, COMPAS RISK ASSESSMENT, REHABILITATIVE EFFORTS, RISKS, CLEAN DISCIPLINARY RECORD, PAROLE PLAN, AND ALL OTHER FACTORS REQUIRED BY LAW.
>
> YOU CLEARLY FAILED TO BENEFIT FROM PRIOR EFFORTS AT LENIENCY AND REHABILITATION. PAROLE IS DENIED."

The document perfecting petitioner's administrative appeal from the February 2014 parole denial determination was received by the DOCCS Board of Parole Appeals Unit on June 12, 2014. 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-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; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department [New York State Department of Corrections and Community Supervision] . . . (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 Jackson v. Evans,* 118 AD3d 701, *Nankervis v. Dennison,* 30 AD3d 521 and *Zane v. New York State Division of Parole*, 231 AD2d 848.

Petitioner advances a variety of arguments in support of his ultimate contention that the February 2014 parole denial determination must be vacated. One argument in particular resonates with the Court. On page seven of the document perfecting petitioner’s administrative appeal from the February 2014 parole denial determination (Appellant’s

Brief dated June 2, 2014), which is incorporated by reference into the Petition, it is argued, in effect, that no Transitional Accountability Plan (TAP) was prepared in conjunction with the discretionary parole release consideration process. As part of the same legislative enactment wherein Executive Law §259-i(2)(c)(A) was amended (L 2011, ch 62, Part C, subpart A), a new Correction Law §71-a was added. This statute provides, in relevant part, 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."

Correction Law §71-a became effective on October 1, 2011 but it has been determined that this legislative enactment does not mandate the preparation of TAPs with respect to inmates in DOCCS custody prior to that date. *See Tran v. Evans,* 126 AD3d 1196, and *Rivera v. New York State Division of Parole*, 119 AD3d 1107. This Court notes, however, that although petitioner was first received into DOCCS custody (in connection with his Attempted Murder 2° conviction/sentencing) prior to the effective date of Correction Law §71-a, he was conditionally released from custody (parole for deportation only) on or about February 17, 2005. Following his October 31, 2013 Queens County conviction/sentencing petitioner was received back into DOCCS custody on November 19, 2013, after the effective date of Correction Law §71-a. Under these circumstances the failure of DOCCS officials

to prepare a TAP upon petitioner's November 19, 2013 re-admission into DOCCS custody warrants the overturning of the February 2014 parole denial determination.

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that respondent is directed to develop a TAP for the petitioner and utilize same in conjunction with *de novo* parole release consideration, all within 60 days of the date of this Decision and Judgment.

Dated: October 19, 2015 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice