Matter of James v New York State Bd. of Parole
2016 NY Slip Op 32349(U)
November 15, 2016
Supreme Court, St. Lawrence County
Docket Number: 148031
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
PENDER L. JAMES, JR.,#91-A-9268,
Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2016-0446.08
INDEX #148031

-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 Pender L. James, Jr., verified on July 14, 2016 and filed in the St. Lawrence County Clerk's office on July 20, 2016. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging the January 2016 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 July 25, 2016 and has received and reviewed respondent's Answer and Return verified on September 30, 2016, including confidential Exhibits B, C, E and I. The Court has also received and reviewed the petitioner's reply thereto dated October 12, 2016 and received on October 17, 2016. In the petitioner's reply, he challenged that the sentencing minutes provided by the respondent were incomplete and, in response thereto, the respondent provided a supplemental Exhibit D with a complete transcript of the sentencing minutes which were received on October 21, 2016.

On October 30, 1991, the petitioner was sentenced as a persistent felony offender following his conviction of two (2) counts of Rape in the First Degree, one (1) count of Attempted Assault in the Second Degree and one (1) count of Burglary in the Second Degree. The petitioner was sentenced to a term of incarceration of twenty (20) years to life

on each of the four counts to run concurrently. The petitioner appeared for the fourth time before the Parole Board on January 27, 2016. Following that appearance, Petitioner was denied discretionary parole release and it was directed that he be held for an additional 24 months. The parole denial determination reads as follows:

> "FOLLOWING CAREFUL REVIEW AND DELIBERATION OF YOUR RECORD AND INTERVIEW, THIS PANEL CONCLUDES THAT DISCRETIONARY RELEASE IS NOT PRESENTLY WARRANTED DUE TO CONCERN FOR THE PUBLIC SAFETY AND WELFARE. THE FOLLOWING FACTORS WERE PROPERLY WEIGHED AND CONSIDERED:
> YOUR INSTANT OFFENSES IN SUFFOLK COUNTY IN APRIL 1990, INVOLVED RAPE 1ST, ATT. ASSAULT 2ND AND BURGLARY 2ND.
> YOUR CRIMINAL HISTORY INDICATES YOU WERE ON PAROLE AT THE TIME FROM A 1985 ATT. BURGLARY 2ND.
> YOUR INSTITUTIONAL PROGRAMMING INDICATES PROGRESS AND ACHIEVEMENT WHICH IS NOTED TO YOUR CREDIT.
> YOUR DISCIPLINARY RECORD REFLECTS ONE (1) TIER II REPORT SINCE YOUR PRIOR APPEARANCE.
> YOU HAVE APPROXIMATELY SIX (6) FELONIES AND TWO (2) MISDEMEANORS. THIS IS YOUR FIFTH (5^{TH}) STATE BID.
> REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, INCLUDING YOUR RISK TO THE COMMUNITY, REHABILITATION EFFORTS, AND YOUR NEEDS FOR SUCCESSFUL COMMUNITY RE-ENTRY.
> YOUR DISCRETIONARY RELEASE, AT THIS TIME, WOULD THUS NOT BE COMPATIBLE WITH THE WELFARE OF SOCIETY AT LARGE, AND WOULD TEND TO DEPRECATE THE SERIOUSNESS OF THE INSTANT OFFENSES, AND UNDERMINE RESPECT FOR THE LAW." Resp. Ex. F.

An appeal of the parole board's determination was filed by the petitioner on April 8, 2016. Thereafter, the Board of Parole Appeals Unit upheld the determination on April 22, 2016.

Petitioner challenges the denial of parole release alleging that the parole board failed to properly consider all of the statutory factors pursuant to Executive Law §259-i; based on the denial of the instant offense which is tantamount to double jeopardy; failed to recognize the intent of the sentencing judge; acted arbitrarily and capriciously; failed to consider the petitioner's institutional achievements inasmuch as he has completed all of the required

programming; failed to note the significant improvement in his behavior; and failed to provide any guidance to the petitioner to enhance his ability to be granted discretionary release. Furthermore, petitioner alleges the 24 month hold is excessive. The petitioner notes that the previous parole hearing occurred in December of 2013 and the current hearing concluded in January of 2016 which was more than 24 months.

Respondent argues that the petition should be dismissed in its entirety insofar as the parole board is afforded great discretion in determining parole release provided that the board considers the relevant factors as described in Executive Law §259-i(c)(A). Respondent argues that there is no requirement that the parole board give equal weight to each factor nor does an inmate's exemplary institutional record compel parole release. Respondent further asserts that the denial of parole is not akin to double jeopardy and there is no "right" to discretionary parole release. In addition, respondent asserts that the next parole hearing is scheduled for December of 2017 and therefore is not in excess of 24 months. The respondent argues that the petitioner's maximum sentence was life and therefore, the additional time is not excessive.

Executive Law §259-i(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 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 had 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. Dennison*, 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.

A Parole Board 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; *see also 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 (internal citations omitted)." *Comfort v. New York State Division of Parole*, 68 AD3d 1295, 1296.

In the case at bar, reviews of the Parole Board Report and transcript of Petitioner's January 27, 2016 Parole Board appearance reveal that the Board had before it information

with respect to the appropriate statutory factors, including Petitioner's educational and therapeutic programming records. The petitioner testified that he had received 138 college credits and has graduated from Cayuga Community College (presumably with an Associates Degree) and has also graduated from a theology program while at the Eastern Correctional Facility. It was noted that the COMPAS ReEntry Risk Assessment Instrument score was relatively low other than the violent nature of the petitioner's previous convictions. The petitioner's disciplinary record indicated that he had received only one Tier II report since his last hearing. However, the Parole Board also had the persistent felony offender hearing transcript and sentencing minutes from the instant offense which indicated that the instant offense was committed when the petitioner was 35 years old and he had already served 11 years in state prison. The sentencing minutes indicate that the petitioner had been released on parole four times previously and he was rearrested for a new felony during each parole release. The sentencing minutes reflect that during his previous state prison sentences, the petitioner took college courses and did other positive rehabilitative acts but did not employ those skills while on parole release. The sentencing minutes also indicate that following his conviction by trial, the petitioner maintained his innocence of the charges, which he now repudiates. The Parole Board noted that if he were released, the petitioner would reside with his mother and would be employed. The Court, moreover, finds nothing in the hearing transcript to suggest that the Parole Board denied the Petitioner an opportunity to answer questions or provide insight into how and why he believed that he would be a good candidate for release. Indeed, the Petitioner indicated that he was remorseful about the instant offense and stated: "If I had some type of problem with her (the victim) in our relationship, I should have been man enough to walk away instead of doing what I did." Resp. Ex. E. (4:22-24).

In view of the foregoing, the Court finds no basis to conclude that the Parole Board failed to consider the 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 the discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality bordering on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying Petitioner's incarceration and his prior criminal record (including that the instant offense occurred while he was on parole for a previous crime and this was his sixth felony conviction). *See Neal v. Stanford,* 131 AD3d 1320 and *Confoy v. New York State Division of Parole*, 173 AD2d 1014.

While the petitioner asserts that the Parole Board's determination of a 24 month hold was excessive and actually more than 24 months, insofar as the Parole Board retroactively dated the next appearance to December of 2017 instead of January of 2018, the petitioner will not be held more than the 24 months before his next appearance before the Parole Board. In light of the foregoing factors discussed relative to the Petitioner's previous criminal history, including the instant offense occurring while he was on parole release for a previous felony sentence, the Board's imposition of a 24 month hold is not excessive. *See Shark v. New York State Division of Parole*, 110 AD3d 1134, 1135, *lv dismissed* 23 NY3d 933; *see also Smith v. New York State Division of Parole*, 81 AD3d 1026.

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: November 15, 2016
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court