

<b>State of New York ex rel. Hoyer v Stanford</b>
2018 NY Slip Op 30336(U)
February 27, 2018
Supreme Court, Seneca County
Docket Number: 51787
Judge: Dennis F. Bender
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defendant, Timothy R. Lewis, stole items from property owned by Harold Dettmer. Mr. Dettmer was a former employer of the defendant's co-defendant, Timothy Lewis. They took food, money and other property including firearms.

The Murder conviction stems from an incident on November 12, 1984 when the defendant and his brother, William Hoyer, robbed the Red Door Deli in Central Bridge, Schoharie County. The defendants entered the deli with a 12 gauge loaded shotgun and when they directed the clerk, a 22 year old gentleman, to hand over the money, and he refused, the defendant shot the gun at an extremely close range into the clerk's chest, killing him immediately. The brothers took approximately \$180.00 from the deli and fled.

The Assault 2<sup>nd</sup> charge stems from an incident while the defendant was awaiting trial on the Murder charges. The defendant and a co-defendant, Vaughn Robinson, attempted to escape from the Schoharie County Jail. The defendant used a piece of furnace radiator to strike a Sheriff's deputy in the head, tied the deputy up and took his keys and money. While he was tied up, the deputy was abused, suffering a head laceration requiring numerous sutures and a broken jaw. The defendants were apprehended prior to fleeing the jail.

In his present petition, the Petitioner alleges he pulled the weapon from the store clerk's hands not realizing the weapon was loaded. The Petitioner argues that his parole denials are essentially predicated upon an unchangeable crime and that despite anything he has done such as, "consistently taking responsibility for his insidious past behavior, demonstrating remorse and maintaining an acceptable institutional record", he continues to get denied parole. (Petition, Page 4)

The Petitioner submits that the denial of parole is exclusively based on his seriousness of his underlying crime and if that is the sole reason for the parole board's determination, the same

is arbitrary, capricious, and irrational, bordering on impropriety. At the time of the burglary actions the Petitioner was 16 years of age and at the time of the murder he was 17. The Petitioner submits the Respondent failed to explain why he continually gets denied parole as he did not have any disciplinary tickets from the last time he was in front of the board, and there was no record of him refusing to take recommended programs, denying responsibility or failing to express remorse. The Petitioner submits he is completed and taught ART (Aggression Replacement Treatment) ASAT, (Alcohol Substance Abuse Treatment), AVP (Alternatives to Violence Program), which is voluntary, and that he has completed vocational training programs. The Petitioner submits he has done everything possible to change his past bad behavior so that the past would not be repeated. The Petitioner is now 50 years of age, having been born on May 18, 1967. He has spent over 30 years of his life in prison.

At the time of his hearing challenged herein, the Parole Board Officer asked the Petitioner “We recognize that teenagers can be impulsive. As a grown individual what is your assessment of yourself at the time you committed these offenses?” (Transcript, Page 3) The Petitioner explained a chaotic home situation where he was at times without food, and that his family going through some serious difficulties. The Parole Board asked the Petitioner about his achievements which he listed at length (Transcript, Pages 5 to 6). The Parole Board noted the sentencing minutes from Montgomery County offenses including the Judge’s remarks “The defendant has snuffed out a 22 year old life, left a mother, who is already a widow and two sisters. The impact upon the victim’s family has been enormous in that they have lost the head of a family. Quite understandably, the victim’s family expressed to the probation department that they would hope the defendant spend the rest of his life in jail.” (Transcript, Page 7)

The Parole Board noted the Risk Assessment and that it showed the Petitioner's risks were low except for a history of violence which was medium (Transcript, Page 8). They also noted they had received his case plan with his list of goals. They noted his program achievements and further noted he had a number of disciplinary infractions although he had not had any since 2013 (Transcript, Page 9). The Petitioner expressed remorse for committing the crime and attributed his actions to being young (Transcript, Pages 12-13).

The decision of the Parole Board was 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. The panel has considered your institutional adjustment including discipline and program participation. Required statutory factors have been considered including your risk to society, rehabilitation efforts, and your needs for successful re-entry into the community. Your release plans have also been considered as well as your COMPAS risk and needs assessment, case plan, and sentencing minutes which are in the file. Your IO, Murder 2<sup>nd</sup>, Assault 2<sup>nd</sup>, Burglary 2<sup>nd</sup>, Grand Larceny 3<sup>rd</sup> (2 cts), and CPCS 2<sup>nd</sup> (2 cts) involved you, at the age of 17 acting in concert, shooting a store clerk to death and at 16 while in the Schoharie County Jail you intentionally injured a Sheriff Deputy during an escape attempt. You also unlawfully entered a residence and stole property. Due consideration was given to your positive institutional record, your letters to the board, letters of support/reasonable assurance. The panel also recognizes your difficult upbringing. The panel remains concerned about your continued willingness to assess blame for your crimes and discipline on your age. The panel remains concerned about your actions in the IO in which an innocent victim was killed after

you made a decision to carry a shotgun into the store and pull the trigger not knowing whether it was loaded or not, and also assaulting an officer. The needless and senseless death of another and the senseless assault of an officer remain concerns for this panel. Accordingly, discretionary release at this time is not warranted. Parole is denied". (Pages 15-16 of Transcript, Exhibit H)

It is well settled that, "Determinations rendered by the Board are discretionary and are generally not subject to judicial review if made in accordance with the requirements of the statutory guidelines (Citations omitted). Contrary to Petitioner's contention that the Board's decision was based solely on the seriousness of the crime, the record supports the conclusion that the Board considered the other relevant statutory factors in denying Petitioner's release, including its interview with the Petitioner, the COMPAS risk assessment, and the Petitioner's positive institutional record." (Trobiano v State of NY Div of Parole, 285 AD 2d 812 (3<sup>rd</sup> Dept, 2001), pages 812-813). In Trobiano, the inmate had positive evaluations dating back to 1972 for his various prison jobs and his inmate status reports indicated he was one of the best behaved inmates and required little or no supervision. Despite this extremely positive history, the Court noted the underlying crime was done in a fit of rage and jealousy when he murdered his girlfriend. In this case, the Petitioner has established an improving disciplinary report, and he has taken advantage of institutional programming. The Petitioner's reckless killing of a store clerk and assault of a corrections officer, however, shows the board was not arbitrary and capricious in being concerned about the Petitioner's continued risk to the community if released. The board's emphasis on the seriousness of Petitioner's crime is permissible and does not establish that its ultimately discretionary determination was affected by "irrationality bordering on impropriety" (citations omitted) and of course the board is not required to expressly discuss, or give the same weight, to each statutory factor (Citations omitted). Trobiano supra

Likewise, in Garcia v. NYS Division of Parole, 239 AD 2d 235 (1<sup>st</sup> Dept, 1997), an inmate appealed a denial of his request for parole supervision. The inmate had been convicted of Attempted Murder and was serving a sentence of 38-1/3 to 115 years. He had an outstanding prison record, winning several awards and showing true progress in his behavior and interactions. The court noted, “Clearly the Board of Parole has been vested with an extraordinary degree of responsibility in determining who will go free and who will remain in prison, and a petitioner who seeks to obtain judicial review on the grounds that the board did not properly consider all the relevant factors, or that an improper factor was considered, bears a heavy burden. (Citations omitted). Id., p. 238.

If the Parole Board complied with the procedures set forth in Executive Law §259-i, its discretionary determinations are not subject to review unless there has been a showing of irrationality bordering on impropriety. Matter of Russo v NY State Board of Parole, 50 NY 2d 69, 77; Zane v Travis, 231 AD 2d 848, (4<sup>th</sup> Dept, 2002); Burgos v Berbary, 270 AD 2d 930 (4<sup>th</sup> Dept, 2000).

The petition is in all respects dismissed, without costs, as the Petitioner has not met the “heavy burden” required to show impropriety in the board’s action. Walker v Travis, 252 AD 2d 360 (1<sup>st</sup> Dept, 1998).

THIS CONSTITUTES THE DECISION AND JUDGMENT OF THE COURT.

DATED: February 27, 2018

  
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HON. DENNIS F. BENDER  
Acting Supreme Court Justice