

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: FEBRUARY 26, 2009

Honorable: PETER ESPINOZA
NONE

Judge JULIE A. RAMIREZ
Bailiff NONE

Deputy Clerk
Reporter

(Parties and Counsel checked if present)

BH 005388

In re,
BERNARD JACKSON,
Petitioner,
On Habeas Corpus

Counsel for Petitioner:

Counsel for Respondent:

Nature of Proceedings: ORDER RE: PETITION FOR WRIT OF HABEAS CORPUS

The Court has read and considered the Petition for Writ of Habeas Corpus filed on July 2, 2008 by the Petitioner, the Return filed on December 4, 2008 by the Attorney General and the Traverse filed on January 2, 2009 by the Petitioner. The Petitioner challenges the Board of Parole Hearings' ("Board") September 12, 2007 finding that he is not suitable for parole and denying him parole for two years.

Having independently reviewed the record and giving deference to the broad discretion of the Board of Parole Hearings ("Board") in parole matters, the Court concludes that the record does not contain "some evidence" to support the determination that the Petitioner currently presents an unreasonable risk of danger to society and is, therefore, not suitable for release on parole. See Cal. Code Reg. Tit. 15, §2281; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 667; *In re Lawrence* (2008) 44 Cal.4th 1181, 1205-06. Thus, the Board's decision must be vacated.

The Petitioner was received in the Department of Corrections on July 25, 1988 after a conviction for kidnapping for robbery with a firearm. He was sentenced to life, plus seven years. His minimum parole eligibility date was June 22, 1999. He has served more than 20 years in prison.

Facts

The record reflects that on May 6, 1986, the Petitioner approached the victim, Patricia Buchanan, while she was sitting in her car. The Petitioner displayed a gun and ordered the victim into the passenger seat of her car. The victim told the Petitioner she could not get in the passenger seat, because she was blocked by the gear shift, so he entered the car on the passenger side and instructed her to drive. The victim drove for approximately five miles until the Petitioner ordered her to pull over and get out of the car at gunpoint. He then drove away in the victim's car. The victim was not physically harmed. See 2007 Board Hearing Transcript, pages 10-11. Two years later, the Petitioner was arrested after attempting to sell the victim's car. The Petitioner claims that he did not commit the robbery and claims that he bought the victim's car at a used car lot before attempting to re-sell it. *Id.* at 13.

The Petitioner was previously convicted of robbery in 1980 after he conspired with a store manager to stage a false, unarmed robbery and split the proceeds from the register. *Id.* at 14-15. The Petitioner has received three 115 disciplines in prison, the last of which was received in 1997. One 115 was received in 1991

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for fighting. Additionally, he received a 128A, which was reduced from a 115, for possession of tobacco in 2006. *Id.* at 27-29; 2005 Psychological Report, page 4.

Throughout his more than 20 years of incarceration for the commitment offense, the Petitioner has participated in anger management programs, the Balanced Re-entry program and has attended several study courses. See 2007 Board Hearing Transcript, page 32. He has earned an A.A. degree in electronic engineering and has a trade school diploma in auto diesel mechanics. *Id.* at 44. He has earned a vocation in apprentice plumbing, which he has worked in for nine years with good work reports. He has also worked as a maintenance carpenter with good work reports. *Id.* at 36-38. Upon his release, the Petitioner plans to live with his parents and he has contacted several job placement organizations. *Id.* at 41, 49.

The Petitioner's psychological report indicated that the Petitioner presents a low to moderate risk for violence in the community. The slightly elevated placement was based mainly on his static, historical factors. See 2005 Psychological Report, page 4. The report noted that this assessment is not likely to change substantially over time. *Id.* The report also noted that the Petitioner has a stable, supportive family, good work skills and education and that he has increased maturity since his incarceration. The report indicated that the Petitioner does not require substance abuse or mental health treatment. *Id.* at 5.

The Board's Decision

The Board found the Petitioner unsuitable for parole after a parole consideration hearing held on September 12, 2007. The Petitioner was denied parole for two years. The Board concluded that the Petitioner was unsuitable for parole and would pose an unreasonable risk of danger to society and a threat to public safety. The Board based its decision on the Petitioner's commitment offense, his prior conviction for robbery, his institutional behavior, and his psychological report.

Standard of Review

The Board must consider "all relevant, reliable information available" and its decision must not be arbitrary or capricious. *Rosenkrantz, supra*, 29 Cal.4th at 670; Cal. Code Regs., tit.15, §2281, subd. (b). The paramount consideration in making a parole eligibility decision is the potential threat to public safety upon an inmate's release. The Board's decision must be based upon some evidence in the record of the inmate's current

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dangerousness. *In re Lawrence, supra*, 44 Cal.4th at 1205-06. Only a modicum of such evidence is required. *Id.* at 1191.

The Commitment Offense and Prior Robbery

The Board found that the Petitioner’s commitment offense was especially heinous, atrocious, or cruel, because it was carried out in a dispassionate and calculated manner, because it was “callous” and because the motive was very trivial in relation to the offense. Cal. Code Regs., tit. 15, §2281, subds. (c)(1)(B), (c)(1)(D) and (c)(1)(E). The Court finds that there is some evidence that the offense was carried out in a dispassionate and calculated manner and that the motive was very trivial in relation to the offense. The record indicates that the Petitioner armed himself and approached the victim for the purpose of stealing her car. His actions were planned and deliberate and the motive of stealing the car was very trivial in relation to his kidnapping the victim at gunpoint. The Court finds that there is no evidence the offense demonstrated an exceptionally callous disregard for human suffering. Although the victim was likely very frightened during the offense, she was never physically harmed and the Petitioner did not act in a manner calculated to intentionally induce terror in her. See *In re Scott* (2004) 119 Cal.App.4th 871, 891-92.

The Board also considered the Petitioner’s prior conviction for robbery. Although the robbery was not violent, as the Petitioner was unarmed and was working in concert with the manager of the store he stole from, the Board may consider this prior offense. Cal. Code Regs., tit. 15, §2281(b).

However, the Board may base a denial of parole upon immutable factors, such as the commitment offense and prior offenses, only if the facts are probative of the “ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety.” *Lawrence, supra*, 44 Cal.4th at 1221. Evidence of certain factual findings alone is not sufficient. *Id.* at 1212. Here, the commitment offense and the prior robbery conviction, neither of which involved any actual violence or physical assault, do not continue to indicate a current risk, after many years of violence-free rehabilitation.

As discussed above, the Petitioner has no history of physical violence, other than the one altercation in prison in 1991, and he has been free of any 115 disciplines for 11 years. He has upgraded vocationally and educationally and has participated in several self-help programs to enhance his ability to function upon his release. Cal. Code Reg. Tit. 15, §2281, subd. (d)(9). The Petitioner has no juvenile record and, despite his prior conviction for the unarmed robbery, he lacks a significant history of violent crime. Cal. Code Reg. Tit. 15,

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§2281, subs. (d)(1) and (d)(6). As noted in his psychological report, the Petitioner has a stable social history and strong family support. Cal. Code Reg. Tit. 15, §2281, subd. (d)(2). The Petitioner also has a confirmed offer of residence and marketable skills, as previously discussed. Cal. Code Reg. Tit. 15, §2281, subd. (d)(8).

Particularly after an inmate has served his suggested base term, the underlying circumstances of immutable factors, such as the commitment offense and prior offenses, will rarely constitute a valid basis for a denial or reversal of parole absent other evidence of current dangerousness. *Lawrence, supra*, 44 Cal.4th at 1211. Because the Petitioner’s post-conviction record strongly supports a finding that he no longer poses a danger to public safety, the Board’s findings regarding the immutable facts of the commitment offense, absent a rational nexus between those facts and current dangerousness, do not provide some evidence of unsuitability. *Id.* at 1227.

The Petitioner’s Disciplines in Prison

The Board also found that the Petitioner’s three 115s in prison and the 128A discipline he received in 2006 supported a finding that he is not suitable for parole. Cal. Code Regs., tit. 15, §2281(c)(6). However, the record indicates that the Petitioner’s only serious discipline was received for fighting more than 17 years ago. Although this discipline was indicative of a continued risk of danger at the time, it does not continue to be predicative of dangerousness now, after so many years of violence-free rehabilitation. Further, the Board may not rely on the 128A discipline, no matter how recent, as it is not considered a “serious discipline” by the Board’s own regulations. Only serious disciplines may serve as a valid basis for denying parole. See Cal. Code Regs., tit. 15, §2281(c)(2); Cal. Code Regs., tit. 15, §3315.

The Petitioner’s 2005 Psychological Report

The Board also considered the Petitioner’s 2005 psychological report’s indication that he presents a low to moderate risk of future violence. The report noted that the low to moderate assessment was based on historical factors and was not likely to change over time. A psychological report assessment that reflects that an inmate’s character remains unchanged from the time of the commitment offense may be evidence that he is dangerous and not suitable for parole. See *In re Shaputis* (2008) 44 Cal.4th 1241, 1260. Here, the report indicated that the Petitioner has increased maturity resulting from his positive rehabilitation in prison and noted that he has upgraded himself well vocationally and educationally. The Petitioner may not perpetually be denied parole because of a risk assessment that is largely based on his history and not his current mental state. Thus,

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the assessment of a low to moderate risk, based mainly on past, immutable factors, does not provide some evidence that the Petitioner is currently dangerous.

Conclusion

The Board's September 12, 2007 decision, finding the Petitioner unsuitable for parole is not supported by some evidence in the record of the Petitioner's current risk of danger to society. Therefore, the petition for writ of habeas corpus is granted. The Board is ordered to vacate its decision denying parole and thereafter conduct a new parole hearing for the Petitioner in conformity to the decision of this Court within 120 days.

The court order is signed and filed this date. The clerk is directed to send notice.

A true copy of this minute order is sent via U.S. Mail to the following parties:

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