

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: APRIL 02, 2009
Honorable: PETER ESPINOZA
NONE

Judge J. RAMIREZ
Bailiff NONE

Deputy Clerk
Reporter

(Parties and Counsel checked if present)

BH005486
In re,
HAROLD ZEIGLER,
Petitioner,
On Habeas Corpus

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 September 3, 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") March 4, 2008 decision, 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 *In re Lawrence* (2008) 44 Cal.4th 1181, 1205-06; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 667; Cal. Code Reg. Tit. 15, §2402. Thus, the Board's decision must be vacated.

The Petitioner was received in the Department of Corrections on May 20, 1988 after a conviction for murder in the second degree. He was sentenced to 15 years to life. His minimum parole eligibility date was January 16, 1998. He has served over 20 years in prison.

Facts

The record reflects that on September 10, 1987, the Petitioner stole William Abeytia's car while Mr. Abeytia was using a nearby pay phone. As the Petitioner was driving away, Mr. Abeytia grabbed the passenger door of his car. The Petitioner continued driving as Mr. Abeytia hung on the side of the car until he hit a pole and fell. The Petitioner drove away and was later apprehended by police. Mr. Abeytia died as a result of the injuries he sustained when he hit the pole. See 2008 Board Hearing Transcript (HT), pgs. 14-15.

The Petitioner was previously convicted of a misdemeanor for taking a vehicle without the owner's consent, stemming from an incident in which he misused a company vehicle. He was also previously arrested on several occasions. HT, pgs. 25-30. The Petitioner has a history of substance abuse and depression, which resulted in his losing his job and becoming intermittently homeless, as he was at the time of the commitment offense. *Id.*, pgs. 20-22.

Throughout his more than 20 years of incarceration for the commitment offense, the Petitioner has participated in numerous self-help programs, including anger management. He has been continuously involved

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in Alcoholics Anonymous and Narcotics Anonymous for more than 16 years. *Id.*, pgs. 49, 52. The Petitioner has also earned his high school diploma and has taken some college courses, including entrepreneurial courses. *Id.*, pgs. 39, 47. He has worked in Prison Industry textiles and earned a vocation in sewing machine repair. *Id.*, pgs. 46-47. If paroled, the Petitioner plans to apply these marketable skills and live with his sister, who has offered residential and financial support. *Id.*, pg. 58.

The Petitioner has received only one serious discipline in prison and has never been cited for violent conduct. In 2001, the Petitioner received a 115 for possession of a narcotic. The Petitioner was prescribed morphine by a prison doctor to treat a shoulder injury. However, when the medication was distributed to him, the Petitioner placed it into his pocket, rather than ingesting it. The Petitioner claims he did not need the pain killer at the time and decided not to immediately take it. *Id.*, pgs. 55-57.

The Petitioner's 2007 psychological report indicated that he presents a low risk of future violence and recidivism. See 2007 Psychological Report (PR), pg. 6. The report noted that the Petitioner has been committed to being substance abuse-free, that he has a positive outlook and gave him a Global Assessment of Functioning score of 90 out of 100. PR, pgs. 2, 4. The report further determined that the Petitioner's risk of danger had not increased because of the 2001 discipline. *Id.*, pg.6.

The Board's Decision

The Board found the Petitioner unsuitable for parole after a parole consideration hearing held on May 4, 2008. The Petitioner was denied parole for one year. 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 primarily on his commitment offense, his unstable social history, and the 115 discipline in 2001. Cal. Code Regs., tit. 15, §2402, subd. (c)(1), (c)(3) and (c)(6). The Board also determined that it would not be reasonable to expect the Petitioner to be paroled in the next two years, citing the same reasons. See *In re Jackson* (1985) 39 Cal.3d 464, 479.

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, §2402, 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

The Board found that the Petitioner's commitment offense was especially heinous, atrocious, or cruel, because it demonstrated an exceptionally callous disregard for human suffering and because the motive was very trivial in relation to the offense. Cal. Code Regs., tit. 15, §2402, subds. (c)(1)(A) and (c)(1)(E). The Court finds that there is no evidence to support the former finding. Although the Petitioner's reckless actions resulted in the victim's death, the record does not indicate that he intentionally inflicted pain or suffering on the victim, nor did his actions amount to a prolonged assault or torture. Thus, there is no evidence that the offense demonstrated an exceptionally callous disregard for the victim's suffering. See *In re Scott* (2004) 119 Cal.App.4th 871, 891-92.

The Court finds that the record does support the finding that the Petitioner's motive to steal the victim's vehicle was very trivial in relation to continuing to drive recklessly while the victim was attached to the car, resulting in his death. However, the Board may base a denial of parole upon the circumstances of the offense 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. Particularly after an inmate has served his suggested base term, the circumstances of the offense will rarely constitute a valid basis for a denial of parole, absent other evidence of current dangerousness. *Id.* at 1211. Here, the Petitioner has served more than his suggested base term and his commitment offense, which did not involve any deliberate violence, alone, does not continue to indicate a current risk of violence, after more than 20 years of violence-free rehabilitation.

As discussed above, the Petitioner has participated in numerous programs to enhance his ability to function within the law upon his release. Cal. Code Regs., tit. 15, §2402, subd. (d)(9). He has no juvenile record and lacks a significant criminal history. Cal. Code Regs., tit. 15, §2402, subds. (d)(1) and (d)(6). The Petitioner has demonstrated remorse and has taken responsibility for his offense. Cal. Code Regs., tit. 15, §2402, subd. (d)(3). He has also developed realistic plans and marketable skills for his release. Cal. Code Regs., tit. 15, §2402, subd. (d)(8). The likelihood of recidivism is further reduced by his advanced age. Cal. Code Regs., tit. 15, §2402, subd. (d)(7). 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 his immutable, pre-commitment factors, do not provide some evidence of unsuitability. *Lawrence, supra*, 44 Cal.4th at 1227.

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Unstable Social History

The Board also found that the Petitioner has an unstable social history. Cal. Code Regs., tit. 15, §2402, subd. (c)(3). The Board based this finding on the Petitioner’s history of drug and alcohol abuse, the periods of time in which he was homeless, as well as his prior conviction. None of these factors indicate a history of tumultuous relationships with others. An inmate’s minor criminal history and former substance abuse, alone, are not evidence of an unstable social history. See *In re Roderick* (2007) 154 Cal.App.4th 242, 268; *In re DeLuna* (2005) 126 Cal.App.4th 585, 594.

The 2001 Discipline

The Board also cited the Petitioner’s 2001 discipline for possession of a narcotic in denying him parole. Cal. Code Regs., tit. 15, §2402, subd. (c)(6). While this is a serious incident of discipline, the Board itself noted that the narcotic in question was “legitimately prescribed” to the Petitioner, for treatment of a shoulder injury. HT, pgs. 56-57. Further, the Petitioner’s psychological report indicated that, even if the 2001 discipline did reflect a lapse in his otherwise clean record of sobriety in prison, he is recommitted to maintaining his abstinence and any brief lapse would not increase his risk of danger. PR, pg. 6. Therefore, the Petitioner’s only 115 in his 20 years of positive, violence-free rehabilitation and sobriety, does not indicate an unreasonable risk of danger to society and may not serve as a basis for denying him parole.

Conclusion

The Board’s May 4, 2008 decision, finding the Petitioner unsuitable for parole and denying him parole for two years 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 90 days.

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

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