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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re ERIKA SCHOMBERG
on Habeas Corpus.

C067944

(Super. Ct. No.
WHC0000995)

Appellant, the Warden of Valley State Prison for Women, appeals the superior court's order granting respondent Erika Schomberg's petition for writ of habeas corpus. The superior court found the Board of Parole Hearings's (the Board) April 2010 decision issuing a three-year denial of Schomberg's parole was not supported by some evidence. Accordingly, the superior court vacated the Board's April 2010 denial of parole and remanded to the Board for a new suitability hearing. Under the standard as articulated in *In re Shaputis* (2011) 53 Cal.4th 192, 209 (*Shaputis II*), we conclude there was some evidence supporting the Board's finding of current dangerousness and reverse the superior court's order granting Schomberg's petition for writ of habeas corpus.

FACTS AND PROCEEDINGS

In February 1993, Schomberg's best friend, Trina Werly, was involved in a custody dispute with the father of her child, Gregory Kittle. Werly alleged Kittle had molested the child. Criminal charges were instituted, but were dropped by the district attorney's office after a preliminary hearing. Werly was ordered to share joint custody with Kittle. Because of their shared belief that Kittle was molesting the child, Schomberg and Werly conspired with Aaron Harper to kill Kittle.

Schomberg had been the caretaker for the child and had herself been a victim of sexual abuse. A few days before the murder, Werly came to Schomberg's house in a frantic state of mind. She was carrying a loaded gun and said she was going to kill Kittle. Schomberg dissuaded Werly from killing Kittle herself. Because she wanted the situation to stop and her friend to be "okay," she agreed to help Werly have Kittle killed. Because he had previously bragged about having grenades, Schomberg contacted Harper, with whom she had become pen pals with when he was in prison. After speaking with Werly, Harper agreed to "take care of this" for Werly.

Schomberg, Werly and Harper followed Kittle from his job to his home. Harper walked up to the front door, armed with a shotgun. When Kittle answered the door, Harper shot him in the chest. Kittle was hospitalized for 10 days and then died.

Schomberg pleaded guilty to second degree murder in exchange for a stipulated sentence of 15 years to life. The prosecutor believed the plea was appropriate because in 1988, Schomberg had been involved in a car accident and suffered substantial brain injuries. These injuries resulted in her having difficulties performing normal daily activities. Also, the prosecutor believed the murder would have happened irrespective of Schomberg's participation and that, unlike Werly and Harper, there was no evidence that her motive was financial gain. Werly proceeded to trial, was convicted of voluntary manslaughter and sentenced to a term of 12 years in prison.

Schomberg had no juvenile record. She had one conviction as an adult in 1992 for prostitution. Although her brain injuries made it difficult, she held a number of jobs before the murder.

In prison, Schomberg participated in a variety of self-help programs, including conflict and stress management, narcotics anonymous, victim impact and self-awareness, and alternatives to violence. She also participated in a number of volunteer activities, including the Women's Advisory Council, child abuse prevention and victim services. She completed a range of educational and vocational courses, including hotel and restaurant management, legal studies, personal finance, small business operations and management.

Upon release, Schomberg planned to live with her mother and work at furniture and upholstery repair and, seasonally, in air conditioning and refrigeration repair. She had a letter from Michelle Hofer of Hofer Construction expressing interest in hiring Schomberg and mentoring her in business and real estate.

Also while in prison, Schomberg received nine "128As." A "128A" is a "Custodial Counseling Chrono. When similar minor misconduct recurs after verbal counseling or if documentation of minor misconduct is needed, a description of the misconduct and counseling provided shall be documented on a CDC Form 128-A, Custodial Counseling Chrono." (Cal. Code Regs., tit. 15, § 3312, subd. (a)(2).)

She also received five "115s." A "115" is a "Rules Violation Report. When misconduct is believed to be a violation of law or is not minor in nature, it shall be reported on a CDC Form 115." (Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).)

In 1995, she received a 115 for breaking a room window. In 1996, following a family visit, Schomberg attempted to bring a pair of panties, a package of bubble gum and 100 clear capsules into the prison. She knew it was against the rules to bring the contraband into the prison. Schomberg admitted the charge, was assessed a 30-day credit forfeiture and visits were suspended for six months. In 2001, Schomberg passed a note

from one inmate to another. Inside the note were two bindles of heroin and an agreed upon sale price. The matter was referred to the district attorney's office, but was later dismissed. Schomberg was aware she was not supposed to pass notes, but claimed "people do it all the time." She also claimed she was unaware there was heroin in the note. The Board found Schomberg's version of the event was not credible. In 2008, during a random search of her cell locker, a correctional officer found a manufactured tattoo gun with an exposed needle. Schomberg's cellmate admitted the tattoo gun belonged to her. Schomberg was charged with possession of contraband, specifically a tattoo gun. The charge was substantiated and Schomberg was assessed a 30-day forfeiture of credit. Schomberg explained to the Board that she had allowed her cellmate to use her locker, which she also realized was a rules violation. She acknowledged she should have kept her cell locker locked.

In 2009, Schomberg "caused" 180 handbooks titled "California Life Prison Handbook for Women" to be printed. She was charged with obtaining printed material by theft, fraud or dishonesty and after a hearing, was assessed a 60-day credit forfeiture and a 90-day loss of yard privileges. Schomberg explained she had written the handbook and a friend wanted to make copies of it. The copies were not authorized and the signature on the work order allowing them to be made had been forged. Schomberg was given 20 copies of the handbook and "found out the girls were getting in trouble." She believed they had made too many copies, so she went to the graphic arts department to take responsibility for their acts. The supervisor asked how she had created the work order and she said she did not forge any signatures, but she had altered it. She "figured later on they would see there is no possible way I could have done that anyway. And so I took responsibility for the printing of the books."

Dr. Mair conducted a psychological evaluation of Schomberg. Dr. Mair concluded Schomberg was sincere in her expression of remorse and appeared to have "gained insight into her criminal conduct as well as the contributory factors of her

commitment offense.” Dr. Mair noted, however, that Schomberg continued “to have a problem, at times, following institutional rules and regulations. . . . [S]he does not seem to take personal responsibility for the RVR’s, as she has an excuse for her behavior in most cases.” Dr. Mair also reflected that while none of the rules violations were violent, “they do indicate that she continues to break rules even in a controlled environment and can be influenced by negative peers.” Dr. Mair concluded the 115’s were evidence of Schomberg’s tendency “to have a need to take responsibility for others’ misconduct, as she tends to overextend herself into others’ lives.” Dr. Mair concluded Schomberg’s overall risk for violence if released was “likely somewhere in the low range.” However, Dr. Mair noted Schomberg’s “propensity to help others and take the blame for others may put her at increased risk for violence and/or reoffense” as does her continuing need for validation.

During the hearing, the Board noted Schomberg sometimes got “mired in [her] decision-making because of friendships.” It noted with respect to both the 115’s and the commitment offense, it appeared her attitude about friendship got her into trouble. Schomberg agreed with this assessment and acknowledged she had “overextended” herself and put herself in bad situations, many of which “were not [her] personal situations.”

In speaking about her state of mind at the time of the life offense, Schomberg revealed she had felt “like I needed to be helping and I needed to be-- If I was anywhere around a situation that could use my assistance, I felt like I needed to be a part of it.” She said she now recognized that she needed to allow “others to be responsible for their own behavior . . . [and] also continue to practice the restraint of involving myself in any way. And although I cannot live in a bubble, there is a fine line between practicing restraint and offering help or advice only when asked. Or just more or less the practicing of more restraint to where I am not involving myself and not putting myself in a bad situation.”

Reflecting on what she could have done differently at the time of the life offense, Schomberg now realized she and Werly could have appealed the family court ruling “[a]nd I could have been the helpful friend that I wanted to be by poring [*sic*] myself in the law books and finding the correct way to have dealt with the situation And if I had just geared my thought process into legal, legal, legal, the law, the law, the law, how things are supposed to be done in the eyes of the law, and known of the appeal process, I could have wrote [*sic*] a wonderful appeal for my friend because I was so involved in her situation So what I did do was I wrote that in the time before this hearing. . . . I wrote a mock appeal that would have applied. It would have been accepted. And we could have hid [*sic*] [the child]. We could have hid her for weeks while these appeals were in process. . . . And if I had known the law better, then I could have been the type of person that could have helped her adequately. And what I did do was I took a victim advocacy legal class because I wanted to learn how to be and how I should have been a better victim advocate. . . . There was just a lot of things [we could have done] And this is where what I was saying that Greg’s death was senseless. It was senseless. It was unnecessary, because there was a legal avenue. There was a legal avenue that I didn’t even consider.”

When asked about her current interests, Schomberg answered she was doing all she could to obtain more knowledge because “I just want to be the type of person who can say, you have a problem, wait, I have a magazine for you, I can--I have information and we will supply you with that information, or there is information somewhere else and we will look for information And that’s my thought process now, is finding resources to resolve issues by becoming more informed.”

After considering all the information before it, the Board issued a three-year denial of parole.

The Board acknowledged Schomberg’s prior criminal history was minor, the circumstances of the offense were highly emotionally charged, she had adequate parole

plans and had expressed remorse for the murder. However, the Board found her recent rule violations were “kind of the same thing that got you into this crime. You decided it’s a good deal, that you need to be involved in it, that it’s something that you need to support, and you move forward with it. You had recent 115s. You just made this decision, despite you know what the rules of the institution are. Despite that, you decided in your own mind that you’re going to move forward and do what you think is best. That’s in an institution.”

The Board also found that pattern repeated in some of Schomberg’s answers to its questions, where irrespective of the focus of the question, she “had something to say and . . . said it anyway.” The Board noted that with respect to both passing the note with heroin in it and the possession of the tattoo gun, Schomberg knew the behavior was wrong and just went “along to be along. You know, you’re just doing the same kind of thing” as the life crime. The Board expressed concern that she had to have “the courage and fortitude to go out into the community and stand alone and not get suckered into another crime by someone who you think is well-intentioned and your friend. Friends don’t draw you into criminality. You make a personal decision to do that. And that’s what you have to work on.”

Schomberg filed a petition for writ of habeas corpus in the superior court. The superior court granted the petition for writ of habeas corpus, finding the decision was “not supported by any evidence that [Schomberg] continues to pose a threat to public safety.” The Attorney General sought a petition for writ of supersedeas, which this court treated as a request for stay and granted. The People’s appeal followed.

DISCUSSION

I

Motion to Dismiss

Schomberg filed a motion to dismiss the People’s appeal or recuse the supervising deputy attorney general, “because the decision to appeal and prosecution of it is infected by a conflict of interest creating an appearance of bias of the supervising deputy attorney general.” This claim is based on the fact that the supervising deputy attorney general on this case is the daughter of one of the deputy commissioners on the panel that decided Schomberg’s parole suitability. We agree that Deputy Attorney General Blonien’s participation in cases on which a family member participated in the underlying decision-making is problematic and raises an appearance of impropriety. That, however, does not require either dismissal or recusal.

Since neither party has cited any authority directly on point, nor has our independent research revealed any, we are guided by the principles found in Penal Code section 1424. A conflict “ ‘exists whenever the circumstances of a case evidence a reasonable possibility that the [prosecuting attorney’s] office may not exercise its discretionary function in an evenhanded manner.’ . . . However, for recusal to be granted, defendant must demonstrate that fair treatment by the office is unlikely.” (*People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1479-1480; see also Pen. Code, § 1424, subd. (a).) “ ‘[W]hether the prosecutor’s conflict is characterized as actual or only apparent, the potential for prejudice to the defendant . . . must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness. Thus [Penal Code] section 1424, . . . does not allow disqualification merely because the [prosecuting] attorney’s further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system.’ [Citation.]” (*Stark v. Superior Court* (2011) 52 Cal.4th 368,

415.) Rather, the conflict requires recusal only when the possibility of less than impartial treatment “is so great that it is more likely than not the defendant will be treated unfairly during some portion of the criminal proceedings.” (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 713.) It is Schomberg’s burden to establish the conflict and the likely unfair treatment. (*Id.* at pp. 709, 718.)

Schomberg has provided no authority for the proposition that dismissal of an appeal is the appropriate remedy for an alleged conflict of interest. Nor has Schomberg met her burden to establish that the treatment of this case by the Attorney General’s office has been unfair. Given our conclusion that the appeal is well-taken, we cannot find that “the fact that an appeal was filed at all, and the appeal has been prosecuted as it has been, is infected with . . . bias.” Accordingly, we deny the motion to dismiss and the alternative motion to recuse.

But we should add that this appearance of impropriety can and should be prevented. It creates an issue that should not have arisen. We urge the Attorney General to put into place conflict procedures that will avoid such occurrences in the future.

II

The Board’s Decision is Not Arbitrary and is Supported by Some Evidence

One year before an inmate’s minimum eligible parole date, the Board must set a parole release date, unless it determines that public safety requires a lengthier period of incarceration. (Pen. Code, § 3041, subs. (a) & (b); *In re Shippman* (2010) 185 Cal.App.4th 446, 454; see also *In re Lawrence* (2008) 44 Cal.4th 1181, 1204.) In making the parole suitability determination, the Board must consider all reliable, relevant information that bears on the inmate’s suitability for release. (*In re Twinn* (2010) 190 Cal.App.4th 447, 462; *Lawrence*, at p. 1203; *In re Gomez* (2010) 190 Cal.App.4th 1291, 1304; *In re Reed* (2009) 171 Cal.App.4th 1071, 1080; Cal. Code Regs., tit. 15, § 2402, subd. (b).) Such information includes, “the circumstances of the prisoner’s: social

history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." (Cal. Code Regs., tit. 15, § 2281; see also *id.*, § 2402, subd. (b).)

The Board's regulations also delineate factors tending to show suitability and unsuitability for parole. (Cal. Code Regs., tit. 15, §§ 2402, subds. (c) & (d), 2281.) These suitability factors are only intended to provide "general guidelines," not an exclusive or binding list. "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*In re Lawrence, supra*, 44 Cal.4th at p. 1212; see also *In re Twinn, supra*, 190 Cal.App.4th at p. 463.) The Board is authorized "to identify and weigh only the factors relevant to predicting 'whether the inmate will be able to live in society without committing additional antisocial acts.' [Citation.]" (*Lawrence*, at pp. 1205-1206.) Thus, "the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel." (Cal. Code Regs., tit. 15, § 2402, subds. (c) & (d).)

"[T]he fundamental consideration in parole decisions is public safety," and "the core determination of 'public safety' under the statute and corresponding regulations involves an assessment of an inmate's *current* dangerousness." (*In re Lawrence, supra*, 44 Cal.4th at p. 1205.) On review of the Board's parole-suitability determination, we focus on whether there is " 'some evidence' demonstrating that an inmate poses a current

threat to public safety, rather than merely some evidence suggesting the existence of a statutory factor of unsuitability.” (*Shaputis II, supra*, 53 Cal.4th at p. 209.) Under this standard of review, the Board’s “interpretation of the evidence must be upheld if it is reasonable, in the sense that it is not arbitrary, and reflects due consideration of the relevant factors.” (*Id.* at p. 212.) “Only when the evidence reflecting the inmate’s present risk to public safety leads to but one conclusion . . . may a court overturn a contrary decision by the Board or the Governor.” (*Id.* at pp. 223-224.) On review, we do not consider whether the inmate is currently dangerous, only “whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness.” (*Id.* at p. 221.)

On the record before us in this matter, we must affirm the Board’s decision.

A. Due Consideration of Relevant Factors

Schomberg claims the Board “failed to give due consideration to all [the relevant] factors in its weighing and decision-making process.” Schomberg’s claim rests on the fact that the Board’s decision does not delineate each specific factor tending to show suitability or unsuitability. While the Board is required to consider all relevant, reliable information before it, there is no requirement the Board provide a detailed analysis of every parole suitability factor. (See *In re McClendon* (2003) 113 Cal.App.4th 315, 323; *In re Morrall* (2002) 102 Cal.App.4th 280, 299–300; see also *In re Caswell* (2001) 92 Cal.App.4th 1017, 1031-1033.) In the absence of a record affirmatively showing the contrary, we presume the Board considered the evidence before it and the relevant factors. (Evid. Code, § 664; see also *Caswell*, at p. 1031.)

Here, there is no indication that the Board did not properly consider the materials before it or failed to consider mitigating evidence. Rather, the record here reflects the Board considered both the relevant factors and the evidence. The Board had before it the probation officer’s report, a recent psychological evaluation, the facts and circumstances of the life offense, Schomberg’s criminal and social history, her disciplinary history, her

custodial programming including self-help, education and vocational training, her laudatory chronological reports, her letters and statements of support, and her parole plans. At the hearing, Schomberg discussed her remorse about the offense and her understanding of the factors that led to it. The Board also spoke directly, and extensively, with Schomberg about the evidence and how it related to each parole suitability factor.

The record reveals that after considering “all the information received from the public and all relevant information” before them, the Board noted Schomberg had virtually no criminal record, the life offense was committed under extremely emotional circumstances, that Schomberg had recognized the tragedy of the crime and was remorseful, had adequate parole plans and had committed some nonviolent rule violations. Despite these positive factors, the Board found Schomberg continued to have the same mental state which led to the offense, and concluded Schomberg was not suitable for release on parole. On this record, we cannot find the Board failed to give due consideration to the relevant factors or the evidence before it.

B. Some Evidence of Current Dangerousness

The inmate’s understanding, current mental state and insight into factors leading to the life offense are highly probative “in determining whether there is a ‘rational nexus’ between the inmate’s dangerous past behavior and the threat the inmate currently poses to public safety.” (*Shaputis II, supra*, 53 Cal.4th at p. 218; see also *In re Lawrence, supra*, 44 Cal.4th at p. 1227.)

Schomberg described her state of mind at the time of the life offense as feeling she needed to be helpful and a part of any situation that could use her assistance. That mental state of “needing to help” her friend Werly, led her to seek out Harper’s assistance to kill Kittle. Thus, at the time of the commitment offense, Schomberg’s mental state was one in which she was responsible for taking on others’ problems as her own and seeking to solve those problems, even knowing that the conduct was wrong. She claimed she now

recognized she needed to let others be responsible for their own behavior and to practice restraint in offering help.

The record, however, belies Schomberg's claim that she now recognizes the need to let others be responsible for their own behavior and is restraining herself from the need to help them. In describing what she could have done differently to prevent the life offense, she replied that *she* could have learned the law and written appellate briefs or *she* could have hidden the child. Similarly, when asked about her current interests, she stated she was learning all she could so that *she* could be the person with solutions for people with problems. It was not Schomberg's lack of legal knowledge that led to her involvement in Kittle's murder, but her over-involvement in Werly's problems and need to solve them. Her comments make clear, even now, she continues to cling to the belief she was responsible for solving Werly's problem and still expresses a "need to be helping" anyone with a problem and to be a part of any "situation that could use [her] assistance." In that regard, her mental state now remains what it was at the time of the murder.

The rules violations are further evidence that Schomberg continues to act with the same mental state that led her to seek to solve Werly's problem by helping her arrange Kittle's killing; that is, taking on others' problems as her own and seeking to solve their problems, unconstrained by rules or consequences. Dr. Mair found the 115's were evidence of Schomberg's apparent "need to take responsibility for others' misconduct" and tendency to "overextend herself into others' lives." In each circumstance, she knew the conduct she was engaging in was a violation of the rules. Nonetheless, she decided it was acceptable to break the rules to help her friends. Tellingly, in the most recent 115, believing the "girls" were getting in trouble because of the excess printing, she "helped out" by taking responsibility for them breaking the rules. Schomberg admitted that as to both the 115's and the life offense, she had "overextended" herself into others' problems and put herself in bad situations. Dr. Mair cautioned this "propensity to help others and

take the blame for others” and continuing need for validation increased her risk of violence or reoffense. Schomberg’s mental state remains what it was at the time of the murder, in that she continues to feel responsible for taking on others’ problems as her own and seeking to solve those problems, even knowing that the conduct is wrong. There is some evidence to support the Board’s conclusion that Schomberg had the same mental state that led to Kittle’s murder, and that there is a rational nexus between that mental state and Schomberg’s current dangerousness.

DISPOSITION

The trial court’s order granting writ of habeas corpus is reversed. The trial court is directed to enter a new order denying writ relief. Upon finality of this decision, the stay previously issued is vacated.

_____ HULL _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ DUARTE _____, J.