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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re SATERIAL THOMAS
on Habeas Corpus.

C069035
(Super. Ct. No.
10F08043)

Petitioner Saterial Thomas has been incarcerated since 1994 for second degree murder. In 2010, the Board of Parole Hearings (Board) denied parole, finding that Thomas is currently dangerous. Thomas filed a petition for writ of habeas corpus, and the trial court, after reweighing the evidence, granted the petition.

We reverse because the Board properly relied on evidence that Thomas is currently dangerous.

BACKGROUND

On July 31, 1994, Thomas, 18 years old at the time, participated in a robbery that resulted in the shooting death of one of the victims.

The Murder

According to the probation report, Thomas and three other men (Richard Gonzalez, Leo "Red" Doley, and Melvin Smith) decided to rob the employees at a Burger King. The men agreed that the employees would not resist because the employees were instructed to lie down and give up the money. Gonzalez obtained a gun and gave it to Doley. The men entered the Burger King with nylon stockings over their heads. The assistant manager was taken to the office, where he handed over some money and then was hit in the head. The manager tried to escape out the front door, but he was shot from behind by Doley. The victim died the next morning from loss of blood.

Later the same evening, Thomas and the others went to Domino's Pizza. A shot was fired at an employee's head, but it missed the employee and hit a pizza tray. Another shot was fired, hitting the employee's pants, but not his leg.

Thomas was arrested on August 3, 1994, and has been incarcerated ever since.

Thomas pleaded guilty to second degree murder (Pen. Code, § 187, subd. (a)) with an arming enhancement (Pen. Code, § 12022, subd. (a)(1)). In exchange for his guilty plea, counts of robbery, assault with a deadly weapon, attempted robbery, and assault with a firearm were dismissed. The court sentenced

Thomas, under the agreement, to a state prison term of 15 years to life for second degree murder, plus one year for the arming enhancement.

Board Hearing

The Board met on July 7, 2010, to consider setting a parole release date. It relied on, among other documents, the probation report prepared before Thomas's sentencing, the appellate court opinion after his conviction, and psychological assessments done by Dr. John J. Wicks in 2009 and Dr. M. Geca in 2010.

Psychological Assessments

Dr. Wicks reported in 2009 that, before Thomas's incarceration, he used marijuana regularly and drank, sometimes heavily. He participated in AA (Alcoholics Anonymous) and NA (Narcotics Anonymous) while incarcerated. Thomas stated that his coperpetrators had been drinking the day of the crimes, but he denied drinking that day. He had two serious write-ups in prison for mutual combat in 1999 and 2000. He also had been written up for repeatedly failing to report for vocational training (1999) and stealing food (2003).

Thomas claimed to have completed vocational certificates in plumbing, electrical wiring, painting, building maintenance, power tools, general shop safety, meat cutting, sanitation, basic electronics, and business management.

Concerning the crimes, Thomas stated that he was the lookout and getaway driver. He had taken only two or three steps into the Burger King restaurant when he heard the

shooting. He ran back to the car and, after the other perpetrators joined him, he drove away. He was also the driver for the Domino's Pizza crimes. Concerning Thomas's motivation for the crimes, Dr. Wick's report states: "Money had been the primary reason for his participation. The inmate stated that he and his girlfriend were very stressed out about their money problems. Work had been up and down. He had started drinking."

Dr. Wicks performed risk assessments and concluded that Thomas was a very low risk of future violence, which Dr. Wicks attributed to Thomas's improved behavior in custody, but that he was still a medium risk for general criminal recidivism. Dr. Wicks noted some concerns with Thomas's parole plans. He also noted that, although Thomas had been smoking marijuana and drinking before the murder, he still minimized the effect of alcohol on his judgment. Thomas's risk of violent recidivism would likely increase if he began using "intoxicating substances" again.

The Board granted parole in 2009, but the Governor reversed the decision. He cited Thomas's failure to appear for a work assignment in 2006, which indicated to the Governor that he might not be able to maintain gainful employment.

During the psychological assessment in 2010, Dr. Geca asked Thomas about the Governor's decision. Dr. Geca's report states: "Although [Thomas] expressed disappointment and sadness over the decision, he offered no insight regarding the Governor's concerns. Follow up questions were asked, and he replied, 'I guess, he was concerned with my history, and he did not like my

prison conduct.' He did not state whether the Governor's concerns were warranted and he did not discuss having a specific plan, which would delineate steps of action and support to maintain steady employment."

Dr. Geca reported that Thomas had developed a feasible parole plan.

Concerning the crimes as recounted in Dr. Wicks's report, Thomas stated that he was not the driver when the men went from the Burger King to the Domino's Pizza. He expressed contrition and remorse. However, when asked how his crimes may have traumatized the victims, he responded, after several circuitous answers: "'I never thought how it might have affected them. Maybe they were afraid to have a job around people.'"

Dr. Geca stated: "Mr. Thomas'[s] responses evidenced some understanding of the life offense and its contributing factors. Yet, at times, his answers lacked depth and required clarification. During such moments, he was unable to elaborate on his responses and he tended to repeat his answers, used clichés, and he seemed bewildered when he was asked to attend to more intricate and personal aspects of his crime and its impact on others. Of particular concern was what appeared to be his limited empathy for the victims and his grasp of their suffering, loss, and the emotional impact the [murder] had on them. Perhaps he may have a clear awareness of the impact his crime had on the victim(s), but he did not verbalize his awareness during this interview."

Dr. Geca noted Thomas's improvement in prison, but was concerned that Thomas did not have a viable substance abuse relapse prevention plan. Dr. Geca felt this was a problem because Thomas abused alcohol in times of stress.

Dr. Geca also echoed the Governor's concern about Thomas's ability to provide for himself because of his failure to appear for work in prison and the lack of a well-developed plan for finances once released.

2010 Board Decision

Thomas testified during the hearing, discussing the murder and his current thoughts concerning the crime and its consequences.

The Board denied parole on July 7, 2010, because Thomas poses an unreasonable risk of danger.

The Board's reasoning for the denial began with the gravity of the offense, noting that the murder was atrocious and cruel. The victim was shot while he was fleeing for his life, and he was left to bleed to death on the sidewalk. Thomas minimized his involvement, however, claiming he was only a lookout and getaway driver.

The Board also relied on Thomas's past and present mental state and his attitude towards the crime. Thomas had no insight concerning the Governor's reasons for denying parole and expressed no plans to Dr. Geca concerning steps to maintain steady employment.

Thomas's answers concerning his understanding of the murder and its consequences lacked depth and required clarification.

He used clichés and seemed bewildered when asked to discuss the more intricate and personal aspects of the crime and its impacts on others. The Board was particularly concerned with Thomas's limited empathy for the victims and his failure to grasp their suffering and loss. The Board also noted his minimization of the effects of alcohol on his judgment, as he had increased his drinking before the murder. He claimed that he did not feel compelled to drink; however, he increased his drinking when he was feeling stress. The Board stated that Thomas must "develop further insight into the causative factors of [his] conduct."

The Board determined that Thomas had not obtained vocational certification as he claimed to Dr. Wicks. Instead, he merely attended classes on those subjects, after which he received certificates for participation in those classes. He was certified only as a plumber. He expressed a hope to obtain a cosmetology license, but he lacked well-developed plans to secure money to live on in the meantime.

The Board also relied on the assessment that Thomas is a medium risk for general criminal recidivism.

Finally, the Board congratulated Thomas on exceptional parole plans and counseled Thomas to stay on track for future parole consideration.

Trial Court Decision

Thomas filed a petition for writ of habeas corpus in the trial court. After the court issued an order to show cause, the People filed a return. The court granted the petition without

an evidentiary hearing and set aside the Board's order denying parole.

The trial court concluded that the Board's decision was not supported by "some evidence" that Thomas is currently dangerous. It analyzed separately the Board's findings with respect to (1) the commitment offense, (2) minimization of conduct, (3) remorse, (4) substance abuse, (5) the unfavorable psychological report, and (6) parole plans.

1. Commitment Offense

The court did not say much about the murder, noting only that the murder, alone, cannot establish current dangerousness.

2. Minimization of Conduct

On the other hand, the court delved deeply into the Board's finding that Thomas minimized his conduct. The court concluded that the Board's finding was unsupported because Thomas acknowledged the facts concerning his participation in the crime. To support its decision with respect to Thomas's minimizing of his role, the court noted Thomas's insight into some of the factors leading to his crime, such as his recognition now that he had engaged in poor decisionmaking.

3. Remorse

The trial court concluded that Thomas's unsophisticated answers concerning remorse and the effects of his crimes on others did not support the conclusion that he remains a danger to society. The court claimed that this lack of sophistication could not be used against Thomas because it was factored into the risk assessment that concluded that Thomas is a very low

risk for violence. The court relied on actions Thomas has taken, such as expressing remorse and apologizing to the victims and their families.

4. Substance Abuse

The trial court stated that the Board could not rely on testimony that Thomas might reoffend if he goes back to drinking because Thomas had participated in AA and NA at times while in prison and had a plan to avoid drinking. The court did not consider the evidence that Thomas drank more heavily before the murder because of stress in his life.

5. Psychological Report

The trial court concluded the Board could not rely on the risk assessment that found Thomas to be a medium risk for general criminal recidivism because there was another risk assessment that found Thomas to be a very low risk for violent recidivism.

6. Parole Plans

The trial court refused to consider whether Thomas had sufficient ability to succeed on parole because the Board did not explicitly rely on that factor and Thomas had a good parole plan. The court also refused to consider the discrepancies between the vocational certificates Thomas claimed to have and what he really had because, in the trial court's words, "it was clarified at the hearing."

DISCUSSION

A. *Applicable Law*

Penal Code section 3041, subdivision (b) "provides that the Board must grant parole unless it determines that public safety requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction."¹ (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654; *In re Lawrence* (2008) 44 Cal.4th 1181, 1203 (*Lawrence*).) The courts, both trial and appellate, review the Board's decision for "some evidence" demonstrating the prisoner remains a current threat to public safety. (*Lawrence, supra*, at p. 1191.) We

¹ The factors tending to show unsuitability for parole are that the prisoner: (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) possesses a previous record of violence; (3) has an unstable social history; (4) previously has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (Cal. Code Regs., tit. 15, § 2402, subd. (c).)

The factors tending to show suitability for parole are that the prisoner: (1) does not possess a violent juvenile record; (2) has a reasonably stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress has built over a long period of time; (5) committed the criminal offense as a result of Battered Woman Syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills; and (9) has engaged in institutional activities indicating an enhanced ability to function within the law upon release. (Cal. Code Regs., tit. 15, § 2402, subd. (d).)

must adopt the Board's interpretation of the evidence if the interpretation is reasonable and reflects consideration of the statutory factors. (See *In re Shaputis* (2008) 44 Cal.4th 1241, 1258 (*Shaputis I*)). "[T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion'" of the Board. (*Id.* at p. 1260.)

"[T]he court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based on the factors specified by statute and regulation." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 658.) "It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*Id.* at p. 677.)

"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. [¶] Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the decision of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. [Citations.]" (*Lawrence, supra*, 44 Cal.4th at p. 1212, italics omitted.)

Recently, in *In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*), the Supreme Court reaffirmed the limited scope of judicial

review and the deferential nature of the "some evidence" standard for reviewing parole suitability determinations. The court explained: "While the evidence supporting a parole unsuitability finding must be probative of the inmate's current dangerousness, it is not for the reviewing court to decide *which* evidence in the record is convincing. [Citation.] 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. In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process. [Citation.]" (*Id.* at p. 211, original italics.)

"[A] court must consider the whole record in the light most favorable to the determination before it, to determine whether it discloses some evidence -- a modicum of evidence -- supporting the determination that the inmate would pose a danger to the public if released on parole. [Citations.] . . . Any relevant evidence that supports the parole authority's determination is sufficient to satisfy the 'some evidence' standard. [Citation.]" (*Shaputis II, supra*, 53 Cal.4th at p. 214, fn. omitted.)

"Consideration of an inmate's degree of insight is well within the scope of the parole regulations. The regulations do not use the term 'insight,' but they direct the Board to consider the inmate's 'past and present attitude toward the crime' [citation] and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature

and magnitude of the offense' [citation]. These factors fit comfortably within the descriptive category of 'insight.'" (*Shaputis II*, supra, 53 Cal.4th at p. 218.) "[T]he presence or absence of insight is a significant factor 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. [Citations.]" (*Ibid.*)

Here, contrary to the trial court's conclusions, evidence of several factors supports the Board's decision. We consider each factor considered by the Board and the trial court.

B. *Factors Considered by the Board and the Trial Court*

1. Commitment Offense

The Board concluded that the murder was particularly atrocious and cruel, as the victim was shot while he was fleeing for his life and was left to bleed to death on the sidewalk. The trial court ignored this finding. This was error because the egregiousness of the murder is a factor in determining dangerousness, even if it cannot be used alone to deny parole. (Cal. Code Regs., tit. 15, § 2402, subd. (c).)

2. Minimization of Conduct

Concerning Thomas's minimizing of his role in the crime, the trial court missed the point of the Board's finding. The finding was not that Thomas participated in more aspects of the crime, such as shooting the gun, than he admitted to the Board. Instead, the Board's finding was that, even though he admitted his participation in the crime, he implied that he was less culpable because he was just the lookout man or getaway driver.

It was this implication of lesser culpability that concerned the Board. Thomas lacks insight into his crime because, the Board impliedly concluded, he continues to believe he can partially explain away his culpability by claiming he was less involved than the other participants. This lack of insight contributes to his dangerousness.

3. Remorse

The trial court explained away Thomas's lack of remorse and inability to empathize with the victims' pain and suffering by claiming that Thomas was merely unsophisticated. Again, that may be the trial court's point of view, but the trial court is not entitled to a point of view in this analysis or to reweigh the evidence by noting that Thomas had apologized to the victims and their families, for example. The fact is that there is some evidence that Thomas continues to lack remorse and is unable to empathize with his victims. That contributes to his dangerousness.

4. Substance Abuse

The trial court ignored the evidence that Thomas is presently unable to come to terms with the fact that he began drinking more heavily before the crimes because of stress. This lack of insight also contributes to his dangerousness.

5. Psychological Report

Particularly inexplicable is the trial court's total rejection of the assessment that Thomas is a medium risk for general recidivism. The Board, when determining dangerousness, is entitled to consider the risk of antisocial acts. (*In re*

Reed (2009) 171 Cal.App.4th 1071, 1081-1082.) "Antisocial acts include, of course, crimes of violence. But in discharging its responsibilities, the Board is entitled to deny parole when an inmate poses an unreasonable risk of causing personal or financial harm to others if released." (*Id.* at p. 1082, italics omitted.)

6. Parole Plans

Finally, the trial court disagreed with the Board on the relevance of Thomas's misrepresentation concerning the vocational certificates he had obtained. The court reweighed the evidence and concluded it was simply a misunderstanding that was cleared up at the hearing. The reweighing was inappropriate. The evidence supported the Board's conclusion that Thomas was lying about his ability to earn a living after he is released.

C. Conclusion

This is not a close case. Construing the evidence in favor of the Board's determination, there was evidence supporting the Board's decision to deny parole. The trial court's reweighing of the evidence was prejudicial error.

DISPOSITION

The trial court's order granting Thomas's petition for writ of habeas corpus is reversed and the court's order setting aside the Board order of July 7, 2010, is vacated. The cause is

remanded with directions to deny the petition for writ of habeas corpus.

NICHOLSON, Acting P. J.

We concur:

MAURO, J.

HOCH, J.