Filed 12/22/09 In re Ledbetter CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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| IN RE RANDY LEDBETTER ON HABEAS CORPUS | C060498<br>(Super. Ct. No. 103365) |

In 1989, when defendant Randy Ledbetter was 16 years old, a jury convicted him of attempted first degree murder, robbery, and first degree burglary. The jury also found, as to the attempted murder, that defendant inflicted great bodily injury on the victim. He was sentenced to a term of life with possibility of parole for the attempted murder plus a determinate term of five years, four months for the robbery and burglary.

On November 14, 2007, at defendant's sixth hearing before the Board of Parole Hearings (Board), the Board found defendant unsuitable for parole because he posed an unreasonable risk of danger to the public if released. The reasons cited by the Board were defendant's unstable social history, his questionable sincerity in claiming that he was now taking full responsibility for the crime, and the aggravated circumstances of the attempted murder.

On August 5, 2008, defendant filed a petition for writ of habeas corpus in the Butte County Superior Court seeking reversal of the Board's ruling. On November 18, the trial court (Judge Robert A. Glusman) granted the petition, finding that no evidence supported the Board's finding that defendant was currently dangerous. The court directed the Board to set a parole date and to release the defendant forthwith. On November 26, the People filed a notice of appeal from, and a request for a stay of, the trial court's orders. On December 1, we granted the stay pending further order by this court.

The People contend that reversal of the trial court's order is required because the record contains "some evidence" supporting the Board's finding of unsuitability for parole, and that even if there was no such evidence, the remedy was remand for further consideration rather than ordering the Board to set a parole date and to immediately release defendant. We shall affirm the trial court's granting of the petition, but shall remand the matter to the Board with directions.

THE BOARD'S DUTIES

For defendants sentenced to an indeterminate term with the possibility of parole, as is the case here, the Board is required to set a parole release date unless the Board determines that the defendant is unsuitable for parole because he is an unreasonable risk of danger to society if released. (Pen. Code, § 3041, subds. (a), (b); Cal. Code Regs., tit. 15, § 2402, subd. (a), undesignated section references are to title

15 of the California Code of Regulations.) In determining a defendant's suitability for release, the Board is required to consider both the general and specific circumstances set forth in section 2402. (§ 2402, subd. (a); *In re Rosenkrantz* (2000) 80 Cal.App.4th 409, 425, disapproved on other grounds in *In re Rosenkrantz* (2002) 29 Cal.4th 616, 679.)

The general circumstances consist of "[a]ll relevant, reliable information available to the panel" including "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 offense, 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." (§ 2402, subd. (b).)

Specific circumstances tending to show unsuitability include, as is relevant here, that the offense was committed in "an especially heinous, atrocious or cruel manner" (§ 2402, subd. (c)(1)); that the defendant has an unstable social history (§ 2402, subd. (c)(3)), and that the defendant has engaged in serious misconduct in prison or jail (§ 2402, subd. (c)(6)).

Specific circumstances favoring suitability include, again as is relevant here, lack of a juvenile record, (§ 2402, subd. (d)(1)); signs of remorse (§ 2402, subd. (d)(3)); lack of a history of violent crime (§ 2402, subd. (d)(6); plans for release including development of marketable skills (§ 2402, subd. (d)(8)); and activities which indicate an enhanced ability to function within the law upon release (§ 2402, subd. (d)(9)).

TRIAL AND APPELLATE COURT REVIEW OF THE BOARD'S DETERMINATION THAT DEFENDANT LACKS SUITABILITY FOR PAROLE

"[T]he Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.]" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1221.) "[W]hen a [trial or appellate] 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.]" (*Id.* at p. 1212.) Where, as here, the trial court grants habeas corpus relief without an evidentiary hearing, the question is one of law which we review de novo. (*In re Lazor* (2006) 172 Cal.App.4th 1185, 1192; *In re Zepeda* (2009) 141 Cal.App.4th 1493, 1497.)

## EVIDENCE REGARDING THE BOARD'S FINDING OF FACTORS OF UNSUITABILITY

### The Facts of the Commitment Offense

In 1989, defendant, who was 16 years old, homeless and working as a male prostitute, was taken off the streets by Ernie Glenn who provided defendant with room, board and a job at Glenn's ranch in Butte County.[1] Glen Russell, who was "around 23" years old, and Charles Vogt also lived and worked at the ranch, as did some others. At some point, defendant and Russell entered into a plan to steal items from Glenn, sell them and go to Hawaii.

On July 3, 1989, while Glenn and the others were away from the ranch, defendant and Russell decided to implement their plan. Vogt, however, had remained at the ranch. Knowing that Vogt would not go along with their plan, defendant and Russell decided to knock Vogt unconscious, handcuff him, and then burglarize Glenn's residence. While all three were together in a cabin, defendant struck Vogt from behind with a wrench, but Vogt did not lose consciousness. Russell threw Vogt to the floor and defendant and Russell kicked and beat him.

During the beating, Russell straddled and handcuffed Vogt, grabbed Vogt's hair, "yanked up," and told defendant to cut Vogt's throat. Defendant first stabbed Vogt in the back of the

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[1] While living at the ranch, defendant was going by the name of Vince Malono; however, after his arrest in this case, he informed the officers that his name was Randy Ledbetter and that he was a minor. He was found unfit for juvenile court and tried as an adult.

neck, then he cut Vogt's throat. Because there was a lot of blood, defendant believed Vogt was dead. Defendant and Russell then burglarized Glenn's residence.

Still believing that Vogt was dead, defendant and Russell returned to the room and took Vogt's wallet. A short time later, defendant again returned to the room, this time to obtain keys to a van to facilitate their escape. However, Vogt was not only still alive, but he now had a rifle which he pointed at defendant, who immediately fled.

Vogt made it to a neighbor's home and the sheriff's department was called. A few hours later, the officers found defendant and Russell walking down a nearby road and took them into custody.

We shall have more to say about how the facts of the offense affect the decision whether to grant parole.

Defendant's Unstable Social History

The Board found defendant had an unstable social history based upon his "transitory lifestyle," truancies, runaways, and teen prostitution. The evidence established that in his childhood defendant lived with his mother who was in the military; they moved to Italy, Germany, England and back to the United States; and defendant admitted becoming increasingly truant, out of parental control, drinking alcohol at 14, smoking marijuana at 15, running away and engaging in prostitution for about a month.

Although the factors cited by the Board are adequately supported by the evidence, the factors themselves do not establish an unstable social history. Section 2402, subdivision (c)(3), defines "Unstable Social History" as one where "[t]he prisoner has a history of unstable or tumultuous relationships with others." Aside from the instant offense, there is no evidence in defendant's record of "unstable or tumultuous relationships with others."[2] Indeed, while the factors cited by the Board establish turmoil and upheaval in defendant's youth, they do not establish any relationship at all with others, let alone relationships that are unstable and/or tumultuous. (See, for example, *In re Roderick* (2007) 154 Cal.App.4th 242, 268 [factors of being raised by grandmother and dropping out of school in 11th grade, and continuing criminal activity during 20-year marriage do not provide evidence of unstable social history or tumultuous relationships "with others"]; *In re DeLuna* (2005) 126 Cal.App.4th 585, 595 [even where the evidence shows consumption of alcohol contributed to the defendant's criminal activities, such circumstance does not in and of itself show instability or tumultuous relationships with others].)

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[2] "Tumultuous" means: "1. marked by a tumult: full of commotion and uproar . . . 2. tending or disposed to cause or incite a tumult . . . 3. marked by violent or overwhelming turbulence or upheaval." (Webster's 3d New Internat. Dict. (1981) p. 2462.) "Tumult" means: "3a: violent agitation of mind or feelings; highly disturbing mental or emotional excitement or stress . . . ." (*Ibid.*)

Additionally, the record is devoid of evidence that defendant experienced any on-going or difficult relationships with other prisoners or prison staff. In fact, the panel noted both that defendant had "maintained Medium A custody" which is "the lowest custody you can have as a life term prisoner without a parole date" and that he had "no enemies" or "gang affiliations."

Consequently, we conclude there is no evidence supporting the Board's finding that defendant had an unstable social history.[3]

Board's Uncertainty that Defendant Accepted Responsibility for the Crime

The Board is to consider a defendant's "past and present attitude toward the crime" in determining parole suitability. (§ 2402, subd. (b).) Defendant claimed that he had now taken full responsibility for his part in the attempted murder, a circumstance which, if true, would favor parole. (§ 2402, subd. (d)(3) [defendant "understands the nature and magnitude of the offense"].)

During the instant Board hearing, defendant admitted that in his early years of incarceration he repeatedly lied about the extent of his involvement in the attack on Vogt. His lies

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[3] Even if any of the foregoing factors, singly or in combination, could be stretched to find an unstable social history, we would conclude that there is no conceivable, rational inference which could be drawn between such long-ago and relatively benign events and a prediction of defendant's current dangerousness.

ranged from claiming that it was Russell who cut Vogt's throat to having committed the offense because he was under the influence of heroin and alcohol when he aided Russell in the attack on Vogt. Defendant also admitted that he lied when he claimed that he had been talked into having sex with Glenn and had been molested by his babysitter. Defendant said that he told these lies "to avoid the consequences of what [he] had done" and to minimize his punishment.

However, defendant insisted that starting in 1999 he had consistently told the truth and taken full responsibility for his part in the attempted murder, specifically admitting that he had struck Vogt from behind with a wrench, stabbed Vogt in the back of the neck, and cut Vogt's throat, all of which was done while defendant was not under the influence of alcohol or drugs.

The Board observed that defendant's "past and present versions and attitude towards the crime" bore "significantly" on his suitability for parole. The Board stated: "I'm not sure if we're getting the truth as it should be or is this an evolution of layers of falsehoods spun to satisfy the Panel today. But we would like to believe that you have made progress, but we're just not real sure if this is the truth. And if it is, it's been a long time coming and it is recent. [¶] . . . [¶] So, this Panel looks at your gains as recent . . . . And it wasn't until after [2002] that you started saying I take full responsibility. . . . So that's relatively recent . . . ."

Defendant argues that, contrary to the People's position, the Board "did not deny parole based on the alleged falsity of [defendant's] testimony . . . , but because it felt his 'gains,' i.e., his acceptance of responsibility, was too 'recent.'"

We do not read the record so narrowly. What the Board said was that because of defendant's repeated lying about the extent of his involvement in the crime, the Board was unsure whether defendant was now truthful in his claim of acceptance of responsibility. But even if defendant was now being truthful, which only he could know for certain, the recency of his acceptance still left the matter in doubt.

Notwithstanding this difference in interpretation, we nevertheless conclude that the evidence does not support the Board's failure to credit defendant with this favorable factor.

That defendant had taken full responsibility for the crime since at least August of 2000 is documented by the reports of mental health experts who evaluated him for the various Board hearings. Specifically, that defendant had admitted hitting Vogt with a wrench and cutting his throat was reported by Dr. William O. Evans in 2000, by Dr. John R. Bellinger in 2003, by Dr. Meredith B. Smith in 2005, and again by Dr. Smith in 2007.

The instant Board hearing was in November 2007. Thus, defendant had been taking full responsibility for the offense for over eight years when the Board refused to credit him with accepting responsibility for the crime. This eight years of consistency, coupled with the opinions of the mental health

professionals who evaluated and accepted defendant's sincerity, renders unreasonable the Board's refusal to credit defendant's acceptance of responsibility for the offense.

Defendant's Institutional Behavior

A defendant's institutional behavior is a circumstance unfavorable to parole when the defendant has "engaged in serious misconduct in prison or jail" (§ 2402, subd. (c)(6)); it is favorable when the defendant's "[i]nstitutional activities indicate an enhanced ability to function within the law upon release" (§ 2402, subd. (d)(9)).

Evidence of defendant's negative behavior is the following: Defendant was committed to the California Youth Authority (CYA) -- now the Department of Juvenile Justice -- in December 1989. In 1991, he escaped, making "it outside the fence and about two blocks down the street." He was transferred to adult prison in November 1991. There he accumulated six section 115 write-ups -- failure to report to work, attempted suicide, manufacture of pruno, twice refusing to work, and failure to report to job assignment. The last section 115 write-up was in 1998. He also received eight section 128 write-ups -- not obeying orders, twice failing to report, possession of contraband, absent from work, unauthorized property, cell standards, and out of bounds. The last section 128 write-up was on June 11, 2004.

Defendant's positive behavior was evidenced by his successful completion of programs offered by Narcotics

Anonymous, Alcoholics Anonymous, stress management, life skills, coping skills, anger management, and victim awareness. He earned an Associate of Arts degree from Palo Verde College where he also made the Dean's list, and he received vocational certificates in dry cleaning, computer services technician, electronics technician, information technology, and data processing. He participated in, but has not completed, training in carpentry.

Aside from defendant's inept escape at CYA, he has no "serious misconduct" while incarcerated. Indeed, the panel recognized as much when it noted that, even including defendant's section 115 and 128 write-ups, "As to your institutional behavior, you have programmed well." Consequently, this circumstance favors suitability for parole.

No Juvenile Record

A prisoner is considered having no juvenile record where "[t]he prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims." (§ 2402, subd. (d)(1).) Aside from committing the instant assault when he was a minor, defendant has no such juvenile record.

Lack of Criminal History

This favorable circumstance applies where "[t]he prisoner lacks any significant history of violent crime." (§ 2402, subd. (d)(6).) Again, aside from the committing offenses, there is

nothing in the record reflecting any violent crime, let alone a significant one.

Defendant's Post-Release Plans

A circumstance favoring release exists where "[t]he prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release." (§ 2402, subd. (d)(8).) As previously set forth, these marketable skills are receiving an associate arts degree from Palo Verde College and obtaining certificates in dry cleaning, silk screening, data processing, information technology, and computer services.

Additionally, Ronald Reed, the attorney who represented defendant in juvenile court prior to his being found unfit, has offered defendant housing and full time employment in a commercial development that he and his sons own. The Board also had before it a letter from Dr. Voss, a marriage and family therapist, offering outpatient counseling to defendant. The Board found these plans "adequate."

Butte County District Attorney's Letter

The Butte County District Attorney's office provided a letter, dated November 6, 2007, opposing a finding of suitability. Factors cited were the aggravated circumstances of the offense, the "number of rule violations [and] chronos [defendant had] received," his escape from CYA, and the inconclusiveness of Dr. Smith's psychological reports in assessing defendant's risk if released. Aside from the letter's

opposition to defendant's being paroled, the letter neither contained any information which was not before the Board nor any recognition of defendant's achievements while incarcerated nor analysis as to why defendant was currently dangerous.

Aggravated Nature of the Commission of the Offense

A circumstance favoring unsuitability, and the one relied on primarily by the Board, is that "[t]he prisoner committed the offense in an especially heinous, atrocious, or cruel manner." (§ 2402, subd. (c)(1).) We have recounted the facts above.

Ample evidence supports the Board's finding that the attempted murder was carried out in an especially heinous, atrocious and cruel manner, and defendant does not contend otherwise.

However, "[T]he aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (*In re Lawrence, supra,* 44 Cal.4th at p. 1214.)

In addition to the many institutional programs completed and the vocational certificates obtained by defendant, the mental health professionals who examined him over the past eight

years consistently rated his current dangerousness from being no more dangerous than the average person on the street to virtually nonexistent.

Thus, in March 1998, Dr. William O. Evans, Ph.D. wrote: "Inmate Ledbetter presents as an essentially changed individual based on his previous psychiatric and psychological evaluations." "Once in a while, the system works, and CDC should be proud of its own extensive use of resources in this inmate's behalf." "[H]e is a low recidivism risk . . . [and] [h]is current dangerousness is considered almost nonexistent."

In August 2002, Dr. Evans opined that while defendant had remained discipline free for approximately two years, Dr. Evans recognized that it would take "a number of years before the Board of Prison Terms would take his improvement seriously." However, Dr. Evans also noted, "He seems to have experienced some sort of a turn around, a somewhat realistic epiphany concerning reality."

In January 2003, Dr. John R. Bellinger assessed defendant's dangerousness as having "no identifiable risk factors, at this point, which could lead to violent behavior."

In June 2005, Dr. Meredith Smith stated that while "[i]t is impossible to predict with scientific certainty that any individual will or will not reoffend . . . . [¶]. . . [¶] . . . [i]f he were released into the community he would be expected to present no greater risk than the average citizen."

In March 2007, Dr. Smith wrote, "Mr. Ledbetter does not present a risk to the public. There are no psychological factors that would adversely affect his release. He is expected to be able to sustain a successful parole and adequately adjust back into a free society. Participation in Alcoholic and Narcotics Anonymous self help programs and individual and family therapy are recommended as additional supports when released."

In an addendum to her previous report, prepared in September 2007, Dr. Smith reviewed defendant's plans if released and concluded, "There is every indication that he will be a productive member of a free society if released. [¶] . . . [¶] [And] [h]e is to be considered a good candidate for release."

Aside from defendant's single instance of violence committed when he was 16 years old, he has no record of violence in or out of prison. The mental health professionals who have evaluated him for the past eight years have found the risk of his current dangerousness if released as nearly nonexistent or, at the least, no more than would be expected of the average person on the street. Notwithstanding defendant's accumulation of sections 115 and 128 write-ups, the last of which occurred in 2004, the Board noted that during the time of his incarceration he had programmed well, a conclusion clearly evidenced by the certificates he had obtained, his degree from Palo Verde College, and his participation in and completion of the many programs offered by the institution.

In sum, and in accordance with the requirement of *Lawrence, supra*, 44 Cal.4th 1181, the record fails to establish anything in defendant's "pre- or postincarceration history, or his [ ] current demeanor and mental state" that indicates that the circumstances of the commitment offense remain "probative of the statutory determination [that he is] a continuing threat to public safety." (*Id.* at p. 1214.) Consequently, the Board erred in finding defendant unsuitable for parole.

REMEDY

On November 14, 2007, defendant was entitled to have the Board set a date for his release on parole and, pursuant to Penal Code section 3053, subdivision (a), to consider what, if any, conditions should be imposed.[4] Because the Board erroneously determined defendant was not suitable for parole, it of course did not set any conditions for the parole. Remand is therefore required for this purpose.

DISPOSITION

The Butte County Superior Court's granting of defendant's petition for writ of habeas corpus and its order directing the Board of Parole Hearings to set a date for defendant's release on parole are affirmed. The Butte County Superior Court's order directing the Board of Parole Hearings to release defendant

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[4] Penal Code section 3053, subdivision (a) states: "The [Board of Parole Hearings] upon granting any parole to any prisoner may also impose on the parole any conditions that it may deem proper."

forthwith is vacated, and the matter is remanded to the Board of Parole Hearings to set a parole date and to determine what, if any, conditions should be placed on the parole. The stay issued by this court on December 1, 2008, is vacated upon this opinion's finality.

SIMS, J.

We concur:

SCOTLAND, P. J.

BUTZ, J.