

APPENDIX

'A'

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

Court of Appeal
Fourth Appellate District
FILED ELECTRONICALLY
01/12/2018
Kevin J. Lane, Clerk
By: Michael Hubbard

STATE OF CALIFORNIA

In re KEITH ROBERT LUGO

on

Habeas Corpus.

D073308

(San Diego County
Super. Ct. Nos. CR110323 &
HC16986)

THE COURT:

The petition for writ of habeas corpus has been read and considered by Justices Benke, Irion, and Dato. Judicial notice is taken of the opinion filed in habeas corpus proceeding No. D017391.

Keith Robert Lugo, "a methamphetamine manufacturer, was arrested by federal authorities and large amounts of cash were confiscated. Lugo formed the opinion that Timothy Ridgewell (Ridgewell) and Robert Pharoah (Pharoah) had informed on him. Together with Michael Smith, Lugo took Ridgewell and Pharoah to a rural area near San Marcos. There Lugo shot Ridgewell and Pharaoh six times each, and Smith inflicted stab wounds on them. Lugo and Smith went to the home of friends, where they washed the blood off and joked about the killings. Lugo told several people about the killings, and at Ridgewell's funeral Lugo joked about having killed Ridgewell and then having to pay for the funeral." (*In re Lugo* (Nov. 20, 1992, D017391) [nonpub. opn.].) A jury found Lugo guilty of two counts of first degree murder with firearm enhancements, and he was sentenced to prison on January 8, 1991, for an aggregate term of 51 years to life.

At Lugo's first parole hearing, held on March 28, 2017, the Board of Parole Hearings (the Board) found he would pose an unreasonable risk to public safety if he were released from prison and therefore denied parole. By the present petition, Lugo challenges the Board's decision on the following grounds:

- (1) The Board denied him due process of law by giving insufficient weight to his youth at the time he committed the murders, by improperly weighing the parole suitability and unsuitability factors, and by basing its decision on insufficient evidence he would pose an unreasonable risk of danger to the public if he were released from prison.

- (2) The Board violated the statutory requirement that it consult him before holding the parole hearing.
- (3) The transcript of the parole hearing contains numerous prejudicial errors and omissions that violate his right to due process of law.
- (4) Counsel provided constitutionally ineffective assistance at the parole hearing by inadequately reviewing Lugo's file before the hearing, by failing to make certain objections at the hearing, and by failing to elicit testimony about anger management from Lugo at the hearing.
- (5) The cumulative effect of all these errors requires reversal of the Board's decision.

Lugo asks this court to issue an order to show cause, hold an evidentiary hearing, and order the Board to release him from prison.

Lugo's primary contention is that the evidence was insufficient to support the Board's decision to deny him parole. "[P]arole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654.) Due process requires the Board's decision "reflects 'an individualized consideration of the specified criteria' and is not 'arbitrary and capricious.'" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205.) "The essential question in deciding whether to grant parole is whether the inmate currently poses a threat to public safety." (*In re Shaputis* (2011) 53 Cal.4th 192, 220.) "As long as the [Board's] decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is *some evidence* in the record that supports the [Board's] decision." (*Id.* at p. 210, italics added.) Under this "highly deferential standard," the decision must be upheld if it is supported by "a modicum of evidence." (*Id.* at p. 221.) As explained below, the Board's decision to deny parole satisfied due process requirements.

At the parole hearing, the Board considered Lugo's testimony, his central file, the comprehensive risk assessment prepared by a forensic psychologist, arguments of the district attorney and Lugo's counsel, and a statement from the victim's mother. The Board noted some factors tended to show Lugo was suitable for parole. His age at the time of the murder (21 years) diminished his culpability. (Pen. Code, § 4801, subd. (c) [directing Board to give "great weight to the diminished culpability of juveniles as compared to adults"].) Lugo had no recent serious misconduct in prison and participated in some self-improvement programs. (Cal. Code Regs., tit. 15, § 2402, subds. (c)(6), (d)(9).) His age at the time of the hearing (52 years) reduced the risk of recidivism. (*Id.*, tit. 15, § 2402, subd. (d)(7).)

The Board found, however, the factors tending to show parole suitability were outweighed by others tending to show unsuitability. The Board noted Lugo's prior *criminality* (Cal. Code Regs., tit. 15, § 2402, subd. (b)), which "involved [a] significant drug trade" that harmed many people and led to the murders. What most concerned the Board was Lugo's lack of insight into the causative factors of the murders. (*Id.*, tit. 15, § 2402, subd. (b) [prisoner's "past and present mental state" is relevant to parole suitability]; *In re Shaputis, supra*, 53 Cal.4th at p. 219 [prisoner's lack of insight into commitment offense may support parole denial].) The Board described Lugo as "naïve" for "blam[ing] anger for the root of all [his] problems" and having no apparent understanding of the role his involvement in the drug trade played in the murders. When the Board questioned Lugo about why he killed Ridgewell and Pharoah, he repeatedly attributed the murders to anger. When the Board asked Lugo about how he managed anger now, he responded he "studied in books and everything else," took no "rehabilitative class while [he has] been in prison," and avoided such classes so he would not "get [himself] into trouble" by being "dragged into somebody else's stuff." The Board also asked Lugo whether his substance abuse problems affected his behavior, and he answered, "Maybe they have." Lugo admitted he has taken no classes on substance abuse while he has been in prison. The Board found that before Lugo could be released safely from prison, he "need[s] to address . . . some kind of relapse plan for anger, alcohol, drugs, since they were the causative factors of why [he] killed these two individuals."

The comprehensive risk assessment prepared by the forensic psychologist who interviewed Lugo, on which the Board relied, supports the Board's findings regarding Lugo's lack of insight and unsuitability for parole. The psychologist reported Lugo has "haughty and entitled thinking, and has viewed himself as beyond requiring services often found helpful to others with similar historical problem behavioral patterns." The psychologist described Lugo's flat rejection of the suggestion that anger could trigger violence if he were released from prison as "overly simplistic," "primitive and superficial." The psychologist acknowledged Lugo's remorse for the murders and his acceptance of the causative roles of "his own character and thinking deficits"; but she noted "his unwillingness to seek self-help, individual counseling, or engage in a substance recovery community belied some of his more positive indices of insight." When discussing Lugo's status as a youth offender, the psychologist noted that the "factors of youth, which *partially* contributed to his life crime, have not been fully attenuated via maturation, and that the behavioral and character-based traits that [Lugo] demonstrated in his life crime have evolved into an entrenched personality disorder." The psychologist rated Lugo's risk for violence as **Moderate**, which means "elevated risk relative to long-term inmates, and non-elevated risk relative to other parolees."

In sum, the record shows the Board considered the relevant parole suitability and unsuitability factors in reaching its decision to deny parole, and some evidence supports that decision. Although Lugo urges this court to weigh the factors differently and to reach a different decision, this court "is not empowered to reweigh the evidence" and draw its

own independent conclusion on whether he is currently dangerous. (*In re Shaputis, supra*, 53 Cal.4th at p. 221.) "That question is reserved for the executive branch." (*Ibid.*) Where, as here, "a modicum of evidence supports the [Board's] parole suitability decision," this court must uphold it. (*Ibid.*)

Lugo also complains the Board was required to consult him before holding the parole hearing so he would know what would be expected for him to be found suitable for parole, and its failure to do so rendered the hearing a sham and a violation of his due process rights. The statute on which he relies requires the Board to "meet with each inmate *during the sixth year before the inmate's minimum eligible parole date* for the purposes of reviewing and documenting the inmate's activities and conduct pertinent to parole eligibility." (Pen. Code, § 3041, subd. (a)(1), italics added.) The Board initially calculated Lugo's minimum eligible parole date as December 19, 2022. Based on this date the consultation would have been required to be held between December 19, 2016, and December 19, 2017. Lugo became immediately eligible for release on parole, however, when an amendment to the youth offender parole hearing statute making it applicable to offenders who were younger than 23 years when they committed their controlling offenses took effect on January 1, 2016 (Pen. Code, § 3051, subd. (a)(1), as amended by Stats. 2015, ch. 471, § 1), because Lugo was then in his 25th year of incarceration (Pen. Code, § 3051, subd. (b)(3)). Although the youth offender parole hearing statute provides a youth offender "shall meet with the board pursuant to subdivision (a) of Section 3041" (*id.*, § 3051, subd. (c)), because of the change in Lugo's minimum eligible parole date caused by the statutory amendment, that consultation could not be held. The youth offender parole hearing statute required Lugo's hearing be held by July 1, 2017. (*Id.*, § 3051, subd. (i)(2)(A).) As noted earlier, it was held on March 28, 2017. Lugo never requested a postponement of his hearing so he could avail himself of the benefit of the consultation. Under the circumstances, the Board complied with the requirements of the statute. Moreover, Lugo will be eligible for another review hearing in five years, less than the six-year period provided in section 3041, subdivision (a)(1). And, of course, on a proper showing he could always request advancement of that review date. (*Id.*, § 3041.5, subd. (d)(1).)

Next, Lugo objects that numerous errors and omissions in the reporter's transcript of the parole hearing were prejudicial and violated his right to due process of law. The transcript does contain the errors he identifies, and at many places the reporter typed "(unintelligible)" when she apparently could not understand something Lugo had uttered. The Board noted Lugo was "a soft talker" and asked him to pull the microphone closer because his statements did not "seem to be coming across." Nevertheless, a review of the entire transcript indicates the Board heard and considered Lugo's testimony, and the material portions were accurately transcribed so as to permit meaningful judicial review. Lugo has not shown any due process violation.

Lugo's fourth claim of error is that counsel's ineffective assistance at the parole hearing violated the Sixth Amendment. (See U.S. Const., 6th Amend. ["In all criminal

prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."); *Gideon v. Wainwright* (1963) 372 U.S. 335 [6th Amend. right to counsel applies to states through due process clause of 14th Amend.].) Although Lugo had a state statutory right to be represented by counsel at the parole hearing (Pen. Code, § 3041.7), he had no federal constitutional right to counsel at that hearing. "A parole release hearing is not part of the criminal prosecution; the Sixth Amendment is inapplicable." (*Ganz v. Bensinger* (7th Cir. 1973) 480 F.2d 88, 89, fn. omitted.; accord, *Dorado v. Kerr* (9th Cir. 1972) 454 F.2d 892, 897 ["due process does not entitle California state prisoners to counsel at [parole hearings] called to determine, administratively, the length of imprisonment, and to grant or deny parole"]); *Barnes v. U.S.* (8th Cir. 1971) 445 F.2d 260, 261 [due process does not require "appointment of counsel to assist a prisoner on any aspect of his efforts to obtain parole"].) When a prisoner has "no constitutional right to an attorney in state post-conviction proceedings," he "cannot claim constitutionally ineffective assistance of counsel in such proceedings." (*Coleman v. Thompson* (1991) 501 U.S. 722, 752.)

Finally, we reject Lugo's claim the cumulative effect of errors at his parole hearing was so prejudicial that we must reverse the Board's decision. Because we have rejected his claims of error, "there is no cumulative prejudice to address." (*People v. Landry* (2016) 2 Cal.5th 52, 101.)

The petition is denied.

IRION, Acting P. J.

Copies to: All parties

APPENDIX

‘C’

SUPREME COURT
FILED

JUN 27 2018

Jorge Navarrete Clerk

S247688

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re KEITH R. LUGO on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

**Additional material
from this filing is
available in the
Clerk's Office.**