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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re DANNY VILLANUEVA on Habeas Corpus.	B234982 (Los Angeles County Super. Ct. No. BH007467)

APPEAL from an order of the Superior Court of Los Angeles County, Patricia Schnegg, Judge. Reversed.

Brandie Devall, under appointment by the Court of Appeal, for Petitioner Danny Villanueva.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Julie A. Malone and Nikhil Cooper, Deputy Attorneys General, for Respondent James D. Hartley, Warden of Avenal State Prison.

INTRODUCTION

This appeal is taken from an order of the superior court granting the petition for writ of habeas corpus of Danny Villanueva, a state prisoner, reversing the decision of the Board of Parole Hearings (the Board) denying Villanueva parole. Appellant, the warden of the prison where Villanueva is incarcerated, contends on appeal that the superior court's order reversing the Board's denial of parole was erroneous. Appellant contests the superior court's finding that there was no evidence to support the Board's decision that Villanueva was unsuitable for parole, arguing that there is some evidence that Villanueva remains currently dangerous. Because we conclude that there was some evidence to support the Board's decision, we reverse the superior court's order granting Villanueva's petition for writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

In June 1991, Villanueva confronted the victim (Steven Velis) on a public street, regarding the $20 Velis had borrowed from Villanueva's father several months earlier and failed to repay. He told Velis, "I'm going to get you." Velis ran away from him and hid. Ten minutes later, Velis thought Villanueva had left, and began walking down the street. Villanueva had parked his truck and was waiting for Velis. When he saw Velis, Villanueva aimed a gun through the window and fired four times. Velis was struck twice; he was rendered paralyzed by the gunshot wounds and remains dependent on a wheelchair. Villanueva was convicted of attempted murder with the use of a firearm, and received a prison term of five years to life. He had no prior criminal record.

On August 13, 2009, the Board held a parole suitability hearing. The Board concluded that Villanueva presented an unreasonable risk of danger if he were to be released on parole. The Board considered the nature of the commitment offense, noting that the crime was heinous, and was committed in a dispassionate and calculated manner. The motive for the crime was exceedingly trivial. The Board noted that Villanueva had

placed some blame on others for the crime as recently as January 2008, in that he cited the victim's disrespect and noncompliance (with Villanueva's order to come and talk to him) as factors in causing him to shoot the victim. However, it appeared to the Board that Villanueva was now "putting this conclusion behind [him]."

The Board also focused on the level of Villanueva's insight into the factors leading to his committing the crime, finding a lack of insight in that he had not fully explored the totality of the events and many conflicting issues that resulted in his shooting the victim. Villanueva had not adequately identified what the underlying issues and problems were that caused him to shoot Velis. The Board concluded that Villanueva's current mental state demonstrated a certain degree of self-centeredness to the extent he considered himself a victim. Because the crime represented such a stark departure from Villanueva's behavior before and after the crime, the Board was concerned that he needed to continue to explore what had occurred.[1] The Board observed positive growth, but described him as "a work in progress." It praised him for his vocational work and participation in self-help programs. One panel member described Villanueva as being "real close to being there." However, in the Board's view, Villanueva had not yet demonstrated sufficient remorse, noting that he said little during the hearing about feeling remorseful. He told a psychologist who evaluated him in December 2007 that the crime occurred due to his stupidity. He explained that there was "bad blood" between him and Velis and they had had previous misunderstandings with one another. He also said he had been drinking alcohol prior to shooting Velis. Villanueva expressed remorse to the psychologist, stating he held himself responsible and could not express how bad he felt.

The Board conceded that the recent psychological assessment was generally favorable, but noted that the doctor observed a lack of insight regarding the paralyzed

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[1] Villanueva had received two "115's" while incarcerated, the last of which was in February 1997 and involved his participation in a disturbance.

condition of the victim, and that he was not forthcoming in discussing the matter.[2] The psychologist stated in her report dated June 2008 that Villanueva "was somewhat naïve or lacking in insight with regard to the present paralyzed condition of the victim; however, he commented that he has learned empathy as a result of the life crime." "[T]his evaluator was not fully convinced that Mr. Villanueva completely appreciated what it meant to be in the 'shoes' of his victim, and further elaboration was not forthcoming."

Villanueva filed a petition for writ of habeas corpus, challenging the Board's decision. In July 2011, the superior court granted the petition and ordered the Board to conduct a new parole hearing within 120 days.

Regarding the Board's conclusion that Villanueva lacked insight, the trial court noted that Villanueva had "discussed the causative factors of his offense and told the Board that his pre-existing dislike of the victim, his jealousy over the victim's relationship with his father, and his anger at being rebuffed by the victim, along with his intoxicated state led him to commit the offense." The court concluded that "[t]he Board's belief, without any reference to evidence in the record, of a lack of insight into a causative factor, does not support a finding of unsuitability."

The trial court also discounted the Board's reliance on the fact Villanueva "listed himself on his list of people he has wronged for his twelve-step practice. However, the Petitioner clearly stated that the victim was the primary person on his list of persons wronged and that he (the Petitioner) was only a victim of his own poor choices. He also stated that his sentence was fair and indicated remorse for the victim and the victim's ongoing struggles." Finally, the trial court found that Villanueva had cured the deficiency the Board perceived in his understanding of the victim's paralyzed condition;

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[2] The psychologist opined that Villanueva's risk is minimal if released into the community, although a relapse into alcohol and substance abuse would increase his risk for violence. Villanueva completed three assessment tests for risk of future violence, and scored in the low range on each test. However, his score on the first test fell in the "moderate" range as to one factor, "reflecting notable deficits in interpersonal functioning and affective processes."

he discussed the victim's condition with the Board at the 2009 hearing. The court concluded that the Board's decision finding Villanueva unsuitable for parole was "not supported by some evidence in the record of the Petitioner's current risk of danger to society."

Appellant filed a timely notice of appeal. Appellant also filed a petition for writ of supersedeas, which this court granted, directing the superior court's order to be stayed pending disposition of the present appeal.

DISCUSSION

I. The Applicable Law

The California Supreme Court filed its opinion in *In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*)[3] on December 29, 2011, after all briefing had been filed in this case.[4] It provides clear guidance for our purposes here, as the court's focus was on "reaffirm[ing] the deferential character of the 'some evidence' standard for reviewing parole suitability determinations." (*Id.* at p. 198.) "The 'some evidence' standard, which we articulated in *In re Rosenkrantz* (2002) 29 Cal.4th 616 (*Rosenkrantz*) and refined in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), is meant to serve the interests of due process by guarding against arbitrary or capricious parole decisions, without overriding or controlling the exercise of executive discretion. (*Rosenkrantz*, at pp. 664-665; *Lawrence*, at p. 1212.)" (*Shaputis II*, *supra*, at p. 199.) We quote extensively from that decision in order to demonstrate the strong emphasis the Supreme Court gave to the notion that the Board's decision must be given considerable deference.

The *Shaputis II* court began by pointing out that its holding in *Lawrence* that "the 'some evidence' standard of review applicable to parole suitability determinations applies

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[3] Previously, the Supreme Court had decided that the appellate court had improperly substituted its own conclusion for that of the Governor regarding the threat posed by Shaputis. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1255 (*Shaputis I*).)

[4] Both sides addressed this decision in oral argument before us.

not simply to the factors relied on for denial, but to the ultimate decision on whether the inmate's release will unreasonably endanger public safety." (*Shaputis II*, *supra*, 53 Cal.4th at p. 200; citing *Lawrence*, *supra*, 44 Cal.4th at p. 1209.) "'[I]n evaluating a parole-suitability determination by either the Board or the Governor, a reviewing court focuses upon "some evidence" supporting the core statutory determination that a prisoner remains a current threat to public safety—not merely "some evidence" supporting the Board's or the Governor's characterization of facts contained in the record. . . .'

"Here, the Court of Appeal majority appears to have misconstrued the 'some evidence' standard by stating that the factors relied upon to find an inmate unsuitable for parole must be 'demonstrably shown by evidence in the record.' To the extent the adverb 'demonstrably' suggests a reviewing court is free to determine whether the evidence establishes the existence of a particular factor, or that anything other than 'some evidence' is required to support a finding by the Board or the Governor, this formulation was erroneous. We have never used such terminology in connection with review of parole decisions. . . . [R]eview under the 'some evidence' standard is *more deferential* than substantial evidence review, and may be satisfied by a lesser evidentiary showing. (*Rosenkrantz*, *supra*, 29 Cal.4th at pp. 656, 665.)" (*Shaputis II*, *supra*, 53 Cal.4th at pp. 209-210.)

"It is settled that under the 'some evidence' standard, '[o]nly a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of [the Board or] the Governor. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of [the Board or] the Governor . . . . 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. As long as the . . . 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 . . . decision.' (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 677; see also *Lawrence*, *supra*, 44

Cal.4th at p. 1204; *Shaputis I*, *supra*, 44 Cal.4th at pp. 1260-1261.)" (*Shaputis II*, *supra*, 53 Cal.4th at p. 210.)

"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. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1204, 1212.) 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. (*Id.* at pp. 1204-1205.)" (*Shaputis II*, *supra*, 53 Cal.4th at p. 211.)

"We urge the Courts of Appeal to bear in mind that while the 'some evidence' standard 'certainly is not toothless' (*Lawrence*, *supra*, 44 Cal.4th at p. 1210), and 'must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights' (*id.* at p. 1211), it must not operate so as to 'impermissibly shift the ultimate discretionary decision of parole suitability from the executive branch to the judicial branch' (*id.* at p. 1212). Under the framework established by legislation and initiative measure, the Board is given initial responsibility to determine whether a life prisoner may safely be paroled. (Pen. Code, § 3040.)" (*Shaputis II*, *supra*, 53 Cal.4th at p. 215.)

"When . . . the parole authority declines to give credence to certain evidence, a reviewing court may not interfere unless that determination lacks any rational basis and is merely arbitrary." (*Shaputis II*, *supra*, 53 Cal.4th at p. 215.)

"It bears emphasis that while 'subjective analysis' is an inherent aspect of the parole suitability determination, it plays a proper role only in the *parole authority's* determination. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 655.) The courts' function is one of objective review, limited to ensuring that the Board's or Governor's analysis of the public safety risk entailed in a grant of parole is based on a modicum of evidence, not mere guesswork. (*Lawrence*, *supra*, 44 Cal.4th at p. 1213.) It is the parole authority's duty to conduct an individualized inquiry into the inmate's suitability for parole. [Fn. omitted.] (*Lawrence*, at p. 1219.) The courts consider only whether some evidence supports the

ultimate conclusion that the inmate poses an unreasonable risk to public safety if released. (*Id.* at p. 1221.)" (*Shaputis II*, *supra*, 53 Cal.4th at p. 219.)

II. Application of the Law to the Present Record

Governed by the clear standards set forth in *Shaputis II*, we must conclude that the trial court did not limit itself to consideration of whether "some evidence" supported the Board's decision, instead venturing into a more subjective analysis of the evidence.

The Board's decision reflects due consideration of the specified factors, in accordance with applicable legal standards. (*Shaputis II*, *supra*, 53 Cal.4th at p. 210.) The Board found that the crime was heinous and did not support suitability for parole because Villanueva's motive for attempted murder was exceedingly trivial: the victim's failure to repay $20 to Villanueva's father. He callously disregarded the victim's suffering and committed the attack by lying in wait and shooting him on a public street. (See Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(E), (D), (B).) The Board found that the nature of the crime remained probative of current danger because Villanueva lacked insight into his conduct and could not explain why he attacked the victim. (See Cal. Code Regs., tit. 15, § 2402, subds. (b), (d)(3).) The Supreme Court "ha[s] expressly recognized that the 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. (*Lawrence*, [*supra*, 44 Cal.4th] at p. 1227; see also *Shaputis I*, [*supra*, 44 Cal.4th] at p. 1261, fn. 20.)" (*Shaputis II*, *supra*, 53 Cal.4th at p. 218.)

The Board noted that Villanueva could explain only in general terms why he attacked Velis, including his preexisting dislike of the victim, his jealousy over the victim's relationship with his father, his anger at being rebuffed by the victim, his intoxicated state, and his general unhappiness with his life. He did not have insight into why those factors, which amounted to the ordinary frustration one might encounter in daily life, caused him to act out in such extreme and dangerous fashion. The Board decided that without a greater understanding of the reasons why he tried to kill Velis,

Villanueva would pose too great a risk to public safety if released. Thus, the Board had before it "some evidence" of Villanueva's current dangerousness due to his lack of insight. The trial court considered the same evidence and construed it favorably to Villanueva, finding that his explanation of the causative factors was sufficient. But in so doing the trial court engaged in "a fundamental failure to accord the Board's decision the deference that the 'some evidence' standard was designed to provide. (*Rosenkrantz, supra,* 29 Cal.4th at pp. 664-665.)" (*Shaputis II, supra*, 53 Cal.4th at p. 212.) It is only when the evidence reflecting the inmate's present risk to public safety leads to *but one conclusion* that a court may overturn a contrary decision by the Board. (*Id.* at p. 211.) That was not the case here, where the evidence supported the Board's conclusion regarding Villanueva's lack of insight and the current risk he poses to public safety.

Similarly, the Board concluded that Villanueva did not demonstrate sufficient remorse during the parole hearing, and lacked a full appreciation and understanding of the paralyzed condition of his victim. The psychologist who evaluated Villanueva stated that his ability to empathize with the victim was incomplete, and he could not or would not elaborate on the subject. The Board interpreted this as an indication that Villanueva had more work to do before he could safely be released. Once again, however, the trial court failed to defer to the Board's interpretation of the evidence, noting that the psychologist still opined that Villanueva posed a low risk of future violence or recidivism. This amounted to an impermissible reweighing of the evidence.

Finally, the Board also noted that Villanueva considered himself a victim almost on par with Velis, as when he said regarding his list of people he had wronged that "I'd have to put Mr. Velis on number one. Actually, I'm not too far behind. I'm on the list, too. I'm way up there, too . . . ." The trial court reinterpreted this statement, finding that Villanueva clearly stated that the victim was the primary person on his list of persons wronged and that he was only a victim of his own poor choices. This, too, constituted a reweighing of the evidence, rather than an evaluation of whether "some evidence" existed to support the Board's decision. We reiterate that subjective analysis plays a proper role only in the parole authority's determination, and the courts must confine themselves to an

objective review to ensure that the Board's analysis of the public safety risk entailed in a grant of parole is based on a modicum of evidence, not mere guesswork. (*Shaputis II*, *supra*, 53 Cal.4th at p. 219.) Because we conclude that the Board's decision was indeed supported by a modicum of evidence, we reverse the trial court's order granting Villanueva's writ of habeas corpus.

DISPOSITION

The order of the superior court granting Villanueva's petition for writ of habeas corpus is reversed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.