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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DWIGHT LEON ELLIS, Defendant and Appellant.	B269621 (Los Angeles County Super. Ct. No. BA098584)

APPEAL from an order of the Superior Court of Los Angeles County, Judge David V. Herriford. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Dwayne Leon Ellis, currently serving a third strike sentence, appeals from the denial of his petition under Penal Code section 1170.126 to recall his sentence. We find no error, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1994 the People charged Ellis with corporal injury to a cohabitant in violation of Penal Code section 273.5(a).[1] According to the probation department report, Ellis hit his pregnant girlfriend several times in the head with his fists, knocked her to the ground, then struck her in the stomach. The People alleged Ellis had three prior strike convictions: a 1986 conviction for assault with a deadly weapon; a 1990 conviction for attempted robbery; and a 1991 conviction, again for assault with a deadly weapon. In February 1995, a jury convicted Ellis of the injury to his girlfriend. The trial court sentenced Ellis to 25 years to life under California's three strikes law.

In about November 2012, Ellis (self-represented) filed a petition to recall his sentence under Penal Code section 1170.126, the Three Strikes Reform Act of 2012. Somehow, Ellis learned he was entitled to counsel, and the Los Angeles County Alternate Public Defender entered an appearance on his behalf. In January 2013, Ellis's attorney filed an Amended Petition for Recall of Sentence. Ellis asserted there was "no evidence that release of petitioner will pose [an] unreasonable risk of danger to public safety." The superior court issued an order to show cause. In September 2013, the People filed an opposition to Ellis's petition. Ellis filed an informal reply in May 2014.

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[1] All statutory references are to the Penal Code.

In July 2015, the superior court held a hearing on the petition. The People marked 23 exhibits and the court admitted them into evidence without objection. Ellis marked 11 exhibits; the court admitted them into evidence as well. Ellis also called two witnesses: Richard Subia and Hy Malinek. Subia testified he had worked for nearly 27 years in corrections in California. When Subia retired in 2012, he was the acting director responsible for the operation and management of all adult correctional institutions in California as well as 500 California offenders housed in other states. While at the California Department of Corrections and Rehabilitation (CDCR), Subia had been involved in conducting disciplinary hearings for inmates. Subia explained how an inmate's classification score is calculated and what it means. The lowest score an inmate serving a life sentence can earn is 36 regardless of his good behavior.

Subia testified that, in his opinion, Ellis "currently does not [pose] an unreasonable risk of dangerousness to public safety." Subia provided some details about the discipline CDCR had imposed on Ellis during his first decade in prison, from 1995 to 2005. Subia explained that in about 2005 Ellis asked to be placed in special housing called the Special Needs Yard (SNY). Subia noted Ellis had not been disciplined since he moved to SNY. Subia said the last classification score he had seen for Ellis was 91 points in 2013; he thought Ellis's score might have come down to about 83 in the two years since. Subia testified Ellis had a transition plan if he were to be released: in a letter dated July 2014 the Amity Foundation had accepted him.

On cross-examination Subia admitted that Ellis had been sent to the security housing unit at Pelican Bay at one point and that, upon admission to the prison system, his classification score

had been 95. When asked if Ellis had participated in any self-help or improvement programs while in prison, Subia said Ellis had worked in the prison laundry and dining hall; in Subia's view this work qualified as rehabilitative. Subia stated Ellis had been on a waiting list for programs but was not able to get placed, probably because of his classification score and his housing in "close" housing—somewhere between maximum and medium security. (Subia noted Ellis's "custody designation" recently had been reduced from close custody to medium custody.) Subia admitted Ellis seemed not to have worked at any prison job since 2005, nor had he attended any Alcoholics Anonymous or Narcotics Anonymous meetings. Subia testified he had asked Ellis about his 1994 crime against his girlfriend. Ellis replied the responding officer accepted his girlfriend's account of the altercation and then lied on the witness stand about what he had seen when he arrived.

Hy Malinek is a forensic psychologist. He read Ellis's prison records, interviewed him, gave him some tests, and conducted a risk assessment. Malinek testified, "I think the overall risk that [Ellis] would engage in unmanageable risk to society is no more than moderate." Malinek said he had used a risk assessment tool with Ellis called the LS/CMI and Ellis's score had been 29. According to Malinek, a score of 29 "suggests that [Ellis] falls into a higher risk category . . . ." Malinek admitted that score was inconsistent with his opinion that Ellis presents "only a moderate risk." Malinek explained that the LS/CMI tool estimates recidivism based on the commission of *any* crime—not just a felony or violent offense—and that it did not take into account the effect of age. Malinek noted that Ellis was

29 when he went to prison; at the time of the July 2015 hearing, Ellis was 51.

The court took the matter under submission. On August 21, 2015, the court issued its twenty-page memorandum decision denying Ellis's petition. The court noted Ellis's criminal history began when he was arrested for burglary at age 14. Ellis was sent to the California Youth Authority (CYA) in about 1980 for grand theft from a person. Within four months of his parole at age 17, Ellis was returned to CYA on a parole violation. In 1983, less than a month after again being released on parole, Ellis was arrested for, and convicted of, misdemeanor battery on a public transit agent. In 1984 Ellis again was returned to CYA on a parole violation. Two months after his parole in 1985, Ellis was arrested for attempted murder. He was convicted of assault with a deadly weapon or with force likely to cause great bodily injury. Ellis was placed on probation, which he violated repeatedly.

In April 1990 Ellis was arrested for robbery. Armed with a starter pistol, Ellis and a companion had tried to grab clothing from the victim. Ellis said he had been drinking. He was convicted and sentenced to 16 months in prison. In 1991, while on parole, Ellis was arrested for and convicted of assault with a deadly weapon, a beer bottle. Again, Ellis claimed to have been under the influence of alcohol. Ellis was sentenced to two years in prison. He violated his parole in 1992 and 1993. In 1994, he was arrested for the corporal injury to his girlfriend. On that occasion as well, Ellis said he had been drinking.

The superior court's memorandum of decision detailed Ellis's 13 rules violations while in prison. The court noted Ellis had not worked in any prison job since 2005, nor had he participated in any self-help or rehabilitative programming.

After summarizing the testimony of Subia and Malinek, the court observed, "From the time of his first arrest at age 14, Petitioner has not spent a single year of his life outside of the supervision of prison, jail, parole, or probation. His extensive criminal history and commitment of violent offenses is further marked by his alcohol addiction. While a history of recidivism alone is an insufficient basis for a court's finding that a petitioner currently poses an unreasonable risk of danger to public safety, the multiplicity of prior convictions and the failure to comply with conditions of intervening periods of probation or parole give rise to a valid concern about a danger to public safety."

The court was especially troubled by Ellis's "failure to engage in any self-help or rehabilitative programming throughout his incarceration." The court noted Ellis had not received any treatment for his alcohol problem, a problem that Ellis himself repeatedly had said contributed to his crimes. This failure, the court said, adds to his dangerousness: "[Ellis] has been unable to develop the tools necessary to avoid alcohol use if released to the free community." While acknowledging Ellis has had no disciplinary proceedings since 2005, the court also found "significant that he has not engaged in any meaningful efforts to work through the internal factors that have caused him to act out with violence and aggression, and to violate the rights of others since he was 14-years-old." Finally, the court stated, Ellis "also failed to exhibit remorse or accept responsibility for much of his past conduct." Based on all of its findings, the court concluded the People had met their burden of proving, by a preponderance of the evidence, "that resentencing [Ellis] would pose an unreasonable risk of danger to public safety at this time due to his criminal history, prison misconduct, insufficient rehabilitative

programming, and inadequate reentry plans." The court therefore discharged the order to show cause and denied Ellis's petition to be resentenced to a second strike sentence.

Ellis filed a timely notice of appeal. (See *Teal v. Superior Court* (2014) 60 Cal.4th 595.)

Ellis's contentions on appeal

Ellis makes three arguments. First, he contends the superior court used the wrong legal standard in ruling on his petition. It should, he says, have applied the definition of "unreasonable risk of danger to public safety" set forth in Proposition 47. (§ 1170.18, subd. (c).) Second, Ellis asserts the court should have presumed him suitable for release unless the People proved beyond a reasonable doubt that he continues to be dangerous. Third, Ellis argues the evidence did not support the superior court's conclusion that resentencing him would pose an unreasonable risk of danger to public safety. We discuss, and reject, each argument in turn.

DISCUSSION

1. ***Proposition 36, The Three Strikes Reform Act of 2012***

In November 2012, California voters enacted Proposition 36, the Three Strikes Reform Act. With some exceptions, Proposition 36 modified California's three strikes law to reduce the punishment imposed when a defendant's third felony conviction is not serious or violent. (*People v. Valencia* (2017) 3 Cal.5th 347, 350 (*Valencia*).) It also enacted a procedure governing inmates sentenced under the former three strikes law whose third strike was neither serious nor violent, permitting them to petition for resentencing in accordance with Proposition 36's new sentencing provisions. (§ 1170.126, subd. (e).) "The resentencing provisions provide, however, that an inmate will be

denied resentencing if 'the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).)" (*Valencia*, *supra*, 3 Cal.5th at p. 350.) Proposition 36 did not define the phrase "unreasonable risk of danger to public safety." (*Ibid*.)

We review a denial of resentencing based on dangerousness under a mixed standard. We review the facts and evidence on which the court based its finding of unreasonable risk for substantial evidence. (*People v. Frierson* (2017) 4 Cal.5th 225, 239 (*Frierson*); *People v. Losa* (2014) 232 Cal.App.4th 789, 791.) We review the trial court's finding that the defendant presents an unreasonable risk of danger to public safety under the "abuse of discretion" standard. (*Losa*, at p. 791.)

2. ***Proposition 47's Definition of "Unreasonable Risk of Danger to Public Safety" Does Not Apply to Resentencing Proceedings Under Proposition 36***

Ellis first argues the superior court should have applied the definition of "unreasonable risk of danger to public safety" set forth in Proposition 47, which the voters approved in November 2014. The parties filed their briefs in this case in 2016. Since then, our Supreme Court has clarified the governing law on this issue. In *Valencia, supra*, 3 Cal.5th 347, the Court held that Proposition 47 did not amend the Three Strikes Reform Act. Under Proposition 36, "[i]n exercising its discretion to deny resentencing, the court has broad discretion to consider: (1) the inmate's 'criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes'; (2) his or her 'disciplinary record and record of rehabilitation while incarcerated'; and (3) '[a]ny other evidence the court, within its

discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (g)(1)–(3).)" (*Id.* at p. 354.) The Court stated that, in contrast to this broad discretion under Proposition 36, "Proposition 47 limits the trial court's discretion to deny resentencing by defining the phrase 'unreasonable risk of danger to public safety' narrowly." (*Id.* at p. 355.) The Court also noted that California courts "have rejected arguments that the phrase 'unreasonable risk of danger to public safety,' as used in section 1170.126, subdivision (f), is unconstitutionally vague." (*Id.* at pp. 354–355 [citing *People v. Garcia* (2014) 230 Cal.App.4th 763, 769–770; *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075].)

3. ***The Superior Court Properly Applied a "Preponderance of the Evidence" Burden of Proof***

Ellis next argues the superior court should have required the People to prove that his release would pose an unreasonable risk of danger to public safety beyond a reasonable doubt. Ellis acknowledges that *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279 (*Kaulick*) held that a preponderance of the evidence is the correct standard. (*Id.* at pp. 1301–1305 [citing *Dillon v. United States* (2010) 560 U.S. 817].)

Our Supreme Court recently reiterated that "preponderance" is the applicable burden of proof in suitability proceedings addressed to dangerousness. In *Frierson*, *supra*, 4 Cal.5th 225, the Court held the People must prove an inmate's *ineligibility* for resentencing beyond a reasonable doubt. Frierson had been convicted of stalking—neither a serious nor a violent felony. He petitioned under Proposition 36 for resentencing. The People argued Frierson was not eligible for resentencing because the record showed he intended to cause great bodily injury during

the commission of the crime. The trial court applied a "preponderance of the evidence" standard in denying Frierson's petition. (*Id*. at pp. 232–233.) The Supreme Court held this was error. (*Id*. at p. 240.)

The Court noted the different burdens of proof for *ineligibility* determinations and *unsuitability* determinations. The Court stated, "The determination whether a defendant poses an unreasonable risk of danger to public safety is discretionary (§ 1170.126, subd. (f)), and several Courts of Appeal have properly concluded that '[t]he facts upon which the court's finding of unreasonable risk is based must be proven by the People by a preponderance of the evidence . . . and are themselves subject to [appellate] review for substantial evidence.' [Citation.]" (*Frierson*, *supra*, 4 Cal.5th 225 at p. 239.) Ellis's argument that the People must prove unsuitability beyond a reasonable doubt or by clear and convincing evidence is without merit.[2]

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[2] Ellis also contends "the trial court erred by failing to apply a presumption in favor of [Ellis's] release from custody." Again, Ellis admits governing law is to the contrary, but he argues the court's "reasoning" in that case was "flawed." (*People v. Florez* (2016) 245 Cal.App.4th 1176, review granted June 8, 2016, No. S234168, 371 P.3d 241, review dismissed and remanded Nov. 21, 2017 in light of *Valencia, supra*, 3 Cal.5th 347.) This court rejected a similar argument in *Kaulick*, *supra*, 215 Cal.App.4th 1279. There, the petitioner Kaulick argued that, once the court concluded he was eligible for resentencing under Proposition 36, he was entitled to a second strike sentence unless the prosecutor established dangerousness. (*Id*. at p. 1289.) The *Kaulick* court stated, "[D]angerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all." (*Id*. at pp. 1302–1303.) The court noted the "shall be sentenced" language appears in the prospective, but not retrospective, part of the Act.

4. ***The Superior Court Did Not Abuse its Discretion in Denying Ellis's Petition for Resentencing***

The superior court's thoughtful, lengthy memorandum of decision detailed its reasons for denying Ellis's petition to recall his sentence. As noted above, Proposition 36 gives the court broad discretion to consider the factors listed in subparagraphs (g)(1) and (g)(2) of section 1170.126 as well as "[a]ny other evidence the court, within its discretion, determines to be relevant . . . ." (*Valencia*, *supra*, 3 Cal.5th at p. 354 [citing § 1170.126, subd. (g)(3); Voter Information Guide for Prop. 36].) The record belies Ellis's contention that "[t]he trial court focused exclusively on remote factors when it concluded [Ellis] was currently to[o] dangerous to be released." As discussed above, the court considered recent and current information, including Ellis's failure to do *anything* with his time in custody during the last ten years—no in-prison jobs, no counseling or classes, no AA meetings—and his 2015 statement to his expert witness, Richard Subia, that his conviction for beating his pregnant girlfriend resulted at least in part from a police officer's commission of perjury at his trial. Nor are we persuaded by Ellis's argument that he tried to attend rehabilitation programs but CDCR would not let him. If Ellis's inability to participate in programs was based on his classification score and his housing in a setting more restrictive than medium security, the responsibility for that barrier lies with Ellis, not CDCR. In sum, the superior court

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(*Id*. at p. 1303, fn. 26; see also *People v. Esparza* (2015) 242 Cal.App.4th 726, 738–739 [Proposition 36 did not "create[] a presumption in favor of a second strike sentence"].)

acted well within its broad discretion in denying Ellis's petition for resentencing.

DISPOSITION

The order denying Ellis's petition to recall his third strike sentence under section 1170.126 is affirmed.

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EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.