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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. HENRY NOLKEMPER, Defendant and Appellant.	B279069 (Los Angeles County Super. Ct. No. LA030060)

APPEAL from an order of the Superior Court of the County of Los Angeles, William C. Ryan, Judge. Affirmed.

Stanford Law School Three Strikes Project, Michael S. Romano, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill, Supervising Deputy Attorney General, and William N. Frank, Deputy Attorney General, for Plaintiff and Respondent.

The trial court determined defendant Henry Nolkemper,[1] although eligible to have her three strikes prison sentence reduced under Penal Code section 1170.126, the Three Strikes Reform Act of 2012 (Proposition 36),[2] posed an unreasonable risk of danger to public safety and denied the petition to reduce her sentence. Defendant argues the trial court applied the wrong standard to determine she posed an unreasonable risk of danger to public safety and abused its discretion by admitting and considering her prison disciplinary record and faulting her for not participating in rehabilitative programs designed to facilitate an eventual transition out of the prison system.

The trial court applied the correct legal standard to determine defendant posed an unreasonable risk of danger to public safety. Defendant forfeited the challenge to the trial court's admission of, and reliance on, evidence of her prison disciplinary record. And the trial court did not abuse its discretion by considering defendant's lack of participation in rehabilitative programs as one factor that weighed against recalling her sentence. Accordingly, we affirm the trial court's order.

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1 Defendant's opening brief advises defendant "is a pre-operative male-to-female transgender woman who has adopted the first name, 'Alejandra,' and requests to be referred to as 'she.'"

2 All further statutory references are to the Penal Code, unless otherwise indicated.

FACTUAL BACKGROUND[3]

Defendant's long criminal history began in 1983, with a conviction for second degree burglary. In 1985, while on probation for that offense, defendant was again convicted of burglary. She was sentenced to prison for that offense, with a concurrent two-year term upon revocation of probation for the earlier crime.

Over a five-day period in 1987, defendant and an accomplice broke into two occupied homes for the purposes of robbery. Defendant was armed with a handgun on both occasions. The victim in the first home was severely beaten and robbed. In the second home invasion, defendant fired the gun at two victims, striking one in the back shoulder. Defendant was sentenced to nine years in prison for these crimes.

In 1992, while incarcerated in state prison, defendant was convicted of committing battery on a correctional officer. She was sentenced to two years in state prison. In May 1994, defendant was released on parole; but she was returned to prison in December 1994 for violating parole. She was paroled again in August 1996.

Between April 1997 and May 1997, while still on parole, defendant and another accomplice burglarized five different churches, stealing office supplies and electronic equipment. Defendant, representing herself, pleaded guilty to five counts of burglary. The trial court found true the allegations that defendant suffered prior strike convictions within the meaning of sections 667, subdivisions (b) through (i), and 1170.12,

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[3] Because the underlying facts are undisputed, the factual background is based on the trial court's memorandum of decision.

subdivisions (a) through (e), and four prior prison terms within the meaning of section 667.5, subdivision (b).

After the trial court imposed a sentence of 129 years to life, defendant retained counsel who sought to withdraw defendant's guilty plea. The trial court denied that motion, but the prosecutor agreed to dismiss four of the five burglary counts. Defendant was resentenced to the current term of 25 years to life in state prison.

That sentence increased as a result of defendant's 1999 and 2001 convictions for battery by a prisoner, a 2005 aggravated battery conviction, and a 2012 conviction for assault by a prisoner on a non-prisoner.

During her current commitment, defendant was found to have committed at least 45 serious rules violation reports (RVR's).[4] As of December 2013, defendant had a CDCR classification score of 716.[5]

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[4] In prisons operated by the California Department of Corrections and Rehabilitation (CDCR), when misconduct by an inmate is believed to be a violation of law or is not minor in nature, the violation is recorded on a serious rules violation report. (Cal. Code Regs., tit. 15, § 3312 (a)(3).) Section 3315 lists the serious violations that would warrant an inmate receiving a RVR. An inmate is entitled to a hearing on an RVR before a senior hearing officer or SHO. (Cal. Code Regs., tit. 15, § 3315(c).) To find an inmate guilty, the SHO must find the allegation to be true beyond a preponderance of the evidence. (CDCR Operations Manual, § 52080.9.3, p. 414.)

[5] A CDCR classification score is a summary of an inmate's overall prison behavior that takes into account a variety of factors. Inmates have additional points added to their score for serious rules violations. The higher the score, the higher the

PROCEDURAL BACKGROUND[6]

Defendant initiated the current petition to recall her sentence pursuant to section 1170.126 on June 2, 2014. Although acknowledging defendant's eligibility to be resentenced, the People contended she posed an "unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) The matter was fully briefed, and the trial court conducted a suitability hearing on August 31, 2016. The trial court admitted a substantial number of exhibits from both sides and heard testimony from defendant's two experts, Professor Valerie Jenness and Jennifer Orthwein, Ph.D.

Prof. Jenness testified as an expert on the challenges faced by male-to-female transgender individuals incarcerated in California prisons. This expert did not offer any testimony specific to defendant's incarceration or the petition to recall her sentence.

The trial court accepted Dr. Orthwein "as an expert in the area of risk assessment of transgender inmates." Dr. Orthwein reviewed defendant's prison file and mental health and medical records going back to 1999, as well as the probation reports from her earlier cases. She also interviewed defendant and administered psychological tests. Dr. Orthwein concluded

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security controls. Inmates with low scores have better housing and access to programs and work. Defendant's classification score of 716 was the highest the trial court had seen in handling over 700 Proposition 36 cases.

[6] The procedural background is also based on the trial court's memorandum of decision.

defendant was "suffering from gender dysphoria as well as post traumatic stress disorder."

The trial court denied defendant's petition. The comprehensive memorandum of decision tracked the statutory criteria in section 1170.126, subdivision (g) and addressed defendant's criminal history, disciplinary history while incarcerated, CDCR classification score, and age, as well as the hearing testimony.

Concerning defendant's disciplinary history while incarcerated, the trial court noted defendant had "received at least 45 RVR's during her current commitment, including violent RVR's for mutual combat, violent threats, battery, aggravated battery, and assault. Four of [defendant's] violent RVR's resulted in criminal convictions; her last conviction was for a 2012 assault on a non-prisoner. Her last RVR was in 2014 for refusing to submit a urine sample for drug testing. [Defendant's] poor behavior in prison has earned her a classification score of 716, indicating she poses a high security risk."

The trial court also acknowledged defendant's argument concerning the difficulties faced by male-to-female transgender women housed in men's prisons: "The court accepts that harsh prison conditions may lead transgender women to engage in rule-breaking behavior in order to survive in prison, and that in some instances, [defendant] engaged in such rule-breaking behavior to cope with her prison conditions. Based on [Prof.] Jenness's testimony, it is clear that the CDCR does not currently have a plan to safely house transgender inmates, although there are indications the CDCR is working on such a plan. As such, the Court gave little weight to disciplinary violations where [defendant] apparently engaged in self-defense (mutual combat)

and where she broke prison rules (destruction of state property, delaying a peace officer) in order to speak with senior correctional officers. The Court also gave less weight to the 2004 and 2008 batteries where [defendant] admittedly committed those acts in order to be housed in the [security housing unit]."

The trial court, however, did not accept the assertion that all of defendant's disciplinary issues were the product of being housed in a men's prison: "The Court . . . cannot dismiss all of [defendant's] disciplinary violations as attempts to cope with her prison conditions. [Defendant] has, on multiple occasions, assaulted and battered staff who posed no threat to her. . . . Moreover, [defendant's] willingness to engage in serious rule-breaking behavior, although understandable at some level, remains highly probative of her recidivist tendencies and danger to public safety."

The trial court rejected conclusions by the defense experts concerning defendant's disciplinary record, failure to participate in rehabilitative programming, and whether defendant would continue her pattern of misconduct if released: "[Prof.] Jenness and Dr. Orthwein both suggest that [defendant's] institutional misconduct would not necessarily occur outside the prison environment. . . . The Court would be receptive to these arguments if [defendant] had a record of positive rehabilitation in prison. But she does not. [Defendant] has not provided any evidence that shows she has completed rehabilitative programming, engaged in vocational training, or otherwise prepared herself for release into the community. If [defendant] were resentenced and released, she would face serious challenges in the community as both a transgender woman and a convicted felon. Having made no effort to prepare for these challenges, the

Court believes there is a serious risk [defendant] will re-offend if she is released. [¶] [Defendant] argues the hostile prison environment and her incarceration in the [security housing unit] have prevented her from programming. The relevant question, however, is not *why* she did not program, but *whether* she programmed, and the fact remains [defendant] has not programmed at all during her incarceration. While housed in the [security housing unit, defendant] still had the opportunity to seek out rehabilitative programming through different venues, including mail correspondence and book reports. [Defendant's] failure to program at all lies squarely on her shoulders. Overall, [defendant's] disciplinary record and rehabilitative record indicate[][defendant] currently poses an unreasonable risk of danger to public safety."

Although the trial court recognized defendant's post-release plans favored resentencing, it concluded other factors outweighed that consideration: "[Defendant's] post-release plans are supportive of release. . . . She has been accepted to two residential treatment programs that provide comprehensive vocational training, assistance with employment, and therapeutic services to former inmates. Unfortunately, this positive factor is outweighed by [defendant's] history of recidivism, lengthy disciplinary record, and lack of rehabilitative programming while in prison. There is no evidence that [defendant], once resentenced and released, would be able to complete these treatment programs."

The trial court concluded "the totality of the record, including consideration of all the statutory factors, demonstrates that resentencing [defendant] at this time would pose an unreasonable risk of danger to public safety."

DISCUSSION

A. Standard for Determining Unreasonable Risk of Danger Under Proposition 36

It is the People's burden to prove by a preponderance of the evidence that a petitioner seeking recall of her sentence under Proposition 36 poses an unreasonable risk of danger to public safety. Under section 1170.126, subdivision (f), a prisoner "shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." The dangerousness determination is a matter of discretion based on the factors enumerated in section 1170.126, subdivision (g).[7] (*People v. Frierson* (Dec. 28, 2017, S236728) __ Cal.5th __, __ .) Contrary to defendant's assertions,

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[7] Section 1170.126, subdivision (g) requires the trial court to consider "(1) [t]he petitioner's criminal conviction history, including the types of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; (2) [t]he petitioner's 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."

When defendant's opening brief was filed, there was a question as to whether Proposition 47's statutory definition for "unreasonable risk of danger to public safety" applied to Proposition 36 petitions to recall sentences under the Three Strikes Law. The question was answered in the negative in *People v. Valencia* (2017) 3 Cal.5th 347.

the likelihood of future violence by the petitioner is not one of the enumerated criteria.[8]

B. Admission and Reliance on Rules Violations Reports

Defendant maintains the trial court abused its discretion by admitting and considering the prosecution's evidence of her disciplinary record while in prison. Citing *Coleman v. Wilson* (E.D.Cal. 1995) 912 F.Supp. 1282 (*Coleman*), defendant asserts she "is a member of the *Coleman* class" and the CDCR disciplinary procedures are unconstitutional as to her, rendering the RVR's based on those procedures unreliable and inadmissible under *United States v. Tucker* (1972) 404 U.S. 443.

In *Coleman*, state prison inmates with serious mental disorders successfully prosecuted a federal civil rights action on the basis "the mental health care provided at most institutions within the California Department of Corrections [was] so inadequate that their rights under the Eighth and fourteenth

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[8] Defendant's reliance on *In re Hunter* (2012) 205 Cal.App.4th 1529 to assert Courts of Appeal have held parole eligibility determinations require a finding of a likelihood of future violence is misplaced. The *Hunter* court concluded there was no evidence in the record that the inmate would pose "an unreasonable risk of future violence if granted release on parole." (*Id.* at p. 1536.) But the appellate panel did not state or imply a likelihood of future violent behavior was the only factor upon which a dangerousness determination could be based. To the contrary, the court expressly recognized that "[r]ecent [prison] discipline may provide a basis for denying parole. [Citations.] But prison discipline, like any other parole unsuitability factor, 'supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness.'" (*Id.* at p. 1543.)

Amendments to the United Sates Constitution [were] violated." (*Coleman, supra,* 912 F.Supp. at p. 1293.) A special master was appointed to oversee the treatment of mentally ill inmates in California's state prisons.

In the trial court, defendant did not cite her status as a member of the *Coleman* class or claim she suffers from a severe mental illness. She did not challenge the admissibility of her prison disciplinary records during the suitability hearing or object to the trial court's consideration of that information. Rather, defendant argued the trial court should assign little, if any, weight to her prison rules violations because they were committed to obtain safe housing within the prison system and otherwise cope with harsh prison conditions based on her status as a transgender inmate.

The Attorney General contends defendant may not raise the constitutional challenge for the first time on appeal. Defendant counters that forfeiture rules do not apply because (1) she is merely raising a new legal theory on appeal to support substantive arguments made in the trial court (*People v. Partida* (2005) 37 Cal.4th 428, 436); (2) a challenge to an unauthorized sentence may be raised for the first time on appeal (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1048, fn. 7); (3) section 1259 permits appellate review of claimed errors to the extent they affect the substantial rights of defendant (*People v. Gamache* (2010) 48 Cal.4th 347, 375, fn. 13); and (4) this court has discretion to review forfeited but meritorious claims of error to forestall additional rounds of ineffective assistance of counsel litigation (*People v. Mattson* (1990) 50 Cal.3d 826, 854). For the reasons that follow, we conclude defendant did not preserve this issue for appeal.

Generally, a criminal defendant's failure to object or raise an issue in the trial court "relieves the reviewing court of the obligation to consider those errors on appeal. [Citations.] This applies to claims based on statutory violations, *as well as claims based on violations of fundamental constitutional rights.* [Citations.] [¶] The reasons for the rule are these: In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." (*People v. Salazar* (2016) 63 Cal.4th 214, 239-240, italics added, internal quotation marks omitted.)

Requiring criminal defendants to object or face forfeiture "allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal." (*People v. Partida, supra,* 37 Cal.4th at p. 434, internal quotation marks omitted.)

We do not agree defendant's present constitutional challenge is a new legal theory in support of a previous substantive argument. At the suitability hearing, defendant asserted the rules violations should be excused or given little weight because she is a transgender inmate. On appeal, however, defendant contends she is a member of the *Coleman* class of mentally ill California prison inmates as to whom certain

prison disciplinary procedures are unconstitutional. Defendant forfeited the constitutional argument by failing to raise it below.

As the Supreme Court recognized in *People v. Tully* (2012) 54 Cal.4th 952, constitutional claims raised for the first time on appeal are forfeited if they "invoke facts or legal standards different from those the trial court itself was asked to apply . . . . '[A] party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.'" (*Id.* at pp. 979-980.) Here, the trial court was not asked to analyze the admissibility of defendant's disciplinary history based on unreliable and unconstitutional underpinnings. The trial court was asked to weigh defendant's disciplinary history against the experts' testimony concerning the reasons transgender women housed in men's prisons violate prison rules. Because the trial court was not called upon to analyze the admissibility of defendant's disciplinary record, her constitutional argument has been forfeited.

Defendant's other arguments for avoiding forfeiture are unavailing because she made no attempt to explain or develop them. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["We are not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument . . . allows this court to treat the contentions as waived"].) Thus, for example, we are left to speculate why this is a claim of an "unauthorized sentence;" how section 1259 applies to the order under review; or what claims of ineffective assistance of counsel would arise from a finding of forfeiture and why.

C. Failure to Participate in Rehabilitative Programs

Defendant argues the trial court's finding that her failure to participate in rehabilitative programs while in prison made her unsuitable for resentencing was "illogical and internally inconsistent." Defendant contends the trial court found she violated rules to secure safer housing and those safer housing options prevented her from participating in rehabilitative programs. Accordingly, defendant asserts the trial court abused its discretion when it denied her petition on the basis she did not engage in rehabilitation efforts.

Defendant overstates the trial court's findings. The trial court did not excuse all of defendant's rules violations on the basis she committed them solely to obtain safer housing. Rather, as the trial judge noted, defendant "on multiple occasions, assaulted and battered staff who posed no threat to her." The trial court found that even when defendant was placed in the security housing unit, she "still had the opportunity to seek out rehabilitative programming through different venues, including mail correspondence and book reports. Her failure to program at all lies squarely on her shoulders." Defendant does not challenge this finding.

Section 1170.126, subdivision (g) identifies a defendant's "record of rehabilitation while incarcerated" as just *one* factor that must be considered when an inmate seeks to recall her sentence. The "failure to program" was not the sole ground for denial of defendant's petition. The trial court considered defendant's lack of rehabilitative efforts along with the other statutory factors—as it was required to do—and, based on "the

totality of the record," determined resentencing defendant would pose an unreasonable risk of danger to public safety.

Viewing the record as a whole, as we must, we hold the trial court applied the appropriate statutory factors and properly exercised its discretion to determine defendant posed an unreasonable risk of danger to public safety. (*People v. Flores* (2014) 227 Cal.App.4th 1070, 1075 ["Surely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would pose an unreasonable risk of harm to the public safety"], cited with approval in *People v. Valencia, supra*, 3 Cal.5th at pp. 354-355.)

Additionally, under the abuse of discretion standard, a "decision will not be reversed merely because reasonable people might disagree. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377, internal quotation marks omitted.) The trial court's determination that defendant would constitute an unreasonable risk of danger to public safety if resentenced was neither irrational nor arbitrary. There is no basis for reversal.

DISPOSITION

The order denying the petition for recall of sentence is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court appointed by the Chief Justice pursuant to article VI, section 6, of the California Constitution.