Filed 11/13/19 P. v. Pritchett CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GREG PRITCHETT, Defendant and Appellant.	B291885 Los Angeles County Super. Ct. No. SA023891

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott M. Gordon, Judge. Affirmed.

Nancy L. Tetreault, 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, Senior Assistant Attorney General, Noah P. Hill and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Greg Pritchett appeals from an order denying his petition for recall of his sentence under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).[1] Pritchett argues: (1) the term "unreasonable risk of danger to public safety" is void for vagueness in violation of due process; and (2) the trial court abused its discretion by finding he posed such a risk. We disagree and therefore affirm.

PROCEDURAL BACKGROUND

In 1996, a jury convicted Pritchett of second degree burglary (§ 459). The jury found he had suffered three prior serious or violent felony convictions within the meaning of the Three Strikes law (§§ 667, 1170.12), and on July 15, 1996, the trial court sentenced him to 25 years to life in prison. We affirmed the judgment on direct appeal in 1997.

Following the November 2012 enactment of Proposition 36 by the voters, Pritchett filed a petition for recall of the third strike sentence. The district attorney opposed the petition on the ground that Pritchett posed an unreasonable risk of danger to public safety. Pritchett filed a reply to the opposition arguing he was suitable for resentencing because he did not pose such a risk.

On May 20, 2016, the trial court—after conducting a hearing during which the parties' exhibits were received into evidence, and Richard Subia, a former warden with the California Department of Corrections and Rehabilitation (CDCR), testified on behalf of Pritchett—filed a 16-page memorandum of

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[1] Further undesignated statutory references are to the Penal Code.

decision concluding the record demonstrated Pritchett posed an unreasonable risk of danger to public safety and accordingly denied the resentencing petition. The court detailed Pritchett's criminal history, disciplinary history, record of rehabilitation, classification and California Static Risk Assessment ("CSRA") scores, and post-release plans. The court also summarized expert Richard Subia's conclusions.

After a thorough discussion of the evidence, the court found Pritchett's age, family support, CSRA score, participation in rehabilitative programming, and positive educational and work reports were supportive of release, but concluded those positive factors were outweighed by Pritchett's criminal history, classification score, recent disciplinary record, inadequate post-release plan, and substance abuse issues.

Pritchett filed a motion for rehearing. The district attorney filed an opposition and a supplemental opposition to the motion. The trial court denied the motion on October 13, 2016.

Nearly two years after the denial of the motion for rehearing, Pritchett filed a notice of appeal. We granted his request for relief from default and ordered the trial court to accept for filing as timely the notice of appeal.

FACTUAL BACKGROUND[2]

At the hearing on Pritchett's suitability for resentencing pursuant to section 1170.126, the district attorney presented exhibits and elected not to call witnesses, and Pritchett presented exhibits and the expert testimony of Richard Subia.

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[2] This section is based largely on the recitation of facts in Judge Gordon's 16-page opinion.

1. Pritchett's Criminal History

Pritchett had misdemeanor convictions for theft (§ 484) in 1978, reckless driving (Veh. Code, § 23103) in 1979, unlawful driving or taking of a vehicle (Veh. Code, § 10851) in 1979, carrying a concealed weapon (Former § 12025, subd. (b) (Stats 2011-2012, Ch 12, § 41 [repealed]) in 1979, driving with a suspended license (Veh. Code, § 14601, subd. (a)) in 1981, possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) once in 1981 and once in 1983, grand theft from person (Former § 487.2) in 1982, receiving stolen property (§ 496) in 1982, assault with a deadly weapon (§ 245, subd. (a)) in 1982, and attempted burglary (§§ 664, 459) in 1984.

Pritchett committed his first felony (robbery) in 1985. As the victim was attempting to exit his car, Pritchett confronted him with his hand under his jacket to simulate a handgun. When Pritchett demanded, "Give me your money," the victim said he did not have any. Pritchett asked if he had any jewelry and the victim replied in the negative. Pritchett tried to take the victim's car keys from him, but the victim was able to break loose and run. Pritchett and the codefendant also attempted to rob the passenger of the car. Pritchett and his codefendant proceeded to search under her blouse before she gave them her wallet. Pritchett was convicted of one count of robbery. He received a four-year suspended prison sentence and was ordered to 365 days in county jail and 36 months of probation.

In November 1985, Pritchett and a codefendant, each armed with a knife in hand, approached the victim as he was walking down the street. Pritchett and the codefendant demanded money from the victim. They then grabbed and

dragged the victim when they were told he did not have any. Three security guards witnessed Pritchett and the codefendant going through the victim's pockets. Pritchett was convicted of robbery with the use of a weapon and sentenced to two years in state prison. He was paroled in December 1986.

In 1987, Pritchett and codefendants entered a jewelry store, each armed with a handgun, and ordered the employees to lie on the floor. Pritchett broke the display cases, removed jewelry and cash from the store, and fled in a stolen car. He was convicted of robbery while armed with a firearm and sentenced to 12 years in state prison. He was paroled on July 8, 1993, and discharged from parole on August 7, 1994.

Pritchett committed his third strike conviction on November 21, 1995. Two undercover police officers observed appellant and codefendant Willie Pritchett break into the closed and locked Barbecues Galore store and remove a barbecue valued at $429. They placed the stolen property in a car driven by codefendant Michael Kelley, entered the car, and left the scene. Shortly thereafter, the police intercepted the car and arrested appellant, Willie Pritchett, and Kelley.

2. Disciplinary Record During Incarceration

Over the course of his current commitment, Pritchett incurred 17 serious Rules Violation Reports (RVR), 11 of which were incurred after he filed his petition for resentencing in this case. Of Pritchett's serious RVRs, four were classified as Division F violations, one as a Division E violation, six as Division D

violations, three as Division C violations, two as Division B violations, and one as a Division A-2 violation.[3]

In 1998, Pritchett received a Division F violation for conduct which could lead to violence (Cal. Code Regs., tit. 15, § 3005, subd. (b)) after he was observed fighting with another inmate.

In 2006, Pritchett received a Division A-2 RVR for distribution of a controlled substance (Cal. Code Regs., tit. 15, § 3016, subd. (c)). During a search of his cell, correctional officers found one bag and one bindle of marijuana. The bindle contained 16 individual clear plastic bags containing marijuana. The officers determined the marijuana was originally in a large bag and had been broken down into the small individual bags inside Pritchett's cell, indicating he planned to sell and distribute the marijuana to other inmates.

In 2010, Pritchett received a Division E RVR for destruction of state property valued at less than $400 (Cal. Code

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[3] When inmate misconduct is believed to be a violation of law or is not minor in nature, it must be reported in a serious RVR. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).) Section 3315 states which inmate misconduct is to be classified as serious. An inmate is entitled to a serious rules violation hearing before a "Senior Hearing Officer" (SHO), which must be at least a facility captain, correctional captain, correctional counselor III, parole agent III, or an experienced correctional lieutenant, correctional counselor II, or parole agent II. (Cal. Code Regs., tit. 15, § 3315, subd. (c).) To find an inmate guilty, the SHO must find the allegation true by a preponderance of the evidence. (CDCR Departmental Operations Manual, § 52080.9.3.) Serious rules violations are classified in order of seriousness from A to F, with Division F offenses being the least serious. (Cal. Code Regs., tit. 15, § 3323.)

Regs., tit. 15, § 3011). A correctional officer discovered the vent in Pritchett's cell had been altered to hide contraband. Upon inspection, the officer found a pair of ear buds typically used for cellular telephones.

In 2011, Pritchett received a Division F RVR for behavior that could lead to violence or disorder (Cal. Code Regs., tit. 15, § 3005, subd. (a)) after custody staff became aware of anonymous correspondence alleging Pritchett would assault a custody staff member if he remained in the general population. In addition, confidential information indicated Pritchett was pressuring inmates to pay money owed to him and threatening violence.

In 2011, Pritchett also received a Division B RVR after he was found guilty of possession of a controlled substance (morphine) (Cal. Code Regs., tit. 15, § 3016, subd. (a)). During a search of Pritchett's cell, a correctional officer discovered a bindle of marijuana and black tar-like substance resembling heroin. Pritchett subsequently tested positive for morphine.

In 2012, Pritchett was found guilty of possession of a controlled substance (marijuana), a Division B offense.

In 2013, Pritchett received an RVR for use of a controlled substance (methadone/methamphetamine), a Division F offense. He also received two RVRs for use of a controlled substance (morphine), a Division D offense.

In 2014, Pritchett incurred another RVR for use of a controlled substance after testing positive for morphine, a Division D offense. He also received an RVR for possession of inmate-manufactured alcohol, a Division C offense. Pritchett also received an RVR for fighting (Cal. Code Regs., tit. 15, § 3005, subd. (d)(1)), a Division D offense, after he and another inmate

were observed yelling and exchanging punches. Both Pritchett and the other inmate sustained minor injuries.

In 2015, Pritchett incurred five RVRs. He received two RVRs for possession of inmate-manufactured alcohol (Cal. Code Regs., tit. 15, § 3016, subd. (a)), a Division C offense. He received one RVR for possession of dangerous contraband (cellphone) (Cal. Code Regs., tit. 15, § 3006, subd. (a)), a Division D offense. He received a Division F RVR for disobeying a written order (Cal. Code Regs., tit. 15, § 3005, subd. (b)) after he was observed participating in yard activities despite having lost yard privileges as a consequence of a previous RVR. He also received a Division D RVR for fighting requiring the use of force (Cal. Code Regs., tit. 15, § 3005, subd. (d)(1)) after he and another inmate were observed punching each other with closed fists. A correctional officer ordered them twice to get down and administered pepper spray but Pritchett and the other inmate continued to fight. Pritchett and the other inmate sustained minor injuries.

3. Rehabilitation and Work Record

In 2014, Pritchett completed a seven session, 12-hour "Victim's Awareness Program." In 2013, he received a certificate for a voluntary parenting program. In 2012, he received certificates for "Anger Management," "Nonviolent Conflict Resolution," and "The Way to Happiness Course." In 2007, he received a certificate for "Adjustment to Incarceration [and] Effective Interpersonal Communication Skills."

Pritchett received certificates in 2012 and one certificate in 2013 for participating in a religious 12-step recovery program. He

also received approximately 60 certificates for participating in various bible study programs.

Pritchett received his GED in 2014 and received positive feedback from his instructors. He also mentored other inmates working toward earning their GEDs, and his instructor praised him in a letter to the trial court for his study habits and efforts to help other students. He completed a literacy project at California State University in Sacramento in 1996, received a certificate in sign language in 2008, and received a certificate in classroom safety in 1997.

Pritchett worked in the education department as a student assistant to one of the teachers before being transferred to High Desert State Prison in 2015. He received satisfactory, above average, and exceptional marks from all of his work supervisors. In 2004, Pritchett received a laudatory evaluation praising him for his participation in a music course and describing him as courteous and helpful. In 2007, he received a laudatory evaluation praising him for voluntarily providing live music for monthly memorial services.

4. Classification and Static Risk Assessment Scores

The CDCR assigns every inmate a "classification score." The lower the score, the lower the perceived security risk. The lowest score a life inmate can receive is 19. At the time of the suitability hearing, Pritchett's classification score was 98. Pritchett's classification score increased from 19 to 98 between 2007 and his suitability hearing in 2016. His California Static Risk Assessment Score (CSRA) was one, the lowest possible score, which indicated he presented a low risk of incurring a

felony arrest within three years of release to parole. At the time of the suitability hearing, Pritchett was 57 years old.[4]

5. Expert Testimony

Richard Subia was appointed as an expert in corrections and rehabilitation. Subia was employed by the CDCR for over 26 years. He held several positions, including Prison Warden, Correctional Administrator for the Central Region of California, and Director of the Division of Adult Institutions.

Subia prepared a report examining Pritchett's disciplinary record and record of rehabilitation while incarcerated in an effort to determine whether he posed an unreasonable risk of danger to public safety. Subia reviewed Pritchett's conviction history and prison file, and conducted a personal interview with Pritchett.

Regarding his third strike conviction, Pritchett told Subia he had been partying the night before with friends and was in a car being taken home to get his own car; he was asleep in the car when the driver pulled over at a store; he woke up and walked to a convenience store to get coffee; when he returned to the car, the driver was already inside the car and yelled to him, "Let's go"; not long after they drove away, police pulled them over; up until that

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[4] A Stanford University study concluded criminality declines drastically after age 40 and "due to their age, the recidivism rate of lifers is dramatically lower than that of all other state prisoners, indeed infinitesimal." (*In re Stoneroad* (2013) 215 Cal.App.4th 596, 634, citing Weisberg, et al., *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences without the Possibility of Parole in California*, Stanford Criminal Justice Center (Sept. 2011) 1, 17.)

point, he did not know that the driver had stolen a barbecue; he never knew the driver had blamed him for stealing the item and was not informed of that until a few days before trial; he had nothing to do with the theft; and he was found guilty after two hung juries.

Subia's report noted Pritchett began using marijuana at age 14 and used PCP at age 19. By age 24, Pritchett was using cocaine and told Subia he would "use anytime I could get it." Pritchett told Subia "he had a problem with drugs and was always trying to find a way to obtain money to purchase drugs."

Subia testified that although Pritchett has a substance abuse issue requiring treatment, he did not believe Pritchett posed an unreasonable risk of danger to public safety. When asked which factors he relied on in forming his opinion, Subia stated Pritchett "has not continued the same patterns that he was involved in in the community," has not been involved in any "violent behavior" in prison,[5] has been involved in faith-based and self-help programming, has not participated in any gang activity, was 57 years old, had family support, and had a job available to him if released.

6. Post-Release Plans

Pritchett's brother wrote a letter to the trial court indicating Pritchett could live with him if released. He stated he would transport Pritchett to any medical or correctional supervision appointments and was working on finding Pritchett

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[5] Subia did not consider Pritchett's RVRs for fighting to constitute acts of violence.

steady employment. He also stated other family members were willing to help.

The trial court also received letters of support from Pritchett's sisters who stated they were willing to help him adjust to society if released. Pritchett's niece also wrote a letter to the trial court expressing her intent to buy him clothes, pay for him to attend adult educational and job training classes, add him to her gym membership, help him find a good church, and transport him to any necessary appointments.

DISCUSSION

Proposition 36 authorizes an inmate currently serving an indeterminate term under the original Three Strikes law to petition the trial court for resentencing. (§ 1170.126, subds. (a), (b).) Upon receiving such a petition, the trial court "shall determine whether the petitioner satisfies the criteria" for resentencing eligibility, including whether the petitioner's third strike offense was neither serious nor violent. (§ 1170.126, subds. (e), (f).) If the petitioner is found eligible for resentencing, he or she "shall be resentenced pursuant to [Proposition 36] unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

1. The Phrase "Unreasonable Risk of Danger to Public Safety Is Not Void for Vagueness

Pritchett argues the term "unreasonable risk of danger to public safety" is unconstitutionally vague in violation of due

process. This argument has been expressly rejected by Division Six of this Court and the Third Appellate District. (*People v. Flores* (2014) 227 Cal.App.4th 1070, 1075 (*Flores*) [Second Appellate District, Division Six]; *People v. Garcia* (2014) 230 Cal.App.4th 763, 769-770 (*Garcia*) [Third Appellate District].) We agree with *Flores* and *Garcia* that the term Pritchett challenges is not unconstitutionally vague. "Surely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would impose an unreasonable risk of harm to the public safety." (*Flores*, *supra*, 227 Cal.App.4th at p. 1075.)

The fact that *Flores* and *Garcia* were decided prior to *Johnson v. United States* (2015) ___ U.S. ___ [135 S.Ct. 2551, 192 L.Ed. 2d 569] (*Johnson*) does not alter our analysis. *Johnson* held the statutory definition of the term "'violent felony'" in the Armed Career Criminal Act of 1984, which included "any felony that 'involves conduct that presents a serious potential risk of physical injury to another,'" known as the residual clause, was unconstitutionally vague. (*Johnson*, *supra*, 135 S.Ct. at pp. 2555, 2557-2558.) The residual clause at issue in *Johnson* was held unconstitutionally vague in part because it "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." (*Id.* at p. 2557.) Proposition 36, by contrast, ties the definition of the term Pritchett challenges to tangible real-world factors. The meaning of "unreasonable risk of danger to public safety" is clarified by subdivision (g) of section 1170.126, which explains that a trial court, in making its determination, may consider the petitioner's criminal conviction history, disciplinary record and record of rehabilitation while incarcerated, and any other evidence the

court determines to be relevant. (See *Garcia*, *supra*, 230 Cal.App.4th at p. 769.) The statute is not void for vagueness.[6]

2. The Trial Court Did Not Abuse Its Discretion

We likewise reject Pritchett's argument that the trial court abused its discretion by concluding he posed an unreasonable risk of danger to public safety.

Pritchett's eligibility for resentencing is not at issue. An eligible defendant may be unsuitable for 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); see § 1170.126, subd. (e); *People v. Valencia* (2017) 3 Cal.5th 347, 354 [220 Cal.Rptr.3d 230, 237].) The prosecution bears the burden of proving by a preponderance of the evidence that a petitioner poses an unreasonable risk of

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[6] "The Fifth Amendment provides that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.'" Under the void for vagueness doctrine, "the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." (*Johnson*, *supra*, 135 S.Ct. at p. 2556.) We are skeptical of whether the void for vagueness doctrine applies to instances such as this, where the challenged law is not a statute that would deprive an individual of his or her life, liberty, or property in the first instance, but rather is an ameliorative statute being applied retrospectively with the possibility of restoring liberty that has already been taken. Because the parties do not address these issues, however, we need not reach them.

danger to public safety. (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1305.) As mentioned above, in determining whether a petitioner poses an unreasonable risk of danger to public safety, the criteria a court may consider include: "(1) [t]he petitioner'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) [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." (§ 1170.126, subd. (g).) Because section 1170.126 vests "'discretionary power . . . in the trial court, its exercise of that discretion "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]"' [Citation.]" (*People v. Williams* (2013) 58 Cal.4th 197, 270-271; § 1170.126, subd. (g).)

Applying this deferential standard, we find no abuse of discretion. As noted above, in a 16-page memorandum of decision, the court carefully weighed the various factors, noting some cut in favor of suitability and others did not. In making its ruling that Pritchett would pose an unreasonable risk of danger to public safety if released, the court properly focused on his chronic substance abuse, history of committing crimes fueled by substance abuse, numerous recent substance abuse-related RVRs, lack of concrete substance abuse treatment plans if released, and recent minimizing of or dishonesty about his substance abuse problems. For these reasons, we reject

Pritchett's sub-arguments that the court abused its discretion because his parole plans were sufficient; his decades-old criminal history did not make him a current unreasonable risk of danger to public safety; his recent disciplinary record shows he needs substance abuse treatment rather than more time in prison; and the trial court erred in its analysis of his classification scores. Nothing about the trial court's decision was arbitrary or capricious. (See *Williams*, *supra*, 58 Cal.4th at pp. 270-271.)

Pritchett also argues the trial court abused its discretion by basing its decision in part on unsubstantiated claims. Specifically, he argues one of his RVRs was not supported by credible evidence because it was based on an anonymous note stating he would assault a guard if he remained in general population, was engaging in loan sharking, and might engage in violence if people did not repay their debts. Even assuming the RVR was not supported by credible evidence, we find no abuse of discretion, because the RVR Pritchett complains of played little role in the trial court's decision, which was based largely on the substance abuse issues described above.

DISPOSITION

Affirmed.

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CURREY, J.

WE CONCUR:

WILLHITE, Acting P. J.

COLLINS, J.