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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY GENE TERRY,

Defendant and Appellant.

B277122

(Los Angeles County  
Super. Ct. No. BA197176)

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

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

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Billy Gene Terry appeals from a post-conviction order denying his petition to recall his sentence and to resentence him under the Three Strikes Reform Act of 2012, added by Proposition 36. (Pen. Code, § 1170.126.)<sup>1</sup> We affirm.

### **BACKGROUND**

In 2000, a jury found Terry guilty of one count of felony battery with injury on a peace officer (§ 243, subd. (c)(2)), one count of misdemeanor battery with injury on a peace officer (§ 243, subd. (b)), and two counts of resisting an officer (§ 69)). Additionally, the jury found true the special allegations that Terry had two prior “strike” robbery convictions (§§ 667, 1170.12) and had served two prior prison terms (667.5, subd.(b)). The trial court sentenced him under the “Three Strikes” law to 25 years to life in prison as a third strike offender, plus two consecutive one-year terms for the prior prison term enhancements.

In November 2012, California voters approved Proposition 36, which amended the Three Strikes law to limit third strike sentences of 25 years to life to cases where the current offense is a serious or violent felony or the prosecution pleads and proves an enumerated factor. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) The amended Three Strikes law also provides a procedure for qualified inmates serving indeterminate life sentences under the Three Strikes law to seek recall and resentencing under the terms of the amended law as second strike offenders. (§ 1170.126.) An inmate who has a prior conviction for a “sexually violent offense,” as defined in Welfare and Institutions Code section 6600, subdivision (b), is not eligible

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise indicated.

for recall and resentencing under section 1170.126. (§§ 667, subd. (e)(2)(C)(iv)(I), 1170.12, subd. (c)(2)(C)(iv)(I), 1170.126, subd. (e)(3).)

On February 22, 2013, Terry petitioned for relief under section 1170.126, seeking recall of his sentence and resentencing to a determinate term of eight years as a second strike offender. Terry argued his current offenses and prior convictions did not render him ineligible for recall and resentencing. Terry listed his prior convictions as two 1982 robbery convictions and a 1984 assault with a deadly weapon conviction.

The District Attorney filed an opposition to the petition, arguing Terry was ineligible for recall and resentencing because he had sustained a prior conviction for a “sexually violent offense,” as defined in Welfare and Institutions Code section 6600, subdivision (b). Evidence presented in connection with Terry’s petition established that in 1978, when Terry was 17 years old, the juvenile court sustained a delinquency petition against him for sodomy by force with a 16-year-old, a violation of section 286. The juvenile court declared him a ward of the court and committed him to the California Youth Authority.

On August 23, 2016, after reviewing juvenile court records and holding a hearing on the matter, the trial court denied Terry’s petition, concluding his juvenile adjudication for forcible sodomy is a sexually violent offense under Welfare and Institutions Code section 6600, subdivision (b), rendering him ineligible for recall and resentencing under section 1170.126.

### **DISCUSSION**

Section 1170.126, subdivision (e)(3) provides that an “inmate is eligible for resentencing” if he or she “has no prior convictions for any offenses appearing in” sections 667,

subdivision (e)(2)(C)(iv) or 1170.12, subdivision (c)(2)(C)(iv). Forcible sodomy, a “sexually violent offense,” as defined in Welfare and Institutions Code section 6600, subdivision (b), is a disqualifying offense under the resentencing provisions of section 1170.126. (§§ 667, subd. (e)(2)(C)(iv)(I), 1170.12, subd. (c)(2)(C)(iv)(I), 1170.126, subd. (e)(3).)

Terry does not dispute he sustained the 1978 juvenile adjudication for forcible sodomy or challenge the sufficiency of the evidence demonstrating the adjudication, as presented in connection with his petition. He contends the prior adjudication did not render him ineligible for recall and resentencing under section 1170.126 because it was not pleaded as a strike prior and proved beyond a reasonable doubt in the 2000 proceedings related to the current offense for which he is serving the indeterminate life sentence. The resentencing provisions of section 1170.126, however, do not contain a requirement that disqualifying prior convictions be pleaded and proved in the underlying third strike case.

In *People v. Thurston* (2016) 244 Cal.App.4th 644, the First District addressed the issue Terry raises in a factually similar case. There, the defendant contended a 1975 juvenile adjudication for rape could not be used to disqualify him from recall and resentencing under section 1170.126 because the juvenile adjudication was not pleaded and proved in the underlying 2002 third strike case. (*Id.* at p. 652.) The Court of Appeal concluded the trial court properly considered records from the 1975 juvenile adjudication in determining the defendant was ineligible for recall and resentencing under section 1170.126, even though the records were not part of the underlying third

strike case and the juvenile adjudication was not pleaded and proved in the third strike case. (*Id.* at pp. 657-659.)

Terry's 1978 juvenile adjudication for forcible sodomy disqualifies him from recall and resentencing under section 1170.126. The trial court did not err in denying his petition.

**DISPOSITION**

The order is affirmed.

NOT TO BE PUBLISHED.

CHANNEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.