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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. MAURICE JOHNSON, Defendant and Appellant.	B280508 (Los Angeles County Super. Ct. No. YA026755)

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

Rich Pfeiffer, 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 Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant challenges the trial court's order denying his petition for resentencing pursuant to Penal Code section 1170.126 (Proposition 36).[1] He argues the court abused its discretion when it found that he posed an unreasonable risk of danger to public safety. We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

In August 1996, appellant was charged by information with sale or receipt of an access card with intent to defraud under section 484e, subdivision (c), and with possession of a forged driver's license under section 470b. The information further alleged appellant had 10 prior strike convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). A jury found appellant guilty of both counts in November 1996. The trial court found the allegations regarding appellant's prior convictions true. Appellant was sentenced to 25 years to life in state prison for each count, with the sentence for the second count stayed.

In January 2013, appellant filed a petition for recall of sentence and resentencing pursuant to Proposition 36. Appellant was found eligible for recall of his sentence for count one (sale or receipt of an access card with intent to defraud).

At a November 2016 evidentiary hearing to determine appellant's suitability for resentencing under section 1170.126, subdivision (f), the resentencing court heard evidence that appellant had committed murder at the age of 15, had committed multiple violent robberies with a firearm, and had sustained 11 serious rule violations during his time in prison. The serious rule

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

violations included engaging in mutual combat with another incarcerated person, twice threatening a female correctional officer with violence, kicking another incarcerated person in the head and torso during a riot, participating in three other riots (one of which resulted in serious bodily injury), and possessing a prison-made weapon. Appellant had been given a security classification score of 114, indicating that he posed a high security risk.

Appellant claimed he acted in self-defense during two of the riots in which he participated. He presented evidence that one riot ensued after prison personnel forcibly moved African-American incarcerated people into an area controlled by Hispanic incarcerated people, leading to a fight between members of the two racial groups.

Appellant was 50 years old at the time of the suitability hearing. There was evidence he had participated in four rehabilitative programs during his prison term, each of which he began after filing of his petition for recall of sentence and resentencing. He had been accepted for transitional living and employment assistance by postrelease transition organizations. Supervising psychiatric social worker Michael Boretz wrote a letter on behalf of appellant, opining that he did not pose a risk to himself or others in prison. Mr. Boretz acknowledged that he was not qualified to make determinations about individuals' likelihood of reoffending postrelease. Mr. Boretz stated that rehabilitative programs were "scarcely available" to appellant.

In January 2017, the court found appellant was not suitable for release because he posed an unreasonable danger to public safety. The court found that appellant's postrelease plans were supportive of release and recognized that appellant's age

would typically mitigate the risk that he would re-offend. Nonetheless, the court concluded that in light of appellant's criminal history, prison disciplinary history, and lack of sufficient participation in remedial programming, he posed an unreasonable danger to public safety. The court stated that the timing of appellant's entry into rehabilitative programming called his sincerity into question because it indicated he was motivated solely by the prospect of release, which suggested he would be unmotivated to be successful in postrelease programming. The court gave little weight to Mr. Boretz's letter due to his admission that he was unable to assess the likelihood that appellant would recidivate postrelease.

This appeal followed.

DISCUSSION

Appellant argues the trial court abused its discretion when it denied his petition for resentencing under Proposition 36 based on a finding that he posed an unreasonable danger to public safety. We disagree.

The decision to grant or deny a petition for resentencing under Proposition 36 is discretionary. (§ 1170.126, subd. (f) [describing court's determination of danger to public safety as "in its discretion"].) Where, as here, "a discretionary power is statutorily vested 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 . . . .'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

In assessing a defendant's suitability, Proposition 36 directs a trial court to consider: (1) the defendant's criminal history; (2) the defendant's disciplinary record and record of rehabilitation while incarcerated; and (3) any other evidence the court deems relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. (§ 1170.126, subd. (g).)

The court's conclusion that appellant posed an unreasonable danger to public safety and therefore was unsuitable for resentencing was well-supported. Appellant's criminal history included repeated and severe use of violence. Although appellant attempts to recharacterize some of his prison disciplinary history by arguing that he acted in self-defense and was prompted by the actions of prison personnel, these arguments do not erase the multiple other instances of violent conduct in which appellant has engaged while incarcerated. Coupled with his violent criminal history and his security classification score, appellant's history of violent misconduct in prison supported the court's conclusion that he was not suitable for resentencing. It was reasonable for the court to give little weight to Mr. Boretz's letter because he was unable to opine regarding appellant's likelihood of reoffending postrelease, the point at issue at the suitability hearing.

Appellant also argues in his opening brief that the trial court should have evaluated him using the definition of unreasonable risk of danger to public safety provided in section 1170.18, subdivision (c), passed as part of Proposition 47. As respondent notes and appellant concedes, the Supreme Court's recent decision in *People v. Valencia* (2017) 3 Cal.5th 347,

precludes the application of Proposition 47's definition in Proposition 36 cases like this one.

DISPOSITION

The order is affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.