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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP LEWIS RANDALL, Defendant and Appellant.	B278440 (Los Angeles County Super. Ct. No. TA057445)

APPEAL from an order of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Defendant and appellant Phillip Lewis Randall (defendant) appeals from the trial court's order denying his petition for resentencing under the Three Strikes Reform Act of 2012 (Proposition 36). He challenges the trial court's discretion in determining that defendant posed an unreasonable risk of danger to the public. Finding no abuse of discretion, we affirm the judgment.

BACKGROUND

Proposition 36 petition

In 2001, defendant was convicted of evading a law enforcement officer with willful disregard for the safety of persons and property, in violation of Vehicle Code section 2800.2. Defendant was also previously convicted of three serious or violent felonies which qualified as strikes under the "Three Strikes" law, in addition to two other felony convictions. Defendant was sentenced to 25 years to life in prison, plus two one-year enhancements for prior prison terms, and the judgment was affirmed in a nonpublished opinion. (*People v. Randall* (June 11, 2002, B149438).) In 2013, defendant filed a petition for recall and resentencing under Proposition 36, enacted as Penal Code section 1170.126.[1] The prosecution opposed on the ground that defendant would pose an unreasonable risk of danger to public safety if resentenced. After hearing the testimony of the parties' expert witnesses and reviewing defendant's criminal history and prison records, the trial court found that defendant would pose an unreasonable risk, and denied the petition.

Defendant filed a timely notice of appeal from the order.

Prosecution expert

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

Sergeant Robert Lyons of the Los Angeles County Sheriff's Department, Major Crimes Bureau, testified as the prosecution's expert on prison and street gangs. He was familiar with the 113th Block Crips gang in Los Angeles, as well as the Black Guerilla Family (BGF) prison gang.[2] He reviewed defendant's prison records, court documents, including probation reports, and obtained information about defendant from an agent of the California Department of Corrections and Rehabilitation (CDCR). As noted in his prison file, defendant identifies himself as a member of the 113th Block Crips gang, a gang known for committing crimes such as murder, conspiracy to commit murder, kidnapping for ransom, armed robbery, and carjacking, as well as auto theft and narcotics sales.

Sergeant Lyons explained that in prison a Crip gang member generally remained a Crip gang member, and aligned with other Crips, although not necessarily with the same set. If an inmate wanted to leave his gang he would voluntarily enter a "step down" program, would "debrief" by disclosing everything known about the criminal activities of his gang associates, and go into the "S and Y [*sic*] yard."[3] Any inmate who did not opt out remained a member of his street gang when released.

Crip gang members in prison who do not step down may align themselves with the BGF or other prison gangs. The level of dangerousness of such gangs is identified in prison records with the term, "Security Threat Group" or STG. The most

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[2] Although the reporter's transcript consistently refers to this gang as the "Black Gorilla Family," the trial court referred to the "Black Guerilla Family" in its memorandum decision.

[3] The trial court and both parties to this appeal understood that Sergeant Lyons was referring to the "Sensitive Needs Yard" or SNY.

dangerous levels are designated "STG 1" and "STG 2." The more dangerous of the two, STG 1, includes the Mexican Mafia, BGF, Nazi Low Riders, and Aryan Brotherhood. BGF, originated in San Quentin and used a dragon image as its symbol, and was known as the most violent gang in CDCR history. Sergeant Lyons testified that an inmate could be aligned or involved with a gang but not yet be formally "validated" under prison procedures with an STG. Evidence in defendant's prison file suggesting that he was a member of BGF included: a photograph of George Jackson, as well as documents and a birthday card regarding George Jackson, found in defendant's cell; and a dragon tattoo on defendant's body similar to those worn by BGF members. Defendant was validated in prison as a member of an STG 2 gang as a result of his admission to the chief disciplinary officer in February 2016, that he was an "STG L.A. Crip."

Sergeant Lyons summarized rules violations noted in defendant's file, such as conspiracy to introduce narcotics (31.58 grams of marijuana) into the prison in 2009, an activity consistent with gang behavior, as STG 1's and STG 2's both distribute drugs in prisons. Defendant was involved in a fight in 2006. In 2009 and 2015, defendant owed other inmates money which he could not repay, and was placed in "ad seg"[4] for his protection from assault. He was invited to enter SNY in 2015, but refused.

Defense expert

Public safety consultant Richard Subia (Subia), testified as the defense expert.

Subia personally interviewed defendant and reviewed the reports of defendant's prison rules violations. He did not consider the violations to be serious or violent. He explained that the fight

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[4] Presumably referring to "administrative segregation."

was mutual combat that could have been self-defense, and that both combatants were released back into the facility. Subia did not consider the battery on a peace officer to be physical conduct, as it stemmed from the officer's belief that defendant attempted to send a letter with body fluid on it. He also explained that the 2013 charge of possession of a controlled substance was based upon an officer smelling marijuana and defendant's positive urinalysis; the 2009 conspiracy to introduce marijuana into the prison did not involve defendant's actual possession of the marijuana; and that the remaining offenses were minor instances of disrespect, many of which were instigated by staff members after defendant's relationship with a nurse, who was dismissed from her job as a consequence. Regarding the 2006 possession of a cell phone, Subia observed that there was no evidence defendant used it for any criminal activity.

Subia saw nothing in defendant's prison record that caused him to conclude that defendant currently posed an unreasonable risk of danger to the public based upon his "supposed" gang affiliation. Subia noted that there were no formal gang validation documents, only a Form CDCR 812 Critical Information Document, which noted that defendant had mentioned he was a member of a Southern California Crip faction. The BGF item found in defendant's cell in 2006 and his dragon tattoos earned him just one point toward formal validation, which requires 10 points. Subia did not think defendant's dragon tattoo resembled the type used by BGF members or associates, as it had no claw or prison tower included.

Subia was of the opinion that the prison classification process was responsible for defendant's lack of participation in vocational and educational programs prior to 2012 Most programs met after 6:00 p.m., and due to his classification

defendant was not allowed out of his cell past 6:00 p.m. Defendant's classification was based on the length of his sentence and for the first 10 years made him ineligible to participate in evening programs or take jobs in areas outside the inner secure perimeter, leaving only porter, yard crew, and painting jobs. In addition, defendant had been in eight different institutions during the 15 years of his current term, and transfers made it difficult to obtain and stay in jobs. It is difficult for life offenders to obtain jobs, and budget cuts have eliminated some programs. Nevertheless, in 2014 and 2015, after defendant's classification score dropped down, he participated in self-help programs such as Victim Awareness, Narcotics Anonymous (2014), Criminal Rehabilitation Anonymous, Getting Out By Going In, Mastering Oral Presentation, and Alternatives To Violence. Defendant also participated in group therapy and counseling sessions throughout his incarceration. Defendant entered a mental health program in July 2008 which allowed him to be housed in a clinical environment for access to group therapy, medication, and recreational therapy. In 2013, a clinical psychologist praised his progress and recommended parole.

In Subia's opinion, defendant did not pose an unreasonable risk of danger to public safety.

Findings and decision

In a 13-page memorandum decision, the trial court reviewed defendant's criminal history, prison discipline, rehabilitation programming in prison, evidence of gang involvement, mental health issues, and defendant's post-release plans. The court made detailed findings of fact in each category, with citations to the prison records, the testimony of the two experts, defendant's conviction records, and past probation reports.

With regard to prison rules violations, the trial court found: "During his current commitment of approximately 15 years, Petitioner has been found guilty of 15 serious rule violations documented on a California Department of Corrections and Rehabilitation ('CDCR') Form 115 (hereafter referred to as 'RVR'). In the last ten years, petitioner has received RVRs for possession of a controlled substance in 2013 as well as conspiracy to introduce/possess marijuana in 2009. (See RVRs, People's Exhs. 2, 13-14). Petitioner also received RVRs for unauthorized possession of *157* canteen yard cards in 2009, failure to comply with emergency procedures during a riot in 2007, disruptive behavior (use of profanity and uncooperative behavior in the medication line) in 2007, disrespect towards staff (use of profanity toward staff) in 2007 on two separate occasions, disobeying verbal orders on two separate occasions in 2007, attempted battery on a peace officer in 2006, possession of a cell phone in 2006 (petitioner had made or received *7004* phone calls on this cell phone in a two-month period) and mutual combat in 2006. (See RVRs, People's Exhs. 2, 15-24)." (Fn. omitted.)

The court noted defendant's criminal history of targeting vulnerable women, using violence or threats of violence against them to commit drug-related and theft crimes, and his history of leading the police on high-speed pursuits. Despite the remoteness of this history, the court found a continued nexus between defendant's "criminal history and his current risk of danger to public safety because of his continued gang involvement in prison, his prison disciplinary history, and lack of rehabilitative programming."

DISCUSSION

I. Denial of Proposition 36 petition

Defendant contends that trial court's denial of his Proposition 36 petition was an abuse of discretion.

When enacted, the Three Strikes law required a minimum sentence of 25 years to life for a defendant convicted of *any* felony, if the defendant had previously been convicted of two prior felonies which came within the legal definitions of serious or violent felonies, and thus qualified under the law as "strike" offenses. (See former §§ 1170.12, subd. (c)(2)(A) & 667, subds. (d), (e)(2)(A).) Proposition 36 amended the Three Strikes law to provide in most cases in which a defendant with two prior convictions of a serious or violent felony would be sentenced to 25 years to life upon conviction of a third serious or violent felony. (See §§ 1170.12, subd. (c)(2)(C) & 667, subd. (e)(2)(C).) Proposition 36 also added section 1170.126, which permits those serving a third-strike sentence to petition for resentencing under the amended law. (§ 1170.126, subd. (b).) The court must grant the petition if defendant is eligible for resentencing, unless the court determines in its discretion that resentencing the otherwise eligible petitioner would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).)

Throughout his arguments, defendant claims that the People are required to prove by a preponderance of the evidence that defendant posed an unreasonable risk of danger to public safety. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301, 1305.) Defendant acknowledges that the trial court recognized and applied this standard of proof. Defendant's references on appeal seem to suggest that the standard of review to be applied on appeal requires a determination of whether the prosecution met its burden. However, the statute expressly called for the trial court to exercise its discretion. On review, we must apply an abuse of discretion standard. (See *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

It is the burden of the party challenging the trial court's discretion to show not only that the decision was arbitrary or capricious, but also that it resulted in a manifest miscarriage of justice. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) "'[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.]' [Citation.]" (*Id.* at p. 978.) In general, a ruling is not arbitrary or capricious if it "is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*People v. Sandoval* (2007) 41 Cal.4th 825, 847-848.)

"In 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.' [Citation.] Thus, . . . '[i]n determining whether an offender poses [an unreasonable risk of danger to public safety], the court could consider *any evidence* it determines is relevant, such as the offender's criminal history, behavior in prison, and participation in rehabilitation programs.' [Citation.]" (*People v. Valencia* (2017) 3 Cal.5th 347, 354, quoting § 1170.126, subd. (g)(1)-(3), and Voter Information Guide, Gen. Elec. (Nov. 6, 2012) analysis of Prop. 36, p. 50.)

Defendant contends that the trial court's abuse of discretion is demonstrated by the absence of evidence of defendant's gang involvement in prison. He also in essence

argues that Sergeant Lyons's testimony was speculative, illogical, lacking in foundation, or in conflict with the opinions of the defense expert. On the other hand, defendant extensively refers to the testimony and opinions of the defense expert, who concluded that defendant's prison rules violations were not particularly serious, and that defendant's tardy and scant rehabilitative, employment, and educational efforts were adequate considering the difficulty posed by frequent facility transfers, housing assignments and time of day offerings. Defendant also seems to argue that the trial court should have disregarded the evidence of defendant's gang membership in the community, because none of his crimes were shown to have been gang related or crimes typically committed by the 113th Block gang, and because he was not *formally* validated as a gang member. Defendant also points out that the defense expert did not "see any indicators to show . . . that [defendant] was continually participating in gang behavior in prison." Defendant minimizes the significance of associating with other Crip inmates in prison, relying on the defense expert who indicated that he did not "see any indicators to show me that [defendant] was continually participating in gang behavior in prison." Further, defendant argues that the Step-Down Program was not available, and his failure to debrief and enter the SNY should be interpreted more favorably to defendant, as the SNY had its disadvantages. Also there was no showing that defendant was *asked* to debrief. Defendant also argues that there was no reason for him to debrief because no evidence supported the conclusion that he was a member of a prison gang. Defendant also contends that the court should have given greater weight to defendant's age (47), his post-release plans, and the unavailability or inconvenience of some rehabilitative programming.

We agree with respondent that defendant's arguments amount to a request that this court reweigh the evidence and come to a different conclusion. Defendant's arguments are largely dependent on his own expert's opinions and interpretation of defendant's prison records, defendant's own interpretation of the prison records, as well as his own resolution of perceived conflicts in the evidence, and the inferences to be drawn.

The abuse of discretion standard requires that we give deference to the trial court's resolution of factual disputes, undertaking an analysis comparable to the substantial evidence rule. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1065-1066.) Thus, we must review the record in the light most favorable to the trial court's ruling. (See *People v. Wader* (1993) 5 Cal.4th 610, 640.) We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence, including all reasonable inferences drawn from circumstantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) And we do "not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

We thus decline to independently review the facts, give greater weight to defendant's expert than given by the trial court, to draw only those inferences that favor reversal, and in essence make a de novo determination of defendant's risk to public safety. We also decline to disregard Sergeant Lyons's testimony based upon defendant's opinion that it was speculative or lacking in foundation, as no such objection was made in the trial court. (See *People v. Valdez* (2012) 55 Cal.4th 82, 130; Evid. Code, § 353.)

In addition, we disagree with defendant's claim that there was no evidence to support the finding of defendant's gang

involvement in prison. As the trial court set forth in its findings of fact, defendant admitted his pre-incarceration membership in the 113th Block Crips gang. The court relied on prison records, including exhibit 35, a 1994 report that defendant was identified as a gang member by observation of his tattoos and his self admission, as well as exhibit 36, a 1993 admission to such membership, signed by defendant. The court reasonably inferred that defendant did not wish to disassociate with the gang, as he did not debrief or accept the prison's offer to place him in the SNY. The court also relied on the testimony of Sergeant Lyons that prison staff determined that defendant belonged to a STG 2, and his testimony was supported by exhibit 12, which included a report of defendant's admission that he was "an STG-II L.A. Crip." The court's finding that defendant was currently classified as a member of the BGF prison gang was supported by the testimony of Sergeant Lyons to that effect, as well as by (exhibit 52) the 2009 prison report showing defendant's dragon tattoo, known to be a symbol of the BGF prison gang, and documents relating to George Jackson.

Finally, we accept the trial court's rejection of the defense expert's opinion that the prison rules violations were not really serious. The trial court could reasonably conclude that smuggling drugs and a cell phone into prison, possession of credits given to other inmates, and fighting were serious, and more so in combination with the number of less serious violations. We also defer to the little weight given to the expert's reasons why defendant might have had difficulty in attending rehabilitative programs, and to defendant's post-release plans. We discern no arbitrary or capriciousness in the court's observation that defendant's limited efforts at rehabilitation came only after he filed the Proposition 36 petition, and that defendant's post-release plans were inadequate due to

defendant's complete lack of work experience outside prison and only menial employment in prison.

In sum, defendant has not met his burden to demonstrate that the trial court exercised its discretion in an arbitrary or capricious manner, resulting in a manifest miscarriage of justice. (See *People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at pp. 977-978.) Defendant has demonstrated no more than the possibility that if the court had given greater weight to some evidence and had drawn other reasonable inferences, the result might have been different. However, facts that merely afford an opportunity for a difference of opinion do not establish an abuse of discretion. (*People v. Clair* (1992) 2 Cal.4th 629, 655.)

II. Defining unreasonable risk of danger

In his opening brief, defendant argued that the definition of "unreasonable risk of danger to public safety" as used in Proposition 36 (§1170.126, subd. (f)) should be governed by the definition of that term in Proposition 47 (§ 1170.18, subd. (c)), and that the definition should be applied retroactively. However, defendant agreed that the contention would not be meritorious if the California Supreme Court denied the petition for rehearing of its decision in *People v. Valencia, supra*, 3 Cal.5th 347 (rehearing denied Aug. 30, 2017). As that eventuality has occurred, we deem the issue withdrawn.

DISPOSITION

The order denying resentencing under Proposition 36 is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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