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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. DARRELL LEE McCONICO, Defendant and Appellant.	B281858 (Los Angeles County Super. Ct. No. YA043593)

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

Susan Wolk, 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 Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

In 2000, appellant Darrell Lee McConico smuggled cocaine into a Los Angeles jail facility. He was convicted of two felony offenses stemming from that incident: possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)(1), count 1) and possession of an illegal substance in a correctional facility (Pen. Code, § 4573.6, subd. (a), count 2).[1] Because appellant had two prior strike convictions, the trial court sentenced him to 25 years to life on each count. It stayed the sentence on count 2 pursuant to section 654.

In 2012, appellant filed a petition for recall and resentencing under Proposition 36 (§ 1170.126). While that petition was pending, appellant filed a petition for recall and resentencing under Proposition 47 (§ 1170.18). The trial court adjudicated the Proposition 47 petition first and reduced appellant's count 1 conviction to a misdemeanor. It then resentenced appellant, using count 2 as the principal count and lifting the stay on the previously imposed sentence of 25 years to life. The court imposed and stayed a misdemeanor sentence on count 1 pursuant to section 654. Appellant voluntarily abandoned his appeal of that decision after discussing it with his appointed appellate counsel. Subsequently, the trial court denied appellant's Proposition 36 petition, leaving in place his sentence of 25 years to life.

In this appeal from the denial of his Proposition 36 petition, appellant raises three issues. First, he contends the trial court denied him an opportunity to litigate the question of whether he was resentenced properly under Proposition 47. Second, appellant argues that the trial court imposed a legally

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

unauthorized sentence by lifting the stay on count 2 rather than allowing it to become permanent. Finally, appellant contends that the trial court abused its discretion by finding that resentencing him to a two-strike sentence under Proposition 36 would pose an unreasonable risk of danger to public safety.

We reject appellant's contentions and affirm.

FACTUAL AND PROCEDURAL HISTORY

In March 2000, appellant possessed cocaine while jailed at a Los Angeles County Sheriff's Department facility. He was charged with and convicted of two felony offenses in connection with this incident: possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)(1), count 1) and possession of a controlled substance in a correctional facility (§ 4573.6, subd. (a), count 2). The trial court sentenced appellant to 25 years to life on each count pursuant to the Three Strikes Law. It stayed the sentence on count 2 pursuant to section 654. Appellant appealed, and we affirmed his convictions and sentence. (*People v. McConico* (Sept. 12, 2001, B145461) [nonpub. opn.].)

On November 6, 2012, voters approved Proposition 36, the Three Strikes Reform Act of 2012. (*People v. White* (2014) 223 Cal.App.4th 512, 517.) Prior to Proposition 36, all defendants with two prior serious or violent felony convictions were subject to a "third strike" sentence of 25 years to life upon conviction of any third felony. (*Ibid.*) Proposition 36 altered that requirement both prospectively and retrospectively. Relevant here is the retrospective portion of Proposition 36, now codified at section 1170.126, under which a person currently serving a third strike sentence for a felony that is neither serious nor violent may be eligible to be resentenced as a second strike offender, provided

the court determines, in its discretion, that resentencing the person would not pose an unreasonable risk of danger to public safety. (See *ibid.*; see also § 1170.126.) Appellant filed a petition to be resentenced under Proposition 36 on November 29, 2012. The Los Angeles County District Attorney ("the People") opposed the petition.

While appellant's Proposition 36 petition was pending, the voters on November 4, 2014 enacted Proposition 47, the Safe Neighborhoods and Schools Act. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reclassified certain enumerated drug- and theft-related offenses from felonies to misdemeanors, including violations of Health and Safety Code section 11350. (*Id.* at p. 1091.) It also provided a mechanism for people currently serving a felony sentence for a reclassified offense to petition for recall and resentencing, the granting of which is subject to the trial court's discretionary determination that resentencing the petitioner would not pose an unreasonable risk of danger to public safety. (See § 1170.18.) Appellant filed a petition to be resentenced on both counts 1 and 2 under Proposition 47 on April 7, 2015. The People opposed this petition as well.

The trial court held a readiness hearing on the Proposition 47 petition on November 2, 2015. At that hearing, the court remarked that appellant's petition presented "an interesting issue here, because if I resentence him on count 1 then I have to impose a sentence on count 2." Appellant's counsel disagreed, stating, "my argument is that the stay is permanent upon completion of the sentence on count 1. And if you reduce it to a misdemeanor, then the stay will be permanent on the 25-to-life." The court responded, "Okay. We'll have to litigate that, then."

At the next hearing on appellant's Proposition 47 petition, on January 25, 2016, the People conceded that appellant was eligible for Proposition 47 relief on count 1, the Health and Safety Code section 11350 violation. The court agreed but ruled that count 2, the section 4573.6 violation, was not a reducible offense. The court explained that split outcome meant it would need to "lift the 654 stay on count 2 and impose a 25-to-life sentence on count 2, which you can then challenge via a Prop 36." Appellant's counsel again disputed the court's conclusion. Relying only on *People v. Beamon* (1973) 8 Cal.3d 625, which predated both the determinate sentencing law and Proposition 47, he argued that the proper procedure would be for the court to resentence appellant on count 1, which was the original principal count. Then, because appellant already completed the new misdemeanor sentence, the court should permanently stay his 25-years-to-life sentence on count 2. The court disagreed, explaining that the determinate sentencing law required the court to make the count with the longest sentence the principal term. "Because . . . count 1 is no longer the sentence with the longest sentence, I have to make count 2 the one with the longest sentence of 25 to life."

The court granted appellant's Proposition 47 petition in part and resentenced him as follows: "So as to count 1, the Prop 47 petition is granted. Sentence is 364 [days], county jail. Credit is 364. Count 2 of the sentence, 654 stay is lifted and sentence of 25 to life in fact. Count 1 sentence is stayed 654. That is the order." An updated abstract of judgment was filed on February 2, 2016. However, the court did not enter its order until April 4, 2016.

Meanwhile, appellant's counsel filed a second Proposition 36 petition on February 3, 2016. In that petition, counsel noted

that the trial court on January 25, 2016 had "flip-flopped the sentences holding that the current interpretation of Penal Code 654 allows this" but did not pursue the issue further. Instead, the petition argued that appellant should be resentenced on count 2 under Proposition 36 because he does not pose an unreasonable risk of danger to the public. The People filed an opposition on March 3, 2016.

The parties appeared before the court on May 23, 2016 for a readiness hearing on appellant's second Proposition 36 petition. At that hearing, the court granted appellant's motion to represent himself. Appellant, acting in propria persona, subsequently filed a notice of appeal challenging the court's Proposition 47 order.[2] In the notice of appeal, appellant asserted that the "Prop. 47 denial affects liberty interest in possible resentencing." He further contended that the equal protection clause required the court to treat his section 4573.6 conviction the same as his Health and Safety Code section 11350 conviction, "because there is no permissible basis upon which to discriminate against defendant for being in simple possession of a personal use amount of narcotics while in a camp, jail, or prison as opposed to having committed the exact same offense while at liberty outside a camp, jail, or prison." He did not mention section 654 or the new sentence he received.

On June 27, 2016, the parties appeared before the trial court for another hearing. Appellant advised the court that he had filed a notice of appeal regarding the Proposition 47 ruling. The trial court informed appellant that the pending appeal

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[2] On our own motion, we take judicial notice of the file in the prior appeal, docket number B275304. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

deprived it of jurisdiction to adjudicate the Proposition 36 petition. Appellant responded that he planned to dismiss the appeal. On October 14, 2016, appellant filed a request to dismiss his appeal; the request noted that he had discussed the case and the consequences of abandoning it with his appointed attorney. We ordered the appeal dismissed on October 17, 2016.

The parties appeared in the trial court again on October 31, 2016. The trial court advised them that its jurisdiction had been restored and set the matter for a suitability hearing on January 3, 2017.

At the January 3, 2017 hearing, the court received evidence documenting appellant's criminal history, prison conduct, and post-release plans. It also heard argument from the People and from appellant, who was still acting in propria persona. During his argument, appellant contended that the People had conceded during his Proposition 47 hearing that he did not pose an unreasonable risk of danger. He further asserted that the same concession should apply to his Proposition 36 petition to reduce his sentence on count 2, because "[i]t was the same act." The following exchange ensued:

"The Court: It doesn't make any difference.

"The Defendant: I know I have got two convictions, but - -

"The Court: The second one you were convicted of, the 25 years to life, sentence was stayed. When count 1 became a misdemeanor, the 25 year to life sentence as to count 2 went into effect.

"The Defendant: I understand. That was only one act.

"The Court: I'm not going to relitigate that now. You had a chance to appeal that, and you withdrew your appeal.

"The Defendant: It was stayed. You imposed a life

sentence up under it [*sic*].

"The Court: It was stayed because you didn't complete the sentence as to count 1. You failed to complete the sentence of count 1 because you filed a Prop 47 petition. Then the stay is lifted and the 25 years to life as to count 2 goes into effect.

"The Defendant: You imposed a punishment under count 1.

"The Court: Correct.

"The Defendant: According to 654 - -

"The Court: You could have taken an appeal if you think I did it wrong. And you withdrew your appeal. I'm not going to relitigate that. Let's talk about Prop 36. I'm not going to relitigate 47."

The court issued a written memorandum of decision denying appellant's Proposition 36 petition on February 15, 2017. As we discuss more fully below, the court found that the totality of the evidence presented at the Proposition 36 hearing "demonstrates that resentencing Petitioner at this time would pose an unreasonable risk of danger to public safety."

Appellant timely appealed.

DISCUSSION

I. Opportunity to Litigate

Appellant first contends that the trial court denied him the opportunity to litigate the section 654 issue "after previously informing him he could do so" at the January 25, 2016 hearing. Appellant points to the court's statement, "You have conceded eligibility on count 1, but that requires me to lift the 654 stay on count 2 and impose a 25-to-life sentence on count 2, which you can then challenge via a Prop 36," which he construes as a promise that he could raise the section 654 issue at his Proposition 36 proceedings. He contends he detrimentally relied

on the statement and abandoned his appeal only to be "unable to make an adequate record [because] the court refused to entertain the issue" at his Proposition 36 hearing. These contentions are not supported by the record.

After making the statement at the January 25, 2016 hearing, the trial court asked appellant's counsel if he wanted to be heard. Appellant's counsel proceeded to argue that the stay on appellant's count 2 sentence should become permanent after count 1 was reclassified as a misdemeanor. He articulated appellant's position and cited authority—*People v. Beamon*, *supra*, 8 Cal.3d 625. The court gave appellant's counsel an opportunity to be heard and rejected the argument on its merits, not out of hand.

Even if we interpret the court's statement as appellant does rather than as an invitation to challenge the newly unstayed third strike sentence on count 2, neither appellant nor his counsel gave any indication that they relied on the court's statement or intended to pursue the section 654 issue further. In the Proposition 36 petition that counsel filed a few days after the Proposition 47 hearing, he mentioned the Proposition 47 ruling only as background; his substantive arguments focused exclusively on appellant's suitability for resentencing.

Appellant made no mention of the issue in his appeal from the denial of the Proposition 47 petition. Instead, he claimed that the court's ruling violated the equal protection clause and affected his "liberty interest in possible resentencing." Likewise, there is no suggestion in his request to dismiss the appeal that he did so in reliance on the court's statement or with the intention of contesting the section 654 issue in connection with his Proposition 36 petition. The request to dismiss does, however,

state that appellant made it voluntarily, after consulting with his appointed counsel, and with an understanding of the consequences. One of the most obvious consequences of dismissing an appeal is that the underlying trial court ruling stands. The trial court correctly and appropriately informed appellant that he "had a chance to appeal" the section 654 issue if he thought the court "did it wrong." Appellant took that chance but dismissed his appeal, which did not address the section 654 issue in any event. Any restriction on his ability to litigate the issue stems from appellant's actions, not the court's.

II. Proposition 47 Resentencing

Appellant next contends that the sentence the trial court imposed at his Proposition 47 hearing was "unauthorized," such that we may review and correct it in this appeal. Specifically, he contends that the new sentence violated section 654, "resulting in double punishment for the same act." He argues that "he completed the sentence as to count 1 once it was reduced to a misdemeanor, having served approximately 17 years for a sentence of 364 days," and that the stay on his count 2 sentence "should have become permanent upon completion of the sentence on the other count."

We reject appellant's contention that the "unauthorized sentence" doctrine preserves his claim here. "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*).) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instances because such error is 'clear and

correctable' independent of any factual issues presented by the record at sentencing. [Citation.]" (*Ibid.*) The "unauthorized sentence" doctrine thus prevents forfeiture of valid sentencing claims by permitting appellants to assert on appeal sentencing claims they failed to assert below. It is well recognized that section 654 claims generally are within this universe. (*Id.* at p. 354, fn. 17; see also *People v. Hester* (2000) 22 Cal.4th 290, 295.)

Yet the "unauthorized sentence" doctrine is not a panacea that permits an appellant to belatedly raise section 654 claims he or she had the opportunity to pursue in a previous appeal. *People v. Haney* (1994) 26 Cal.App.4th 472, cited by respondent, is instructive. In *Haney*, the trial court imposed a sentencing enhancement based on one of the appellant's prior convictions. (*Haney*, *supra*, 26 Cal.App.4th at p. 474.) The appellant contended the enhancement was improper because section 654 prohibits enhancements based on a stayed conviction, and it was unclear from his prior abstract of judgment and sentencing minute order which of his three simultaneously imposed previous sentences had been stayed. (See *id.* at pp. 476-477.) The court agreed that the prior documentation improperly "merged" rather than "stayed" the appellant's previous sentences and "was therefore an ineffective attempt at complying with Penal Code section 654." (*Id.* at p. 477.) But it did not use the "unauthorized sentence" doctrine to belatedly correct the error. Instead, it noted that the section 654 error would have been "subject to correction if it had been appropriately raised in a timely appeal." (*Id.* at pp. 477-478.) In other words, the appellant was required to abide by an erroneous final order that he did not properly appeal, even though a court addressing his subsequent appeal recognized the order as an unauthorized sentence on its face.

The same result is appropriate here even were we to assume the trial court erred when it resentenced appellant under Proposition 47.[3] Unlike an ordinary "unauthorized sentence" case, the problem here is not that appellant failed to object to an inaccurate sentence in trial proceedings giving rise to his appeal. The problem is that a sentencing error that allegedly occurred in the prior Proposition 47 proceeding went unchallenged. The "unauthorized sentence" doctrine does not authorize us to reexamine the sentence the trial court imposed during appellant's Proposition 47 hearing.

III. Proposition 36 Suitability

Appellant's final contention, properly before us in this appeal, is that the trial court abused its discretion when it found that he was not suitable for resentencing under Proposition 36

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[3] As a leading treatise on Proposition 47 has recognized, "The purpose of section 1170.18 is to take the defendant back to the time of the original sentence and resentence him with the Proposition 47 count now a misdemeanor." (Couzens, Bigelow & Prickett, Sentencing California Crimes (Aug. 2017 update) Proposition 47, § 25:11.) Thus, "[i]f the Proposition 47 offense is the principal term in a consecutive sentence, it will be necessary for the court to resentence the case with the offense now being a misdemeanor and determine a new principal term. . . . It may be necessary to 'elevate' a subordinate term to be the new principal term. In selecting the new principal term, the court must select the sentence with the longest term actually imposed. . . .
The only restriction is that the aggregate sentence must not exceed the original aggregate sentence imposed by the court. Because the Proposition 47 count is part of a multiple-count sentencing scheme, changing the sentence of one count fairly puts into play the sentence imposed on the non-Proposition 47 counts. . . ." (*Ibid.*) The court here acted in compliance with these parameters.

because he posed an unreasonable risk of danger to public safety. We disagree.

Proposition 36, as codified in section 1170.126, subdivision (f) provides that an eligible petitioner "shall be resentenced" as a second-strike offender "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." When considering whether a petitioner is suitable for resentencing under Proposition 36, the trial court is permitted to consider three broad categories of information. "(1) The petitioner's criminal 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) The petitioner's disciplinary record while incarcerated; and [¶] (3) Any 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).) The prosecution bears the burden of proving, by a preponderance of the evidence, that a petitioner would pose an unreasonable risk of danger if he or she were to be resentenced. (*People v. Frierson* (2017) 4 Cal.5th 225, 239.) 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).)

A. Evidence Before the Court

The People introduced and the trial court admitted 16 exhibits documenting appellant's criminal history and conduct

while incarcerated. Appellant also submitted several certificates documenting his educational and vocational progress and achievements, as well as his prison work history, a "Needs Assessment," and a letter from a substance abuse treatment program that had conditionally accepted him.

1. Criminal History

Appellant's criminal history began in 1987, when he was 15 years old. The trial court sustained a petition alleging burglary (§ 459) and ordered appellant into a camp program. In November 1988, appellant was committed to the California Youth Authority for taking a vehicle without the owner's consent (Veh. Code, § 10851) and possessing a dangerous weapon for sale (former § 12020, subd. (a)). He was paroled in April 1990, but violated his parole in October 1990 and returned to the California Youth Authority. Appellant was paroled a second time in September 1991.

In August 1992, while he was still on parole, appellant sexually assaulted two female victims. The first victim, Vicki B., testified at a preliminary hearing that appellant accosted her while she was exiting her apartment building one night. He ran toward her with his pants unzipped and unfastened, screaming, "Jesus is Lord." When appellant reached Vicki, he grabbed her by the arms and said, "I'm going to fuck you." Appellant attempted to pull Vicki toward a nearby underground parking garage, rubbed his erect penis against her, and moaned, "Come on, baby." As appellant attempted to pull her pants down, Vicki managed to kick appellant and run into the apartment building. When police came to take Vicki's statement, she "saw him on the corner grabbing another lady."

The "other lady," Yvonne P., also testified at the preliminary hearing. She testified that she was walking with her "grandmom and [her] little girl" when she saw appellant running toward her, panting and "acting real crazy." Appellant slapped Yvonne in the face and then rubbed her vagina and buttocks while trying to remove her pants. Yvonne managed to fight appellant off and run away, though appellant grabbed her hair as she was escaping. He also knocked over Yvonne's grandmother.

Appellant was charged with two felony counts of assault with intent to rape Vicki and Yvonne (§ 220) and one misdemeanor count of battery upon Yvonne's grandmother (§ 242). In December 1992, appellant pled guilty to one count of assault (§ 245, subd. (a)(1)), which he and the prosecutor stipulated was a lesser related offense of assault with intent to rape (§ 220).[4] He received a three-year suspended sentence and was placed on formal probation, with the condition that he serve one year in jail.

In June 1994, while appellant was on probation, he robbed and assaulted four people at gunpoint. Victim Jorge J. testified that he, his two sisters, and their female cousin were getting into his car when appellant approached them inside an enclosed carport. Appellant pointed a pistol at Jorge and took his wallet. He also pointed the pistol at Jorge's sister and threatened to shoot her if she shouted.

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[4] A disposition report from the prosecutor's office indicates that the prosecutor did not believe she would be able to prove the requisite intent to sustain a conviction under section 220 because appellant was under the influence of PCP at the time of the attacks.

The officer who arrested appellant in connection with this incident testified that he found five or six rocks of cocaine in appellant's mouth while booking him.

Appellant was charged with one count of robbery (§ 211), two counts of assault with a firearm (§ 245, subd. (b)), and one count of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)). The information further alleged that appellant personally used a firearm to commit the robbery and assaults. On November 28, 1994, appellant pled no contest to the robbery and assaults, admitted the enhancement allegations, and further admitted to violating his probation. The trial court imposed an agreed total sentence of five years for the robbery and assaults and a concurrent sentence of three years for the probation violation. In his trial court briefing in support of his Proposition 36 petition, appellant asserted that he was "under the influence of a narcotic" when he made the "bad decision" to rob Jorge "out of retaliation for the victims [sic] disrespectful comments." He further asserted that the assault counts involving Jorge and his sister "derrived [*sic*] from a lie . . . for I never threaten [*sic*] to shoot the female victim, it's not in petitioner's nature."

In May 1997, while he was on parole, appellant was charged with possessing cocaine (Health & Safe. Code, § 11350, subd. (a)). Appellant pled guilty to the offense in August 1997 and was sentenced to 16 months in state prison. He violated parole for that offense twice, in July 1998 and June 1999. Appellant was arrested for taking or driving a vehicle without consent (Veh. Code, § 10851, subd. (a)) in March 2000. The victim declined to prosecute, but appellant was arrested for the possession offenses underlying this appeal while in custody.

2. Prison Conduct

a. Rules Violations

During his current term of incarceration, appellant committed several rules violations. In 2004 and 2005, he was written up for being "out of bounds." In 2007, appellant pled guilty to engaging in mutual combat with another inmate; they were found "striking each other with clinched [sic] fist to each others [*sic*] upper torso and facial [*sic*]." In 2010, after a disciplinary hearing, he was found guilty of participating in a race riot on the prison yard. Appellant sustained a puncture wound to his arm during the riot. Despite these violations, appellant's "placement score" as of 2012 was 19, which is the lowest it could be given his life sentence.

Appellant sustained three more rules violations after he filed his initial Proposition 36 petition. In January 2014, he pled guilty to possessing a cell phone and charger, which are deemed "dangerous contraband." (Cal. Code Regs., tit. 15, §§ 3000, 3006.) In June 2014, he tested positive for marijuana use and was found guilty of using a controlled substance (Cal. Code Regs., tit. 15, § 3016, subd. (a)) after a July 2014 disciplinary hearing. The "chrono" documenting the marijuana offense noted that it was appellant's first drug-related offense and requested that he be referred to a substance abuse program. In December 2015, appellant was found with "a large quantity of tobacco, secreted in the front flap of [his] state issue boxers [*sic*]," as well as an inmate-manufactured lighter consisting of "two (2) AA-size batteries, rigged in a series, held together with a rubber-band, and masking tape at one end." He pled guilty to possession of tobacco (Cal. Code Regs., tit. 15, § 3006, subd. (c)(18)).

Appellant challenged all three of the most recent violations in his briefing before the trial court. He asserted that the tobacco offense "only demonstrates that petitioner might be addicted to a tobacco product, are those action [*sic*] considered dangerous to public safety? When the public sells tobacco." As to the cell phone offense, appellant stated, "right about now, 91% of the world is in possession of a cell phone." Though he acknowledged that the marijuana offense was an "ill-responsible moment in relapse," he noted that marijuana "is now deemed for public recreational use" and claimed that his actions were "within the perimeter [*sic*] of what society is allow [*sic*] to do."

b. Education and Training

While incarcerated, appellant successfully completed several educational and vocational training programs. He earned his GED in March 2002 In July 2002, he received certificates recognizing his "outstanding performance, professionalism and dedication" in "Voc. Electric Construction & Repair – Plans & Planning" and "Voc. Electric Construction & Repair – Blueprints." In January 2004, he received an "Award of Distinction For Participation and Notable Performance In Electric Construction & Repair." In November 2006, he successfully completed a course entitled "Vocational Drywall-Installer/Taper." In September 2007, he completed the requirements for a program entitled "Getting Fit and Staying There – Part 1." In January 2010, he completed courses in "Basic Punctuation" and "Basic Writing."

Appellant also submitted numerous quarterly "Education Progress Reports" from GED, electrical, and drywall courses he attended from 2001 to 2008. The reports document many satisfactory behavioral assessments and favorable comments

including, "respectful of his teacher and his peers," "appropriate attitude," "helpful with class projects," and "perfect" attendance and punctuality. The reports also document a few unsatisfactory behavioral assessments, including those relating to appellant's "Adaptability," "Dependability," and "Initiative." Some of appellant's instructors also remarked that appellant "needs to pick up the pace," "has done very little this quarter," "refus[ed] his work assignment," and "did little more than nothing this quarter. He is capable, he quite simply does not work."

The only evidence indicating that appellant participated in educational or vocational training after 2008 are appellant's two 2010 certificates for "Basic Punctuation" and "Basic Writing." Appellant did not participate in any prison-sponsored substance abuse treatment programs while in custody. He points to an October 2000 intake document noting that he was ineligible for substance abuse treatment due to his life term. Respondent points to an earlier portion of the same document, which appellant omitted from his submission. It states, "He claims past use of various narcotics supported by criminal activity. He does not consider himself to be addicted to drug usage." During his hearing, appellant told the court that he knew he "had a problem and need[s] to further work on it." He also told the court he "did self-help programs," which consisted of his speaking with a psychologist while he was in segregation for participating in the race riot. He learned "what triggers are, and to avoid negative environment and people."

c. Work Performance

At the Proposition 36 hearing, appellant told the court that inmates with life sentences "can't really do too much work." For instance, he informed the court that he was not allowed to work

"in culinary." Appellant nevertheless held a few jobs while incarcerated. From July 26, 2013 to October 31, 2013, appellant worked as a "D14 Grounds." His supervisor gave him a satisfactory review. Appellant began a new job, "D14 Porter," on November 1, 2013. He held that job for only 41 days; his supervisor gave him several unsatisfactory marks, including in quantity and quality of work. He returned to "grounds" in December 2013 and received satisfactory marks during the 60 days he held the job. Appellant then worked as a porter a second time, apparently for one day, in February 2014. He received satisfactory marks.

3. Post-Release Plans

Appellant was screened for "Prison Programming Requirements" on December 1, 2015. That "Needs Assessment" deemed it "Highly Probable" that appellant would face substance abuse and educational problems upon release. However, it also noted that appellant was "Unlikely" to have issues with "Criminal Personality," anger, or employment problems. The assessment further noted that appellant had "low" support from his family of origin. Appellant told the court during his hearing that he had a "nice support system" from his family and planned to work for them. Alternatively, appellant told the court, he planned to look for a job with Cal Trans, Home Depot, or an oil refinery.

Appellant submitted a letter dated August 6, 2016 from Delancey Street, a "residential educational organization for former alcoholics, drug addicts and convicts." The letter stated that appellant was "tentatively accept[ed]" there immediately upon his release from prison.

B. Ruling

The trial court denied appellant's Proposition 36 petition in a 12-page memorandum decision. In that decision, the court outlined the above evidence relating to appellant's criminal and disciplinary history, as well as that relating to his rehabilitative programming. The court also noted appellant's age—then 44—classification score, and post-release plans.

In its discussion, the court emphasized the serious and continuous nature of appellant's criminal history, noting that appellant "has either been incarcerated or under some form of state supervision" since 1987. It further noted that he sustained convictions for robbery with a firearm and assault with a deadly weapon and was "required to register as a sex offender." The court acknowledged that much of that history was "remote in time," but observed that appellant "continued to misbehave in prison." The court noted that appellant sustained seven rule violations, three of which occurred after appellant filed his Proposition 36 petition. The court found the marijuana offense, which it referred to as "possession," "particularly concerning, given that criminal record [*sic*] is marked by substance abuse." The court concluded that appellant's "willingness to engage in serious rule-breaking behavior is highly probative of his recidivist tendencies and danger to public safety."

The court was "not persuaded by the suggestion that [appellant] had no opportunity to participate in rehabilitative programming during the majority of his incarceration." It recognized that appellant "may have been precluded from participating in some programs due to his custody classification," but found that he failed to "seek out programming through different venues, including mail correspondence and book

reports." The court placed the blame for appellant's "failure to program . . . squarely on his shoulders." The court opined that appellant's "failure to address the causative factors which led to his criminality, such as his substance abuse problem, indicates that [appellant] will not voluntarily or successfully complete re-entry programs once he is released into the community." It further found that his post-release plans were not realistic. The court erroneously stated that appellant did not provide evidence that he was accepted into a residential substance abuse treatment program. Additionally, it did not specifically mention appellant's "Needs Assessment."

The court found that appellant's age and classification score were "supportive of release." The court further found, however, that appellant's "recent disciplinary violations" "contradicted" his low score. It ultimately concluded that appellant's age and classification score were "outweighed by [appellant's] criminal history, disciplinary record, and rehabilitative record. In sum, the totality of the record, including consideration of all the statutory factors, demonstrates that resentencing [appellant] at this time would pose an unreasonable risk of danger to public safety."

C. Analysis

Appellant argues that the trial court abused its discretion in denying his petition. He contends it relied on "erroneous factors," including a violation for "possessing" rather than merely testing positive for marijuana, appellant's purported sex offender registration requirement, and the lack of evidence regarding his acceptance into a post-release program. He also asserts that the court "erred in giving substantial weight to low level rule violations," and emphasizes that his now-remote crimes were all

drug-related and he did not kill or seriously injure anyone. We are not persuaded that the court abused its discretion.

The trial court thoroughly considered and appropriately weighed all of the types of evidence enumerated in the statute and presented at appellant's hearing. Its minor error regarding the precise nature of appellant's marijuana rule violation does not demonstrate that it abused its discretion. Whether appellant possessed or used marijuana, the court was entitled to conclude from the violation that appellant was unwilling or unable to control his substance abuse even in the restrictive prison environment. In addition, the court reasonably could conclude from appellant's attempts to minimize this and his other rules violations that appellant was likely to disregard societal rules and norms if he were released.

The court's conclusion that appellant's post-release plans were unrealistic also was not an abuse of discretion. It did not, as appellant suggests, rely exclusively (and erroneously) upon the lack of proof that appellant had been conditionally accepted into Delancey Street. It also noted that appellant did not provide any evidence of work plans aside from tentative plans to look for work with his father—who would be nearing retirement age—and a few businesses. The assessment that appellant contends the court overlooked—which was attached to a reply brief and not formally introduced at the hearing—also noted that appellant's family support was "low" and that it was "highly probable" that appellant would continue to suffer substance abuse problems.

Appellant also asserts that the court erred in pointing to his sex offender registration requirement because it was imposed and "misdocumented" in error. While that may well be true given appellant's convictions, appellant conceded that he had never

challenged the alleged error or sought to have the Department of Corrections and Rehabilitation investigate or correct it. Moreover, the court mentioned the registration requirement once in passing; it did not rely on the requirement to conclude appellant was likely to reoffend or posed an unreasonable risk of danger to public safety. Rather, the court focused on the continuous, lengthy nature of appellant's criminal history and the danger he posed to his victims; his lack of effort to rectify his substance abuse problems; and his escalating disregard for rules and minimization of his behavior. All of these factors reasonably support the court's conclusion.

The fortuity that appellant's victims were not injured when he pointed a gun at them or accosted them does not demonstrate that he may be safely released. Nor does his assertion that he "was [not] made aware of any other" substance abuse programs absolve him of responsibility for his rehabilitation. Appellant's last documented participation in rehabilitative programming was more than a decade ago, and there is no indication he followed the psychologist's advice to stay away from triggers. To the contrary, he was subsequently found with marijuana in his system and tobacco secreted in his undergarments, even while his Proposition 36 petition was pending. Appellant emphasizes that his criminal offenses "were drug related"; but the trial court was well within its discretion to conclude there was an unreasonable risk that appellant's largely unresolved substance abuse issues could lead to future criminal activity.

DISPOSITION

The order of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

*MICON, J.

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