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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. RICKY HOWARD, Defendant and Appellant.	B278707 (Los Angeles County Super. Ct. No. BA174927)

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

Marilee Marshall, 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 Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal is from an order denying a petition by defendant and appellant Ricky Howard for resentencing under Penal Code section 1170.126[1] and Proposition 36 (the "Three Strikes Reform Act," hereafter "the Act"). Defendant was sentenced under the three strikes law in 2000 to an indeterminate term of 53 years to life following his convictions for receiving stolen property (§ 496, subd. (a)) and unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), with true findings that defendant had suffered three prior robbery convictions (§§ 1170.12, subds. (a)–(d), 667, subds. (b)–(i)), and had served three prior prison terms without remaining free of custody (§ 667.5, subd. (b)). The trial court denied the petition for resentencing, finding that defendant posed an unreasonable risk of danger to public safety.

Defendant contends the trial court applied an incorrect standard when evaluating whether he posed an unreasonable risk of danger to public safety. He argues that the narrow definition of unreasonable risk contained in section 1170.18, which was added by initiative measure Proposition 47 ("The Safe Neighborhoods and Schools Act") in 2014, applies to resentencing petitions under the Act, such as his, which were still pending at the time the initiative became effective. He further contends the evidence

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[1] All future statutory references are to the Penal Code unless otherwise specified.

is insufficient to support the trial court's finding that he poses an unreasonable risk of danger to public safety under any standard.

We affirm the court's order denying defendant's petition for resentencing.

FACTS AND PROCEDURAL HISTORY

Strike Convictions and Commitment Offenses

First Three Strike Offenses

Defendant's first three strike convictions were for robbery convictions (§ 211) on February 14, 1983, July 15, 1987, and October 28, 1992. The details in the record are scant. In the 1987 robbery, defendant forced a female victim out of her car, and struck her male companion in the head with a gun before fleeing with the vehicle. In the 1992 robbery, defendant was seen driving a vehicle that had previously been reported stolen and parking it at a hotel.

Commitment Offenses[2]

On January 23, 1998, an unidentified man in an old Nissan robbed two women in separate incidents approximately 15 minutes apart.

About 15 minutes after the second robbery, Los Angeles Police Officer Kevin Brawner noticed defendant driving a brown Nissan. Defendant appeared nervous. Officer Brawner and his partner, Alfonso Lopez, checked the license plate number of the Nissan and discovered it was stolen.[3]

Officer Brawner tried to follow defendant, but lost sight of him. A few minutes later he found defendant standing by the driver's side of the parked brown Nissan. Defendant was holding a car stereo, a case, a large nylon bag, and a tennis racket, and was in the process of removing objects from the car. He ran into the yard of a nearby residence and onto the back porch. Officers Brawner and Lopez arrested him.

On the porch of the residence, Officer Brawner found several items belonging to the two robbery victims, including

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[2] The facts are taken from our opinion in *People v. Howard* (Apr. 12, 2001, B142863) [nonpub. opn.], of which we have taken judicial notice.

[3] At trial the parties stipulated the Nissan was stolen from Maria Del Refugio on January 8, 1998.

credit cards. Officer Lopez searched the Nissan and discovered that it was hot-wired.

Defendant was found guilty of receiving stolen property and unlawful driving or taking of a vehicle.

Section 1170.126 Petition

Petition

On February 19, 2013, defendant filed a petition seeking recall of his three strikes sentence on the basis that his commitment offenses were not serious or violent felonies. A contested suitability hearing was held. On October 18, 2016, the trial court denied the petition on the basis that defendant posed an unreasonable risk of danger to the public safety.

Facts[4]

We set forth the facts in the light most favorable to the trial court's ruling.[5] Defendant's criminal history began at

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[4] We recognize that defendant presented expert opinion testimony by Richard Subia, who had 26 years experience working in the California Department of Corrections and Rehabilitation, reaching high ranking positions within the Department. Subia concluded that defendant did not pose a current risk of danger to public safety. Subia downplayed defendant's criminal record and prison misconduct, but the trial court impliedly rejected Subia's theories. Subia was not a percipient witness to any of the events in this case, and the trial court's rejection of his opinion of the defendant's conduct was well within the court's discretion as finder of fact. Our discussion focuses on the facts as found by the trial court.

[5] At the suitability hearing, the prosecution introduced a table of defendant's criminal history, as well as defendant's California Law Enforcement Telecommunications System criminal history; the court of appeal opinion, abstract of judgment, verdict form, information, and sentencing memorandum for the commitment offenses; probation reports in connection with defendant's convictions; certification documents from the California Department of Correction and Rehabilitation; reports pertaining to defendant's 33 prison rules violations; counseling chronos; a confidential information disclosure form; a list of defendant's enemies; a Segregated Housing Unit term assessment dated

the age of 17, when he was arrested for robbery while armed. (§§ 211, 12022, subd. (a).) A juvenile petition was sustained, and defendant was committed to the California Youth Authority. He was paroled in June 1982, and committed his first strike offense, for which he was sentenced to five years in prison, five months later. In April 1986, defendant entered and started a vehicle that had been reported stolen, exiting when officers approached. He was convicted of taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)), and placed on probation for 36 months with 135 days in jail as a condition of probation. In April 1986, defendant was arrested for using a gun to force a woman out of her vehicle and striking her male companion in the head. He was convicted of robbery, his second strike conviction, and sentenced to seven years in prison. Defendant was released on parole in November 1990. In April 1992, defendant was arrested for his third strike offense. Defendant was observed driving and parking a stolen vehicle. He was again convicted of robbery, and sentenced to three years in prison. Defendant was released on parole in February 1994. He was twice arrested and found in violation of his parole. Defendant was arrested for yet another robbery in December 1995, for which he was convicted and sentenced to two years in prison. In May 1996, defendant was arrested for possession of a controlled

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October 17, 2006; and an Institutional Staff Recommendation Summary dated January 12, 2001.

substance. (Health & Saf. Code, § 11350, subd. (a).) A police officer had responded to reports of a robbery at a hotel. Defendant was identified as the perpetrator. When the officer approached him, defendant was disposing of rock cocaine and a cocaine pipe. He was convicted of possession of a controlled substance and sentenced to 204 days in jail. Defendant was arrested for the commitment offenses on January 23, 1998.

While incarcerated, defendant engaged in substantial misconduct. He committed 27 serious rules violations. These included: refusing to provide a urine sample (May 4, 2015); refusing to return to his cell (March 23, 2011; September 1, 2010; May 31, 2009; August 14, 2004; March 17, 2004); refusing to follow a verbal order during an emergency (August 18, 2010); refusing to go to the nurse (June 3, 2009); willfully delaying/obstructing an officer in the performance of his duty (December 19, 2008); indecent exposure (April 6, 2008; May 27, 2007; March 17, 2004; June 17, 2004; May 13, 2003; May 12, 2002; March 8, 2002; November 13, 2000); resisting staff with the use of force (October 25, 2006 [two separate violations]); threatening staff (October 4, 2006); threatening a peace officer (October 4, 2006); aggravated battery (July 27, 2006 ["gassed" another inmate with water, no serious injury sustained]); battery on a peace officer (November 9, 2005 [pulled away from an officer, causing him to scrape his hand]); threat of force or violence against a public official (August 11, 2002); disobedience with a potential for violence (August 10, 2002);

disobeying a direct order (January 20, 2002); behavior which could lead to violence (October 1, 2000); and disrespect of staff (September 2, 2000).

Defendant was also found guilty of numerous administrative offenses, and had "chromos" detailing further misbehavior, including fights (April 27, 2016; June 15, 2012); possession of an inmate fashioned weapon (July 9, 2012); and hoarding pills (March 25, 2005).

Defendant participated in minimal educational and vocational programming in prison. With respect to self-help programs, defendant only participated in psychological programming that was required due to his Enhanced Outpatient Psych Program status. He did not participate in any substance abuse programs.

Defendant intended to enter Tarzana Treatment Center for a year if released. He also had the support of his mother.

Trial Court's Ruling

The trial court found that defendant posed an unreasonable risk of danger to public safety on the basis of numerous factors. Defendant had continually been subject to probation or parole or incarcerated since the age of 17, and had never successfully completed a probation or parole term. His criminal history was "extensive and prolonged" and included multiple robberies and thefts involving the use of force. Defendant denied responsibility for his sentencing

offense. Defendant had received 27 serious rules violations during his time in prison. The rules violations indicated he was willing to break rules and had a tendency for recidivism. Although the violations did not involve outright violence against staff, defendant had engaged in physical fights with other prisoners—even as his petition was pending with the court—and was defiant and threatening toward authorities. His prison classification score had risen from 83 upon entry to 167.[6] Defendant has continued in his defiant behavior despite being treated in the Enhanced Outpatient Psych Program. Once outside of prison, defendant would be required to submit to treatment center rules and oversight of a probation or parole officer, which he had shown he would be unable to do. Defendant had a long history of drug abuse prior to his current term of incarceration, but had not participated in any programming for controlled substance dependency. He had not demonstrated the acquired skills necessary to cope with mental illness or propensity for drug use.

The court considered factors in mitigation, including that defendant's criminal history was remote, he was over 50 years old which made him statistically less likely to reoffend, and he had a favorable California Static Risk Assessment score. It ultimately determined that the mitigating factors were outweighed by the many factors indicating that

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[6] The minimum risk assessment score for a life inmate is 19.

defendant would pose an unreasonable risk of danger to public safety. The petition was denied.

DISCUSSION

Defendant contends that the court applied the wrong standard when determining that defendant posed an unreasonable risk of danger to public safety. The Supreme Court recently rejected the argument that Proposition 47's definition of unreasonable risk applies to resentencing proceedings under Proposition 36 in *People v. Valencia* (2017) 3 Cal.5th 347, so we need not address the issue further. Defendant further contends that the evidence is insufficient to support the unreasonable risk finding under any standard. This contention lacks merit.

The Act gives the court broad discretion in determining whether the petitioner poses an unreasonable risk. It lists multiple factors that the court "may" consider, including the petitioner's criminal history (encompassing the nature of the crimes, injuries inflicted, length of sentence, and remoteness in time), the disciplinary record while in prison, and any efforts made at rehabilitation. (§ 1170.126, subd. (g).)

The trial court here considered these factors and found defendant's history contained strong indicia that he would pose an unreasonable risk of danger to public safety. The court considered that defendant had a long and consistent criminal history. Defendant's crimes, though remote in time, were highly relevant in light of the fact that he continued to

accrue rules violations with regularity over more than a decade of incarceration. His misconduct in prison was indicative of an inability to follow rules or submit to authority of any kind. Defendant would require a structured environment to prevent recidivism, but was ill-equipped to function within such structure, even in prison. The court observed that defendant's crimes were fueled by substance abuse, but defendant had done nothing to address his addiction. Defendant participated in minimal educational and vocational programming, and had only participated in required self-help programs. The court acknowledged that, at 53 years of age, defendant was statistically less likely to reoffend, he had a favorable California Static Risk Assessment score, and his offenses were remote in time, but found that these factors were outweighed by his criminal and institutional history.

In light of defendant's "extensive and prolonged" history of crime, his regular serious rule violations, and his lack of participation in programs that would help to rehabilitate and prepare him for a successful reentry into society, we cannot say that the trial court abused its discretion in determining that defendant posed an unreasonable threat of danger to public safety.[7]

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[7] We reject the argument that defendant's crimes and rules violations are caused by his mental illness, and that with proper medication he would be able to function in society. Defendant has provided no information regarding

DISPOSITION

The order denying defendant's petition for recall of sentence is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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what type of mental illness he suffers from, when his illness began, or evidence of a direct connection between his illness and his crimes and continuing misbehavior. We accept that defendant's mental illness may contribute to his behavior, but no evidence has been provided to show that if it was controlled by medication defendant would no longer pose an unreasonable risk of danger to the public.

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