Filed 12/11/18 P. v. Williams CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. GERRY DEWAYNE WILLIAMS, Defendant and Appellant.	B285577 (Los Angeles County Super. Ct. No. YA033259)

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

Nancy L. Tetreault, 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, Nicholas J. Webster and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Gerry Dewayne Williams appeals from an order denying his petition for resentencing under Penal Code section 1170.126, a provision enacted under the Three Strikes Reform Act of 2012 (Proposition 36).[1] The trial court denied the petition because it found that resentencing Williams would pose an unreasonable risk of danger to public safety.

Williams contends: (1) the statutory language "unreasonable risk of danger to public safety" (§ 1170.126, subd. (f)) is unconstitutionally vague; and (2) the trial court abused its discretion and violated due process by finding an unreasonable risk of danger. We reject these contentions and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

On June 13, 1997, Los Angeles County deputy sheriffs arrested Williams for possession of 0.141 grams of cocaine base after seeing him staggering and stumbling on a sidewalk. On October 10, 1997, a jury convicted Williams of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)). The jury found that Williams had suffered two prior robbery (§ 211) convictions, and the trial court sentenced him to an indeterminate life term under the Three Strikes law. Williams was 43 years old at the time of his conviction.

On February 8, 2013, Williams filed a petition for recall of sentence and resentencing under section 1170.126. The district attorney acknowledged that Williams was eligible for resentencing, but argued that he was not suitable for resentencing because his prior criminal history and record of discipline while incarcerated showed that resentencing Williams

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[1] All undesignated section references are to the Penal Code.

would pose an unreasonable risk of danger to public safety. After a hearing, the trial court found that resentencing Williams would pose an unreasonable risk of danger to public safety and denied the petition. The court filed a 15-page Memorandum of Decision discussing the evidence and concluding:

"The court acknowledges that some evidence in the record weighs in favor of suitability for resentencing. Petitioner's age is well into the range of reduced recidivism, and having the strong emotional support of a sibling would no doubt be helpful upon release. The conduct of the commitment offense similarly supports release. Possession of .14 grams of cocaine is among the least serious conduct the court has seen with respect to third-strike resentencing. Without doubt, the disparity between Petitioner's commitment offense and his sentence is representative of the problem the Three Strikes Reform Act was intended to address.

"However, the proper inquiry for this court is whether resentencing Petitioner would currently pose an unreasonable risk of danger to public safety. With that inquiry in mind, the court concludes that Petitioner is unsuitable for release at this time. Petitioner's criminal history is significant, and, as discussed ante, Petitioner was quick to offer excuses for each instance of criminal conduct. This trend continued during his incarceration, in the form of a lengthy disciplinary history. That disciplinary history not only includes violent conduct during the pendency of this petition, but was also accompanied in many instances by the same sort of excuses offered for Petitioner's criminal history. Finally, the record does not indicate that Petitioner has adequate re-entry plans or marketable skills to support himself upon his release. Taken together, this evidence

suggests that Petitioner continues to engage in antisocial conduct, and has taken inadequate measures to prevent re-offense on release. The record before the court, viewed as a whole, is therefore unsupportive of Petitioner's release."

DISCUSSION

1. *Proposition 36*

Enacted by the voters in November 2012, Proposition 36 modified the Three Strikes law by generally reducing the punishment imposed when a defendant's third felony conviction is for an offense that is neither serious nor violent. (§ 667, subd. (e)(2)(C); *People v. Valencia* (2017) 3 Cal.5th 347, 350.) Proposition 36 also authorizes inmates currently serving an indeterminate life term under the former Three Strikes law to petition the court for recall of sentence and resentencing in accordance with Proposition 36's new sentencing rules. (§ 1170.126, subds. (a), (b); *People v. Perez* (2018) 4 Cal.5th 1055, 1062.)

An inmate is eligible for resentencing under Proposition 36 if the inmate is currently serving an indeterminate life term under the Three Strikes law for a conviction of a felony that is not classified as serious or violent after Proposition 36, the current conviction is not for a disqualifying offense, and the inmate has no prior conviction for a disqualifying offense.[2]

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[2] Disqualifying current offenses include offenses involving large quantities of controlled substances, certain sex offenses, and offenses in which the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury. (§§ 667, subd. (e)(2)(C)(i)-(iii), 1170.12, subd. (c)(2)(C)(i)-(iii); *People v. Johnson* (2015) 61 Cal.4th 674, 681.)

(§ 1170.126, subd. (e); *People v. Johnson*, *supra*, 61 Cal.4th at pp. 681–682.) If the trial court determines that the petitioner satisfies these criteria and is eligible for resentencing, the petitioner "shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

"In exercising its discretion in subdivision (f), the court may consider:

"(1) The petitioner'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) The petitioner's disciplinary record and record of rehabilitation 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).)

2. *The Statutory Language is Not Unconstitutionally Vague*

Williams contends the language "unreasonable risk of danger to public safety" (§ 1170.126, subds. (f) & (g)) is

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Disqualifying prior convictions, sometimes known as "super strikes," include certain sex offenses, homicide or attempted homicide, solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction, and any serious or violent felony punishable by life imprisonment or death. (§§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv); *Johnson*, at p. 682.) Williams has not suffered a conviction of any of the disqualifying current or prior offenses.

unconstitutionally vague because there is "no concrete way" for a trial court to measure the petitioner's degree of risk to the public and no discernible standard to determine when such a risk is unreasonable.

The void-for-vagueness doctrine, part of the constitutional requirement of due process of law (U.S. Const., 5th and 14th Amends.), prevents the government from "enforcing a provision that 'forbids or requires the doing of an act in terms so vague' that people of 'common intelligence must necessarily guess at its meaning and differ as to its application.' [Citations.]" (*People v. Hall* (2017) 2 Cal.5th 494, 500, quoting *Connally v. General Construction Co.* (1926) 269 U.S. 385, 391.) "[T]he vagueness doctrine demands '"no more than a reasonable degree of certainty."' [Citation.]" (*Hall*, at p. 503.)

There is a strong presumption that statutes are constitutionally valid, and statutes "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 828; accord, *People v. Morgan* (2007) 42 Cal.4th 593, 605–606.) The constitutionality of a statute is a question of law that we review de novo. (*Vergara v. State of Califorina* (2016) 246 Cal.App.4th 619, 642.)

People v. Garcia (2014) 230 Cal.App.4th 763 held that the language "unreasonable risk of danger to public safety" (§1170.126, subd. (f)) is not unconstitutionally vague. The meaning of the quoted language can be ascertained by reference to the examples of evidence the court may consider in making its determination, specifically, the petitioner's criminal conviction history and record of discipline and rehabilitation while incarcerated. (*Garcia*, at pp. 769–770.) *People v. Flores* (2014)

227 Cal.App.4th 1070 also rejected the contention that the quoted language is unconstitutionally vague, stating, "Surely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would impose an unreasonable risk of harm to the public safety." (*Id.* at p. 1075; see *People v. Valencia*, *supra*, 3 Cal.5th at pp. 354–355 ["Courts of Appeal have rejected arguments that the phrase 'unreasonable risk of danger to public safety,' as used in section 1170.126, subdivision (f), is unconstitutionally vague"].)

Regarding the term "unreasonable," ""'There is no formula for the determination of reasonableness.' Yet standards of this kind are not impermissibly vague, provided meaning can be objectively ascertained by reference to common experiences of mankind.'" (*People v. Morgan* (2007) 42 Cal.4th 593, 606 [67 Cal.Rptr.3d 653, 170 P.3d 129] quoting *People v. Daniels* (1969) 71 Cal.2d 1119, 1128–1129 [80 Cal.Rptr. 897, 459 P.2d 225].)" (*People v. Garcia*, *supra*, 230 Cal.App.4th at p. 769; accord, *People v. Flores*, *supra*, 227 Cal.App.4th at p. 1075.)

We agree with this reasoning and conclude that the language "unreasonable risk of danger to public safety" in section 1170.126, subdivisions (f) and (g) is not unconstitutionally vague.

Johnson v. United States (2015) 135 S.Ct. 2551, cited by Williams, is unavailing. *Johnson* held that the statutory definition of the term "violent felony" in the Armed Career Criminal Act of 1984, which included "any felony that 'involves conduct that presents a serious potential risk of physical injury to another,'" known as the residual clause, was unconstitutionally vague. (*Johnson*, at p. 2555.) Under Supreme Court precedent, a court determines whether a crime qualifies as a violent felony by

reference to how the law defines the offense and the kind of conduct the crime involves in the ordinary case. (*Id*. at p. 2557–2559.) *Johnson* held the residual clause was unconstitutionally vague because "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements" (*id*. at p. 2557), and it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony" (*id*. at p. 2558). *Johnson* stated, "It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." (*Ibid*.) In contrast, section 1170.126 ties the judicial assessment of dangerousness to real-world facts concerning the petitioner's criminal conviction history and record of discipline and rehabilitation while incarcerated, and does not tie an imprecise standard to a judge-imagined abstraction. We therefore hold that *Johnson* is inapplicable here.

3. *The Trial Court Properly Exercised its Discretion*

Williams contends the trial court abused its discretion and violated due process by finding that his resentencing would pose an unreasonable risk of danger to public safety. He argues that Proposition 36 created a presumption that a petitioner who is eligible for resentencing should be resentenced. He also argues that he has a due process liberty interest in resentencing, which requires a rational nexus between his record and the trial court's conclusion of dangerousness.

Section 1170.126, subdivisions (f) expressly vests the trial court with discretion to determine whether resentencing the petitioner would pose an unreasonable risk of danger to public safety. In exercising its discretion, the court may consider (1) the petitioner's criminal conviction history, (2) the petitioner's record

of discipline and rehabilitation while incarcerated, and (3) any other evidence relevant to the determination. (*Id.*, subd. (g).)

We review the trial court's determination that resentencing would pose an unreasonable risk of danger to public safety for abuse of discretion. (*People v. Buford* (2016) 4 Cal.App.5th 886, 895, review granted Jan. 11, 2017, S238790, review dismissed Nov. 15, 2017.)[3] "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 that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.) We review any factual findings in connection with that determination under the substantial evidence test. (*Buford*, at p. 901.)

Courts of Appeal have rejected the argument that section 1170.126, subdivision (f) creates a presumption in favor of resentencing. Instead, the provision grants discretion to the trial court to determine whether resentencing would pose an unreasonable risk of danger to public safety, with no presumption in favor of resentencing. (*People v. Buford*, *supra*, 4 Cal.App.5th at pp. 901–903; *People v. Esparza* (2015) 242 Cal.App.4th 726, 738–739.) We agree. We need not decide whether Williams has a due process liberty interest in resentencing because we conclude that our review of the dangerousness determination for abuse of discretion ensures a rational nexus between the petitioner's

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[3] The California Supreme Court granted and then dismissed review in *People v. Buford* (S238790) without ordering the Court of Appeal opinion depublished, so the opinion remains published. (Cal. Rules of Court, rule 8.528(b)(3).)

record and the trial court's determination of dangerousness. Because we conclude that the trial court properly exercised its discretion, as discussed *post*, there was no due process violation.

Williams has an extensive history of criminal convictions. In February 1981, Williams was convicted of exhibiting a deadly weapon (§ 417), a misdemeanor. He was sentenced to one year of probation and 10 days in jail. In January 1982, Williams was convicted of misdemeanor grand theft (§ 487) and sentenced to two years of probation and 60 days in jail. In April 1983, Williams pled guilty to procuring sex by misrepresentation (§ 266), a felony. The crime involved an undercover police officer. Williams was sentenced to five years of probation and 180 days in jail. In September 1983, he was convicted of exhibiting a deadly weapon (§ 417) and was sentenced to two days in jail. In March 1984, he was convicted of attempted burglary (§ 459) and sentenced to two years of probation and 60 days in jail. In May 1986, Williams was convicted of possession of a deadly weapon (§ 12020, subd. (a)) and sentenced to 18 months of probation and 5 days in jail.

In October 1986, Williams pled guilty to robbery (§ 211), his first strike, and was sentenced to three years of probation and 270 days in jail. In May 1987, Williams was convicted of robbery, his second strike, and was sentenced to eight years in prison. In October 1995, he was convicted of forgery and sentenced to 32 months in prison. In November 1996, Williams was convicted of possessing drug paraphernalia (Health & Saf. Code, § 11364) and sentenced to 24 months of probation and 15 days in jail. In June 1997, Williams was convicted of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), his third

strike, and sentenced to an indefinite term of 25 years to life in prison.

Williams also has an extensive record of disciplinary violations while incarcerated. The most serious involved possession of an inmate-manufactured weapon (a sharpened plastic shaft measuring five-inches in length) in October 2004, possession of controlled medication for distribution in May 2007, and possession of an inmate-manufactured weapon in April 2011 (D-cell batteries inside two tied socks).[4] Other violations involved mutual combat with his cellmate inside their cell in August 2003 and again in March 2008; mutual combat with another inmate in the prison yard in March 2008; willfully delaying a peace officer in the performance of his duties in November 2010, involving verbally belligerent conduct toward a prison guard; fighting his cellmate in their cell in February 2011; fighting another cellmate in the dayroom on two occasions in March 2011; willfully delaying a peace officer by refusing assigned housing in May 2011; battery on an inmate in January 2014; fighting another inmate in November 2016; disobeying a direct order on numerous occasions; and various low-level offenses.

Williams' record of rehabilitation while incarcerated includes earning his General Educational Development (GED) certificate in August 1999; participating in Alcoholics Anonymous/Narcotics Anonymous meetings in 2001 and 2002; attending a series of eight Lifer Group Therapy sessions in 2004; completing a Life Skills course in July 2008; passing GED examinations in social studies and mathematics in June 2009

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[4] Findings on a charge that an inmate violated prison rules are documented in a Rules Violation Report (RVR).

and September 2010; completing an Impact of Crime on Victims training course (date unspecified); participating in Veterans self-help programs in 2015 and 2016; participating in the Lifers for Change program in 2015 and 2016, and serving as sergeant at arms; and completing a 30-day self-improvement course called Getting Out by Getting In in 2016. Williams also received certificates of appreciation and other recognition for participating in a fundraiser at the prison in 2015 and Christian studies in 2016, and for donating two books to the library in 2016. In October 2016, Williams committed to a 90-day "Pledge of Peace" to remain free from violence.

In its Memorandum of Decision, the trial court carefully summarized and then analyzed the evidence. The court stated regarding Williams' criminal history, in part:

"[P]etitioner's criminal history is significant, with eleven total convictions and several violations of probation and parole. This history begins in 1981, and continues consistently until the commitment offense. The evidence shows that Petitioner was quick to offer excuses for his conduct, and often supplied false names and dates of birth when arrested. Accordingly, Petitioner's criminal history supports a concern about a danger to public safety."

The trial court stated regarding Williams's record of discipline while incarcerated, in part:

"Petitioner's RVR history is lengthy, involving 26 RVRs dating from 1999 to 2016. Eight of Petitioner's RVRs involved violence, typically in the form of fighting with other inmates. [Citation.] Particularly noteworthy is that Petitioner's two most recent RVRs, incurred while Petitioner was seeking resentencing, involved fights instigated by Petitioner. [Citation.] In general,

Petitioner's RVRs show a pattern of conflict with both [prison] staff and other inmates, at least twice requiring officers to deploy chemical weapons before Petitioner yielded. [Citation.] That this trend has continued as recently as November 2016 does not give the court confidence that Petitioner would remain conflict-free if released.

"Petitioner's counsel represented in argument that these conflicts were the result of Petitioner continuously being assigned homosexual cellmates. [Citation.] This explanation was apparently never raised during any of Petitioner's RVR hearings, and in fact, Petitioner made contrary claims in several cases. In any event, counsel's explanation does not justify Petitioner's pattern of attacking cellmates. To the contrary, Petitioner's explanations for many of his RVRs echo the excuses offered for his criminal history. When accused of fighting, Petitioner consistently claimed he was a victim of either circumstance or the aggression of others. In many cases, Petitioner claimed that correctional officers wronged him or lacked authority to give him orders. In two instances, Petitioner offered contradictory explanations at various points. . . . These excuses are further evidence that Petitioner remains a danger to public safety."

The trial court stated regarding Williams's record of rehabilitation while incarcerated:

"Petitioner's rehabilitative programming is insufficient to allay the concerns created by his disciplinary history. The court acknowledges that, since 2015, Petitioner has begun to engage in relevant rehabilitative programming. However, the fact that Petitioner's habit of fighting has continued since that time demonstrates that much progress remains to be made. In particular, the court notes that Petitioner's last fight was on

November 26, 2016, two days before his 90-day peace pledge was set to end. [Citation.] If Petitioner cannot remain violence-free while seeking resentencing and engaging in a voluntary peace pledge, it is difficult to conclude that Petitioner will remain violence-free in the community."

Regarding post-release plans, the trial court noted that Williams's sister had written in support of resentencing, but she did not state whether Williams could live with her. Williams presented no evidence supporting his counsel's representation that he had applied to transitional programs, and he presented no other evidence of his post-release plans or of any marketable skills. The court noted that Williams's advanced age of 63 ordinarily would indicate that he no longer posed an unreasonable risk of danger to public safety, but his continuing disciplinary record, including recent violent incidents, undermined this. The court noted that Williams's classification score of 156 was "significantly elevated" and had "steadily increased over the course of his incarceration."[5]

Williams does not challenge the trial court's factual findings. Instead, he challenges the court's discretionary determination that resentencing would pose an unreasonable risk of danger to public safety. Williams argues that the court abused its discretion "by failing to consider the totality of appellant's individualized circumstances" in making that determination. But Williams has not shown that the court failed to consider any

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[5] A classification score measures the level of security risk presented by an inmate based on the inmate's criminal conviction history, conduct in prison, and other factors. (*In re Morales* (2013) 212 Cal.App.4th 1410, 1413; see Cal. Code Regs., tit. 15, § 3375.)

relevant circumstances. His disagreement with the court's conclusion does not show an abuse of discretion.

Williams argues that the trial court erred by rejecting the argument that his erroneous designation with an "R suffix," which indicates a history of certain sex crimes, made him a target for violence by other inmates. The court noted that Williams failed to raise this issue in his RVR hearings, and stated that the designation did not justify Williams's pattern of attacking other inmates. We conclude that this ruling was reasonable; the court did not abuse its discretion.

Williams also argues that the trial court erred by failing to consider his rehabilitative record as a whole, minimizing his participation in self-help programs, and focusing on his latest fight that occurred after he filed his petition for resentencing. But the trial court dutifully noted Williams's participation in self-help programs and considered his rehabilitative record as a whole. Balancing his rehabilitative record against his extensive criminal history, persistent prison misconduct, and lack of post-release re-entry plans and marketable skills, the court reasonably concluded that if relpeased, Williams would present an unreasonable risk of danger to public safety. Williams argues that reasonable parole conditions and other measures could address any concerns regarding his post-release conduct, but he fails to show that the court could not reasonably conclude to the contrary, and therefore has shown no abuse of discretion.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MICON, J.*

We concur:

MANELLA, P. J.

COLLINS, 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.