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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL L. FOSTER, Defendant and Appellant.	B269610 (Los Angeles County Super. Ct. No. BA198921)

APPEAL from order of the Superior Court of Los Angeles County, Rand S. Rubin and William C. Ryan, Judges. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant Michael L. Foster.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Noah Hill and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Following a suitability hearing under the Three Strikes Reform Act of 2012, enacted by the voters as Proposition 36 (Pen. Code, § 1170.126),[1] the trial court found resentencing Michael L. Foster would pose an unreasonable risk of danger to public safety and denied his petition for recall of his prison sentence. On appeal Foster contends he was provided ineffective assistance of counsel and the trial court failed to apply the proper definition of "unreasonable risk of danger to public safety." We affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Commitment Offense and Petition for Recall of Prison Sentence*

On August 2, 2001 a jury found Foster guilty of unlawful driving or taking a vehicle (Veh. Code, § 10851, subd. (a)) and evading a peace officer with willful disregard for the safety of persons or property (Veh. Code, § 2800.2, subd. (a)). Following a bifurcated bench trial on his prior convictions, Foster was sentenced to an aggregate indeterminate state prison term of 26 years to life, consisting of two concurrent terms of 25 years to life under the three strikes law for the unlawful taking and felony evasion convictions, plus an additional one year for a prior prison term enhancement pursuant to section 667.5, subdivision (b).

On March 1, 2013 Foster filed a petition for recall of his sentence and resentencing under Proposition 36, which amended the three strikes sentencing scheme to provide, in general, that a

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[1] Statutory references are to this code unless otherwise stated.

recidivist is not subject to an indeterminate life term for a third strike felony that is neither serious nor violent unless the offense satisfies other criteria identified in the statute.[2] The amendments also allow inmates previously sentenced to indeterminate life terms under the three strikes law to petition for recall of their sentences and resentencing to the term that would have been imposed for their crime had they been sentenced under the new sentencing provisions. (§ 1170.126, subd. (a).) Foster argued in his petition that his nonviolent third strike convictions for unlawful taking of a vehicle and evading a peace officer with willful disregard for safety made him eligible for recall of sentence and resentencing under Proposition 36.

In their opposition to the petition the People conceded Foster was eligible for resentencing under Proposition 36 but argued he was not suitable for resentencing because it would pose an unreasonable risk of danger to public safety under section 1170.18, subdivisions (b) and (c). In support of their

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[2] Prior to Proposition 36 the three strikes law provided that a defendant convicted of two prior serious or violent felonies would be subject to an indeterminate life sentence of at least 25 years to life upon conviction of a third felony, whether or not that felony was serious or violent. (See *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1285-1286.)

Under the amended law a defendant with two prior qualifying strike convictions is not subject to an indeterminate life sentence as a third strike offender when the current offense is neither serious nor violent (§ 1170.126, subd. (e)(1)) and does not meet one of the criteria in section 667, subdivision (e)(2)(C)(i)-(iii) (§ 1170.126, subd. (e)(2)), and none of the defendant's prior strike convictions was for one of the offenses listed in section 667, subdivision (e)(2)(C)(iv) (§ 1170.126, subd. (e)(3)).

position the People cited Foster's extensive criminal background, disciplinary history and additional felony conviction incurred while in prison. In his reply Foster argued his prior convictions and prison record did not support an inference he would commit violent crimes if released from prison. He also emphasized his age (now 55), his completion of educational and vocational training while in prison and his deteriorating health as factors making it unlikely he would pose a risk to public safety.

2. *The Kings County Offense and Petition for Recall of Prison Sentence*

In 2004, while incarcerated for the current offenses, Foster was involved in an altercation with a correctional officer during which Foster struck the officer on the side of the head. Based on this incident a jury in Kings County found Foster guilty of battery by a confined inmate on a nonconfined person (§ 4501.5). Foster was sentenced to 25 years to life under the three strikes law, to be served consecutive to the term imposed for the current offense.

In 2014, while his petition was pending on the instant offense, Foster filed a petition for recall of sentence related to the Kings County offense. Initially the Kings County prosecutor indicated she would oppose the petition, but ultimately she told the court, "[The] People would submit on the issue of whether or not [Foster] should be released. We're not going to oppose a resentencing. I know that was our initial indication; however given review of the file and recent political events we are not going to oppose. So we are going to submit it." The trial court granted Foster's petition without conducting an evidentiary hearing and resentenced him on the battery charge to a state

prison term of eight years to run consecutively to the sentence for the instant offenses.

3. *Foster*'s *Collateral Estoppel Argument*

After the adjudication of the Kings County petition, Foster filed a supplemental brief in the instant action arguing collateral estoppel required his pending petition for resentencing be granted.[3] Citing *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, Foster argued the requirements for collateral estoppel were met because (i) the issue whether Foster posed an unreasonable risk of danger to public safety was identical in the two cases; (ii) the issue was actually litigated in Kings County; (iii) the issue was actually decided in Kings County; (iv) the decision was final and on the merits; and (v) the Los Angeles County District Attorney and the Kings County District Attorney were in privity because they both represent the People of the State of California. Thus, Foster argued, the issue of his dangerousness had been

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[3] "Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) Even if the minimal requirements for issue preclusion are satisfied, courts will not apply the doctrine if policy considerations outweigh the doctrine's purpose in a particular case. (*Id.* at pp. 342-343.)

decided and could not be relitigated in this proceeding. The People opposed the application of collateral estoppel, arguing the issue of dangerousness was never actually litigated in Kings County because the prosecutor had not opposed the petition and the issue was never submitted to the court for determination.

Following oral argument the trial court found collateral estoppel did not apply. The court stated the issue of dangerousness had not actually been litigated in Kings County because the prosecutor "conceded to [Foster's] suitability for Proposition 36 relief." Thus, the Kings County court made no factual determination as to the danger to public safety if Foster was resentenced on the battery charge. In addition, the court stated the issues in the two proceedings were not identical because each involved different commitment offenses.

4. *The Denial of the Petition*

The trial court conducted a suitability hearing on October 7, 2015. In support of his petition Foster submitted medical records, disciplinary reports, certificates of completed education and rehabilitative programs, a letter from his mother and evidence of acceptance into a residential facility should he be released. Doctor Hy Malinek, a forensic psychologist, testified as an expert on Foster's behalf and opined Foster was a low to moderate risk for recidivism. Foster also testified on his own behalf. The People presented evidence of Foster's criminal history and disciplinary record while incarcerated.

On December 11, 2015 the trial court denied Foster's petition. Pursuant to section 1170.126, subdivision (g), the trial court considered and made findings on Foster's criminal history, disciplinary and rehabilitation record while incarcerated and other relevant evidence, including Foster's classification score,

post-release plans, age and health and the opinion of Dr. Malinek. The court concluded that, while Foster "has engaged in some positive efforts while incarcerated . . . the totality of the record demonstrates he will be unable to follow the law and the rules of society if he is released from prison. Thus, the court finds that resentencing [Foster] would pose an unreasonable risk of danger to public safety at this time."

DISCUSSION

1. *Foster's Counsel Was Not Ineffective in Failing To Argue Judicial Estoppel*
   a. *Governing law*

The right to counsel guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution "'includes, and indeed presumes, the right to effective counsel . . . .'" (*People v. Blair* (2005) 36 Cal.4th 686, 732.) "'To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.'" (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980; accord, *In re Crew* (2011) 52 Cal.4th 126, 150; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656; accord, *People v. Vines* (2011) 51 Cal.4th 830, 875.)

There is a presumption the challenged action or inaction "'might be considered sound trial strategy'" under the circumstances. (*Strickland v. Washington, supra,* 466 U.S. at p. 689; accord, *People v. Gamache* (2010) 48 Cal.4th 347, 391; *People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Moreover, "[i]n reviewing a claim of ineffective assistance of counsel, we give great deference to counsel's tactical decisions." (*People v. Johnson, supra,* 60 Cal.4th at p. 980.)

Finally, in considering a claim of ineffective assistance of counsel, it is not necessary to determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. "'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*People v. Carrasco* (2014) 59 Cal.4th 924, 982, quoting *Strickland v. Washington, supra,* 466 U.S. at p. 697; accord, *In re Champion* (2014) 58 Cal.4th 965, 1007 [defendant must demonstrate a "reasonable probability" that absent counsel's failings the result would have been more favorable].)

b. *Foster has failed to show his counsel's performance was deficient*

Foster contends his counsel failed to meet professional standards by misunderstanding the applicable estoppel law. Rather than argue *collateral* estoppel, which Foster concedes did not apply in this case, Foster states his counsel should have argued *judicial* estoppel prevented the People from opposing his resentencing. Because judicial estoppel did not bar the People from opposing Foster's petition, however, counsel's failure to raise that argument did not constitute ineffective assistance:

"Counsel is not ineffective for failing to make frivolous or futile motions." (*People v. Thompson* (2010) 49 Cal.4th 79, 122; accord, *People v. Solomon* (2010) 49 Cal.4th 792, 843, fn. 24 ["[t]he Sixth Amendment does not require counsel to raise futile motions"]; *People v. Memro* (1995) 11 Cal.4th 786, 834 ["[t]he Sixth Amendment does not require counsel "'to waste the court's time with futile or frivolous motions'"].)

"""Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies."'" (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986.)[4] Judicial estoppel is an """extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice."'" (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 131.) "The doctrine applies when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position

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[4] "Judicial estoppel differs from collateral estoppel in that judicial estoppel does not require a final judgment. [Citation.] The doctrines also differ in that collateral estoppel deprives a party of the right to relitigate an issue, whereas judicial estoppel deprives a party of the right to assert a particular position. [Citation.] The purposes of the two doctrines differ in that collateral estoppel is designed to "'conserve judicial resources by preventing repetitive litigation,"' while judicial estoppel "'maintain[s] the purity and integrity of the judicial process by preventing inconsistent positions from being asserted."'" (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 841-842.)

or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'" (*Aguilar* at pp. 986-987; accord, *People v. Castillo* (2010) 49 Cal.4th 145, 155; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943.) Courts do not "invariably enforce the judicial estoppel doctrine merely because all of its elements are met. '[N]umerous decisions have made clear that judicial estoppel [like the other forms of estoppel] *is an equitable doctrine*, and its application . . . is discretionary.'" (*Castillo*, at p. 156.) The party invoking judicial estoppel bears the burden of proving the doctrine applies. (See *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1467.)

Foster cannot meet the third and fourth requirements for application of judicial estoppel.[5] The Kings County District Attorney was not "successful in asserting" a position in the proceedings relating to Foster's petition for recall of sentence and resentencing on his battery conviction. To the contrary, the

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[5] The People argue Foster cannot meet the first requirement of judicial estoppel because the district attorneys for Kings and Los Angeles Counties are not the "same party." Foster, on the other hand, argues each district attorney represents the People of the State of California. Whether judicial estoppel can be applied against a district attorney based on conduct of the district attorney in another county or, indeed, whether the doctrine ever may be applied against the prosecution in a criminal action, remains an open question. (See *People v. Suff* (2014) 58 Cal.4th 1013, 1061, fn. 12 [declining to decide whether judicial estoppel may apply against the prosecution in a criminal action]; *People v. Watts* (1999) 76 Cal.App.4th 1250, 1262 [stating judicial estoppel had never been applied against prosecution].) Regardless, we need not decide this question here, for we find Foster's argument fails on other grounds.

deputy district attorney took no position on the petition but simply stated she had no opposition. "The factor of success—whether the court in the earlier litigation adopted or accepted the prior position as true—is of particular importance. The United States Supreme Court has recognized that, in deciding whether to apply judicial estoppel, 'courts regularly inquire whether the party [to be estopped] has *succeeded* in persuading a court to *accept* that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was *misled*." . . . Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court *determinations,*" . . . and thus poses little threat to judicial integrity.'" (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 170-171.) Here, the absence of an argument that Foster's resentencing on the battery charge posed an unreasonable risk of danger to public safety does not equate to an affirmative position that resentencing would *not* create a danger to public safety. "[*C*]*oncession* of a legal point does not constitute the successful assertion of a position." (*People v. Suff* (2014) 58 Cal.4th 1013, 1061, fn. 12 [stating judicial estoppel would not bar Attorney General from arguing in camera review of documents was unnecessary where Attorney General had conceded in earlier case trial court erred by not conducting in camera review].)

Moreover, even if Foster could show the Kings County District Attorney had successfully argued that resentencing him would not create a danger to public safety under the circumstances presented in that proceeding, the argument that resentencing him the case at bar would pose such a danger is not inconsistent with the earlier position. The context of the Kings

County proceeding was that Foster, an inmate in his mid-50's, serving two consecutive third strike sentences—one for 26 years to life; the second for 25 years to life—sought to convert the second sentence to a determinate term, second strike sentence. Resentencing Foster to eight years for battery by a confined inmate on a nonconfined person (the upper term doubled) left in place the initial three strikes sentence, which meant Foster would remain incarcerated for many years to come. In contrast, with only an eight-year determinate term for the battery conviction, resentencing Foster in this case as a second strike offender would result in his immediate release from custody, posing a very different risk to public safety.[6] Given these disparate circumstances, the positions taken by the People in each case are not wholly inconsistent with one another. (See *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 182 [for judicial estoppel to apply, "the seemingly conflicting positions 'must be clearly inconsistent so that one necessarily excludes the other'"].)

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[6] Imposing consecutive, second strike sentences for unlawful driving or taking a vehicle and felony evasion would add only 32 months (one-third the middle term for each offense, doubled), plus one-year for the prior prison term enhancement, to the eight-year sentence for battery by a confined inmate on a nonconfined person, or an aggregate term of 11 years eight months. When he filed his Proposition 36 petition in this case, Foster had already served more than 13 years of actual time in custody.

2. *The Trial Court Did Not Abuse Its Discretion in Finding Foster Posed an Unreasonable Risk of Danger to Public Safety Under Proposition 36*

Foster's sole additional challenge to the finding he posed an unreasonable risk of danger to public safety under section 1170.126, subdivision (f), is that the trial court erred by failing to apply the narrower definition of that phrase found in section 1170.18, subdivision (c), part of Proposition 47, the Safe Neighborhoods and Schools Act, which reclassified as misdemeanors certain drug and theft-related offenses and created procedures by which eligible offenders currently serving a felony sentence for those offenses could obtain a recall of sentence and resentencing. After briefing in this case was completed, the Supreme Court in *People v. Valencia* (2017) 3 Cal.5th 347 held Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to resentencing proceedings under Proposition 36, notwithstanding Proposition 47's statement that its definition is to be "used throughout this Code." (*Id.* at pp. 373-375.) In light of *Valencia*, Foster's argument the trial court abused its discretion by failing to apply the Proposition 47 definition is without merit.[7]

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[7] Although we would generally request supplemental briefing to give the parties an opportunity to discuss the impact of a recent Supreme Court decision, Foster conceded in his appellate briefs that *Valencia* would govern his appeal.

DISPOSITION

The order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

BENSINGER, J.*

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