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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DION OCTAVE BREAUX, Defendant and Appellant.	B268399 (Los Angeles County Super. Ct. No. VA037482)

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

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Dion Octave Breaux (defendant) appeals from the trial court's order denying his petition for resentencing under the Three Strikes Reform Act of 2012 (Proposition 36). He challenges the trial court's discretion on the ground that "there is no rational nexus between the evidence and the trial court's finding that resentencing [defendant] would pose an unreasonable risk of danger to public safety." Finding no abuse of discretion, we affirm the trial court's order.

BACKGROUND

In 1997, defendant was convicted of unlawful driving or taking a vehicle in violation of Vehicle Code section 10851, subdivision (a). As a result of two 1984 robbery convictions, defendant was sentenced to an indeterminate term of 25 years to life in prison under the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), & 1170.12, subds. (a)-(e))[1]. In 2013, defendant petitioned for a recall of sentence pursuant to section 1170.126 (Proposition 36). After consideration of the testimony of the defense and prosecution expert witnesses and the prison records, the trial court found that defendant currently posed an unreasonable risk of danger to public safety, and denied the petition. Defendant filed a timely notice of appeal from the court's order.

Defense expert

Public safety consultant Richard Subia (Subia), testified as the defense expert on the issue of whether defendant was currently an unreasonable risk of danger to public safety. Subia reviewed records and reports pertaining to defendant, including his criminal history and his "Central" file with the California Department of Corrections and Rehabilitation (CDCR). A

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

Central file is an inmate's disciplinary and rehabilitation record. Subia noted that though defendant had been found in possession of a cell phone on three occasions in custody, there was no evidence that he used it to further any criminal activity. There was one "mutual combat" violation in 1998, when defendant was found punching another inmate. However no other fights were listed, and Subia did not consider defendant to have been a violent prisoner. In November 2011, defendant was found in possession of a weapon, a seven and one-half inch screw, sharpened at the end, which had been concealed in a secret compartment of a box in defendant's cell. Defendant's cellmate claimed that someone brought it to the cell and said it was for defendant, so the cellmate placed it with defendant's property. Though there was no direct evidence that defendant ever had the weapon on his person, a hearing officer found him guilty of the violation by preponderance of the evidence.

Subia also considered defendant's record relating to street gang and prison gang membership. In 2010, defendant underwent the prison "validation" process to determine gang membership. At that time investigators concluded that he was a member of the prison gang, United Blood Nation (UBN), as well as the 84 Street Swans Blood street gang (Swans). Prior to that (2002, 2004, and 2006), defendant had been placed temporarily in administrative segregation while he was investigated for gang activity. Each time he was cleared of being involved in any active gang behavior in the prison. In the 2006 incident, prison staff received an anonymous note indicating defendant was causing problems between Crip gang members and Blood gang members. A subsequent note in the file indicated that defendant was not promoting gang violence in the yard, and that he was well liked.

Subia nevertheless concluded that defendant was in fact a member of both the UBN prison gang and the Swans.

Defendant's gang related body tattoos and hand-written communications established as much. Letters and other writings in the validation package were signed by defendant with symbols of both gangs. Subia explained that validation does not necessarily mean an inmate is an active gang member. Subia found no violations in defendant's records for any gang conspiracy, and he found no evidence that defendant carried out any criminal activity for the UBN or Swans while in custody, or that he had been involved in any specific illegal or violent incidents as a member or associate of either gang. However, it was possible that defendant was a "shot caller" -- a high ranking inmate who is ordinarily not directly involved in the gang's criminal activity by engaging, for example, in the actual selling of drugs or assaulting rival gang members. Defendant was quoted in 1994, as having said: "'I don't have to conspire. If I wanted to hit on a staff or inmates, all I would have to do is order someone to do it.'"

In Subia's opinion, defendant did not currently present an unreasonable risk of danger to public safety. Subia noted that defendant had been involved in NA and AA programs since 2008, and although he received a violation in 2011 for having marijuana in his system, Subia did not think this showed an inability to rehabilitate with regard to drugs, as his random tests in the following year showed no positive results. Subia also noted that both in and out of prison, defendant had been involved with the organization United One, which assists communities in resolving gang violence and which reaches out to young people to teach them that there is a better way. Also defendant was invited to participate in Option Recovery, a 12-step program with instruction on assisting others.

Prosecution expert

The prosecution presented the testimony of expert Robert Lyons, a Los Angeles County Sheriff's Sergeant assigned to the prison gang unit. Between 2003 and 2005, Sergeant Lyons was deputized by the federal government to participate in a criminal investigation of three Southern California African-American street gangs. During that time, he acquired an informant from whom he learned about the UBN. He also obtained the guidelines followed by UBN members. UBN was originally formed as a union of Blood gang members in prison in order to overcome violence by fellow inmates or assaults by prison staff. It then evolved into a criminal organization involved in conspiracies to sell narcotics, smuggle cigarettes, commit acts of violence within prisons, as well as credit card fraud, identity theft, murder, and assaults against law enforcement. It has a military-type structure, with generals, lieutenants, and sergeants. A general is the highest rank, and has the ultimate say in the organization's activities in the prison.

Prior to his testimony Sergeant Lyons reviewed defendant's prison files, as well as defendant's probation reports and the defense expert's report. He also reviewed photographs of defendant's gang related tattoos, and explained them for the court. The tattoo, "Swans most wanted," referred to the Southern California Swans Blood gang, and the "84" tattoo stood for the particular "circuit" of that gang to which defendant belonged. Defendant's other tattoos included "UBN" for his prison gang, "MSB," meaning Mafia Swan Blood, "Swan" and "84th Street" for defendant's street gang. "TAIFA," the Swahili word for nation is tattooed on defendant's shoulder. Sergeant Lyons explained that it was common for African-American prisoners to use Swahili to communicate while incarcerated.

According to Subia's report, defendant admitted that while in custody in 1983, he had been involved in the formation of UBN and that he called himself "the general." Sergeant Lyons explained that this meant that defendant controlled the criminal activity of the organization in his facility, but was not the one holding drugs, passing them out, or committing assaults. He explained that all Blood gang members are given doctrine letters when they arrive in prison, and must abide by the guidelines and rules. If they follow the rules, the inmates automatically become UBN members.

A December 2000 note placed in defendant's prison file states that defendant was identified as a UBN general and that he had authored a threatening letter sent to an inmate. A 1995 note in defendant's prison file identified defendant as a shot caller, which Sergeant Lyons explained, was a person who was looked up to and controlled the gang's day-to-day activities within the custodial facility. Another note states: "'There is evidence that [defendant] is the founder and ranking member of the disruptive group known as United Blood Nation or UBN.'" Sergeant Lyons's informant identified defendant in 2003 as a one-star UBN general.

It was Sergeant Lyon's opinion that defendant was a current member of the UBN and as a shot caller, he would be dangerous, because shot callers control gang activities both inside and outside correctional facilities. Sergeant Lyons based his opinion on all the documents he reviewed, including the seven validation factors listed by the prison in the 2010 determination that defendant was a member of UBN and the Swans.

Findings

After listening to testimony and considering the other evidence presented, the trial court issued a written memorandum of decision. The court found that from the age of nine, defendant

had spent most of his life under the supervision of prison, jail, parole, or probation. As a juvenile, defendant was arrested for commercial burglary, grand theft person, unauthorized possession of keys to a public building, truancy, possession of marijuana, petty theft, possession of PCP, and burglary with the use of a firearm. At age 16, defendant was committed to the California Youth Authority. In 1982, at the age of 18, defendant was charged with stealing a car at gunpoint, and pled guilty to receiving stolen property. In 1984, defendant was convicted of two counts of robbery and felon in possession of a firearm, after he and an accomplice robbed two women of jewelry and their car at gunpoint. Defendant was sent to prison on a parole violation after his arrests for possession of narcotics for transportation or sale. Released in 1988, defendant was again charged with a parole violation in 1991, when a search of his residence produced a shotgun and live ammunition. He thereafter escaped from custody and was later convicted of escape on a plea of guilty. In 1992, at the age of 28, defendant was charged with murder in two shootings in which he was involved. One case resulted in an acquittal, and in the other a hung jury and dismissal. In 1993, defendant was sentenced to three years in prison for possession of cocaine base for sale. Defendant was charged and convicted, and sentenced in 1997 to 25 years to life in prison after stealing a car.

The trial court also reviewed the prison records admitted into evidence, and noted the 10 rule violations, including disobeying direct orders, possession of an inmate-manufactured weapon, possession of a cell phone and charger, and assault on an inmate from a rival gang. The court found that defendant was a leader of the 84th Street Swans Blood street gang. The court also noted the prison reports that documented defendant as being a high-ranking shot-caller in UBN, and as having threatened a correctional officer with physical harm. The trial court noted

that defendant had participated in Unity One, a gang prevention organization, had participated in the Faith-Based Self-Improvement Youth Forum, and had limited AA/NA participation over a two and one-half year period, but otherwise found that defendant had not participated in much self-help, educational, or rehabilitative programming. In particular, the court found that defendant had received no vocational training, had not participated in classes or workshops, or completed correspondence courses or book reports on self-help topics. In sum, the court found that "[o]f critical importance, [defendant] never wanted to 1) 'step down' (start the process of moving away from gang life) or 2) debrief and go to the Sensitive Needs Yard . . . away from general population where most gang members were housed."

The court found that although defendant had some letters from a post-incarceration transitional housing program, he had not shown where he would live, or how he would support himself financially, and the court had received no support letters from family or friends showing that defendant would have assistance in housing, finances, substance abuse, and employment.

The court considered facts which mitigated against a finding of current risk of danger to public safety, such as defendant's age (51) and some participation in AA/NA, but these were outweighed by defendant's failure to participate in other educational, rehabilitative, or vocational programming, and by his prison misconduct and continued involvement in gang activity. The court found that defendant's criminal history was remote, but also that it continued to have a nexus with current risk due to his continued misconduct in prison, gang participation and lack of programming to address his past violence and criminality. In sum, defendant had "never made an attempt to step away from the prison gang life."

The court rejected defendant's claim that none of his prison misconduct or rule violations indicated an unreasonable risk, as they included such dangerous acts as possession of a weapon, mutual combat, possession of cell phones, possession of a controlled substance, disobeying direct orders, and threatening physical harm to a correctional officer. The court concluded that "the totality of the evidence [demonstrated] that resentencing [defendant] would pose an unreasonable risk of danger to public safety . . . due to his criminal history, prison misconduct, insufficient rehabilitative programming, gang activity and inadequate re-entry plans."

DISCUSSION

I. Proposition 36

Originally the Three Strikes law required a minimum sentence of 25 years to life upon conviction of any felony, if the defendant had previously been convicted of two prior felonies which came within the legal definitions of serious or violent felonies, and thus qualified under the law as "strike" offenses. (See former §§ 1170.12, subd. (c)(2)(A) & 667, subds. (d), (e)(2)(A).) In 2012, Proposition 36 amended the law to provide that that the 25 years to life would in most cases apply only where the current conviction was also a serious or violent felony. (See §§ 1170.12, subd. (c)(2)(C) & 667, subd. (e)(2)(C).) Proposition 36 also added section 1170.126, which permits those serving such a sentence to petition for resentencing under the amended law. (§ 1170.126, subd. (b).) If a defendant is eligible for resentencing, the court shall do so unless, in its discretion, the court determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) In exercising its discretion, the court may consider the defendant's prison disciplinary record, record of rehabilitation, and criminal history, including the nature and remoteness of

prior crimes, any injury to victims, the length of prior prison commitments, and "[a]ny other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

Under Proposition 36, the court's determination that defendant poses a risk to public safety is discretionary. (§ 1170.126, subd. (f).) As the statute expressly calls for the court's discretion, its determination "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.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) On appeal, it is the burden of the party challenging the trial court's discretion to make such a showing. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 (*Alvarez*).)

In general, we do not disturb a trial court's discretionary sentencing decision that "is not arbitrary and capricious". . . and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*People v. Sandoval* (2007) 41 Cal.4th 825, 847-848.) We begin with the presumption that the trial court properly exercised its discretion, and it is defendant's burden to demonstrate otherwise. (*Alvarez*, *supra*, 14 Cal.4th at pp. 977-978.) "Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*Id*. at p. 978.)

Defendant contends that the trial court's decision was error and should be reviewed under the standard of review applied to parole denials, or in the alternative, under a substantial evidence review, or in a kind of hybrid of the two.

II. "Some evidence" standard of review

Defendant first suggests that the appropriate standard of appellate review is the standard applied to a denial of parole, where due process requires that the decision be based on *some* evidence rationally connected to the finding of dangerousness. (See, e.g., *In re Prather* (2010) 50 Cal.4th 238, 255; *In re Lawrence* (2008) 44 Cal.4th 1181, 1206.) The "some evidence" standard for parole review is "unquestionably deferential," as it requires only a "rational nexus between [specified] factors and the necessary basis for the ultimate decision -- the determination of current dangerousness." (*Lawrence*, at p. 1210.) Under that standard, in essence, "[a] trial court abuses its discretion when the factual findings critical to its decision find *no* support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998, italics added.)

If we were to apply that standard here, we would have little trouble finding no abuse of discretion. The trial court considered the factors suggested in section 1170.126 by reviewing evidence of defendant's prison disciplinary record, his record of rehabilitation, his criminal history, and expert testimony. An expert opinion on an ultimate issue of fact may supply substantial evidence if it is based upon an adequate factual foundation. (*People v. $47,050* (1993) 17 Cal.App.4th 1319, 1325.) Both experts relied on the same record without objection or suggestion that the factual foundation was inadequate. Thus, Sergeant Lyons's opinion that defendant posed an unreasonable risk to public safety supplied at least some evidence bearing a rational nexus with the trial court's same conclusion.

Nevertheless, although defendant declares several times in his briefs that the nexus between the evidence and the decision was not rational, his analysis otherwise bears no relationship to a "some evidence" standard of review. Rather than attempting to

demonstrate that there was *no* evidence rationally connected to the finding of dangerousness, defendant contends that both the trial court's factual findings and its ultimate determination were unsupported by substantial evidence.

III. Substantial evidence

Just as defendant's analysis bears no relationship to the "some evidence" standard of review, his substantial evidence analysis consists of no more than a recitation of the evidence that if given greater weight, might have supported a contrary opinion. Facts which merely afford an opportunity for a difference of opinion do not establish an abuse of discretion. (*People v. Clair* (1992) 2 Cal.4th 629, 655.)

Defendant's argument is based almost entirely on the testimony of his own expert's opinions and interpretation of defendant's prison records, as well as defendant's own resolution of credibility issues and of perceived conflicts in the evidence, and the inferences defendant has drawn from the evidence. For example, defendant argues that the court should have found his criminal history too remote to consider, because there was no *credible* evidence that he had continued to engage in any criminal activities in prison; that the court should have given more weight to evidence of his rehabilitative efforts, such as counseling at-risk youths and serving as chairman of the inmate advisory council, and to Subia's testimony that participation in self-help programs was limited due to his escape conviction, as well as his characterization of defendant's rules violations as minor. However, defendant fails to show that there was no substantial evidence of such rule violations but rather, that there was evidence from which the trial court could have concluded that the violations were minor or that defendant was not guilty of them. In essence, defendant asks that we independently review the

evidence and make a de novo determination of defendant's risk to public safety.

Even if we were to evaluate the trial court's decision by reviewing for sufficiency of the evidence, we would not conduct a de novo review. Whenever a defendant challenges the sufficiency of the evidence, we must review the record in the light most favorable to the trial court's ruling. (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Under the substantial evidence test, we must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence, including all reasonable inferences drawn from circumstantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) And we do "not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) Thus, we would not give greater weight to defendant's expert, nor would we decide which expert was more credible, or disregard any of Sergeant Lyons's testimony that might support the trial court's determination, as defendant urges.

The trial court gave considerable weight to defendant's ongoing gang membership, a finding which was supported by substantial evidence such as Sergeant Lyon's opinions that defendant was a current member of the UBN, and that as a UBN shot caller, defendant would be dangerous, because shot callers control gang activities both inside and outside of correctional facilities. Prison documents supporting Sergeant Lyons's opinion included the 2010 validation of defendant as a member of UBN and the Swans, as well as a 2002 investigation suggesting that defendant was a shot caller in the UBN. Even defendant's expert concluded that defendant was a member of both the UBN prison gang and the Swans. And although he cited investigations in

which defendant was not found to have actively engaged in criminal gang activities, Subia agreed that defendant could have been a "shot caller" who directed other inmates to take action.

We conclude that defendant has given this court no basis to find that the trial court was acting arbitrarily or capriciously in finding that defendant's gang membership, disciplinary record, and insufficient reentry plans outweighed the remoteness of his criminal record and evidence of some rehabilitative programming. Defendant has not met his burden to show that the court's ruling fell outside bounds of reason under applicable law and relevant facts. We thus find no abuse of discretion.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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