Filed 12/15/17 P. v. Morris CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DARRELL MORRIS, JR., Defendant and Appellant.	B271847 (Los Angeles County Super. Ct. No. PA025805)

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.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Petitioner and appellant Darrell Morris, Jr., appeals from an order denying his Proposition 36 petition for a recall of sentence and resentencing. (Pen. Code, § 1170.126, subd. (b).[1])

Petitioner contends the trial court applied the wrong standard and abused its discretion in finding he posed an unreasonable risk of danger to public safety. We affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

Petitioner is serving a Three Strikes sentence of 25 years to life following his conviction by jury for selling a controlled substance (Health & Saf. Code, § 11352, subd. (a)), and having suffered two prior felony convictions for robbery and voluntary manslaughter (§ 667, subd. (d)). The conviction for selling a controlled substance is based on petitioner's sale of $10 worth of rock cocaine to an undercover Los Angeles police officer on January 8, 1997.

In November 2012, the electorate passed the Three Strikes Reform Act of 2012, also known as Proposition 36. (*People v. Valencia* (2017) 3 Cal.5th 347, 354 (*Valencia*).) "Proposition 36 'amended the Three Strikes law with respect to defendants whose current conviction is for a felony that is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current felony, pursuant to the provisions that apply when a defendant has one prior conviction for a serious or violent felony.' [Citation.]" (*Ibid.*) Moreover, as pertinent here, "Proposition 36's resentencing provision . . .

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

'provides a procedure by which some prisoners already serving third strike sentences may seek resentencing in accordance with the new sentencing rules. (§ 1170.126.)' [Citation.] An inmate who is serving a third strike sentence that would have yielded a second strike sentence under Proposition 36's new sentencing rules '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.' (§ 1170.126, subd. (f).)" (*Valencia*, at p. 354.)

1. The Petition and Suitability Hearing.

On December 5, 2012, petitioner filed a section 1170.126, subdivision (b) (Proposition 36) petition for a recall of sentence (petition), requesting that the court resentence him to prison for six years, then order him released because he already had served 15 years 11 months in prison. The People filed an opposition conceding petitioner was eligible for resentencing, but urging the court to deny the petition on the ground resentencing him would pose an "unreasonable risk of danger to public safety" within the meaning of section 1170.126, subdivision (f).

On February 2, 2016, the court held a Proposition 36 suitability hearing with petitioner and the parties' counsel present. Voluminous exhibits filed by the People were admitted into evidence, including petitioner's criminal history records, probation reports, Rules Violation Reports (RVR's) from his places of incarceration, and his prison history records and security classification scores. The People called no witnesses.

Numerous exhibits submitted by petitioner were admitted as well, including records and certificates of his completion of counseling, education, and programs in prison; information on reentry programs to which he had been accepted; laudatory

"chronos" (custodial counseling chronology reports) from prison officials; an expert report from Richard Subia, a former California Department of Corrections and Rehabilitation warden; and letters of support from inmates and from Sister Mary Sean Hodges, the representative of one of the reentry programs. Subia, an "expert in . . . the workings of correctional facilities," testified for petitioner, and offered the opinion that petitioner would not pose an unreasonable risk to public safety if resentenced or released.

2. The Trial Court's Decision.

In a lengthy written decision, the trial court made factual findings regarding petitioner's criminal history, his disciplinary history and rehabilitative programming in prison, and other relevant information related to the dangerousness determination. The court concluded that resentencing Petitioner would pose an unreasonable risk of danger to public safety.

a. *Petitioner's Criminal History.*

The court observed that "Petitioner's criminal history dates back to when he was 13 years old. As a juvenile, Petitioner had petitions sustained for possession of a dangerous weapon in 1977, grand theft automobile in 1978, and assault with a deadly weapon in 1979. Petitioner also had several juvenile petitions filed against him, that were ultimately dismissed, including possession of a billy club [in 1977], three batteries, unlawful taking of a motor vehicle, escape, two robberies, assault with intent to commit murder, and resisting arrest." The court found the 1977 offense of possession of a billy club "troubling," because evidence demonstrated petitioner used the club to beat and kill stray dogs. The court noted that in 1979, the District Attorney rejected a petition alleging petitioner committed assault with

intent to commit murder. That petition was based on an incident in which, according to the probation report, he stabbed another juvenile.

The court continued, "As an adult, Petitioner was convicted of robbery and sentenced to three years in prison in 1983. Following his release, Petitioner was arrested and returned to prison several times as a parole violator. In two separate incidents in 1986, Petitioner was convicted of possession of narcotics paraphernalia, and possession of a controlled substance. Petitioner was sentenced to 270 days in county jail and ordered to serve three years of formal probation. Petitioner's probation was subsequently revoked . . . in 1987. Less than four months after Petitioner's probationary term expired, he was arrested for murder but, as discussed *post*, he ultimately pled guilty to voluntary manslaughter," based on his killing of a man by stabbing him. Petitioner was sentenced to eight years in prison for that offense. (C/469-70). At the time he committed the present offense of sale of narcotics, he was a fugitive from parole.

The court found that "[n]otwithstanding Petitioner's several 'second chances', he has engaged in consistent criminal activity since he was 13 years old. Two of Petitioner's prior convictions are considered both serious and violent crimes; one involved taking a human life – which is, of course, the ultimate crime. [Citations.] Petitioner has not remained out of custody for longer than two years as an adult. [Citation.] [¶] Additionally, the juvenile petition alleging that Petitioner engaged in animal cruelty raises serious cause for concern. A recent law journal article described the implications of animal cruelty as follows: ' "Those who abuse animals for no obvious reason are budding psychopaths. . . ." . . .' [Citation.] Although the dismissed

petition is not part of Petitioner's 'criminal conviction history' (§1170.126, subd. (g)(1)), the court is permitted to rely on any evidence it deems relevant to determin[e] whether the petitioner poses an unreasonable risk of danger to public safety. (§ 1170.126, subd. (g)(3).) Similarly, the dismissed 1979 petition for assault with intent to commit murder evinces Petitioner's impulsive violence."

b. *Disciplinary History.*

Discussing petitioner's disciplinary history in prison, the court observed, "Petitioner has received seven [RVR's] during his current term of incarceration. Petitioner's RVRs were for battery on an inmate without serious bodily injury in 1997 and 2001, behavior which could lead to violence in 2006, willfully delaying a peace officer in 2007, disrespect towards staff in 2008, attempted murder in 2008, and refusing a cellmate in 2009. [Citation.] Petitioner's violent misconduct raises serious cause for concern." (Fn. omitted.) The court analyzed the details of the 1997 and 2001 incidents, concluding that petitioner appeared to have been the aggressor in those incidents.

With respect to the RVR for attempted murder in 2008, the court noted that the prison conducted a five-week investigation and determined petitioner was the assailant who stabbed fellow inmate Larry Smith in the neck with a shank. The evidence was largely based on a confidential memorandum, which included a photographic lineup, as well as testimony from petitioner's cellmate and several corrections officers. In support of his petition for resentencing, petitioner provided a declaration from Smith, in which he stated that he did not believe petitioner was his attacker. However, the court gave the declaration "no weight" because it was not part of Petitioner's " 'disciplinary record,' "

(§ 1170.126, subd. (g)(2)) and was not made under penalty of perjury.

The court did consider Subia's testimony that " 'there does not appear to be sufficient information to indicate that the Petitioner was responsible for the specific act of attempted murder, or that the previous acts of battery are acts which would indicate the propensity for violence.' " In particular, the court noted Subia's observation that "Smith had no reason to attempt to exonerate Petitioner from the attempted murder because they are no longer incarcerated at the same prison. Subia also found it noteworthy that the District Attorney did not pursue charges against Petitioner."

However, the court found that petitioner's attempt to convince the court that there was insufficient evidence to prove he committed the attempted murder "ignores this court's limited task of determining whether he currently poses an unreasonable risk of danger to society. (§ 1170.126, subd. (f).)" The court then stated, "The court's role, in this proceeding is not to re-litigate the validity of the RVR. [Citation.] [¶] It is important to note that Petitioner was not without remedies to challenge the RVR guilty finding, if he felt it was wrongly found. Petitioner appealed the decision administratively but Petitioner's inmate appeal was denied at all three levels of review. Petitioner also had the option of pursuing a writ of habeas corpus to challenge the validity of the RVR decision . . . . His attempt now to challenge that RVR is simply much too little, far too late." (Fn. omitted.)

The court concluded that "Petitioner's institutional record follows a similar pattern with his criminal history. Nearly half of Petitioner's RVRs involved violence with other inmates. Although some mutual combat is common with inmates,

especially early in their term, Petitioner's record evinces that he reacts with impulsive and violent responses to conflicts and confrontations, even after years of incarceration and controls. Petitioner's institutional record demonstrates that, if resentenced and released from prison, he would pose an unreasonable risk of danger to public safety. (§ 1170.126, subds. (f) & (g)(2).)"

c. *Rehabilitative Programming.*

The court found petitioner had "engaged in significant positive programming during his current term of incarceration," including Alcoholics Anonymous (2013-2016), Narcotics Anonymous (2011, 2013-2014), anger management (2014), and other programs in 2014 and 2015. The court stated, "Petitioner has received strong scores in his The Way to Happiness correspondence courses offered through Criminon International, a nonprofit organization dedicated to addressing the causes of criminality and to providing criminals with educational programming."

The court observed, "Of particular note is a laudatory chrono issued by the [w]arden of Salinas Valley State Prison in 2015. According to the chrono, Petitioner: [¶] 'voluntarily participated in a video production . . . specifically geared toward [h]igh [s]chool [s]tudents to serve as a tool to dissuade young people from following the paths that can lead to incarceration. [Petitioner] stepped up with courage and focused his effort . . . on helping young people despite inmate perceptions. . . .' [¶] [The] chrono is also impressive because it was issued by the [w]arden himself, which is rare in this court's experience. [Citation.] [¶] Petitioner is also housed in the Enhanced Programming Facility (EPF), which is limited to inmates who choose to better themselves through positive programming. According to Subia,

the requirements to be eligible for EPF include, 'non-violent, no gang activity, no drugs or alcohol, willing to program with all inmates in all races, required to work or participate in education, [and] required to seek self-improvement.' "

Although the court commented that petitioner's recent programming, including his participation in the EPF, was "commendable," the court found it "noteworthy . . . that *all* of [it] took place *after* the electorate approved Proposition 36," which provided him an opportunity for earlier release. The court concluded, "At bottom, Petitioner's recent positive programming simply does not overcome the totality of his institutional record, which demonstrates that he has a tendency towards violence, and has difficulty following the rules."

d. *Other Relevant Evidence.*

Noting that section 1170.126, subdivision (g)(3), permitted the court to rely upon "any relevant evidence" in determining whether petitioner posed an unreasonable risk of danger to public safety, the court considered petitioner's prison classification score and placement, as well as his release plans and age.

The court observed, "An inmate's classification score is directly proportional to the level of security needed to house the inmate; thus, a higher classification score indicates greater security control needs. (Cal. Code Regs., tit. 15, § 3375, subd. (d); *In re Jenkins* (2010) 50 Cal.4th 1167, 1174.) Nineteen is the lowest possible classification score for a life inmate. [Citation.] [¶] Petitioner's earliest available classification score was 118 in 1998 – approximately one year after he entered [prison]. [Citation.] Petitioner's classification score has trended downward since the attempted murder RVR in 2008; his most recent classification score is 88, which was calculated in 2014.

[Citation.] Although the trend is downward slowly, he has yet to earn his way out of a Level IV facility [a maximum security facility]. Petitioner's still elevated classification score provides further evidence of his current dangerousness."

The court also considered petitioner's "realistic release plans," citing California Code of Regulations, title 15, section 2281, subdivision (d)(8). The court noted petitioner had been accepted by two reentry programs, had family support, and planned to participate in a self-help program for released inmates. However, relying on Subia's testimony that petitioner's record of rehabilitation while incarcerated did not include any evidence of vocational training, the court indicated its concern that petitioner would be limited in his ability "to earn an honest living." The court found "the totality of Petitioner's release plans is not supportive of his suitability for resentencing." Further, although petitioner's age -- 52 years -- "statistically reduces his probability of recidivism," the court noted that petitioner was "still relatively young, and his recent institutional behavior demonstrates that he remains dangerous."

e. *Concluding Remarks and Disposition*.

In its concluding remarks, the court stated, "Petitioner has been involved in criminality his entire adult life. Petitioner continues to live with a criminal mindset, revealing that he is incapable of following institutional, and perhaps societal rules. Petitioner's criminal history and institutional record reflect[] that he has a strong propensity for violence and aggression. Although he is not a murderer, Petitioner has been convicted of taking a human life, and was found guilty of an RVR for attempting to take another human life. (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, p. 53

[Proposition 36 was not intended to apply to murderers and other dangerous criminals].) The totality of the record demonstrates that resentencing Petitioner would pose an unreasonable risk of danger to public safety at this time. This conclusion comports with the electorate's intent to 'keep violent felons off the street' and 'prevent[] dangerous criminals from being released early'. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 171.)" The court found "in [its] discretion pursuant to section 1170.126(f), that resentencing Petitioner at this time would pose an unreasonable risk of danger to public safety."

DISCUSSION

A. The Proposition 47 Definition of Dangerousness Does Not Apply.

The People conceded below, and there is no dispute here, that petitioner is eligible for Proposition 36 relief. The sole basis for the denial of the petition was the trial court's discretionary decision that petitioner posed an "unreasonable risk of danger to public safety" within the meaning of section 1170.126, subdivision (f).

"Proposition 36 did not define the phrase 'unreasonable risk of danger to public safety.' " (*Valencia, supra,* 3 Cal.5th at p. 350.) Petitioner argues the trial court erred by failing to apply the definition of that phrase set forth in Proposition 47, the Safe Neighborhoods and Schools Act of 2014. "Proposition 47 limits the trial court's discretion to deny resentencing by defining the phrase 'unreasonable risk of danger to public safety' narrowly." (*Valencia,* at p. 355.) Specifically, under Proposition 47, an " ' "unreasonable risk of danger to public safety" means an unreasonable risk that the petitioner will commit a *new violent felony* within the meaning of' section 667, subdivision

(e)(2)(C)(iv). (§ 1170.18, subd. (c).) The cited subdivision of section 667 identifies eight types of particularly serious or violent felonies, known colloquially as 'super strikes.' " (*Valencia*, at p. 351, italics added.)

After petitioner filed his appeal and the parties completed their briefing, our Supreme Court issued its decision in *Valencia*, holding that "Proposition 47's definition of 'unreasonable risk of danger to public safety' does *not* apply to resentencing proceedings under the Three Strikes Reform Act [Proposition 36]." (*Valencia, supra*, 3 Cal.5th at p. 377, italics added.) Therefore, petitioner's argument is foreclosed by the holding of *Valencia*.

B. The Trial Court Did Not Abuse Its Discretion in Finding Petitioner Posed an Unreasonable Risk to Public Safety.

Aside from arguing that the trial court employed the incorrect standard in assessing petitioner's dangerousness, petitioner argues that the trial court abused its discretion in its consideration of several pieces of evidence. In exercising its discretion to deny resentencing in response to a Proposition 36 petition, "the court has broad discretion to consider: (1) the inmate'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) his or her 'disciplinary record and record of rehabilitation while incarcerated'; and (3) '[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)(1)–(3).)" (*Valencia*, *supra,* 3 Cal.5th at p. 354.)

The People have the burden to prove a petitioner presented an unreasonable risk of danger to public safety, and the standard of proof is preponderance of the evidence. (*People v. Esparza* (2015) 242 Cal.App.4th 726, 740-741; *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1292.) We review a dangerousness finding for abuse of discretion. (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 242.)[2]

Petitioner argues the trial court erred by substantially basing its dangerousness finding on his RVR for attempted murder, where the charge was proven only by a preponderance of the evidence to a prison hearing officer without the procedural safeguards afforded criminal defendants. We reject the argument.

Petitioner does not cite any authority for the proposition that a trial court may not rely upon findings underlying an RVR - clearly germane evidence -- in considering whether petitioner poses a risk of danger to the public. There is no dispute petitioner could have challenged the finding of the prison hearing officer by filing a petition for a writ of habeas corpus (after petitioner exhausted his administrative remedies), and petitioner failed to do so. (See *In re Jackson* (1987) 43 Cal.3d 501, 504, fn. 1; *In re Gomez* (2016) 246 Cal.App.4th 1082, 1086*; In re Scott* (2003) 113 Cal.App.4th 38, 40-44.) Petitioner may not collaterally attack his disciplinary prison record through a Proposition 36 petition for resentencing. (See *People v. Clark* (2017) 8 Cal.App.5th 863, 873 & fn. 7, 875-879 [section 1170.126

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[2] *People v. Buford* (2016) 4 Cal.App.5th 886, held that *facts* underlying the dangerousness finding are reviewed on appeal for substantial evidence. (*Id.* at pp. 893, 901, review granted Jan. 11, 2017, S238790.)

does not authorize a collateral attack on a prior strike conviction]; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336 ["[t]he trial court takes 'the original sentence as given'; doing so leads to the inevitable determination that section 1170.126 merely provides a limited mechanism within which the trial court may consider a reduction of the sentence below the original term"].)

Petitioner also contends the court erroneously concluded that petitioner had no job opportunities, when the letter from Sister Hodges said petitioner learned welding while incarcerated and a 1983 probation report indicates petitioner attended a welding program at New Mexico Junior College and worked as a carpet layer. However, the court was entitled to reject Hodges's unsworn statement, which was based on unidentified sources, in favor of the testimony of Subia, petitioner's expert, that the central file did not reflect petitioner's participation in any vocational training.

Similarly, the statements in the 1983 probation report were based on information "supplied *by defendant* and substantiated in part by juvenile probation files." (Italics added.) That report pertains to his 1983 robbery and discusses training he previously received in New Mexico, and does not, therefore, discuss any vocational training he received during his California imprisonment for the present 1997 offense. The report also reflects petitioner told the probation officer that petitioner worked as a carpet layer from September 1982 through January 1983 for a man petitioner knew only as John. The trial court was not obligated to believe petitioner's statements and the report did not conflict with the court's finding that petitioner had not

engaged in any vocational training "during his current term of incarceration."

The factors considered by the trial court, including petitioner's criminal and prison disciplinary history and his rehabilitative programming, demonstrate a continuum of misconduct and violence supporting the trial court's finding of dangerousness. The trial court conducted a careful examination of the record and engaged in a thoughtful and conscientious weighing and evaluation of the pertinent facts, properly applying Proposition 36's less restrictive definition of dangerousness. The trial court did not abuse its discretion by finding petitioner posed an "unreasonable risk of danger to public safety" within the meaning of section 1170.126, subdivision (f).

DISPOSITION

The order denying petitioner's Proposition 36 petition for a recall of sentence is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STONE, J.*

We concur:

EDMON, P. J.

LAVIN, 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.