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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO R. RODRIGUEZ,

Defendant and Appellant.

B268696

(Los Angeles County
Super. Ct. No. BA094493)

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

Lynette Gladd Moore, 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, Senior
Assistant Attorney General, Mary Sanchez, Andrew S. Pruitt and
Paul S. Thies, Deputy Attorneys General, for Plaintiff and
Respondent.

Appellant Antonio Rodriguez appeals the denial of his petition for resentencing under Penal Code section 1170.26. Rodriguez challenges both the test applied by the trial court, and its exercise of discretion. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Rodriguez was sentenced in 1994 to 25 years to life on a conviction for violation of Health and Safety Code section 11351.5.

In November 2012, Proposition 36, the Three Strikes Reform Act of 2012 (the “Act”), was enacted by the voters. As relevant to Rodriguez, the Act created a procedure for persons sentenced under the Three Strikes law, as was Rodriguez, to petition for resentencing when their third felony conviction was not serious or violent. (Pen. Code, § 1170.126, subd. (e).)¹

“For those sentenced under the scheme previously in force, the Act establishes procedures for convicted individuals to seek resentencing in accordance with the new sentencing rules. (§ 1170.126.) The procedures call for two determinations. First, an inmate must be eligible for resentencing. (§ 1170.126, subd. (e)(2).) An inmate is eligible for resentencing if his or her current sentence was not imposed for a violent or serious felony *and* was not imposed for any of the offenses described in clauses (i) to (iv) of section 1170.12, subdivision (c)(2)(C). (§ 1170.126, subd. (e)(2).) Those clauses describe certain kinds of criminal conduct, including the use of a firearm during the commission of the offense. Second, an inmate must be suitable for resentencing.

¹ All further statutory references are to the Penal Code.

Even if eligible, a defendant is unsuitable for resentencing if ‘the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (§ 1170.126, subd. (f).) If an inmate is found both eligible and suitable, the inmate's third strike sentence is recalled, and the inmate is resentenced to a second strike sentence. (*Ibid.*; § 1170.12, subd. (c)(1).)” (*People v. Estrada*, (2017) 3 Cal.5th 661, 667.)

In 2013, Rodriguez filed a petition for resentencing under the Act. The trial court issued an order to show cause and appointed counsel. The People filed opposition to the petition in December 2013 conceding that Rodriguez was eligible for resentencing, but asserting that he was unsuitable because he posed an unreasonable risk of danger to public safety. Rodriguez replied in September 2014, disputing the facts of some of his underlying convictions, denying any gang affiliation, and arguing that none of his prior convictions demonstrated a risk of current danger. Rodriguez disputed the argument that his immigration status and alcohol issues indicated a current risk. With respect to his record of violations in prison, he provided background details and explanations for his actions. Rodriguez finally provided information concerning his rehabilitation activities, and his physical and learning limitations.²

The People filed 44 exhibits for the hearing pertaining to Rodriguez’s criminal history and incarceration. Rodriguez filed an additional 17 exhibits. The court received all of the exhibits

² Rodriguez, acting independently from his appointed counsel, filed further documents with the court, concerning his health and post-release plans.

into evidence and heard argument by the parties on July 28, 2015; neither party presented live testimony.³ On October 22, 2015, the court issued its written ruling, finding Rodriguez unsuitable for resentencing.

Rodriguez appealed, asserting that the trial court had applied an improper standard to its determination of unreasonable risk, and that, even under the standard it had applied, finding that he posed an unreasonable risk was an abuse of discretion.⁴

³ Rodriguez objected to only one of the People's exhibits; the court overruled the objection. Rodriguez does not challenge that ruling on appeal.

⁴ Rodriguez's first argument, that the test for unreasonable dangerousness found in Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (§ 1170.18, subd. (c)), was the proper standard to be applied, was rejected by the California Supreme Court in *People v. Valencia* (2017) 3 Cal.5th 347 (*Valencia*). Because that decision was filed after briefing was completed in this Court, we asked the parties to file supplemental briefs. Both parties conceded that, so long as *Valencia* remains binding authority, the trial court had applied the proper test to determine unreasonable risk.

DISCUSSION

A. The Issue Before the Court Required the Exercise of Discretion

The Act's resentencing provisions, which Rodriguez invokes, provide that: "[A]n 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).)

"In exercising its discretion to deny resentencing, 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).) Thus, as the Legislative Analyst explained in the Voter Information Guide, '[i]n determining whether an offender poses [an unreasonable risk of danger to public safety], the court could consider *any evidence* it determines is relevant, such as the offender's criminal history, behavior in prison, and participation in rehabilitation programs.' (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) analysis of Prop. 36, by Legis. Analyst, p. 50, italics added.)" (*Valencia*, *supra*, 3 Cal.5th 354.)

Rodriguez asserted at the trial court, the trial court found, and Respondent concedes, that he established eligibility for resentencing, leaving only the question of whether he is properly considered an unreasonable risk of danger to public safety. We review that determination for abuse of discretion. Section 1170.126, subdivision (f), by its terms, confers discretion on trial courts to make the required determination. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303.) “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.’” [Citation.]” (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1264; see also *People v. Gibson* (2016) 2 Cal.App.5th 315, 325.)⁵

⁵ Rodriguez argues that the prosecution is required to prove dangerousness beyond a reasonable doubt, although he acknowledges *Kaulick*, *supra*, 215 Cal.App.4th at p. 1305 holds that the burden of proof is preponderance of the evidence. We agree with the court’s well-reasoned analysis in *Kaulick*, and see no reason to depart from that conclusion. Rodriguez also urges this court to apply the analysis in *In re Lawrence* (2008) 44 Cal.4th 1181, that the evaluation of unreasonable dangerousness required a showing of facts beyond the petitioner’s criminal record. We need not reach his argument that *Lawrence*, which addressed parole determinations, and required “some evidence” to support the decision, is binding here because, as discussed below, the record contains a significant amount of evidence, to which Rodriguez did not object, relating to matters other than his commitment offense and prior criminal record. The reasoned written analysis prepared by the trial court amply demonstrates

B. The Trial Court Based Its Determination on an Extensive Record

The trial court conducted a hearing on the issue of dangerousness, and received all evidence submitted concerning Rodriguez's prior history and his actions during incarceration. Neither party sought to call any witnesses.

The court, in analyzing the facts placed before it, focused its attention on whether Rodriguez posed a current risk to public safety, acknowledging that his criminal history was an immutable factor whose relevance was related to its impact on the determination of current risk of dangerousness. Rodriguez argues that the court abused its discretion in making that determination, by relying too heavily on past events, and by not adequately considering the showing he had made relating to his current status.

The trial court reviewed Rodriguez's criminal history, including juvenile offenses as early as 1976, and his adult criminal history beginning in 1979; his record of convictions continued until he was discharged from prison on parole in August 1993. The events leading to the commitment offense occurred shortly thereafter, in April 1994. The court also noted that Rodriguez had been deported, and then returned to the United States, at least four times.

The court then proceeded to review, in detail, Rodriguez's disciplinary history, and his rehabilitative efforts during his current period of incarceration. The court noted 28 rules

the court's consideration of all of the evidence, along with its recognition that its determination must be that of "current" dangerousness.

violations reports, 26 of which were classified as serious misconduct; eight were alcohol-related, and two were for mutual misconduct, the last of which took place in 2008. The most recent report of misconduct occurred in 2014, while this petition was pending.

The court also discussed Rodriguez's rehabilitative programming and work assignments. The court was aware that Rodriguez was removed from educational opportunities in 2009 due to a brain injury. The court also noted Rodriguez's on going participation in Narcotics Anonymous, and his participation in soccer and a recent fundraising event at the prison.

With respect to Rodriguez's classification score, the court acknowledged that it was currently 147, having risen from a score of 57 at the beginning of the commitment. Rodriguez's risk assessment score, at the time of the hearing, was Moderate, indicating, according to the court, "a moderate risk of incurring a felony arrest within three years of release to parole." The court considered Rodriguez's age, and the related potential that criminality was likely to decline, the fact that Rodriguez had several physical limitations, and his intent to return to Mexico if released.

The court concluded that Rodriguez had a lengthy history of multiple crimes, multiple deportations, and multiple parole violations; he had not been free from custody or supervision since 1979; and deportation had not prevented him from returning to the United States. Acknowledging that this history, to be relevant required a nexus to current dangerousness, the court found that Rodriguez's disciplinary history, elevated classification scores, level of programming, and lack of a viable post-release plan, provided that nexus. The court added: "The

inability to refrain from misconduct even after filing his petition in this case does not bode well for Petitioner's ability to refrain from further misconduct once he is beyond the watchful eye of the Court."

C. The Trial Court Did Not Abuse Its Discretion

The facts before the court supported its conclusion. Rodriguez argues that the trial court did not properly determine a nexus between the events in the record and his current circumstances. What Rodriguez does not do, however, is dispute the factual accuracy of the court's recitation of his criminal record. Similarly, with respect to his prison misconduct, Rodriguez argued that the court should have viewed those circumstances more favorably than the record demonstrated the prison authorities had and should have judged the weight to be given to credibility of the reports differently.

In essence, Rodriguez does not argue that the factual record does not support the matters relied on by the court, but rather that the court should have balanced those facts differently, and placed more weight on Rodriguez's efforts at rehabilitation and other actions while incarcerated, than on the record of his offenses and incarceration on which the court did rely. That the facts could be viewed through a different prism does not establish an abuse of discretion. The court was clear that it was not relying solely on the immutable facts of prior criminal convictions, but as well on behavior. The court also considered the positive factors relating to age, physical condition, rehabilitative efforts and release plans, but on balance found them outweighed by the other facts in the record.

This record does not demonstrate any abuse of discretion. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 [“Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance”].)

DISPOSITION

The order is affirmed.

ZELON, Acting P. J.

We concur:

SEGAL, J.

MENETREZ, J.*

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