Filed 11/19/18 P. v. Shaffer CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. CEDRIC SHAFFER, Defendant and Appellant.	B278446 (Los Angeles County Super. Ct. No. BA212995)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, 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, Senior Assistant Attorney General, Noah P. Hill and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Cedric Shaffer appeals from an order denying his petition to recall his sentence and to be resentenced under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126). (Statutory citations are to the Penal Code.) The trial court denied the petition because Shaffer's resentencing posed an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Commitment Offenses and Criminal History*

On September 4, 2001, a jury convicted Shaffer of evading a peace officer with a willful disregard for safety while fleeing (Veh. Code, § 2800.2, subd. (a)) and unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)). Police officers attempted to stop Shaffer while he was driving a car that was reported stolen. He led them on a high-speed chase, during which he drove through stop signs and red lights and drove on the wrong side of the road. The trial court found true the allegations Shaffer had nine prior convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12). (*People v. Shaffer* (Jan. 21, 2003, B154714) [nonpub. opn.].) It sentenced him to 25 years to life for evading a peace officer and imposed a concurrent sentence for unlawfully taking a vehicle.

Shaffer's earlier convictions resulted from two separate trials. On July 19, 1983, Shaffer was convicted of one count of burglary (§ 459) and two counts of robbery (§ 211) and sentenced to prison for six years. On May 19, 1987, Shaffer was convicted of one count of residential robbery (former § 213.5) and five counts of robbery (§ 211). Including enhancements for weapons and

prior serious felony convictions, his sentence for the 1987 conviction was 25 years and eight months.

B. *Petition to Recall Sentence*

Voters approved Proposition 36, which became effective November 7, 2012. On February 22, 2013 Shaffer filed his petition to recall his sentence for the commitment offenses. He claimed neither his commitment offenses nor his prior offenses were disqualifying offenses (§ 1170.126, subd. (e)(3); see §§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv)), and he posed no unreasonable risk to public safety.

The trial court issued an order to show cause why the petition should not be granted. The People filed an opposition on October 4, 2013. They did not challenge his eligibility for recall of sentence and resentencing but argued his criminal history plus his conduct in prison showed he posed an unreasonable risk to public safety and thus was unsuitable for resentencing. In reply, Shaffer submitted evidence of his suitability.

C. *The Trial Court's Ruling*

In its October 5, 2016 memorandum of decision, the trial court first reviewed the applicable law. It observed the People bore the burden of proving, by a preponderance of the evidence, that Shaffer would pose an unreasonable risk of danger to public safety if resentenced, citing *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301 and footnote 25. Additionally, under section 1170.126, subdivision (f), the court's determination as to dangerousness is a discretionary one. The court also rejected the claim that Proposition 47's definition of unreasonable risk to public safety applies to Proposition 36 resentencing

petitions. The court then turned to the factors set forth in section 1170.126, subdivision (f).

1. *Criminal History*

The court first noted that under *People v. Esparza* (2015) 242 Cal.App.4th 726, 746, a court may deny resentencing based on immutable facts such as criminal history only if those facts support the ultimate conclusion that the petitioner continues to pose an unreasonable to public safety. The relevant inquiry is whether the criminal and disciplinary history, considered in light of the whole record, continue to predict current dangerousness many years later.

Shaffer's criminal history began when he was 13 years old, with "four juvenile petitions denied, or dispositions unknown, for burglary, assault, petty theft, grand theft automobile, reckless driving, refusing to obey a traffic officer, attempted burglary, and prowling (1978-1979). [He] had three juvenile petitions sustained for taking a vehicle without the owner's consent (1978), burglary (1979), assault with a deadly weapon (1979), and temporarily taking a vessel without the owner's consent (1980)." In 1981, he pleaded guilty in adult court to burglary and robbery and was committed to the California Youth Authority for six years.

Shaffer's 1983 adult convictions arose out of five separate episodes in which he took vehicles and other property from victims. He was paroled in 1986 but rearrested two months later for the robberies that resulted in his 1987 convictions. Shaffer used guns in these robberies. He was paroled in late 2000. His commitment offenses were in January 28, 2001.

The court found that Shaffer had "engaged in consistent criminal activity since he was 13 years old. His 11 adult

convictions include first-degree burglary and six robberies in which he was armed with a firearm, both of which constitute violent and serious felony offenses. (§§ 667.5, subds. (c)(8), (9) & (21), 1192.7, subds. (c)(18) & (19)). The last two times [Shaffer] was given a 'second chance' he reoffended shortly after his release from incarceration." The court concluded his "lengthy criminal history demonstrates he has a propensity to engage in dangerous criminal behavior."

2. *Disciplinary History and Rehabilitative Programming*

The court began by observing that Shaffer's disciplinary history is another immutable factor on which the court can rely in assessing risk of dangerousness under section 1170.126, subdivision (g)(2). Shaffer received 12 RVRs—Rules Violation Reports—for serious rule violations during his current period of incarceration. (Cal. Code Regs., tit. 15, §§ 3312, subd. (a)(3), 3315, subd. (a); *In re Martinez* (2012) 210 Cal.App.4th 800, 805.) These "were for being out of bounds (2002), possession of inmate manufactured alcohol, commonly known as 'Pruno' (five separate incidents in 2003, and one in 2011), mutual combat (2003), refusing to provide a urinalysis (2004), and being under the influence of alcohol (2004, 2005, & 2011)." In particular, in February of 2011, a correctional officer responding to an argument found Shaffer intoxicated and in possession of alcohol. Shaffer "admitted he consumed alcohol and got into an altercation with his cell mate because he 'was not in a good mood due to his team losing the Super bowl.'" Four months later, a random search of Shaffer's cell turned up a four-gallon bag of Pruno, which earned Shaffer another Rules Violation Reports.

Shaffer also received a number of "counseling chronos"—custodial counseling chronology reports—for less serious rules violations. (Cal. Code Regs., tit. 15, §§ 3000, 3312, subd. (a)(2); *In re Stoneroad* (2013) 215 Cal.App.4th 596, 606, fn. 4.) These included failure to report to his assigned cell (2000), failure to report for a scheduled law library visit (2003), altering state property (2006), and disobeying a direct order (2009).

While the court found Shaffer's custodial counseling chronology reports and older Rules Violation Reports were "too remote to be dispositive of his current dangerousness, his 2011 RVRs raise cause for concern." These involved possession and use of alcohol. Although Shaffer's "conduct has improved in recent years, the 2011 RVRs evince his willingness to engage in serious rule breaking behavior despite having received a substantial criminal sanction. [Citation.] They also reflect [Shaffer's] ongoing struggle with substance abuse. The court is concerned that [Shaffer] will relapse and commit a dangerous crime, consistent with his pattern of behavior since he was 13 years old." The court found Shaffer's "institutional misconduct paints the picture that he is incapable of following institutional rules and, by inference, societal rules, rendering him an unreasonable risk of danger to public safety."

The court noted Shaffer "participated in educational training in plumbing in 2007 and 2008 with positive feedback" and "also received positive work reports in food service between 2013 and 2016, along with laudatory ch[r]onos for his work with the Culinary staff (2014), and participation in Alcoholics Anonymous (2014 & 2015)."

The court also acknowledged a report prepared by Rahn Y. Minagawa, Ph.D., a clinical and forensic psychologist, at Shaffer's

request. Minagawa also testified at the hearing. Minagawa reported that Shaffer "'has done very well in terms of his current commitment as evidenced by the laudatory chronos that reflect his participation in the AA community, and based on his education progress reports and work supervisor report.'" The court found "Dr. Minagawa's opinion to be overly generous, as [Shaffer's] rehabilitative programming is quite sparse, and only began in 2013 after the voters approved Proposition 36. . . . Of particular concern is [Shaffer's] lack of consistent substance abuse programming, in conjunction with his nine alcohol-related RVRs. [Shaffer's] limited rehabilitative programming is not supportive of his suitability for resentencing."

3. *Other Factors*

The court reviewed Minagawa's report and testimony regarding Shaffer's past and present mental state. It noted the doctor administered only one risk assessment test, the Historical Clinical Risk Management test (HCR-20), while "[t]ypically, court-appointed psychologists in resentencing matters utilize a number of risk assessment methods." Shaffer "scored in the low range of future violence based on the HCR-20 risk factors."

Minagawa diagnosed Shaffer with Alcohol Use Disorder in sustained remission in a controlled setting. The doctor believed Shaffer's criminal behavior was the result of his youth and addiction. Because Shaffer was now older, he would be better able to resist drug use and have greater insight into the consequences of his actions. Minagawa concluded that Shaffer "'demonstrated a remarkable change over the past five years by abstaining from alcohol use, not receiving any further [RVRs] or counseling chronos, and has become active in the AA community

as a way of maintaining his sobriety and ensuring his recovery. He has maintained relations with family members throughout his incarceration, and they report that they will support him once he is released. [Shaffer] is not the same person that he was when he was committed to prison in 2001, nor does he face a prospect of being homeless or without support upon his release." The doctor opined that Shaffer "does not pose an unreasonable risk of danger to public safety if resentenced'."

While acknowledging that "Dr. Minagawa's psychological evaluation [was] generally supportive of [Shaffer's] resentencing," the court found his conclusions did "not dictate the court's suitability decision." It found "Dr. Minagawa's opinions are not sufficient to override the court's concerns that [Shaffer] will relapse and engage in dangerous criminal behavior if resentenced."

The court also agreed with Minagawa that Shaffer's age of 52 reduced the likelihood of recidivism. It added, however, that Shaffer was healthy with no medical conditions, and his "age did not inhibit him from committing RVRs as recently as 2011, which evinces his willingness to engage in serious rule breaking behavior." "Dr. Minagawa specifically testified you never age out of being an alcoholic," so Shaffer's "age does not necessarily diminish his current dangerousness."

4. *Release Plans*

The court recognized that Shaffer had release plans in place. He had "been accepted into the Bible Tabernacle, a six-month transition program," as well as "been offered placement at the Los Angeles Center for Alcohol and Drug Abuse, which offers 'outpatient and residential levels of care and treatment—for

clients with substance use and/or co-occurring disorders.'" Additionally, he could obtain job training and support through "Homeboy Industries." Shaffer also had familial support from his sisters, who offered to help him with a job and a place to live.

Nonetheless, the court found Shaffer's "prospects of earning an honest living are limited, as it is very difficult for convicted felons to secure a job. Also concerning is that [Shaffer] has not acquired many marketable skills while incarcerated, as his only training was in plumbing in 2007 and 2008. Indeed, Dr. Minagawa expressly opined [Shaffer] 'never really was out long enough to establish any type of work skills . . . .'" The court found Shaffer's "positive work reports and acceptance into various transitional programs is encouraging, but the totality of his release plans are not supportive of his suitability for resentencing."

5. *Conclusion*

In conclusion, the court observed that Shaffer "has been involved in serious criminality since he was 13 years old. He has not lasted more than two months in the free world as an adult without reoffending." That Shaffer "received nine RVRs for being under the influence or in possession of alcohol, as recently as 2011, establishes [Shaffer] is not genuinely committed to maintaining his sobriety. Also of concern is that [Shaffer's] excuse for the 2011 altercation with his cellmate was anger over the result of the super bowl. In the free world, [Shaffer] will experience significant stressors that go well beyond petty issues like a sporting match." The court found the totality of the circumstances demonstrated that resentencing Shaffer would

pose an unreasonable risk of danger to public safety. For that reason, the court denied his petition.

DISCUSSION

A. *Governing Law and Standard of Review*

Proposition 36 provides that, when a defendant's current offense is not a serious or violent felony and the defendant is not otherwise disqualified from relief, the defendant will be sentenced as a second strike offender rather than receiving an indeterminate life sentence as a third strike offender. (*People v. Valencia* (2017) 3 Cal.5th 347, 353-354 (*Valencia*).) The court is not to resentence inmates, however, if resentencing would pose an unreasonable risk of danger to public safety. (*People v. Johnson* (2015) 61 Cal.4th 674, 680-681.)

Proposition 36 did not define the term "unreasonable risk of danger to public safety." (*Valencia*, *supra*, 3 Cal.5th at p. 350.) Under Proposition 36, 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 second strike offender unless the court, in its discretion decides that resentencing the petitioner would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) In making this decision, the trial court has broad discretion to consider an inmate's criminal history and record while incarcerated. The court also can consider any other evidence the court decides is relevant. (§ 1170.126, subd. (g)(1)-(3); *Valencia*, *supra*, 3 Cal.5th at p. 354.)

We review the denial of a Proposition 36 petition on the ground of future dangerousness under the abuse of discretion standard. (See § 1170.126, subd. (f); *People v. Superior Court*

(Kaulick), *supra*, 215 Cal.App.4th at p. 1303.) Under this standard, we consider whether the ruling exceeds the bounds of reason or is arbitrary or capricious. This standard involves abundant deference to the trial court's rulings. (*People v. Williams* (2018) 19 Cal.App.5th 1057, 1062.)

However, the People must prove the facts upon which the court's finding of unreasonable risk is based by a preponderance of the evidence. We review this finding for substantial evidence. (*People v. Frierson* (2017) 4 Cal.5th 225, 239.) In doing so, we view the record in the light most favorable to those findings to determine whether the record contains substantial evidence from which the court could have made those findings. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.) We presume in support of the findings every fact reasonably inferable from the evidence. (*Ibid*.) If the circumstances reasonably justify the trial court's findings, we will not reverse simply because the circumstances might also reasonably be reconciled with a contrary finding. We neither reweigh evidence nor reevaluate witness credibility. (*Ibid*.)

B. *Shaffer Withdrew His Proposition 47 Argument*

In his opening brief, Shaffer argued first, and at length, that Proposition 47's definition of unreasonable risk of danger to public safety applies to Proposition 36 resentencing petitions. Our Supreme Court then decided *Valencia*, which invalidated this argument. (*Valencia*, *supra*, 3 Cal.5th at pp. 356-375.) Shaffer's reply brief withdrew this argument.

C. *Proposition 36 Is Not Void For Vagueness*

Shaffer's second argument is Proposition 36 is unconstitutional because its phrase "unreasonable risk of danger to public safety" is void for vagueness. It is not.

The Supreme Court in *Valencia* rejected this vagueness argument by noting that, "[f]ollowing the enactment of Proposition 36, 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. (See, e.g., *People v. Garcia* (2014) 230 Cal.App.4th 763, 769-770 [citation]; *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075 [citation] ['Surely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would pose an unreasonable risk of harm to the public safety'].)" (*Valencia*, *supra*, 3 Cal.5th at pp. 354-355.)

Shaffer revamps the vagueness charge by citing a recent decision by the Supreme Court of the United States in *Johnson v. U.S.* (2015) ___ U.S. ___ [135 S.Ct. at p. 2551]. In *Johnson*, the Supreme Court of the United States held that the "residual clause" of the Armed Career Criminal Act was unconstitutionally vague. (*Id*. at pp. ___, ___ [135 S.Ct. at pp. 2555, 2557].) *Johnson*, however, was an explicitly narrow ruling concerning only an odd statute. *Johnson* does not apply to a conventional statute like Proposition 36.

One must understand the details of the *Johnson* holding to grasp its narrow scope. The statute at issue was the Armed Career Criminal Act, which sharply increased a particular kind of federal criminal penalty. Federal law prohibits felons from possessing a gun transported in interstate commerce. (18 U.S.C.

§ 922, subd. (c).) The Armed Career Criminal Act increased penalties for those convicted under this felon-in-possession law who had suffered three or more previous convictions for a "violent felony." (18 U.S.C. § 924, subd. (e)(2)(B).) The Armed Career Criminal Act defined "violent felony" as follows. (We italicize the final clause, which the *Johnson* opinion called the "residual clause" and which the opinion invalidated as unconstitutionally vague.)

"(B) [T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

"(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

"*(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .*" (18 U.S.C. § 924, subd. (e)(2)(B).)

The problem *Johnson* perceived was that the residual clause defines "violent felony" to include "burglary" and "extortion," and then adds the phrase "or otherwise involves conduct that presents a serious potential risk of physical injury to another." (*Johnson v. U.S.*, *supra*, ___ U.S. ___ [135 S.Ct. at p. 2557].) Some burglaries and extortions involve a risk of injury, but many do not. The fatal defect in this statute, ruled *Johnson*, was that it linked the phrase "serious potential risk" to a confusing list of examples. This linkage created fatal vagueness. The *Johnson* decision illustrated the problem with the following explanatory example. The italics are in the original: "'The

phrase "shades of red," standing alone, does not generate confusion or unpredictability; but the phrase "fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red" assuredly does so.'" (*Johnson v. U.S.*, *supra*, ___ U.S. ___ [135 S.Ct. at p. 2561].)

This *Johnson* holding does not govern this case about Proposition 36 for three reasons.

First, the constitutional guarantee of due process bars the Government from taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. (*Johnson v. U.S.*, *supra*, ___ U.S. ___ [135 S.Ct. at p. 2556].) Proposition 36, however, does not take away liberty. It grants liberty by making sentencing reductions possible. Shaffer cites no precedent for applying the due process ban on vagueness to laws that can operate only to an inmate's advantage.

Second, the conventional structure of Proposition 36 avoids the problem of categorical abstraction that doomed the unusual residual clause in *Johnson*. The statute in *Johnson* demanded elaborate abstraction. (See *Johnson v. U.S.*, *supra*, ___ U.S. ___ [135 S.Ct. at p. 2557] ["Under the categorical approach, a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.' . . . Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury. . . . We are convinced that the indeterminacy of the wide-

ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges."] [citations and quotation marks omitted].) In contrast, Proposition 36 focuses entirely on the concrete: here, on Shaffer as the "individual offender" and on the actions he has committed "on a particular occasion. . . ." (*Ibid*.) Proposition 36 involves none of the abstraction that the *Johnson* decision identified in the residual clause.

Third, the *Johnson* opinion expressly emphasized the narrowness of its ruling in a way that preserves Proposition 36:

"The Government and the dissent next point out that dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,' suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt. . . . *Not at all.* Almost none of the cited laws links a phrase such as 'substantial risk' to a confusing list of examples. 'The phrase "shades of red," standing alone, does not generate confusion or unpredictability; but the phrase "fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so.' . . . More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion.* As a general matter, *we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct*; 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree,' *Nash v. United States*, 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232 (1913). The residual clause, however, requires application of the 'serious potential risk' standard to an idealized ordinary case of

the crime. Because 'the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect,' this abstract inquiry offers significantly less predictability than one '[t]hat deals with the actual, not with an imaginary condition other than the facts.'" (*Johnson v. U.S.*, *supra*, ___ U.S. ___ [135 S.Ct. at p. 2561], italics added.)

This analysis excludes Proposition 36, which deals only with "real-world conduct." No language in Proposition 36 links an abstract phrase with a confusing set of examples. These features of Proposition 36 exclude it from *Johnson*'s reach.

We therefore hold Proposition 36's term "unreasonable risk of danger to public safety" is not void for vagueness.

D. *The Trial Court Did Not Abuse Its Discretion in Denying Shaffer's Petition on the Ground That Resentencing Him Would Pose an Unreasonable Risk of Danger to Public Safety*

1. *Criminal History*

Shaffer first argues that his criminal history "does not brand him as a current risk of danger to public safety." While acknowledging that his criminal history is lengthy and began when he was very young, Shaffer points out that it "contains few acts of violence," and was based on acts occurring when he was quite young. He "entered prison when he barely was out of his teens and with a pernicious untreated drug addiction. Today, he is a 52-year-old man who has spent nearly his entire adult life in prison. With the help of A.A., he has overcome his substance addictions. Without question, he no longer is the young, drug-addicted man who entered prison." For this reason, Shaffer

argues, the trial court abused its discretion in relying on his criminal history to deny his petition for resentencing.

The trial court recognized, however, that it could not base its decision to deny resentencing on such immutable facts as Shaffer's criminal history alone but rather must determine whether his criminal history, when considered in light of other facts in the record, shows he continues to pose an unreasonable risk to public safety. (See *People v. Esparza*, *supra*, 242 Cal.App.4th at p. 746.) As to Shaffer's criminal history, the court found Shaffer had "engaged in consistent criminal activity since he was 13 years old," including violent and serious felonies as an adult. After being incarcerated and then "given a 'second chance' he reoffended shortly after his release from incarceration."

Substantial evidence supports the trial court's finding that Shaffer's "lengthy criminal history demonstrates he has a propensity to engage in dangerous criminal behavior." As the People point out, Shaffer routinely used guns in his crimes, and has yet to spend even one year of his adult life outside the supervision of probation, parole, jail, or the California Department of Corrections and Rehabilitation.

As the trial court observed, Shaffer's misconduct continued during his current incarceration. Between 2002 and 2011, officials reported Shaffer for 12 rule violations. There also were many custodial counseling chronology reports. The trial court aptly noted the fact that Shaffer "received nine RVRs for being under the influence or in possession of alcohol, as recently as 2011, establishes [Shaffer] is not genuinely committed to maintaining his sobriety. Also of concern is that [Shaffer's] excuse for the 2011 altercation with his cellmate was anger over the result of the super bowl. In the free world, [Shaffer] will

experience significant stressors that go well beyond petty issues like a sporting match."

2. *Rehabilitation*

Shaffer points to his participation in AA and five years of sobriety as evidence he no longer poses an unreasonable risk of danger to public safety. He claims that the trial court made an arbitrary finding that he "is, in essence, a permanent risk of danger because of his prior alcohol addiction." He argues that the trial court's conclusion that his sobriety and participation in AA was insufficient to overcome his history of substance abuse and related criminal and institutional misconduct thus constituted an abuse of discretion.

Shaffer's recent sobriety and participation in AA are positive factors, but he has not been clean and sober for a substantial time compared to the duration of his abuse. (See *In re Morganti* (2012) 204 Cal.App.4th 904, 928.) Additionally, Shaffer's substance abuse continued well into his current period of incarceration and was the cause of his most recent rules violations in 2011. The trial court also observed Shaffer's participation in AA "only began in 2013 after the voters approved Proposition 36," suggesting the impetus for his participation was release from prison and not a commitment to sobriety.

The trial court did not find that Shaffer's alcohol abuse was an immutable factor that made him a permanent risk of danger. Rather, it found that Shaffer's five years of sobriety and two years of participation in a substance abuse program did not overcome his years of substance abuse and related criminal conduct and disciplinary problems while incarcerated. Substantial evidence supports the trial court's finding.

3. *Employment*

Finally, Shaffer claims the trial court improperly found that he posed an unreasonable risk of danger to public safety because "it is very difficult for convicted felons to secure a job." He argues that "[b]ecause this is an immutable fact [Shaffer] can never change, the court's logic meant [he] will never be suitable for [resentencing]." He claims that such a finding is contrary to the law and thus an abuse of discretion. (See *People v. Patterson* (2017) 2 Cal.5th 885, 894 [discretion abused when trial court's decision based on an error of law].)

While Shaffer's being a convicted felon is an immutable fact, his lack of job skills is not. He participated in some job training while incarcerated, but there was no evidence his participation provided him with marketable skills. Shaffer's witness Dr. Minagawa acknowledged that Shaffer "'never really was out long enough to establish any type of work skills.'" The trial court found Shaffer's "positive work reports and acceptance into various transitional programs is encouraging, but the totality of his release plans are not supportive of his suitability for resentencing."

While Shaffer submitted evidence of his acceptance into programs that will provide him with job training, the evidence to which he points does not establish that he will be able to find a job and support himself if released. A letter from Fred Brown Recovery Services merely thanked Shaffer for his interest in their program and recommended that he contact his parole or probation officer for funding and a referral. L.A. CADA New Vision Program provided Shaffer with an acceptance letter into its residential substance abuse treatment program. It mentions "employment readiness" but no specific job training programs.

Homeboy Industries offered Shaffer assistance in locating employment. While these letters show Shaffer has taken steps toward job training and employment, Shaffer does not show he has a concrete and realistic plan for job training and employment that would support a finding he would not pose an unreasonable risk of danger to public safety if resentenced. (Cf. *In re Stoneroad*, *supra*, 215 Cal.App.4th at pp. 614, 631 [abuse of discretion in denying parole where petitioner had complied with directive at prior hearing to "[l]earn a trade" and was confident his certification as a printer would enable him to obtain employment after completion of a live-in substance abuse program]; *In re Juarez* (2010) 182 Cal.App.4th 1316, 1320-1321 [abuse of discretion in denying parole where inmate "had been a highly respected worker in the prison's optical lab for at least a decade, become a licensed optician, . . . had a supportive family and realistic parole plans, and multiple job offers as well"].) Again, substantial evidence supports the trial court's finding on the issue.

4. *Conclusion*

The trial court weighed the relevant factors. It considered Shaffer's evidence, giving it the weight the court believed it deserved. It found that, on balance, the evidence supported a finding Shaffer still posed an unreasonable risk of danger to public safety. Under the abuse of discretion standard, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. We are not authorized to substitute our judgment for that of the trial court. (*In re Woodham* (2001) 95 Cal.App.4th 438, 443.) There was no abuse of discretion in the manner in which the court balanced the

positive and negative factors. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 [when the record demonstrates the trial court balanced the relevant facts and reached an impartial decision in conformity with the law, we affirm the trial court's ruling, even if we might have ruled differently in the first instance].)

DISPOSITION

The order is affirmed.

WILEY, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

---

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