Filed 11/22/16 P. v. Pinkston 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. STEVEN TERROSE PINKSTON, Defendant and Appellant.	B268633 (Los Angeles County Super. Ct. No. TA062346)

APPEAL from an order of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed.

Arielle Bases, 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, Noah Hill and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Petitioner Steven Pinkston was convicted of willful evasion of a police officer and sentenced to 25 years to life under the Three Strikes law. After California voters passed the Three Strikes Reform Act (Proposition 36), Pinkston petitioned the trial court for resentencing under Penal Code[1] section 1170.126. The court found Pinkston was eligible for resentencing based on his current and prior convictions, but denied his petition, finding that resentencing him would "pose an unreasonable risk of danger to public safety."

After Pinkston filed his petition, but before it was ruled on by the court, California voters passed the Safe Neighborhoods and Schools Act (Proposition 47), which reduces certain felony theft and drug offenses to misdemeanors and permits past offenders to petition for resentencing of their qualifying felony offenses to misdemeanors. Like Proposition 36, Proposition 47 provides the trial court discretion to deny a petition for resentencing if the court finds resentencing the petitioner would pose an unreasonable risk of danger to public safety. However, whereas Proposition 36 does not define the phrase "unreasonable risk of danger to public safety," Proposition 47 defines it as follows: an "unreasonable risk that the petitioner will commit a new violent felony within the meaning of [section 667, subdivision (e)(2)(C)(iv)]," which is commonly known as a "super strike." Pinkston contends the voters intended to redefine the phrase "unreasonable risk of danger to public safety" as used in Proposition 36 when it enacted Proposition 47, and he argues the court erred by failing to apply that definition when it denied his petition. Pinkston also contends the court abused its discretion by finding that resentencing him would pose an unreasonable

---

1 All undesignated statutory references are to the Penal Code.

risk of danger to public safety. We disagree with both of Pinkston's contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Pinkston's third strike

In September 2001, Pinkston drove his friend to a Target store in Culver City. Pinkston waited inside his car in the parking lot while his friend went inside the store, where she tried to pass a counterfeit check. When police arrived, Pinkston drove out of the parking lot. The police followed Pinkston, stopped him, and ordered him to get out of his car. Pinkston refused and drove off, leading the police on a high-speed chase through city streets. At times, Pinkston drove at speeds of 100 miles per hour. Pinkston was not apprehended and a warrant for his arrest was issued.

In October 2001, Los Angeles Sheriff's deputies stopped Pinkston while he was driving his car. When the deputies started to get out of their car, Pinkston drove off, leading them on a high-speed chase through residential streets. After failing to stop at numerous stop signs and lights, Pinkston crashed his car into a wall and tried to evade the deputies on foot before he was arrested.

In March 2002, Pinkston was convicted of misdemeanor evading arrest (Veh. Code, § 2800.1, subd. (a)) and felony willful evasion of a police officer (Veh. Code, § 2800.2, subd. (a)). The trial court found Pinkston had suffered two prior felony convictions for manslaughter (§ 192, subd. (a)) and making criminal threats (§ 422), both serious or violent felonies within the meaning of the Three Strikes Law (§§ 667 and 1170.12). The court sentenced Pinkston to a term of 25 years to life in state prison for the felony willful evasion count and a concurrent term of 307 days in prison for the misdemeanor evading arrest count. The court imposed, but stayed pursuant to section 654, three

one-year prior prison term enhancements (§ 667.5, subd. (b)). The court awarded Pinkston 307 days of custody conduct credit.

2. Proposition 36 proceedings

In November 2012, Pinkston filed a petition for resentencing under Proposition 36. In July 2013, the People filed an opposition to Pinkston's petition. The People acknowledged that Pinkston was eligible for resentencing based on his past and current strike offenses, but asserted the court should deny Pinkston's petition. In March 2014, Pinkston filed a reply to the People's opposition. Later in March 2014, the People filed a revised opposition, arguing the court should deny the petition because resentencing Pinkston would pose an unreasonable risk of danger to public safety based on his criminal history and behavior in prison. In July 2014, Pinkston filed a supplemental reply.

On July 23, 2015, the court conducted a hearing on Pinkston's petition. Both parties submitted evidence concerning Pinkston's prior convictions and his conduct in prison since he was convicted of felony willful evasion of a police officer in 2002. In addition, Pinkston submitted a written report drafted by Richard Subia, the former director of the California Department of Corrections and Rehabilitation's (CDCR) Division of Adult Institutions, who opined that, based on Pinkston's criminal history and behavior in custody, resentencing Pinkston as a two-strike offender would not pose an unreasonable risk of danger to public safety. Pinkston also presented two live witnesses: Subia and Pinkston's mother, who testified that Pinkston would live with and help care for her if he were to be released.

On September 24, 2015, the court denied Pinkston's petition, finding that resentencing him would pose an unreasonable risk of danger to public safety. Pinkston filed a timely appeal.

DISCUSSION

1. Proposition 47 Did Not Change Proposition 36's Definition of Dangerousness

Pinkston's claim that Proposition 47 redefined the meaning of "unreasonable risk of danger to public safety" as that phrase is used in Proposition 36 requires us to interpret both acts. Accordingly, we independently review Pinkston's claim, applying principles of statutory interpretation. (See *People v. Bankers Ins. Co.* (2016) 247 Cal.App.4th 1004, 1007.)

" 'In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, "we first look to the language of the statute, giving the words their ordinary meaning." [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.] In other words, 'our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.' [Citation.]" (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) If the act's language is not ambiguous, the plain meaning of that language controls, unless it would lead to absurd results the electorate could not have intended. (*People v. Birkett* (1999) 21 Cal.4th 226, 231.) In addition, while courts generally are prohibited from rewriting an act's unambiguous language, a word that has been erroneously used may be subject to judicial correction in order to best carry out the intent of the adopting body. (*People v. Skinner* (1985) 39 Cal.3d 765, 775 (*Skinner*).)

1.1. Proposition 36

"Prior to its amendment by [Proposition 36], the Three Strikes law required that a defendant who had two or more prior

convictions of violent or serious felonies receive a third strike sentence of a minimum of 25 years to life for any current felony conviction, even if the current offense was neither serious nor violent. (Former §§ 667, subds. (d), (e)(2)(A) & 1170.12, subds. (b), (c)(2)(A).) [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. [Citations.]" (*People v. Johnson* (2015) 61 Cal.4th 674, 680–681.)

"[Proposition 36] also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.)

A court may consider the following factors in determining whether the petitioner would pose an unreasonable risk of danger to public safety: "(1) The petitioner'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) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any 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).)

Proposition 36 went into effect on November 7, 2012. (See *People v. Brown* (2014) 230 Cal.App.4th 1502, 1507.)

1.2. Proposition 47

California voters passed Proposition 47 on November 4, 2014, and the act went into effect on November 5, 2014. (See *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) The stated "[p]urpose and [i]ntent" of Proposition 47 include, among other things, "[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes"; "[a]uthoriz[ing] consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors"; and "[r]equir[ing] a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subd. (3), (4) & (5), p. 70.)

Proposition 47 created a new resentencing provision, section 1170.18, under which "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense may petition for a recall of sentence" and request resentencing. (§ 1170.18, subd. (a).)

"If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. In exercising its discretion, the court may consider all of the following: [¶] (1) The petitioner'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) The petitioner's disciplinary record and record of rehabilitation while incarcerated. [¶] (3) Any 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." (§ 1170.18, subd. (b).)

In contrast to Proposition 36, which does not define the phrase "unreasonable risk of danger to public safety," Proposition 47 provides that "[a]s used throughout this Code, '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, subd. (e)(2)(C)(iv)]." (§ 1170.18, subd. (c).) Section 667, subdivision (e)(2)(C)(iv) lists the following felonies, commonly known as "super strike" offenses: "(I) A 'sexually violent offense'. . . . [¶] (II) Oral copulation . . . as defined by Section 288a, sodomy . . . as defined by Section 286, or sexual penetration . . . as defined by Section 289. [¶] (III) A lewd or lascivious act . . . in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense . . . . [¶] (V) Solicitation to commit murder . . . . [¶] (VI) Assault with a machine gun on a peace officer or firefighter . . . . [¶] (VII) Possession of a weapon of mass destruction . . . . [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

1.3. Proposition 47's Definition of an "Unreasonable Risk of Danger to Public Safety" Does Not Apply to Proposition 36

Under Proposition 36's resentencing provision, a petitioner had two years from the date of the act's enactment on November 7, 2012, to file a petition for resentencing, unless he or she made a showing of "good cause," at which point a petition could be filed beyond the two-year window. (§ 1170.126,

subd. (b).) Proposition 47 went into effect two days before Proposition 36's two-year window for filing a petition for resentencing closed. Nevertheless, Pinkston contends Proposition 47's more narrow definition of "unreasonable risk of danger to public safety" controls the meaning of that phrase as used in Proposition 36.

Pinkston points out that Proposition 47 states, "[*a*]*s used throughout this Code*, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony." (§ 1170.18, subd. (c), italics added.) He argues that by using the phrase "[a]s used throughout *this Code*," the voters intended to import Proposition 47's definition of "unreasonable risk of danger to public safety" into the entire Penal Code, including into section 1170.126, subdivision (f).

This issue has been considered by several appellate courts, and it currently is pending before the California Supreme Court. (See, e.g., *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825; *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted February 18, 2015, S223676; *People v. Lopez* (2015) 236 Cal.App.4th 518, review granted July 15, 2015, S227028; *People v. Florez* (2016) 245 Cal.App.4th 1176, review granted June 8, 2016, S234168; *People v. Myers* (2016) 245 Cal.App.4th 794, review granted May 25, 2016, S233937; *People v. Garcia* (2016) 244 Cal.App.4th 224, review granted April 13, 2016, S232679.) Consistent with the majority of courts that have considered this issue, we conclude Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to Proposition 36.

"We recognize the basic principle of statutory and constitutional construction which mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language. [Citation.] That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting

body. [Citation.]" (*Skinner*, *supra*, 39 Cal.3d at p. 775.) We look to the purpose of the section and the electorate's intent in adopting that section to determine whether the use of a particular word is drafting error. (*Id.* at p. 776.)

As we shall explain, we conclude the voters erroneously used the word "Code" in section 1170.18, subdivision (c), instead of the word "Act," and that this error may be corrected by the courts. Specifically, we find nothing in the text of Proposition 47 or that act's legislative materials to suggest the voters intended to modify or otherwise affect Proposition 36, and we believe applying Proposition 47's dangerousness definition to Proposition 36 would lead to illogical and unintended consequences. Thus, we hold Proposition 47's definition of "unreasonable risk of danger to public safety" does not alter the definition of that phrase as used in Proposition 36.

Nothing in Proposition 47's statutory language indicates the definition of "unreasonable risk of danger to public safety" would extend to provisions of the Penal Code outside Proposition 47. To the contrary, section 1170.18 expressly limits Proposition 47's application, stating, "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments *in any case not falling within the purview of this act*." (§ 1170.18, subd. (n), italics added.) By applying Proposition 47's more narrow definition of dangerousness to a petition filed under Proposition 36, a court may diminish the finality of a judgment in a case falling outside the purview of Proposition 47. For example, by applying Proposition 47's more narrow definition of dangerousness to a resentencing petition filed under Proposition 36, a court could not deny the petition unless it finds there is an unreasonable risk the petitioner will commit a "super strike," even if the court believes the petitioner would otherwise pose an unreasonable risk of danger to public safety.

Likewise, Proposition 47's ballot materials do not state, let alone indicate, that the act would have an effect on

Proposition 36. (Voter Information Guide, *supra*, pp. 34–39.) The ballot materials do not state Proposition 47 would have any effect on the procedure a court must follow when reviewing a resentencing petition filed under Proposition 36. To the contrary, those materials emphasize that Proposition 47's resentencing provisions would affect only those persons serving sentences for specified nonserious, nonviolent property or drug crimes, a class of crimes distinct from, and less serious than, those targeted by Proposition 36. Nowhere do those materials suggest that Proposition 47's provisions would also apply to the more serious and violent offenses that are the focus of Proposition 36.

In addition, Propositions 36 and 47 serve different purposes. Proposition 36 is designed to reduce penalties for individuals with two or more prior serious or violent felony convictions, whose current convictions are also felonies. By contrast, Proposition 47 is intended to reduce penalties for low-level, nonserious and nonviolent offenses. (Voter Information Guide, *supra*, p. 35.)

The wording of section 1170.18, subdivision (c), is also inconsistent with an intent to apply that subdivision throughout the entire Penal Code. Subdivision (c) refers to the "petitioner," a term that is used throughout Proposition 47 to refer to persons petitioning under "this section" or "this act." (See § 1170.18, subds. (a), (c), (e), (f), (i), (j), (m), (n), & (o).) Accordingly, subdivision (c)'s use of the term "petitioner" suggests that the term is limited to individuals petitioning under that particular act—i.e., Proposition 47. (§ 1170.18, sub. (c).)

Finally, the timing of Proposition 47's enactment is inconsistent with an intent to affect the terms of Proposition 36. Proposition 36 required defendants to file petitions within two years from the date of its enactment absent a showing of good cause for a late petition. (§ 1170.126, subd. (b).) As noted, Proposition 47 went into effect only two days before the two-year

period for filing Proposition 36 petitions expired. A rational voter would not have understood Proposition 47 to change the rules for reviewing Proposition 36 petitions when the period for filing such petitions had nearly expired and most of the filed petitions had already been adjudicated.

For these reasons, we conclude the electorate's use of the word "Code" in section 1170.18, subdivision (c), is a drafting error that must be judicially corrected to read "Act." When read using the word "Act," Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to Proposition 36.

2. The Trial Court Properly Found Resentencing Pinkston Would Pose an Unreasonable Risk of Danger to Public Safety

Pinkston contends the court erred in finding that resentencing him as a two-strike offender would pose an unreasonable risk of danger to public safety because that finding is not supported by the record. We disagree and conclude the court did not abuse its discretion in denying Pinkston's resentencing petition.

2.1. Relevant facts

2.1.1. Criminal history

Pinkston has an extensive criminal history. In 1981, when he was a teenager, Pinkston committed a robbery, and the following year he committed an attempted robbery. In 1984, the juvenile court sustained a petition alleging Pinkston received stolen property. In 1986, Pinkston was convicted of possessing rock cocaine, and in 1987, he was convicted of possessing narcotics with the intent to sell. In 1989, Pinkston was convicted of being a felon in possession of a firearm. In 1992, Pinkston pled guilty to voluntary manslaughter, his first strike offense, and he was sentenced to six years in prison. In 1992, Pinkston was also convicted of assault with a deadly weapon, and in 1998, he pled

guilty to making criminal threats, his second strike offense. Finally, in 2002, Pinkston was convicted of the underlying offense of willfully evading a police officer, his third strike.

During the incident that led to Pinkston's 1992 conviction for voluntary manslaughter, Pinkston and his co-participant went to the home of the 65 year-old victim. When the victim's housekeeper let Pinkston's co-participant into the house, the co-participant took the victim upstairs and shot him in the back of the head, killing him. A pager registered in Pinkston's name was found inside the house. The police also recovered from Pinkston's house the gun that was used in the murder. Pinkston claimed that someone had stolen the gun from his car before the homicide, and that it was not returned to him until after the crime was committed.

During the incident that led to his 1998 criminal threats conviction, Pinkston and another co-participant, both of whom were armed, approached the victim and the victim's friend to demand the victim return money Pinkston had given him in exchange for a car part. Pinkston's co-participant struck the victim's friend on the head with a gun, and Pinkston threatened to kill the victim if he did not return Pinkston's money. The victim then jumped off his balcony, breaking bones in both of his heels.

2.1.2. Misconduct in prison

Since being incarcerated in 2002, Pinkston has received nine CDCR Rules Violation Reports. Five of the reports cited Pinkston for fighting with other inmates in July 2004, April 2008, April 2010, March 2012, and June 2012. Pinkston claimed that he did not initiate many of these fights and that he frequently was targeted by gang members because he refused to participate in gang activity while in prison. However, the reports for several of the fights found that Pinkston had engaged in mutual combat, meaning the inmates were committing battery on each other and

prison officials were unable to determine who instigated the fights.

After an incident in September 2005, Pinkston was found guilty of committing battery on a peace officer. Pinkston had refused to remove his hands from a food port. When the officer serving Pinkston's food tried to shut the port, the port struck the officer's hand, cutting the hand and causing the officer pain.

In December 2012, Pinkston was placed in solitary confinement after he was cited for threatening the safety of a correctional officer assigned to inspect his cell. Pinkston had filed an appeal using the prison's internal appeal process. In his appeal, Pinkston stated, " 'Remove me from the block, put a copy of the [appeal] in C/O Gutierrez personal file. It will save his life.' " In July 2014, Pinkston was cited for willfully resisting, delaying, or obstructing a peace officer after he refused to accept a cell mate.

2.1.3. Participation in prison programs

In June 2010, Pinkston completed a 13-week group therapy program focused on issues of childhood trauma, anger, grief, loss, forgiveness, family dynamics, and the impact of a prisoner's crimes on others. In October 2011, he completed a 10-week group therapy program focused on anger management and was commended for his hard work, active participation, and insight. Pinkston also received training as an assistance giver for other inmates, and he sometimes worked as a barber and building porter in the prison. Pinkston claimed that he did not participate in more rehabilitative programs because he has had "very little opportunity" to do so.

2.1.4. Gang evidence

Pinkston has never been validated as a member of a gang while in prison.[2] However, when he was first incarcerated in 1992, Pinkston told prison officials that he was a member of the Black P. Stones, or Black Peace Stones, criminal street gang, a subset of the Bloods gang. In 2003, the prison placed a "Clarification of Affiliation" on Pinkston's prison record, stating that Pinkston appeared to be affiliated with the Bloods based on the prison yard staff's observation of Pinkston's behavior. In 2004, Pinkston was interviewed by a correctional officer about his gang affiliation. When asked, which set of the Bloods he belonged to, Pinkston responded, "Black Peace Stones." On the list of Pinkston's "Non-Confidential Enemies" maintained by the prison, Pinkston is identified as a suspected member of the "Black Stone" gang.

2.1.5. Prison classification scores

The CDCR utilizes a "Reclassification" system that scores inmates based on the nature of the crimes leading to their institutionalization and their behavior in prison. A score of 19 is the lowest score an inmate can achieve. Between 2002 and 2013, Pinkston's score has ranged between 52 and 68. At the time he filed his petition, Pinkston's score was 60.

The CDCR also utilizes the California Static Risk Assessment scoring system, which assigns inmates one of five scores based on their level of risk to recidivate, with 1 being the lowest and 5 being the highest. The system weighs 22 factors, including age at the time of release, gender, and the nature of the inmate's crimes. As of 2014, Pinkston was assigned a score of 1.

---

[2] According to Pinkston's expert, the CDCR "validates" an inmate once he is identified as a member of a gang. It is the CDCR's policy that once an inmate is validated, he is removed from the general population and placed in solitary confinement.

2.1.6. Post-release plan

If released, Pinkston plans to live with and care for his mother, who needs support after undergoing hip and knee replacement surgery. Pinkston also has an offer for a fulltime job with his uncle's home remodeling company.

2.2. Analysis

Whether a petitioner poses an unreasonable risk of danger to public safety is a discretionary decision made by the trial court after reviewing the evidence presented in the case. (See § 1170.126, subd. (f).) The People must prove by a preponderance of the evidence any facts the court relies on in making such a determination. (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 241 (*Jefferson*).)

"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. [Citations.]' [Citation]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.) Accordingly, we review Pinkston's claim that the court erred in finding that resentencing him would pose an unreasonable risk of danger to public safety for an abuse of discretion. (See *Jefferson*, *supra*, 1 Cal.App.5th at pp. 242–243.)

"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479.) "A merely debatable ruling cannot be deemed an abuse of discretion." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 390.) Applying these principles in our review of the trial court's ruling, we conclude the court was well within its discretion when it denied Pinkston's resentencing petition.

In making its determination that Pinkston would pose an unreasonable risk of danger to public safety if resentenced, the court focused on the following factors: Pinkston's extensive criminal history; his involvement in numerous incidents of violence while in prison; his elevated reclassification score; his minimal participation in rehabilitative and self-help programs while in prison; evidence of his gang affiliation; and his lack of a structured post-release plan. Each of these factors is supported by the record and was properly considered by the court in making its dangerousness determination. (See § 1170.126, subd. (g) [in exercising its discretion, the court may consider the petitioner's criminal history and circumstances of his crimes, his behavior in prison and efforts to rehabilitate, and "any other evidence the court . . . determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety"].)

The court was concerned that these factors, when considered together, demonstrated that Pinkston has a tendency to engage in violence and make poor decisions, issues that could be amplified if he were released into the community. We share the court's concern. Since he was a teenager, Pinkston regularly engaged in criminal activity, much of which involved violence. From when he was first adjudicated as a juvenile in the early 1980s until he was convicted of his third strike in 2002, Pinkston failed to go a significant length of time without committing a crime, and his violent behavior continued after he was incarcerated in 2002. Between 2004 and 2012, Pinkston was involved in at least five fights with other inmates, and he acted aggressively toward prison officials on several occasions, which, as the court recognized, contributed to Pinkston's reclassification score remaining elevated throughout his incarceration.

Pinkston contends the court erred by failing to discuss his California Static Risk Assessment score of 1 in its statement of decision outlining its dangerousness finding. We disagree. "The

court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) Therefore, it is not error for a court to focus its discussion of its findings on only some of the relevant factors, and doing so does not mean the court considered only those factors that are expressly referenced. (*Ibid.*) We therefore must presume the court considered Pinkston's Static Risk Assessment score and exercised its discretion to give more weight to his elevated reclassification score. (See *ibid.*)

In addition to the evidence demonstrating Pinkston has a tendency to engage in violent behavior, there was evidence that Pinkston is affiliated with a criminal street gang. Although the prison never validated Pinkston as a gang member, he admitted to prison officials on at least two occasions that he was a member of the Black P. Stones gang, and the prison yard staff's observations of Pinkston led prison officials to believe Pinkston had gang connections. As the trial court observed, Pinkston has never made any effort to disavow the prison staff's perception that he is affiliated with the Black P. Stones gang.

Pinkston contends the court erred in relying on evidence of gang affiliation because Pinkston is not a validated gang member. However, Pinkston cites no authority limiting the court's discretion to consider gang evidence to instances in which the petitioner has been validated as a member of a gang. Because there was evidence that Pinkston was affiliated with a criminal street gang—e.g., Pinkston's two admissions to prison staff that he was a member of the Black P. Stones gang—the court properly considered this evidence when determining whether Pinkston would pose a danger to public safety if resentenced. (See § 1170.126, subd. (g)(3).)

With respect to Pinkston's participation in two programs that focused on violence and anger management, the trial court believed Pinkston could have made a greater effort to rehabilitate

and that his participation in those programs did not outweigh the factors demonstrating he would pose an unreasonable risk of danger to public safety if resentenced—i.e., his tendency to engage in violent behavior and his connection to a criminal street gang. The court also found Pinkston did not have an adequate plan to reenter the community should he be released. The court believed Pinkston's plan lacked sufficient structure that would help him remain crime free while out of custody, something he has been unable to do since he was a teenager. In light of Pinkston's sustained pattern of violent behavior both outside and inside of prison, and his failure to adequately address his violent behavior while in custody, the trial court did not abuse its discretion in finding Pinkston would pose an unreasonable risk of danger to public safety if resentenced as a two-strike offender.

DISPOSITION

The trial court's order denying Pinkston's petition for resentencing under Proposition 36 is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.