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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY ALBERT CASTRO, SR., Defendant and Appellant.	B271958 (Los Angeles County Super. Ct. No. KA035299)

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

Rich Pfeiffer, 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 P. Hill, Supervising Deputy Attorney General, Ilana Herscovitz, Deputy Attorney General, for Plaintiff and Respondent.

The trial court found that defendant Johnny Albert Castro, Sr., although eligible to have his three strikes prison sentence reduced under Proposition 36, posed an unreasonable risk of danger to public safety and denied the petition. We affirm.

BACKGROUND

A jury convicted defendant of two drug offenses in 1997 and found allegations that he had previously been convicted of three "strike" offenses to be true. Defendant was sentenced to a term of 25 years to life.

After the 2012 passage of Proposition 36 ("Three Strikes Reform Act"), defendant petitioned under Penal Code section 1170.126[1] to recall his current sentence. The People conceded his eligibility to be sentenced as a second strike offender, but argued he posed an "unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) The trial court appointed an expert to evaluate defendant's suitability for the sentence reduction. (Evid. Code, §§ 730, 952.)

The Proposition 36 petition was still pending in 2014 when voters passed Proposition 47 ("Safe Neighborhoods and Schools Act"). Defendant petitioned to have his current drug offenses reduced to misdemeanors under Proposition 47. (§ 1170.18.) Again, the People conceded defendant's eligibility, but disputed his suitability.

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[1] All statutory references are to the Penal Code.

The Proposition 47 suitability hearing was conducted first. Defendant presented no evidence. The court denied the petition;[2] defendant did not appeal.

The Proposition 36 suitability hearing followed. For this hearing, defendant presented the report and testimony of the appointed expert. The court denied this petition as well.

Defendant timely appealed. He contends the trial court erred as a matter of law in declining to apply Proposition 47's statutory definition of "unreasonable risk of danger to public safety" (§ 1170.18, subd. (c)) and abused its discretion in finding he posed an unreasonable risk of danger to public safety. We affirm.

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[2] The court found defendant posed "an unreasonable risk of danger to public safety" pursuant to section 1170.18, subdivision (c). In a comprehensive statement of decision, the trial court made the following findings: (1) defendant was an inactive member of the Mexican Mafia and he showed no willingness to debrief from gang membership or activity; (2) "[c]riminal gangs in general are a cancer on society and a threat to law-abiding citizens everywhere;" (3) gangs create substantial risks in prison and the local communities; (4) the Mexican Mafia is particularly organized and ruthless criminal enterprise," "wields enormous influence both inside and outside of prison," and violently deals with those "who stand in its way or attempt to leave its members or associate status;" (5) and defendant's "continued association with the Mexican Mafia and refusing multiple offers to participate" in debriefing is "clear evidence" that defendant "still adheres to the gang lifestyle and mentality." The trial court stated that because defendant could not disassociate himself from the gang in prison, it was not likely he could do so if released into the free community—which "clearly poses an unreasonable risk of danger to public safety."

PROPOSITION 36 HEARING

A. Evidence

Defendant has a long criminal history. As a juvenile, between 1978 through 1981, petitions were sustained against him for burglary, disorderly conduct, and driving under the influence. His adult record began in 1982 with convictions for petty theft, reckless driving, and drug offenses. He escalated to residential burglary and robbery. While incarcerated in 1988, he fatally stabbed another inmate and was convicted of voluntary manslaughter.

Defendant violated the terms of his parole twice in 1994. Defendant was convicted in 1996 of making terrorist threats. He was on parole when arrested for possession of methamphetamine and syringes, which led to the 1997 convictions and the current 25 years-to-life sentence. He was convicted again during this incarceration for possession of a weapon by an inmate.

Defendant's prison disciplinary record includes seven "serious rule violations," documented in Rules Violation Reports (RVR's). They resulted from possession of a stabbing weapon in 2003; obstructing or delaying in 2004; possession of drug paraphernalia in 2006; possession of razor blades in 2008; participating in mass disturbance in 2008; willfully delaying a peace officer by participating in a hunger strike in 2013; and refusing to provide a urine sample in 2014.

While incarcerated, defendant earned his GED in 2012 and received certificates for completion of ministry and Bible lessons. He also worked as a teaching assistant and was trained as a cook. Defendant has been imprisoned for much of his adult life; but when not in custody, he worked as a roofer and roofing inspector.

Defendant was a member of a street gang before he was ever sentenced to prison. He was validated as an active associate of the Mexican Mafia prison gang in 1995 and an inactive associate in 2001. He was re-validated as an active associate in 2008. Several confidential disclosure forms also identified defendant as a gang associate.

Because of his association with the Mexican Mafia prison gang, defendant primarily was incarcerated in SHUs or administrative segregation. As of 2014, defendant has been housed in general population. He remained in SHUs between 2011 and 213 because he declined to "debrief," i.e., formally renounce, gang association. In 2013, defendant was also offered placement in the "Step Down Program," but declined to agree to the terms.

Defendant was 51 years old at the time of the hearing. His classification score[3] was 102, down from 110 at the Proposition 47 hearing. When he entered prison in 1997, his classification score was 110. The minimum classification score is 19.

Expert Richard Subia, a former prison warden and an expert in adult corrections and rehabilitation, prepared a report and testified on defendant's behalf. For this assignment, Mr. Subia reviewed defendant's California Department of Correction and Rehabilitation (CDCR) central file and interviewed him. He reviewed several additional exhibits for the first time during his testimony.

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[3] An inmate's classifications score is used to determine "the level of security needed to house the inmate. . . . [P]risoners with high classification scores will be sent to the prisons with higher levels of security. (*In re Jenkins* (2010) 50 Cal.4th 1167, 1174.)

Mr. Subia concluded defendant did not currently pose "an unreasonable risk of dangerousness" to public safety. He opined that defendant's gang status was "somewhat unclear and confusing." Defendant's "introduction into the gang lifestyle in prison was predictable" because without gang involvement, defendant had very few options to ensure his day-to-day safety in prison. The expert testified corrections personnel previously adhered to a system where an inmate's ethnicity and geography almost uniformly dictated gang association on some level. That culture changed in recent years due to several court decisions. The expert attributed defendant's current housing in general population as a response to those decisions and the recognition "that in order to maintain an active validation on a gang member there has to be direct participation in active gang activity." Mr. Subia also explained there are Department of Corrections rules "and prisoner [or house] rules and every person who comes into a prison is going to be required to follow whatever rules have been established by their particular race. . . . Some of the rules being that if there's a racial disturbance on the yard, in this case Southern Hispanics [defendant's "classification"] against anybody, and you're on the facility you're expected to respond and assist Southern Hispanics whether a gang member or not. Failure to do so could result in discipline by the Southern Hispanic[s]."

According to the expert, defendant was assaulted by a group of inmates and retaliated, killing a fellow inmate. He pleaded guilty to manslaughter. He retaliated because had he not done so, would have been the target of his own prison faction for being labeled weak. After that incident, defendant possessed weapons because he became a target. Mr. Subia was of the

opinion that defendant's prison disciplinary record was "pretty low" for someone who had spent so many years in custody.

B. Trial Court Decision

The trial judge issued a comprehensive memorandum of decision, addressing the statutory criteria in section 1170.126, subdivision (g). His written decision discussed the evidence detailed above, i.e., defendant's criminal conviction history, disciplinary record while incarcerated, rehabilitative programming, classification score, age, gang involvement, and post-release plans. The memorandum did not discuss evidence the judge did not rely on in reaching his decision.

The trial court noted defendant's violent criminal history and his failure to ever successfully complete a parole. These facts, the judge noted, "constitute[d] present and relevant concerns only if other evidence in the record provide[d] a nexus between [defendant's] criminal past and his current dangerousness." The trial court found that nexus in defendant's gang involvement while incarcerated, his prison disciplinary history and the dearth of rehabilitative programs.

Defendant's multiple prison rule violations "constitute[d] powerful evidence of an inmate's current willingness to engage in serious rule-breaking behavior and are probative of recidivist tendencies and the danger to public safety." Moreover, defendant did not engage in any substance abuse programming or take classes in anger management or violence prevention while incarcerated.

The trial court recognized defendant's "advanced age of 51 would typically be a factor indicating that he no longer poses an unreasonable risk of danger to public safety . . . ." But defendant

declined opportunities to debrief from gang membership and participate in the Step Down Program, designed to assist gang members upon their release from custody. His classification score was 102, "very high compared with other Proposition 36 petitioners."

The trial court also characterized defendant's "post-release plans [as] tenuous at best," particularly because they did not include any realistic options for defendant "to support himself by honest means if released from custody."

DISCUSSION

The People have the burden to prove by a preponderance of the evidence that a petitioner seeking recall of his sentence under Proposition 36 poses an unreasonable risk of danger to public safety. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1305.)

While this appeal has been pending, the Supreme Court determined Proposition 47's statutory definition for "unreasonable risk of danger to public safety" does not apply to Proposition 36 petitions to recall sentences under the Three Strikes Law. (*People v. Valencia* (July 3, 2017, S233402) __ Cal.5th __.) As previously noted, defendant presented no evidence in the Proposition 47 hearing. In the Proposition 36 hearing, however, he presented the report and testimony of expert Subia. Accordingly, we proceed to review the trial court's decision under an abuse of discretion standard. (§ 1170.126, subds. (f), (g).)[4]

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[4] Citing *People v. Carmony* (2004) 33 Cal.4th 367 (*Carmony*), the Attorney General and defendant agree the abuse of discretion

In *Carmony,* the Supreme Court described the "fundamental precepts" that guide our review under the abuse of discretion standard: "First, "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.] Second, a "'decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra,* 33 Cal.4th at pp. 376-377.)

Defendant argues the trial court abused its discretion because it did not address expert Subia's opinion, "inferred" defendant's positive changes in recent years came "too little too late," and did not give enough weight to defendant's age. These

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standard applies here. We concur, and note Courts of Appeal are of the same mind. The Supreme Court granted review in a number of those published opinions, however, and deferred briefing pending its decision in *People v. Valencia, supra,* __ Cal.5th __. (See, e.g., *People v. Buford* (2016) 4 Cal.App.5th 886, 895, review granted Jan. 11, 2017, S238790; *People v. Sledge* (2015) 235 Cal.App.4th 1191, 1193, review granted July 8, 2015, S226449; *People v. Davis* (2015) 234 Cal.App.4th 1001, 1018, review granted June 10, 2015, S225603; *People v. Aparicio* (2015) 232 Cal.App.4th 1065, 1069, review granted March 25, 2015, S224317.)

arguments demonstrate that reasonable persons disagree. They are insufficient, however, to reverse a decision under an abuse of discretion standard. (*Carmony, supra,* 33 Cal.4th at p. 377.)

The trial court's determination that defendant would constitute an unreasonable risk of danger to public safety if resentenced was not "irrational or arbitrary." (*Carmony, supra,* 33 Cal.4th at p. 377.) There is no basis for reversal.

DISPOSITION

The order denying defendant's petition for recall of sentence is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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