Filed 9/26/18 P. v. Wilson CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. THOMAS WILSON, Defendant and Appellant.	B287710 c/w B286357 (Los Angeles County Super. Ct. No. YA096359)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Eric C. Taylor, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

In this consolidated appeal, defendant and appellant Thomas Wilson (defendant) appeals from a judgment entered upon a plea of no contest to felony possession of a controlled substance (No. B286357), and from the postjudgment order denying his petition for resentencing under Proposition 47[1] (No. B287710). In the appeal from the judgment, defendant's appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), raising no issues. In the appeal from the postjudgment order, defendant contends that the trial court abused its discretion in finding that he posed an unreasonable risk of danger to public safety. Finding no error or abuse of discretion, we affirm the judgment and order.

BACKGROUND

Defendant was charged by information with one count of violating Health and Safety Code section 11377, possession of methamphetamine, a controlled substance, with a prior conviction of committing a lewd or lascivious act involving a child 15 years of age, when defendant was at least 10 years older than the child, in violation of Penal Code section 288, subdivision (c)(1)[2]. The information further alleged defendant had suffered two prior serious or violent felony convictions which qualified as strikes under the Three Strikes law (§§ 667, subds. (b)-(j) & 1170.12).

On August 16, 2017, defendant entered into a plea agreement in which he pled no contest to the charges and admitted a prior strike conviction. The trial court conditionally sentenced defendant to the low term of 16 months (§ 1170, subd.

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[1] Proposition 47, "The Safe Neighborhood and Schools Act," is codified in Penal Code section 1170.18.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

(h)(1)), doubled as a second strike, and imposed mandatory fines and fees. The agreement provided that defendant would be released on his own recognizance for 30 days, and if he failed to return to court on September 19, 2017, he would receive the maximum term of six years in prison. The parties stipulated that there was a factual basis for the plea. Defendant returned on the scheduled date and the agreed upon sentence was executed. Defendant was given 156 actual days of custody credit and 156 days of conduct credit for a total of 312 days.

Defendant timely filed a Proposition 47 petition for resentencing his felony to a misdemeanor. The trial court found that defendant would pose an unreasonable risk of danger to public safety within the meaning of section 1170.18, subdivision (c), based on his criminal history, and denied the petition. Defendant filed a separate timely notice of appeal from the order denying his petition.

DISCUSSION

I. Appeal from the judgment

After receipt of defendant's notice of appeal from the judgment, this court entered an order limiting defendant's appeal to issues not requiring a certificate of probable cause. Defendant's appellate counsel separately filed a *Wende* brief, raising no issues. We notified defendant of his counsel's brief and gave him leave to file, within 30 days, his own brief or letter stating any grounds or argument he might wish to have considered. That time has elapsed, and defendant has submitted no brief or letter.

After reviewing the entire record, we have found no issues which do not require a certificate of probable cause. Defendant was convicted on a plea of no contest, received the bargained-for sentence, and failed to obtain a certificate of probable cause or to reserve the right to have certain issues reviewed on appeal.

(*People v. Shelton* (2006) 37 Cal.4th 759, 769; § 1237.5; Cal. Rules of Court, rule 8.304(b).) We conclude that defendant's appellate counsel has fully complied with his responsibilities and that no arguable issue exists with regard to the appeal from the judgment, and that defendant has received adequate and effective appellate review of the judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 123-124.)

II. Appeal from the denial of Proposition 47 petition

Defendant contends that the trial court erred in denying his Proposition 47 petition, resulting in a denial of his constitutional rights to due process and equal protection of the law. In particular, he contends that the evidence was insufficient to prove that he would pose an unreasonable risk of danger to public safety if relief were granted, and that the trial court failed to make specific findings of fact necessary to support its conclusion.

"'Under section 1170.18, a person "currently serving" a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be "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." (§ 1170.18, subd. (b).)' [Citation.] 'Section 1170.18 thus provides a two-step mechanism . . . . First, the trial court must determine if the petitioner is eligible for resentencing under section 1170.18 based on a preponderance of the evidence. [Citations.] If the court finds the petitioner eligible, the trial court must determine the factual issue of

whether the petitioner presents an unreasonable risk of danger to public safety if resentenced.' [Citation.]" (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1261 (*Hall*), fn. omitted.) As defined in section 1170.18 subdivision (c) an "'unreasonable risk of danger to public safety'" is an unreasonable risk that the defendant will commit a crime listed under section 667 subdivision (e)(2)(C)(iv). The listed crimes are sometimes referred to as "super strikes." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092.)

In exercising its discretion, the trial court may consider the defendant's prior criminal history and any other evidence relevant to the court's determination. (*People v. Valencia* (2017) 3 Cal.5th 347, 351.) "We review a dangerousness finding for an abuse of discretion, given that the court is statutorily required to determine dangerousness 'in its discretion.' (§ 1170.18, subd. (b).) '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.] The abuse of discretion standard 'involves abundant deference' to the court's ruling. [Citation.]" (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 242-243.)

The trial court based its finding that defendant posed an unreasonable risk on his criminal history. Defendant contends that the trial court was required to make express and detailed factual findings, and that simply referring to "prior criminal history" was inadequate and resulted in a denial of due process. We find no such statutory requirement. Both express and implied findings of a trial court are presumed correct absent a showing that they are not supported by substantial evidence. (See *People v. Fernandez* (2017) 11 Cal.App.5th 926, 937.) Furthermore, contrary to defendant's assertion that the court's

record is inadequate for review, we find that the record adequately establishes that defendant had a 1982 robbery conviction and a 2016 conviction of drug possession with a prior conviction of lewd acts with a 15-year-old while 10 years older than the victim, in violation of section 288, subdivision (c)(1).

Defendant argues that such a criminal history provides no rational basis for the court's finding, because the robbery conviction is remote and neither conviction was a super strike. As respondent notes, a similar argument was rejected in *Hall, supra*, 247 Cal.App.4th at page 1266, where the court explained: "[A]n offender who has previously committed a super strike . . . [is] already categorically eliminated from eligibility for resentencing. (§ 1170.18, subd. (i).) [To] limit the trial court's discretion to offenders who have already committed a super strike offense [would be to construe] subdivisions (b) and (c) of section 1170.18 as meaningless surplusage."

Moreover, while defendant's prior conviction of lewd conduct with a 15-year-old was not a super strike, a lewd or lascivious act involving a child under *14* years of age is listed in section 667, subdivision (e)(2)(C)(iv)(III). Defendant's crime would thus have been a super strike if the victim had been under 14 years old -- only a couple of years younger. It is neither arbitrary, capricious, nor irrational to determine that a person with such a background would pose an unreasonable risk of committing a dangerous offense in the future.

In any event, we agree with respondent that regardless of whether defendant poses an unreasonable danger to public safety, he is ineligible for resentencing. Section 290, subdivision (c) requires those convicted of lewd acts upon a 15-year-old child under section 288, subdivision (c)(1), to register as sex offenders. Pursuant to 1170.18, subdivision (i), a defendant convicted of an

offense requiring registration as a sex offender is categorically ineligible for relief under Proposition 47.

Here, the trial court did not rule on eligibility, and the prosecutor appeared to believe that defendant was eligible for relief. Defendant acknowledges that we may affirm the order even if the wrong reason was given for the ruling. (See *People v. Zapien* (1993) 4 Cal.4th 929, 976.) Defendant asks that we nevertheless remand for the trial court to make a finding of eligibility or ineligibility, because the court's mistaken belief created an ambiguous ruling. Defendant does not suggest any circumstances, however, that might allow the trial court to find him eligible despite his conviction of an offense requiring registration as a sex offender. As defendant is ineligible as a matter of law, it is not reasonably probable that remand would produce a different result, and would thus serve no purpose. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment and order are affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT