Filed 10/26/16 P. v. Gardner CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EARL TRAVIS GARDNER, Defendant and Appellant.	B268410 (Los Angeles County Super. Ct. No. BA165537)

APPEAL from an order of the Superior Court of Los Angeles County. Scott M. Gordon, 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, Assistant Attorney General, Noah Hill and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Earl Travis Gardner (defendant) appeals from the trial court's order denying his petition for resentencing pursuant to Penal Code section 1170.126, also known as Proposition 36.[1] Defendant argues that (1) the trial court abused its discretion in determining that he would pose an unreasonable risk to public safety if resentenced; and (2) the trial court erred in failing to apply the definition of "unreasonable risk of danger to public safety" found in section 1170.18, also known as Proposition 47, enacted in 2014.

We conclude that the trial court did not abuse its discretion in finding that the defendant was not suitable for resentencing. Although the second issue is currently pending before out Supreme Court,[2] we conclude that Proposition 47's definition does not apply to Proposition 36. Accordingly, we affirm.

PROCEDURAL HISTORY

On July 9, 1998, defendant was convicted under Health & Safety Code section 11351.5, possession of cocaine base for sale. He was sentenced to a term of 25 years to life in prison pursuant to the "Three Strikes" law (§§ 1170.12, subd. (a)-(d) & 667, subd. (b)-(i).). Defendant had prior convictions of voluntary manslaughter (§ 192) and attempted armed robbery (§§ 664, 211), both occurring in 1989. During the manslaughter, defendant shot the victim four or five times. On December 5, 2000, this court affirmed the conviction.

On January 25, 2013, defendant filed a petition for recall of his sentence pursuant to section 1170.126. The People conceded that defendant was eligible for resentencing but argued that relief should be denied because defendant posed an unreasonable risk of

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

[2] See, e.g., *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted February 18, 2015, S223676; *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825; *People v. Guzman* (2015) 235 Cal.App.4th 847, review granted June 17, 2015, S226410; *People v. Davis* (2015) 234 Cal.App.4th 1001, review granted June 10, 2015, S225603; *People v. Sledge* (2015) 235 Cal.App.4th 1191, review granted July 8, 2015, S226449; *People v. Myers* (2016) 245 Cal.App.4th 794, review granted May 25, 2016, S233937; *People v. Florez* (2016) 245 Cal.App.4th 1176, review granted June 8, 2016, S234168; *People v. Cordova* (2016) 248 Cal.App.4th 543, review granted August 31, 2016, S236179.

danger to public safety if resentenced. On June 9, 2015, the trial court commenced a suitability hearing on defendant's petition for resentencing under section 1170.126, subdivisions (f) and (g). On September 10, 2015, the matter was submitted. On October 15, 2015, the trial court issued a written decision denying Proposition 36 relief. The court found that defendant would pose an unreasonable risk to public safety if resentenced.

On October 22, 2015, defendant filed a timely notice of appeal.

BACKGOUND

Criminal history

Defendant was convicted for shoplifting as a juvenile and was placed in a juvenile program in Florida. Defendant went on to develop a lengthy criminal history in subsequent years. In 1982, defendant was convicted of throwing a missile at an automobile, damaging property, assault and battery, trespassing, and aggravated assault. In 1985, defendant was convicted of possession of PCP and possession of PCP for sale. In 1986, defendant was again convicted of possession of PCP for sale. In 1988, four days after being paroled, defendant was arrested for robbery, eventually pleading guilty to attempted robbery. He went to a gas station and demanded money from the victim who was behind bullet proof glass. When the victim refused, defendant kicked at the glass, then picked up a metal rack and tried to break the glass window. Officers heard the glass breaking and responded to the scene. Three days after defendant was arrested for robbery, he was arrested for murder, ultimately pleading guilty to voluntary manslaughter. Both incidents were violent and involved defendant displaying little or no impulse control. During the incident for which defendant ultimately pleaded guilty to voluntary manslaughter, he got into an altercation with the victim at a crack house, fled the building, returned with a revolver, and shot the victim four times in the chest.

In 1997, after his release from prison following the voluntary manslaughter conviction, defendant violated his parole two times, once for possession of a controlled substance and once for being under the influence of a controlled substance.

In July 1998, defendant was convicted of possession of cocaine base for sale. (Health & Safety Code § 11351.5). Defendant and his co-defendant were observed by the police selling cocaine. Officers found 31.62 grams of cocaine base and defendant was sentenced to 25 years to life.

Disciplinary record in prison

During his current prison sentence, defendant received 14 California Department of Corrections and Rehabilitation (CDCR) Rules Violation Reports documenting serious misconduct. These incidents involved disobeying orders (1999 and 2011); failure to meet program expectations (2000); participation in a melee requiring use of force (2001); battery on an inmate with a weapon (2002); possession of alcohol (2002); extortion of another inmate for canteen items (2002); disobeying institutional rules (2004); possession of a cellular phone (2010 & 2011); theft of state property (2010); possession of dangerous contraband, a lighter (2011); and possession of tobacco for distribution (2011). The three violent incidents during defendant's incarceration occurred in 1999, 2001, and 2002.

Incidents of minor misconduct included bumping inmates he believed were too close behind him; passing items from one cell to another; not appearing for a scheduled medical appointment; becoming angry when a work supervisor refused to let him out of work for a non-priority appointment; having a curtain in his cell; claiming a medical emergency when the medical care needed was not an emergency; being on the yard for an hour after returning from a medical appointment; not following orders; being late for work; and unauthorized use of the telephone.

Positive prison programming

Defendant completed the "Spring Boot Camp" in 2011 and was found to have a positive attitude. In November 2011, defendant completed the 12-week "Healthy Boundaries Group" that dealt with past and present relationships. Also in that month, defendant completed the "Understanding Violence" group that dealt with different types of violence, including domestic violence.

In February 2012, defendant completed the 12-week course, "Exam of Interpersonal Relationships," and the 12-week "Lifer's Group" that dealt with long-range commitments.

In early May 2012, defendant was described as a "valued participant" in a Biblically-based anger management course. Later that month, defendant graduated from the course. He also completed the "Kairos" weekend program on May 30, 2011, and an "Understanding Anger" course that dealt with managing strong emotions and self-control.

In September 2012, defendant completed the program "Core Values: Understanding Personal Values." That program addressed the importance of stating and understanding one's core values, and understanding past behavior that was inconsistent with current values. Also in September 2012, defendant completed the 12-session "Anger Management Group" with perfect attendance. The group dealt with gaining insight into personal anger-related issues.

Defendant completed seven courses through the ECS Prison Ministry of Northern California program.

In October 2012, defendant completed a 10-week violence prevention class. Defendant also had some documentation of participating in a 12-step recovery program.

In November 2013, defendant completed the "Alternatives to Violence Project" which addressed reducing interpersonal violence and developing strategies for positive approaches for the future. In December 2013, he completed the 11-month "Epistle of II Corinthians" Bible course.

Defendant, who according to one of his teachers had a learning disorder, had been taking educational classes to improve his reading and writing skills. He received 15 positive quarterly education progress reports. Defendant also studied small engine repair and machine shop skills. In one quarter he received less than satisfactory scores on his education progress report.

Defendant continued to participate in rehabilitative services during the trial court proceedings. On August 20, 2014, he completed the three-week "Thinking to Change-Problem Solving" course.

Prison mental health treatment

Defendant was a participant in the Mental Health Services Delivery System and was prescribed psychotropic medication. In July 2008, defendant hoarded prescription medication.

Evidence presented to the court regarding defendant's risk to the public

Defendant's prison therapist for the past two years, Dr. Jose Pena, spoke highly of defendant as a model participant in his therapy and work towards rehabilitation.

In September 2014 defendant's attorney submitted a motion for the appointment of an expert to conduct a psychological evaluation of defendant. The trial court granted the motion and appointed defendant's requested expert, Dr. Melvin Macomber. Dr. Macomber conducted an extensive review of defendant's prison records, met with defendant, and administered various predictive risk assessment tests. Because defendant was classified as being developmentally disabled, Dr. Macomber administered two intelligence tests. Defendant tested consistently at the level of IQ 75, which is in the borderline intellectual functioning range. Dr. Macomber believed that defendant had a good relapse prevention plan. While impulsivity and behavioral control had been a serious issue in the past, Dr. Macomber believed that this had improved with defendant's age and maturity. Defendant expressed repentance and remorse for his past criminal actions. Dr. Macomber administered various risk assessments, which revealed a low to moderate risk for potential future criminal behavior. Dr. Macomber concluded that defendant does not currently pose an unreasonable risk of danger to public safety.

Defendant was accepted for post-release assistance by the Amity Foundation. He was eager to continue his 12-step program participation, and his sister was committed to providing him with a stable home upon his release.

Dr. Macomber also testified at the June 9, 2015 Proposition 36 hearing.[3] Dr. Macomber stated that defendant had completed more self-help groups than the average for third-strikers. While the majority of positive programming defendant had completed was after Proposition 36 was passed into law, defendant did participate in Bible studies and stopped disciplinary problems prior to the enactment of Proposition 36. The risk assessment tests that Dr. Macomber had administered did not reveal criminal thinking and defendant's risk assessment was quite low compared to the average inmate.

On June 29, 2015, the trial court appointed Dr. Walker to conduct an evaluation regarding the defendant's developmental disability issues. On July 29, 2015, Dr. Walker's evaluation was filed. On the verbal comprehension index, defendant's performance was significantly below normal. For perceptual reasoning, his performance was in the low borderline range. His arithmetic skills were in the normal range, although he showed abilities significantly below normal in abstract verbal reasoning and immediate verbal memory. Defendant's reading skills were at a 1.1 grade level, and his comprehension skills at a 3.4 grade level. The defendant's social skills yielded a score significantly below normal. Defendant reported that he had very few friends. Dr. Walker noted that he is easily angered. Dr. Walker described him as "remarkably inept in taking in and understanding verbal information." Defendant has difficulty understanding verbal instructions and verbal information such as institutional rules. However, defendant tested as capable of learning from his mistakes and capable of respecting the boundaries and needs of others. Dr. Walker concluded that defendant has potential and a good prognosis to succeed.

In an addendum filed on August 20, 2015, Dr. Walker stated that it was unlikely that defendant would be eligible for Regional Center services since his intelligence is in the borderline range. Dr. Walker suggested that the defendant be placed in a facility, halfway house, or sober living home that offers substance abuse treatment and psychiatric treatment.

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3 The People presented no witnesses. The People stipulated to defendant's eligibility.

Defendant's most recent CDCR score was 48, which is well above the minimum of 19 for a life inmate. The court noted that the higher the score, the greater the security risk.

At the time of the hearing, the defendant was 52 years old, which statistically reduced his probability of recidivism. He also had various health problems.

The parties' arguments

The prosecutor argued that defendant had a violent history. In addition, defendant had done little over the course of his prison commitment to work or obtain skills. Defendant did not participate in any Narcotics Anonymous programs until after Proposition 36 passed. The prosecution was concerned that defendant's history of criminal activity, lack of job skills, prior record of drug abuse and lack of impulse control would lead to an unreasonable risk to the community.

Defense counsel argued that defendant worked when it was available to him and had not had a confrontation with another inmate since 2002. With the exception of one conversation in 1999, defendant had not had any gang involvement in 17 years. Defense counsel emphasized that the defendant had been in therapy, sought help for his mental health issues, and had the support of his family.

The trial court's ruling

After taking the matter under submission, on October 15, 2015, the trial court filed its written decision. The court reviewed the defendant's extensive criminal history, noting that the evidence regarding his robbery and manslaughter convictions showed that the incidents "were very violent and involved [defendant] displaying little, if any impulse control." In particular, the 1988 manslaughter conviction raised serious concerns. It was a violent crime which resulted in the death of the victim. In addition, the evidence showed that defendant left the victim's residence, then returned with a gun and killed him. Despite serving nine years in prison after his voluntary manslaughter conviction, defendant failed to receive a "wake-up call." Instead, he was convicted of another felony shortly after his release. The court concluded that defendant's criminal history

demonstrated that "he is not capable of following the law, thereby rendering him an unreasonable risk of danger to society."

The trial court also reviewed defendant's disciplinary history during his current term of incarceration and concluded that the "institutional misconduct paints the picture that he is simply unable to comply with prison rules, which tends to show he will be unable to follow society's laws if released from prison."

While the court considered the positive institutional programming in which defendant had engaged, the court concluded that "[t]he totality of [defendant's] record of rehabilitation demonstrates he is not likely to follow society's rules and laws if released from prison, thereby making him an unreasonable risk of danger to public safety."

DISCUSSION

I. Proposition 47's definition of unreasonable risk of danger to public safety does not apply to Proposition 36

We first address defendant's argument that, in evaluating defendant's Proposition 36 petition, the trial court should have applied the narrower definition of "unreasonable risk of danger to public safety" found in Proposition 47.

A. Background--Propositions 36 and 47

The voters passed Proposition 36 in 2012. Proposition 36 modifies the Three Strikes law so that the minimum 25-year-to-life sentence may in most cases only be imposed in cases where the third or subsequent felony conviction is also a serious or violent felony.[4] The proposition also grants defendants previously sentenced on a nonserious and nonviolent felony to a 25-year-to-life sentence under the Three Strikes law the right to petition for resentencing on that offense. (§ 1170.126, subd. (b).)

Whether a defendant is entitled to resentencing under Proposition 36 turns on (1) whether he is eligible for relief, and if so, (2) whether he is suitable for relief -- that is,

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[4] Until 2012, the Three Strikes law required a trial court to impose a minimum sentence of 25 years to life for a defendant convicted of a felony if he or she had been previously convicted of two prior "serious" or "violent" felonies (strikes). (Former §§ 1170.12, subd. (c)(2)(A) & 667, subd. (e)(2)(A).)

whether "resentencing [the defendant] would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) In this case, the prosecution stipulated to the first criteria; thus, the remaining question was whether defendant posed an unreasonable risk of danger to public safety.

In assessing a defendant's suitability, Proposition 36 directs a trial court to consider: (1) the defendant's criminal history; (2) the defendant's disciplinary record and record of rehabilitation while incarcerated; and (3) any other evidence the court deems relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. (§ 1170.126, subd. (g).)

Two years after enacting Proposition 36, the voters enacted Proposition 47. (§ 1170.126, effective Nov. 7, 2012; § 1170.18, effective Nov. 5, 2014.) Proposition 47 re-designates as misdemeanors "certain drug -- and theft-related offenses" that were charged as felonies or charged as "wobblers" (offenses that are punishable as a felony until a court reduces them to a misdemeanor) and ultimately sentenced as felonies. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Proposition 47 also allows individuals currently serving a sentence for a conviction to petition for a recall of that sentence. (§1170.18, subd. (a).) Similar to Proposition 36, Proposition 47 requires assessment of (1) whether "the petitioner" is eligible for relief under Proposition 47, and (2) whether resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).) However, Proposition 47's criteria for a finding that a defendant poses an "unreasonable risk of danger to public safety" specifies: "As 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 [subdivision (e)(2)(C)(iv)] of Section 667." (§ 1170.18, subd. (c).) In other words, rather than focus on whether the petitioner poses an "unreasonable risk of danger to public safety" generally, a court evaluating a Proposition 47 petition is to assess only whether there is an "unreasonable risk that the petitioner will commit" one of a handful of particularly egregious "violent" felonies. (§ 1170.18, subd. (c).)

B. Analysis

The question of whether Proposition 47's narrower definition of "unreasonable risk of danger to public safety" applies when a trial court is evaluating a Proposition 36 petition is currently pending before our Supreme Court. (See *ante*, fn. 1.) We conclude that Proposition 47's definition does not apply to an evaluation under Proposition 36. (See *People v. Esparza* (2015) 242 Cal.App.4th 726, 736-737 (*Esparza*), abrogated by *People v. Cordova* (2016) 248 Cal.App.4th 543, 552, fn. 8, review granted Aug. 31, 2016, S236179.)[5]

Although the plain language of Proposition 47 points to the conclusion that it applies to Proposition 36, we find that there are compelling reasons to conclude that the voters did not intend Proposition 47's definition to apply to the inquiry into suitability under Proposition 36. First, subdivision (n) states: "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).) However, if a court evaluating a Proposition 36 petition must grant that petition unless it finds an unreasonable risk that a defendant will commit a "super strike" (rather than a risk of danger to public safety more generally), the finality of that judgment is "diminished" by Proposition 47's definition. Along similar lines, Proposition 47 uses the term "petitioner" in conjunction with "this section" or "this act" (§ 1170.18, subd. (a), (b), (j), (l), (m)); subdivision (c)'s use of the word "petitioner" suggests a similar limitation to the reach of Proposition 47's definition of "unreasonable risk of danger to public safety." (Accord, *Esparza, supra*, 242 Cal.App.4th at p. 737.)

Further, nothing in the legislative history of Proposition 47 suggests that it was intended to alter the scope of Proposition 36. Neither the ballot materials nor the text of

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5 Most of the previously published decisions on this issue cannot be cited, either because they were unpublished to begin with or because the Supreme Court has granted review. (See Cal. Rules of Court, rules 8.1115(a), 8.1105(e)(1).) *Esparza* is an exception. In *Cordova*, the Sixth Appellate District reversed its position on the issue.

Proposition 47 mention an intent to use Proposition 47's definition of "unreasonable risk of danger to public safety" to Proposition 36 or any other resentencing schemes.

In addition, Propositions 47 and 36 have different overarching goals. Proposition 47 is designed to give lower-level criminals who have committed a "nonserious and nonviolent" property offense a reduced sentence (2014 Cal. General Election Official Voter Information Guide, p. 35), while Proposition 36 is designed to give hardened criminals with at least two prior serious or violent convictions a reduced sentence on their third felony (from 25-to-life down to the usual sentence) (§ 1170.126). These are different purposes.

Finally, the timing of Proposition 47's enactment is inconsistent with an intent to apply it to Proposition 36 petitions. Proposition 36 gave defendants "two years" from its enactment to file their petitions for resentencing. (§ 1170.126, subd. (b).) Proposition 47 was enacted two days shy of the closing of that window. (§ 1170.18.) It seems unlikely that any rational voter would have intended to change the rules for Proposition 36 petitions at the last moment, when nearly all petitions would already have been filed and most of them had already been adjudicated.

For all these reasons, we decline to find that the trial court should have applied Proposition 47's definition of "unreasonable risk of danger to public safety" in this Proposition 36 case.

II. The trial court did not abuse its discretion in determining that defendant poses an unreasonable risk of danger to public safety under Proposition 36

Defendant argues that the trial court abused its discretion in determining that he would present an unreasonable risk of danger to public safety under the criteria set forth in section 1170.126, subdivisions (f) and (g). Defendant asserts that the reasons for denying him resentencing did not rise to a level which should result in a finding of an unreasonable risk of danger to public safety.

Defendant concedes that section 1170.26, subdivisions (f) and (g), confers on the trial court a discretionary power to make the resentencing determination. "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.)

A. The trial court properly exercised its discretion after careful consideration of all relevant evidence

The trial court issued a 12-page written decision denying defendant's petition for resentencing. In its analysis, the trial court discussed the evidence relating to each statutory factor set forth in section 1170.126, subdivision (b). First, the court reviewed the defendant's criminal history going back to 1982. While the court noted that the facts related to defendant's commitment offense were "fairly run of the mill," the court expressed concern that both the attempted robbery and the manslaughter were "very violent and involved [defendant] displaying little, if any impulse control." The court discussed in detail the facts leading up to the 1988 manslaughter conviction, pointing out that defendant was able to leave the home of the victim after the first altercation, but upon reflection, returned with a gun and killed the victim. The court concluded that defendant's criminal history "demonstrates he is not capable of following the law, thereby rendering him an unreasonable risk of danger to society."

Next, the court reviewed defendant's disciplinary history. Defendant had 14 CDCR rule violation reports documenting serious misconduct. The court observed that "[defendant's] institutional misconduct paints the picture that he is simply unable to comply with prison rules, which tends to show he will be unable to follow society's laws if released from prison." The court also considered defendant's positive institutional programming, including narcotics anonymous meetings; mental health activities; and anger management. However, the court concluded that the "totality of [defendant's] record of rehabilitation demonstrates he is not likely to follow society's rules and laws if released from prison, thereby making him an unreasonable risk of danger to public safety."

The court also considered defendant's psychological assessments by Dr. Walker and Dr. Macomber. The court noted that one of the biggest issues was defendant's reaction to stress and his lack of impulse control. A recent comment made by one of defendant's therapists suggested that these issues are still of concern. In addition, the lack of a specific reentry and treatment plan raised serious concern regarding the risk of future violent behavior. The court also felt that the lack of Regional Center programming limited the likelihood that defendant would be able to transition back into society.

The court noted that defendant's CDCR classification score of 48 provided further evidence of his unsuitability for resentencing.

The court considered defendant's age and health problems, and acknowledged that these factors may reduce the likelihood of defendant committing a violent offense. In addition, the court noted that defendant had been accepted into the Amity Foundation program, "which includes substance abuse treatment, housing, and employment services in conjunction with the Los Angeles County Probation Department." Defendant's sister submitted a letter indicating that defendant was welcome to stay in her home, and that she would help defendant secure a job and attend any necessary programming. However, the court expressed its concern that defendant has no "marketable skills that can be put to use upon release."

After carefully considering all of this evidence, the court found that "the totality of the record demonstrates that, if resentenced, [defendant] would pose an unreasonable risk of danger to public safety at this time. [Defendant] has been afforded multiple 'second chances,' but continued to engage in serious criminal conduct. [Defendant] falls into the category of offender for which Proposition 36 was not intended to apply."

The court's written decision demonstrates careful consideration of evidence relevant to each statutory factor. (§ 1170.126, subd. (g).) The court also considered additional relevant evidence such as defendant's possible developmental disability, his age, and his post-release plans. The trial court properly weighed all of the evidence and came to a rational conclusion. No abuse of discretion is apparent.

B. Defendant has failed to show an abuse of discretion

Defendant argues that the trial court abused its discretion for several reasons. First, he contends that the crimes he committed were remote in time and that the court made no connection, or nexus, between the time the crimes were committed and the person defendant is today. Defendant cites *In re Lawrence* (2008) 44 Cal.4th 1181, 1226, for the proposition that the "unchanging factor of the gravity of petitioner's commitment offense had no predictive value regarding her *current* threat to public safety, and thus provides no support for the . . . conclusion that petitioner is unsuitable for parole at the present time."

We disagree. As the court noted, the defendant's criminal history did "not form the sole basis for a finding of current dangerousness." The court's written decision reveals that while it considered the seriousness of the crimes that defendant committed in the past, it also carefully considered defendant's record of rehabilitation and discipline. The court found that defendant's institutional record during the course of his prison term showed that defendant remains unable to follow rules and laws.

Next, defendant argues that the trial court erred in inferring that defendant's positive programming was "too little too late." Defendant does not cite to the specific language in the trial court's opinion suggesting that the court reached this conclusion. We find that such an inference is not appropriate. The court acknowledged that defendant "certainly engaged in some positive institutional activities, which indicate an enhanced ability to function within the law upon release." The court noted that defendant actively engaged in mental health activities, group meetings, and was keeping up with his medical and mental health appointments. Defendant also received "numerous certificates of completion for anger management and positive other programming between 2011 and 2014."[6]

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6 Defendant's citation to *In re Lee* (2006) 143 Cal.App.4th 1400, 1414, for the proposition that a genuine acceptance of responsibility ought not to be rejected because it comes too late, is irrelevant.

Defendant argues that the court gave insufficient weight to the defendant's age. Defendant cites *In re Lee*, *supra*, 143 Cal.App.4th at page 1409, footnote 4, for the proposition that "a seriously troubled adolescence, even for an 80-year-old inmate, might constitute 'some evidence' of 'a history of unstable or tumultuous relationships with others.'. . . It would not necessarily be some evidence of an unreasonable danger to public safety." We find that the court gave sufficient consideration to the defendant's age at the time the crimes were committed. The court specifically noted that defendant's age of 52 "statistically reduces his probability of recidivism." The trial court properly considered this factor along with defendant's behavior since then. There is no indication that the trial court gave insufficient weight to the evidence of defendant's age.

Defendant also argues that the court did not carefully consider the evidence regarding defendant's acceptance into the Amity Foundation. Defendant states, "[a]pparently the court missed the November 10, 2014 letter from the Amity Foundation." Again we find that there is no basis to assume that the court missed the letter. The court quoted verbatim from the letter when it noted that the letter does not expressly confirm acceptance, but indicates it has "'received information on the potential release of [defendant].'" In addition, the court accepted Dr. Macomber's testimony that defendant had been accepted into the Amity Foundation program. The court properly considered defendant's release plans, including his acceptance into the Amity Foundation. However, the court in its discretion determined that the risk of danger to public safety was still too great.

Defendant next takes issue with the court's references to Dr. Macomber's report, stating that the court "misapplied" the report. Again, we disagree. The court explained that defendant had told Dr. Macomber that his triggers were "'feelings of frustration, anger, and disappointment.'" The court noted that this was concerning because defendant is likely to experience all of these triggers outside of prison. Defendant states that the trial court found the "existence of the triggers to be a risk to public safety." The trial court found no such thing. Instead, the trial court acknowledged that Dr. Macomber ultimately concluded that defendant does not pose a risk of danger to society. The trial

court properly considered this in its careful evaluation of the factors under section 1170.126, subd. (g).

Defendant also takes issue with the court's analysis of a statement made by Dr. Pena. Dr. Pena described an event where defendant demonstrated good judgment by walking away from actions of another inmate that, in the past, would have triggered a violent response. Defendant argues that this comment showed that defendant is now able to address these impulse control issues appropriately, and without violence. However, the trial court noted that this very recent comment indicates that these issues are still of concern. The trial court was entitled to infer from Dr. Pena's comment that defendant does not always demonstrate such appropriate behavior, and that such restraint is a notable recent event rather than a consistent characteristic of defendant's behavior. Even considering Dr. Pena's comment, the trial court did not abuse its discretion in determining that defendant still poses an unreasonable risk of danger to public safety.

The trial court's written analysis shows that the court carefully weighed all of the evidence before it. No abuse of discretion occurred.

C. Remand for further information is not warranted

Defendant notes that the trial court found Dr. Walker's report to be lacking in certain respects. Specifically, the report did not provide information regarding treatment and services that might be available to defendant after his release. The court stated:

> "As indicated above, Dr. Walker was appoint[ed] to specifically address the general information provided by other witness[es] with regard to the fact that the [defendant] may be developmentally disabled and to provide information regarding treatment and services that are available upon release for an individual facing the [defendant's] challenges. Unfortunately, Dr. Walker's reports proved [*sic*] the Court with little specific information in these areas."

Defendant argues that he should not be prejudiced by Dr. Walker's failure to provide the court with the information that it wanted. Defendant asks this court to remand the matter so that the trial court can consider other possible services or appoint another expert to provide sufficient information to the court. Defendant provides no

authority that such action is appropriate under the circumstances of this case, nor does defendant allege any specific error on the part of the trial court.[7]

We find that, given the trial court's determination that defendant poses an unreasonable risk of danger to public safety, a remand for the purpose of exploring potential services available upon release is not warranted. As set forth in detail above, the trial court considered and weighed a great deal of evidence concerning defendant's suitability for resentencing. The trial court's decision was not premised on a lack of availability of treatment and services upon release, but upon the court's determination that defendant continued to pose too great a risk of danger to society. No error occurred.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST

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[7] If there were additional treatments or services that defendant wanted the court to be aware of, defendant could have presented such information to the trial court through additional evidence.