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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. FREDRICK BERRY, Defendant and Appellant.	B281221 (Los Angeles County Super. Ct. No. GA032410)

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

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Fredrick Berry challenges the trial court's order denying his petition for resentencing pursuant to Penal Code section 1170.126 (Proposition 36).[1] He argues the court abused its discretion when it found that he poses an unreasonable risk of danger to public safety. We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

In 1997, appellant committed the present offense, a purse snatching in which $56 was taken from a woman's purse. He was convicted of grand theft. (§ 487, subd. (c) [taking property from the person of another].) The trial court imposed a prison sentence of 25 years to life under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and a one-year enhancement under section 667.5, subdivision (b), for a total sentence of 26 years to life. In committing this offense, appellant pushed the victim to the ground, resulting in a scrape to her knee. Appellant was detained a short while later. He was near the scene of the crime and had $56 dollars in his possession.

On November 6, 2012, California voters approved Proposition 36, the Three Strikes Reform Act of 2012. The Act amended sections 667 and 1170.12 by limiting the imposition of a Three Strikes sentence to serious or violent felonies. It also added section 1170.126, which allows an eligible defendant who is serving an indeterminate life sentence for a third strike that is neither serious nor violent to petition to recall the sentence and for resentencing under Proposition 36.[2]

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

[2] "Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision

On December 20, 2012, appellant filed a petition under Proposition 36. The court found him eligible for relief since grand theft is neither a serious nor violent felony within the meaning of the Three Strikes law, and granted a suitability hearing.

Before the suitability hearing was held, California voters approved Proposition 47, The Safe Neighborhoods and Schools Act. (§ 1170.18.)[3] Proposition 47 amended several statutes, including section 487. As amended, subdivision (a) of section 487 defines grand theft as the taking of money, labor, or real or

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(e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section." (§ 1170.126, subd. (b).)

[3] "A person who, on November 5, 2014, was 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 ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).)

personal property with a value exceeding $950. Because the amount taken from the victim's purse in this case was less than $950, the same offense if committed today would be charged as petty theft and punished as a misdemeanor unless an exception applies. Appellant filed a petition for resentencing under Proposition 47 in February 2015, but his petition was denied because, due to his prior conviction under section 288a, he is subject to sex offender registration under section 290, subdivision (c). By its express terms, Proposition 47 does not apply to those who are subject to sex offender registration under section 290, subdivision (c). (§ 1170.18, subd. (i) [Prop. 47 inapplicable to those subject to registration under § 290, subd. (c)]; see § 490.2 [petty theft of property valued under $950 shall be punished as misdemeanor but may be punished under § 1170, subd. (h) if defendant has enumerated prior conviction or is subject to registration under § 290, subd. (c)].)

Appellant was 54 years old at the time of his Proposition 36 suitability hearing on December 7, 2016. In assessing a defendant's suitability for resentencing, Proposition 36 directs the 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).)

Criminal History

Appellant has a lengthy criminal history. In 1982, he fatally stabbed a victim in the chest, and received a six-year prison sentence for voluntary manslaughter. (former § 192.1

[currently found at § 192, subd. (a)].) Voluntary manslaughter is a serious and violent felony (§§ 1192.7, subd. (c)(1), 667.5, subd. (c)(1)) and qualifies as a strike under the Three Strikes law. Appellant admitted to the probation officer that he consumed beer several times a week and on the night of the stabbing.

Following his release on parole, appellant was staying at the home of his sister, where he sexually molested his sister's minor son (appellant's nephew), and threatened his sister with a knife when she confronted him about the molestation. In 1987, appellant was convicted of oral copulation of a minor, which was charged as a misdemeanor (§ 288a); soliciting a lewd act (§ 647, subd. (a)); and assault with a knife (§ 245).

Three years later, in 1990, appellant punched a 65-year-old apartment manager with sufficient force to knock her to the ground. He slammed her head twice against the concrete pavement, took her keys, and tried to enter a unit in the building. He was convicted of assault and received a four-year prison sentence. (§ 245.) Appellant told the probation officer that he drank alcohol on a regular basis.

In 1993, appellant shoved a victim into a wall while trying to remove money from his pocket. He was sentenced to seven years in state prison for robbery. (§ 211.) Robbery is a serious and violent felony (§§ 1192.7, subd. (c)(19), 667.5, subd. (c)(9)) and qualifies as a strike under the Three Strikes law.

While on parole for the 1993 offense, appellant committed the current offense, grand theft person, in 1997. He admitted to using cocaine in the range of $200 to $300 worth per day.

Disciplinary Record & Rehabilitation Efforts

On April 18, 2015, appellant received a security classification score of 19, which is the mandatory minimum for prisoners serving a life sentence. His actual classification score on that date was zero. On April 22, 2015, appellant received a California Static Risk Assessment score of "1 Low."

Appellant received five Rules Violation Reports ("RVR's") during his incarceration. An RVR is issued when an inmate is found to have committed misconduct that is a violation of law which is not minor in nature. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).) The most recent RVR's occurred in 2013, while this petition was pending. One was for the attempted receipt of a package containing 16 cell phones and chargers, and the other was for possession of a cigarette lighter. Both cell phones and lighters are considered "dangerous contraband" that can be used to facilitate a crime, aid an escape, or fashioned into a weapon. (Cal. Code Regs., tit. 15, § 3000.)

He received additional RVR's for possession of eight gallons of inmate manufactured alcohol (pruno) in 2008, theft of food (three to four pounds of peanuts and a container full of mayonnaise packets) in 2001, and for showing disrespect to staff in 1999.

Other Information

During his incarceration, appellant participated in manual labor programs, including janitorial, yard crew, and dining hall work. His medical history includes type 2 diabetes, hypertension, asthma, chronic obstructive pulmonary disease, hyperlipidemia, sleep apnea, obesity, seasonal allergies, and intermittent headaches.

Appellant's Expert Witness

Richard Subia, a public safety consultant, testified as appellant's expert witness. During Mr. Subia's 26-year tenure with the California Department of Corrections and Rehabilitation, he served as gang investigator, corrections lieutenant, corrections captain, assistant warden, and warden. In his written report and testimony, Mr. Subia stated that based on his evaluation of appellant's record and interview statements, appellant does not pose an unreasonable risk of danger to public safety.

Mr. Subia surmised from the nature of appellant's disciplinary violations (possession of pruno; theft of food) that he was selling merchandise to other prisoners. Mr. Subia explained that appellant does not have much family support, and was trying to survive by selling these items. He testified that it is not uncommon for those with learning disabilities such as appellant to be recruited by more "sophisticated" individuals to smuggle contraband and take the blame if caught. As to the eight gallons of pruno, Mr. Subia believed it was intended for sale rather than personal consumption. He saw no indication that appellant has a current drug or alcohol problem. The usual procedure when an inmate is found with alcohol or drugs is to require a urine test. Because there is no record of a positive test for drugs or alcohol, Mr. Subia does not believe appellant is using either substance.

In evaluating appellant's criminal history, Mr. Subia took into consideration appellant's interview statements. Appellant told Mr. Subia that he acted in self-defense during the 1982 manslaughter. He claimed the victim was the initial aggressor and cut him across the chest with a knife. Regarding the section 288a conviction, appellant explained that he had sex with an

underage female who told him she was 18 years old. He said that the 1990 assault conviction was based on a "misunderstanding" because he "wasn't anywhere near the area" when the crime occurred. As to the commitment offense, he explained that he was arrested after being mistakenly identified in a field lineup.

Mr. Subia testified that all the crimes were violent, but the level of violence diminished over time. Appellant was armed with a knife in the 1982 and 1987 crimes but not during the later crimes. There is no indication that appellant engaged in violence or sexual misconduct while in prison.

Appellant's Testimony

Appellant testified that he committed many of his crimes to support his use of drugs and alcohol. He does not currently use drugs or alcohol, and he participated in a Narcotics Anonymous program in 2012 and 2013. He completed the requirements of a diabetes class, and participated in a peer education program for disease prevention.

Appellant testified that he committed the 1982 stabbing in self-defense. He denied assaulting the apartment manager in 1990, claiming he "slipped down the stairs when she was right there, and that's how she fell." He stated he was not present during the current offense. As to the sexual molestation conviction, appellant conceded the victim was his minor nephew.

Denial of Appellant's Petition

The trial court denied appellant's petition for resentencing, finding that he poses an unreasonable risk of danger to public safety and is not suitable for release.

The court viewed appellant's effort to minimize or deny his prior convictions as an indication of lack of remorse. Lack of remorse is indicative of an inmate's lack of insight or understanding of his violent conduct and is highly probative of current dangerousness. (Citing *In re Shaputis* (2011) 53 Cal.4th 192, 218.) In addition to his history of reoffending shortly after being released from prison, appellant received two RVR's in 2013 while this petition was pending. The court found that his willingness to violate institutional rules despite a strong motivation to conform suggests he is not sufficiently mature to be safely returned to society.

Appellant's lack of family support will heighten the difficulties of finding employment and housing as a convicted felon and registered sex offender, and the court expressed concern about his ability to navigate these challenges. The rehabilitation programs that accept registered sex offenders are limited, and the court was reluctant to send appellant to a program in an area of downtown Los Angeles that is "magnet for criminality." The court discussed other rehabilitation facilities with counsel, but did not find them suitable.

Notwithstanding the theory that criminality diminishes with age, the court gave little weight to appellant's age and health ailments. Based on the court's observation of appellant at the hearing, the court found him to be "relatively young" and physically capable of committing serious crimes.

Appellant filed a timely appeal from the order denying his petition.

DISCUSSION

Appellant argues the trial court abused its discretion in finding that he poses an unreasonable danger to public safety. We disagree.

Appellant argues that section 1170.126 creates a presumption that a person who is eligible for relief also is suitable for relief. In *People v. Buford* (2016) 4 Cal.App.5th 886, 901–903,[4] the court found there is no presumption of suitability. We agree with *Buford's* holding that because the determination of suitability is entrusted to the discretion of the trial court, there is no presumption of suitability. (*Ibid.*)

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.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.) Viewing the record in the light most favorable to the trial court's ruling, our review is limited to determining whether a rational trier of fact could reasonably conclude that appellant poses an unreasonable risk of danger to public safety. (See *People v. Buford*, *supra*, 4 Cal.App.5th at p. 903.) Because the record

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[4] On November 15, 2017, the Supreme Court dismissed review in *Buford* without ordering the appellate opinion depublished. Accordingly, the publication status of *Buford* remains unaltered. (See Cal. Rules of Court, rule 8.528(b)(3) [unless otherwise ordered, dismissal of review does not affect publication status of appellate opinion].)

supports the trial court's exercise of discretion, appellant has not established a violation of his right to due process.

Appellant contends the trial court gave undue weight to immutable factors such as his prior criminal history, and insufficient weight to the many factors that indicate he no longer poses a threat to public safety. These include his security classification score of 19 (the mandatory minimum), his California Static Risk Assessment (CSRA) score of "Low 1" (Cal. Code Regs., tit. 15, § 3768.1, subds. (a)-(b) [CSRA score is a "risk number value" that predicts likelihood of incurring felony arrest within three years of being released to parole, and is based on factors such as age, gender, criminal record, and sentence/supervision violations]), lack of violent behavior while in prison, current age, abstinence from drugs and alcohol, and the favorable expert opinion of Mr. Subia. Appellant argues there is no nexus between his prior criminal history and the trial court's finding that he poses a current risk of danger to society. We do not agree.

The detailed ruling of the trial court does not support appellant's assertion that the court misapplied the governing legal principles to the facts of this case. Unlike the CSRA score, which "uses static indicators that do not change" (Cal. Code Regs., tit. 15, § 3768.1, subd. (c)), the trial court based its decision on its observations of appellant's demeanor, body language, voice inflections, physical appearance, and attitude during his testimony at the suitability hearing. Based on these personal observations, the court independently evaluated appellant's maturity, insight, and understanding of his previous crimes. It found that appellant's refusal to admit the truth to Mr. Subia about his crimes—he lied about the sexual molestation of his

nephew and the assault of the apartment manager—was an indication of lack of remorse. Because a lack of remorse shows a lack of insight or understanding of his violent conduct, it is highly probative of current dangerousness. (*In re Shaputis*, *supra*, 53 Cal.4th at p. 218.) An inmate's refusal to admit the truth about his criminal history "'establishes a nexus to current dangerousness because it indicates the inmate is hiding the truth and has not been rehabilitated sufficiently to be safe in society.' [Citation.]" (*In re Butler* (2014) 231 Cal.App.4th 1521, 1534.)

In re Lawrence (2008) 44 Cal.4th 1181, cited by appellant, does not compel a reversal. In *Lawrence*, the Supreme Court reviewed the Governor's finding that the petitioner was not suitable for parole because of her lack of remorse and continued efforts to justify the victim's murder. The Supreme Court found the evidence of a lack of remorse was contradicted by "abundant evidence" that the "petitioner consistently, repeatedly, and articulately has expressed deep remorse for her crime as reflected in a decade's worth of psychological assessments and transcripts of suitability hearings that were before the Board." (*Id.* at p. 1222–1223.) In contrast, the testimony by appellant reflects a lack of remorse for the sexual molestation of his nephew and violent assault of the apartment manager. This case also is distinguishable from *Lawrence* because the evidence contains no articulation of deep remorse for either of these crimes.

Although the expert testimony by Mr. Subia which minimized the seriousness of appellant's institutional misconduct is undisputed, it is not conclusive. (See *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 633 [testimony of expert witness is not conclusive and is to be given proper weight by trier of fact, even where expert testimony is uncontradicted].)

Regardless whether appellant knew the package he signed for contained 16 cell phones, he received two RVR's for possession (or attempted possession) of dangerous contraband while the present petition was pending, and the weight they are to be given is for the trial court to determine. It was within the discretion of the court to find that the RVR's demonstrate appellant's "predilection to violate rules even when he has a strong incentive to be on his best behavior—his freedom."

The evidence viewed as a whole and in the light most favorable to the trial court's ruling supports the finding that appellant poses an unreasonable risk of danger to public safety. In addition to his lack of close family ties, appellant's re-entry into society will be further complicated by his status as a convicted felon and registered sex offender. It was within the court's discretion to find that, notwithstanding the low CSRA score, the recent rules violations and lack of remorse displayed at the suitability hearing indicate appellant is not sufficiently rehabilitated to be safely returned to society.

DISPOSITION

The order is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.