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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MARSHALL,

Defendant and Appellant.

2d Crim. No. B292080
(Super. Ct. No. 1026041)
(Santa Barbara County)

David Marshall appeals a postjudgment order denying his Proposition 36 petition (Pen. Code, § 1170.126, subd. (b))¹ to recall his third-strike life sentences for attempted mayhem, assault with intent to commit mayhem, and assault by means likely to produce great bodily injury. Appellant contends, and the Attorney General agrees, that the petition makes a preliminary showing that appellant is serving a concurrent, life term for a non-serious felony, i.e., assault by means likely to

¹ All statutory references are to the Penal Code.

produce great bodily injury. (See § 1170.126, subd. (e)(1); Couzens & Bigelow, Cal. Three Strikes Sentencing (The Rutter Group 2018) § 14:3, pp. 14-4 to 14-5.) We reverse and remand with directions.

Procedural History

In 2001, a jury convicted appellant of attempted mayhem (§§ 664/205), assault with intent to commit mayhem (§ 220), assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), and simple battery (§ 242). Appellant was sentenced as a third strike offender to state prison for 46 years to life based on the following sentence calculation: 25 years to life for assault with intent to commit mayhem, plus four consecutive five-year terms for his prior serious felony convictions (§ 667, subd. (a)), plus one year on a prior prison term enhancement (§ 667.5, subd. (b)). The trial court imposed a concurrent term of 25 years to life on the count for assault by means likely to produce great bodily injury, and imposed and stayed (§ 654) a life term on the count for attempted mayhem. We affirmed the judgment in an unpublished opinion but modified the judgment to reflect that appellant was awarded 389 days presentence custody credit. (B154776.)

Petition for Resentencing

On June 25, 2018, appellant filed a petition for resentencing pursuant to section 1170.126. The trial court denied the petition on the ground that appellant’s “life sentence was based on a serious or violent felony.”² The court was half

² “There are two stages to recall and resentencing under Proposition 36. First, the [trial] court makes a threshold determination whether the life inmate is eligible for resentencing - that is, his or her current offense is neither serious or violent

right. The conviction for assault with intent to commit mayhem is a serious felony, which renders appellant ineligible for resentencing on that count.

Appellant, however, received a concurrent life sentence for assault by means likely to produce great bodily injury, which the Attorney General concedes is not a serious or violent felony. (See § 1170.126, subd. (e)(1).) “[A]n inmate is eligible for resentencing with respect to a [count] that is neither serious nor violent despite the presence of another current offense that is serious or violent.” (*People v. Johnson* (2015) 61 Cal.4th 674, 695.) Although appellant is serving a life sentence for assault with intent to commit mayhem (a serious felony; § 1192.7, subd. (c)(29)), appellant may petition for resentencing on the life term for assault with intent to produce great bodily injury (a non-serious felony). (§ 1170.126, subd. (e)(1).)

We reverse but note that resentencing is not automatic. Appellant may be ineligible for resentencing if the trial court finds that appellant personally inflicted great bodily injury on a person (§ 1192.7, subd. (c)(8); see *People v. Johnson* (2016) 244 Cal.App.4th 384, 389-390), if appellant suffered a prior “super strike” conviction (see §§ 667, subd. (e)(2)(C)(iv); 1170.12, subd. (c)(2)(C)(iv); *People v. Johnson, supra*, 61 Cal.4th at pp. 681-682 [describing “super strikes”]; *People v. Estrada* (2017) 3 Cal.5th 661, 672 [prosecution and trial court may look at the record of conviction]), if the trial court finds that appellant

nor one of the enumerated disqualifying offenses, and the first or second strike is not one of the enumerated disqualifying priors. Pen. C § 667(e). Second, the [trial] court determines whether the petitioner, although eligible, would ‘pose an unreasonable risk of danger to public safety.’ Pen. C § 1170.126(f).” (Cal. Criminal Law Procedure and Practice (Cont.Ed.Bar 2018) § 37.33A, p. 1094.)

poses an unreasonable risk of danger to public safety (§ 1170.126, subd. (f); *People v. Frierson* (2017) 4 Cal.5th 225, 240), or the trial court finds lack of good cause for not timely filing the petition (§ 1170.126, subd. (b)). Although Proposition 36's effective date was November 7, 2012 and the deadline to file a resentencing petition was November 7, 2014, late filing is allowed for good cause. (§ 1170.126, subd. (b); see Cal. Criminal Law Procedure and Practice, *supra*, § 41.17A, p. 1281.)

Disposition

The postjudgment order denying appellant's petition for resentencing is reversed and remanded with directions to determine appellant's eligibility for resentencing, whether appellant poses an unreasonable risk of danger to public safety (§ 1170.126, subd. (f)), and whether there was good cause for the late filing of the petition (§ 1170.126, subd. (b)).

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

John McGregor, Judge

Superior Court County of Santa Barbara

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