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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. TREMAINE DEON CARROLL, Defendant and Appellant.	B267822 (Los Angeles County Super. Ct. No. BA173778)

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

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Tremaine Deon Carroll appeals from an order denying his petition to recall his sentence and to be resentenced under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).[1] The trial court denied the petition based on a finding that resentencing Carroll would pose an unreasonable risk of danger to public safety. (*Id.*, subd. (f).) Carroll contends the court committed legal error in making that finding because it failed to apply the definition of "'unreasonable risk of danger to public safety'" contained in Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (§ 1170.18, subd. (c)). Proposition 47 defines that term to mean an unreasonable risk that the petitioner will commit one or more specified violent felonies, denominated as "super strikes." According to Carroll, Proposition 47's restrictive definition of "'unreasonable risk of danger to public safety'" applies throughout the entire Penal Code, including to Proposition 36. He therefore seeks a remand for a new hearing into his suitability for resentencing based on the Proposition 47 dangerousness standard. Alternatively, Carroll claims that the record on appeal demonstrates that he does not pose a risk of danger to public safety under the Proposition 36 standard and that the trial court abused its discretion in finding to the contrary.

After the parties' briefs were filed and the case was submitted, the California Supreme Court decided *People v. Valencia* (2017) ___ Cal.5th ___ [2017 WL 2837124], which held that Proposition 47's definition of unreasonable risk of danger to public safety does not apply to Proposition 36 resentencing

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

petitions. Applying Proposition 36's less restrictive definition, we hold that the trial court did not abuse its discretion in denying Carroll's petition based on its finding that resentencing Carroll would pose an unreasonable risk of danger to public safety. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Carroll's Juvenile History and Initial Two Strikes*

Carroll's criminal record dates back to 1988, when he was 15 years old. That year, the juvenile court sustained a Welfare and Institutions Code section 603 petition charging Carroll with grand theft of property (§ 487). The following year, the juvenile court sustained another petition charging Carroll with possession of a concealable firearm by a minor (former § 12101, subd. (a), now § 29610) and carrying a concealed weapon (former § 12025, subd. (b), now § 25400, subd. (c)).

Carroll committed his first and second strike offenses in 1990, when he was 17 years old. The offenses arose out of the same incident. In that incident, Carroll was among several men wearing masks and holding handguns who broke into an apartment, took two women at gunpoint to another location, and used one woman's cell phone to demand a ransom for her release. The men sexually assaulted the other woman and took jewelry and money from both women. Carroll's fingerprints were found at the scene, and a call was made from the woman's cell phone to a residence associated with Carroll.

Carroll was charged as an adult with three counts of kidnapping for ransom (§ 209), two counts of robbery (§ 211), and three counts of oral copulation in concert by force (§ 288,

subds. (a), (d)). Following dismissal of some of the counts pursuant to section 1118.1, and a hung jury and mistrial as to the remaining counts, Carroll pled guilty to two counts of kidnapping in lieu of a retrial. He was sentenced to prison for a term of 10 years 8 months.

B. *Carroll's Third Strike*

Carroll committed his third strike offense on August 24, 1998, when he was 25. In that incident, Corbaine Cooper, an acquaintance of Carroll, entered a jewelry shop. Cooper flashed a bundle of money and asked the jeweler to show him two Rolex watches and a gold chain. Cooper put the chain around his neck, took the watches, and ran out the door, with the jeweler in pursuit. Carroll drove up to the front of the shop in a car. Cooper got into it. The jeweler tried to push his way into the car, but Carroll sped off, with the jeweler hanging partway out of the open car door. The jeweler was able to grab the steering wheel, causing the car to hit a parked vehicle. Carroll got out of the car, told Cooper to give him the watches, then ran away.

A witness reported Carroll's location to a retired police officer who was working at a movie shoot nearby. The officer located Carroll and drew his gun. Seeing the officer, Carroll ran to another car that was stopped at a traffic signal, pushed the driver aside, and attempted to get into the car. The driver hit the accelerator and the car began moving, with Carroll hanging out of the car door. The driver suddenly stopped, and Carroll fell to the pavement. He tried again to get into the car, but a police officer apprehended him.

Carroll was initially charged by information with robbery (§ 211) and attempted carjacking (§§ 215, subd. (a), 664). During

trial, a charge of grand theft was added (§ 487, subd. (a)). Carroll was acquitted of robbery pursuant to section 1118. The jury was unable to reach a verdict as to attempted carjacking, and the court declared a mistrial as to that count. The jury found Carroll guilty of grand theft and also found true the allegations Carroll suffered two prior convictions of kidnapping (§ 207), a serious or violent felony under the three strikes law (§§ 667, subds. (b)-(i), 1170.12). The court sentenced Carroll to state prison for 25 years to life as a three strikes offender. Carroll appealed from the judgment of conviction. We affirmed. (*People v. Carroll* (Jun. 19, 2000, B132318) [nonpub. opn.].)

C. *Carroll's Conduct While in Custody*

While Carroll was in jail awaiting trial on his commitment offense (i.e., the third strike), sheriff's deputies acting on a tip from a confidential informant searched Carroll and found him in possession of a metal wire shank. Carroll told the deputies that he was carrying the shank for protection in case "he had to 'stick someone.'" He was convicted in 1999 of possession of a weapon by a prisoner (§ 4502, subd. (a)) and sentenced to four years; the sentence was consecutive to the sentence imposed for the commitment offense.

While in prison, Carroll received 14 RVRs—Rules Violation Reports—for serious rule violations between 2001 and 2015. (Cal. Code Regs., tit. 15, §§ 3312, subd. (a)(3), 3315, subd. (a); *In re Martinez* (2012) 210 Cal.App.4th 800, 805.) One of the RVRs stemmed from his conviction for possession of the metal wire shank. Other RVRs were issued for, inter alia, mutual combat, refusing to obey orders, possession of controlled substances, filing a false report against a peace officer, and behavior that could lead

to violence. Carroll also received 10 "chronos"—custodial counseling chronology reports—for less serious rules violations. (Cal. Code Regs., tit. 15, §§ 3000, 3312, subd. (a)(2); *In re Stoneroad* (2013) 215 Cal.App.4th 596, 606, fn. 4.)

Carroll's most recent classification score, from 2014, was 86, which indicated that he was a medium security risk. (Cal. Code Regs., tit. 15, § 3375 et seq.; *In re Jenkins* (2010) 50 Cal.4th 1167, 1173-1174.) This was down from a high of 106 in 2012 and 2013.

D. *Carroll's Efforts at Rehabilitation*

Carroll received 29 certificates for participating in various rehabilitation programs in prison, including sports, creative expression, educational, and therapeutic programs. However, only five of the certificates were for programs that he commenced prior to the November 7, 2012 effective date of Proposition 36.

E. *Carroll's Proposition 36 Petition*

On January 18, 2013, Carroll through his appointed counsel filed a Proposition 36 petition to recall his sentence and to be resentenced. The trial court issued an order to show cause why the petition should not be granted. The People filed an opposition to the petition, arguing that Carroll was both ineligible and unsuitable for recall of sentence and resentencing. As to unsuitability, the People argued that resentencing Carroll would pose an unreasonable risk of danger to public safety. Eventually, the People withdrew their opposition based on ineligibility but continued to maintain that Carroll was

unsuitable for resentencing on the ground of future dangerousness.[2]

While his Proposition 36 petition was pending, Carroll filed a series of unrelated pro. per. motions, even though he still was represented by counsel. In one of the motions, Carroll requested that the venue, the prosecutor, and the trial judge all be changed. In another, Carroll complained of prosecutorial misconduct and vindictive and selective prosecution. In two others, Carroll sought discovery, including discovery of law enforcement personnel files under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. All told, Carroll filed six pro. per. motions prior to the hearing on his Proposition 36 petition. The trial court repeatedly warned Carroll that he could not file pro. per motions while he was still represented by counsel; nevertheless, Carroll persisted in filing such motions.[3]

At the hearing on Carroll's Proposition 36 petition, Carroll read a prepared statement in which he apologized to his victims, took responsibility for his actions, and promised that if given another chance he would lead a law-abiding life and be a positive

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[2] In November 2014, Carroll filed a petition to recall his sentence and to be resentenced by having his felony grand theft conviction reduced to a misdemeanor under Proposition 47. The court denied this petition without prejudice based on Carroll's failure to allege service on the district attorney's office and his failure to state the value of the property involved in his grand theft conviction, which needed not to exceed $950 for Carroll to be eligible for resentencing under Proposition 47 (§§ 459.5, 1170.18)

[3] The court afforded Carroll the opportunity to seek to represent himself under *Faretta v. California* (1975) 422 U.S. 806 [95 S. Ct. 2525, 45 L.Ed.2d 562].) But Carroll never completed the required *Faretta* waiver form.

role model. Carroll also presented his plans for his release if resentenced, which included transitional housing through the Amity Foundation and employment in the construction industry. Both his father and his fiancée offered their support if he were released.

On October 9, 2015, the court denied Carroll's Proposition 36 petition, finding that resentencing Carroll would present an unreasonable risk of danger to public safety. In making that finding, the court began by reviewing Carroll's criminal history, dating back to the sustained petitions when he was a juvenile. The court expressed particular concern about the violent nature of his strike offenses. The court pointed to the fact that, in the kidnapping incident that led to his initial two strikes, Carroll and his accomplices wore masks, took two women at gunpoint from their homes, robbed them, and sexually assaulted one of them. The court also noted that, in the incident at the jewelry store that led to his third strike, Carroll was the getaway driver and sped down a street while the robbery victim's legs were dangling out of Carroll's car.

After reviewing Carroll's criminal history, the court stated: "Notwithstanding [his] numerous 'second chances,' [Carroll] has engaged in consistent criminal activity since [his teens]." Referring to Carroll's failure to reform during his lengthy incarceration following his conviction on the initial two strikes, the court said that "[o]ne would expect an inmate to learn his lesson after serving nearly ten years in prison [on] the kidnapping convictions; yet [Carroll] did not." The court then noted that while Carroll was awaiting trial on the third strike offense "and facing a potential life sentence for [it], [he] was caught being in possession of a deadly weapon in jail . . . ."

Summarizing Carroll's criminal history, the court found that "[Carroll] has consistently demonstrated he is not capable of following the law, thereby rendering him an unreasonable risk of danger to society."

The court next expressed concern over Carroll's disciplinary history in prison, noting that his "fighting incidents involved altercations over petty issues (loud music and a chess game)," and that he "was also found guilty of possessing a cellular telephone and charger as recently as 2009, both of which constitute dangerous contraband." The court further observed that Carroll's "2009 and 2010 RVRs for possession of marijuana and methamphetamine raise the inference that [Carroll] has a substance abuse problem." The court concluded that Carroll's RVRs and the chronos provided "some evidence that, if released, [Carroll] will be unable to follow society's laws," demonstrating "that he poses an unreasonable risk of danger to public safety at this time."

Turning to Carroll's rehabilitation efforts, the court pointed out that the "vast majority of [his] certificates [of achievement] were earned after 2012, the year the electorate approved [Proposition 36], which provided him an opportunity for release in the near future." A public safety consultant who testified as an expert on Carroll's behalf at the hearing explained that Carroll's ability to participate in rehabilitative programs prior to Proposition 36's enactment may have been affected by a letter he wrote in 2009 exposing illegal behavior by correctional officers. The court discounted the expert's testimony "because the record does not establish that [Carroll] participated in *any* institutional programming prior to his 2009 letter . . . ." The court concluded that "[d]espite [Carroll's] efforts towards positive rehabilitation,

the totality of his institutional record demonstrates that resentencing him would pose an unreasonable risk of danger to public safety at this time." The court stated that its conclusion was buttressed by Carroll's "elevated classification score," which, in the court's view, "provides additional evidence of his current dangerousness."

The court next referred to Carroll's multiple "unauthorized [pro. per.] filings while represented by counsel" and stated it was "troubled by [Carroll's] repeated failure to comply with the court's directive" to refrain from such filings. The court found that his pattern of behavior demonstrated Carroll's "inability to comply with the rules, and express orders by this court, [and] provides additional evidence that he will be unable to follow society's rules if released from prison."

Finally, the court found Carroll's release plans to be commendable and constituted "a factor tending to support a finding of suitability for resentencing." Nevertheless, the court concluded that "[t]he totality of the record makes it clear that resentencing [Carroll] would pose an unreasonable risk of danger to public safety at this time." The court stated that its "conclusion comports with the electorate's intent to 'keep violent felons off the street' and 'prevent[] dangerous criminals from being released early[.'] [Citations.]"

DISCUSSION

A. *Governing Law*

Proposition 36 provides that when a defendant's current offense is not a serious or violent felony and the defendant is not otherwise disqualified from relief, the defendant will be

sentenced as a second strike offender rather than receiving an indeterminate life sentence as a third strike offender. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) Proposition 36 also established a procedure, codified in section 1170.126, "whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety." (*Id.* at p. 168; accord, *People v. Johnson* (2015) 61 Cal.4th 674, 680-681.)

Section 1170.126 does not define the term "unreasonable risk of danger to public safety." It simply says that, in exercising discretion to determine whether the petitioner would pose an unreasonable risk of danger to public safety, "the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

Proposition 47, which was enacted two years after Proposition 36, reclassified as misdemeanors certain drug and theft offenses that previously had been classified "as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) "It also enacted a procedure permitting

inmates who are serving felony sentences for offenses that Proposition 47 reduced to misdemeanors to petition to have their felony convictions reclassified as misdemeanors and to be resentenced based on the reclassification. Like Proposition 36, Proposition 47 gave resentencing courts discretion to decline to impose a lesser sentence if resentencing 'would result in an unreasonable risk of danger to public safety.' [Citation.] In contrast to Proposition 36, however, Proposition 47 restricted that discretion by defining the phrase 'unreasonable risk of danger to public safety[]' . . . [to mean] 'an unreasonable risk that the petitioner will commit a new violent felony within the meaning of' section 667, subdivision (e)(2)(C)(iv). [Citation.] The cited subdivision of section 667 identifies eight types of particularly serious or violent felonies, known colloquially as 'super strikes.'" (*People v. Valencia*, *supra*, ___ Cal.5th at p. ___ [2017 WL 2837124 at p. 1], fn. omitted.)

Carroll argues that Proposition 47's more restrictive definition of unreasonable risk of danger to public safety applies to Proposition 36 resentencing proceedings because Proposition 47 states that its definition extends "*throughout this Code*" (§ 1170.18, subd. (c), italics added), which, according to Carroll, means the whole Penal Code. The California Supreme Court recently rejected that argument. It construed Proposition 47's "definition of an 'unreasonable risk of danger to public safety' as applicable only to the resentencing proceedings that are authorized under Proposition 47." (*People v. Valencia*, *supra*, ___ Cal.5th at p. ___ [2017 WL 2837124 at p. 18].) In short, contrary to Carroll's claim, that definition is not exported into the Penal Code writ large. Accordingly, the less restrictive definition of

unreasonable risk of danger to public safety contained within Proposition 36 applies here.

B. *The Trial Court Did Not Abuse Its Discretion in Denying Carroll's Petition on the Ground That Resentencing Him Would Pose an Unreasonable Risk of Danger to Public Safety*

We review the denial of a Proposition 36 petition on the ground of future dangerousness under the abuse of discretion standard because section 1170.126, subdivision (f), by its terms, confers discretion on trial courts to deny petitions for that reason. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303.) "'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."' [Citation.]" (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1264; see also *People v. Gibson* (2016) 2 Cal.App.5th 315, 325.) Applying this standard, we find no error in the trial court's denial of Carroll's Proposition 36 petition on the ground that resentencing him would pose an unreasonable risk of danger to public safety. Carroll's long criminal record, checkered disciplinary record while incarcerated, and relatively limited efforts to rehabilitate himself support the court's future dangerousness finding.

As to Carroll's criminal history, the court expressed concern about the violent nature of his offenses over an extended period of time. It found that this history showed that Carroll posed an unreasonable risk of danger to public safety. The record of

Carroll's criminal conduct provides ample support for the court's determination.

Carroll contends that the court placed too much weight on the conduct underlying his three strike convictions. In particular, he emphasizes that his third strike offense occurred many years ago, in 1999. The court took pains to state, however, that its future dangerousness finding was not based solely on what Carroll did in carrying out his three strikes in the 1990s; the finding also was based on the two dozen instances of Carroll's unlawful conduct while incarcerated from 1999 to 2015, the majority of which reflected serious offenses. Among the offenses the court cited were a 2001 conviction for possession of a deadly weapon in prison while Carroll was awaiting trial on his commitment offense and mutual combat arising from fights with fellow inmates in 2004 and 2007.

Carroll is correct that many of his RVRs were for relatively minor offenses, such as possession of tobacco, and the more serious RVRs are now relatively old; furthermore, he did not receive any sustained RVRs in the nearly three years between the enactment of Proposition 36 and the hearing on his petition. The court considered, however, "the totality of [Carroll's] institutional record" and determined that Carroll had not demonstrated a consistent commitment to rehabilitation and an ability to conform his behavior to the rules by which he was governed. That Carroll has shown a potential for rehabilitation following the enactment of Proposition 36 does not establish that the court's determination constituted an abuse of discretion.

As he did below, Carroll cites the explanations for his lack of rehabilitation efforts prior to Proposition 36 that were advanced by the public safety expert who testified on his behalf

at the hearing. The trial court discredited the expert's testimony, however. We must defer to that credibility determination. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 ["'it is the exclusive province of the trial judge or jury to determine the credibility of a witness'"].)

The court's reliance on Carroll's unauthorized pro. per. filings as a predictor of future dangerousness gives us pause. Carroll contends there is no "reliable evidence" to support the notion that such filings are "correlated with a risk of danger to the public." The court construed this pattern of behavior as predictive of the risk of danger Carroll poses to public safety because it indicates "that he will be unable to follow society's rules if released from prison." We are not convinced the failure to heed directions regarding filings in judicial proceedings correlates with future dangerousness. But even if the court erred in citing Carroll's pro. per. filings as a factor in its finding of future dangerousness, the other factors on which the court relied (Carroll's criminal history, his misconduct while in custody and the attendant discipline he received, and his lack of demonstrated commitment to rehabilitation) are firmly grounded in the record. Thus, the court's reliance on Carroll's pro. per. filings provides no basis to overturn the future dangerousness finding as an abuse of discretion.

Finally, Carroll claims that his release plan, age, and maturity "provided significant evidence that resentencing would not create an unreasonable risk of danger to public safety." The court found salutary features in Carroll's release plan. It found, however, that this positive factor was outweighed by negative factors in Carroll's overall record. We find no abuse of discretion in the manner in which the court struck that balance. (*People v.*

Myers (1999) 69 Cal.App.4th 305, 310 ["Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance"].)

DISPOSITION

The order is affirmed.

SMALL, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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