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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. MICHAEL SMITH, Defendant and Appellant.	B281293 (Los Angeles County Super. Ct. No. NA025758)

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

Marilee Marshall, 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, Senior Assistant Attorney General, Noah P. Hill and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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Michael Smith (defendant) appeals the trial court's denial of his motion for resentencing under the Three Strikes Reform Act of 2012 (Reform Act) (Pen. Code, § 1170.126).[1] We conclude there was no reversible error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Underlying Criminal Conviction and Sentence

In August 1995, police came to defendant's home to arrest him the day after he threatened to kill someone. Defendant refused to answer the door; instead, he yelled to the police: "I have got an A.K. in here. . . . If you all want to have some gunplay, I've got an A.K., and I'm taking five of you with me. And the motherfucker in back is first." In 1997, a jury convicted defendant of threatening a public officer with unlawful injury (§ 71).[2] The trial court imposed the mandatory sentence of 25 years to life in prison because two of defendant's prior convictions—his 1991 robbery conviction and his 1991 attempted robbery conviction—each constituted a "strike" within the meaning of our Three Strikes law. (Former §§ 667, subd. (e)(2)(A) & 1170.12, subd. (c)(2)(A).)

II. Petition for Relief Under Reform Act

In February 2013, defendant filed a petition to be resentenced on his 1997 conviction under the Reform Act; he thereafter filed two amended petitions seeking the same. Along

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

2 The People also charged defendant with making criminal threats to the victims the day before (§ 422) and with resisting an executive officer (§ 69). The jury hung on those charges, and the People subsequently dismissed the charges.

with his petitions, defendant submitted (1) certificates of completion for three job skills training courses (in 2008 and 2009); (2) a certificate of completion of a three-day alternatives to violence program (in May 2012); (3) certificates of completion for an advanced creative conflict resolution program (in April 2014), a life skills and self-development module (in March 2014), life and beyond group sessions (in 2015), a 13-week tell-a-tale storytelling workshop (in 2015), and a letter writing program for at-risk youth; (4) letters from defendant's uncle, cousin, and stepfather supporting his release; (5) letters from prison staff indicating support for his release; (6) proof that he had donated money to a charitable group during the last six holiday seasons; (7) a letter indicating he regularly attended religious services; (8) a letter offering him residence at a transitional living center in Los Angeles; and (9) a report by a psychologist who opined that "[t]he risk for imminent violence subsequent to [defendant's] release is very low."

III. Trial Court's Ruling

The trial court held an evidentiary hearing at which the psychologist testified.

After taking the matter under submission, the trial court denied defendant's petition in a 14-page written order. The court acknowledged that defendant was eligible for relief under the Reform Act because his 1997 conviction was neither a "serious" nor "violent" felony and because no other disqualifying factor applied. However, the court declined to grant relief because defendant "pose[d] an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

In making this determination, the court looked to the three considerations enumerated in the Reform Act: (1) the applicant's

criminal history; (2) the applicant's disciplinary record while incarcerated; and (3) "[a]ny other evidence . . . relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

The court recounted defendant's extensive criminal history, which included (1) a 1985 juvenile adjudication for burglary (§ 459); (2) a 1985 juvenile adjudication for possessing a controlled substance (Health & Saf. Code, § 11350); (3) a 1986 juvenile adjudication for receiving stolen property (§ 496) and unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)); (4) a 1991 conviction for robbery (§ 211); (5) a 1991 conviction for attempted robbery (§§ 211 & 664); (6) a 1994 conviction for being a felon with a firearm (former § 12021, subd. (a)); and (7) the 1997 conviction at issue in this case, which defendant committed one month after being released from the 1994 prison sentence and while he was on parole. "[S]ince 1985," the court noted, defendant "has either been incarcerated or under some form of state supervision. As an adult, [he] has never successfully completed probation or parole, and he was on parole when he committed the current offense."

The court also detailed defendant's extensive disciplinary record while in prison for the 1997 conviction. This history included (1) five incidents of mutual combat (one in 2000, two in 2004, one in 2006, and one in 2007), one of which (in 2004) necessitated the use of force; (2) two instances of battery on an inmate (one in July 1998, and another in September 2012), one of which (in 2012) resulted in serious bodily injury to the inmate; (3) one incident of attempted battery on a peace officer (in June 2001); (4) two instances of threatening a staff member (one in

March 2001, and another that was downgraded to use of obscene language in 2015), both of which involved profanity; (5) three instances of attempting to introduce or possession of contraband (in July 2001, February 2008, and February 2009); and (6) five instances of disobeying orders or disrespecting prison staff (in May 1999, September 1999, April 2003, February 2004, and September 2005). The court also noted that defendant's inmate security classification (with a higher number corresponding to a greater risk of violence) had gone from 66 in 1994, to a high of 124 in 2012, and remained at 100 in 2015.

The court recognized that defendant's "criminal history is now remote in time," but observed that defendant had "continued to commit violent acts while incarcerated in state prison," including, most recently, battery on an inmate causing serious bodily injury in 2012, and use of vulgar or obscene language in 2015. "When [defendant's] criminal history is viewed alongside his disciplinary record and rehabilitative record," the court reasoned, that history "continues to support the finding that he currently poses an unreasonable risk of danger to public safety."

The court then turned to the factors cutting in favor of resentencing—namely, the programs defendant had completed, his age, and his post-release plans. The court stated that defendant's "recent programming is a positive development," but found that "the timing of the programming" "call[ed] the sincerity of [the] programming into question" because "most of it occurr[ed] after the passage of" the Reform Act. "If [defendant's] only motivation to address the issues that led to his criminal behavior is the opportunity for release," the court reasoned, "the court has little confidence [defendant] would voluntarily or successfully complete his re-entry programs once he is released into the

community." The court noted that defendant's age—47—"typically suggest[s]" less risk, but noted that this suggestion was "contradicted by [defendant's] violent and continuous disciplinary record" while in prison. The court lastly noted that defendant's "post-release plans are slightly supportive of release," although there was "no evidence . . . of any family support[] [that] can be critical to a successful transition" and "this factor [was] outweighed by [defendant's] history of recidivism, lengthy disciplinary record, and meager rehabilitative record."

IV. Appeal

Defendant filed this timely appeal.

DISCUSSION

Until 2012, California's Three Strikes law required a trial court to impose a minimum sentence of 25 years to life in prison for a defendant convicted of a felony—no matter what the felony—if he or she had previously been convicted of two "serious" or "violent" felonies (so-called "strikes"). (Former §§ 667, subd. (e)(2)(A) & 1170.12, subd. (c)(2)(A).) The Reform Act changed this law. As pertinent here, the Reform Act entitled defendants *previously* sentenced on a nonserious and nonviolent felony to a 25-years-to-life sentence under the Three Strikes law to petition for resentencing for that offense. (§ 1170.126, subd. (b).) Whether a defendant is entitled to that resentencing (and thus to an earlier release) turns on (1) whether he is eligible for relief and, if so, (2) whether he is suitable for relief—that is, whether "resentencing the [defendant] would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

The Reform Act explicitly sets forth the factors a trial court is to consider "[i]n exercising its discretion" to determine whether "resentencing the [defendant] would pose an unreasonable risk of

danger to public safety": (1) the defendant'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 defendant's "disciplinary record and record of rehabilitation while incarcerated"; and (3) "[a]ny 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, subds. (f) & (g).) The People bear the burden of establishing, by a preponderance of the evidence, that the defendant poses such a risk. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1305 (*Kaulick*); *People v. Buford* (2016) 4 Cal.App.5th 886, 895-898, review granted Jan. 11, 2017, S238790 (*Buford*).)[3] We review the court's determination in this regard either for substantial evidence (because it entails review of the trial court's factual findings) or for an abuse of discretion (because it entails review of the trial court's exercise of "discretion" (§ 1170.126, subd. (f))). (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1212 [factual findings reviewed for substantial evidence]; *John B.*

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3 Because defendant does not challenge the weight of the People's burden, we need not address the decision in *People v. Arevalo* (2016) 244 Cal.App.4th 836, 842, which holds that the People must establish a lack of suitability beyond a reasonable doubt. Every subsequent decision has disagreed with *Arevalo*. (*People v. Frierson* (2016) 1 Cal.App.5th 788, 793-794, review granted Oct. 19, 2016, S236728; *People v. Newman* (2016) 2 Cal.App.5th 718, 730-732, review granted Nov. 22, 2016, S237491; *Buford*, *supra*, 4 Cal.App.5th at pp. 895-898, review granted.) This issue is now before our Supreme Court in *Frierson* and *Newman*.

v. Superior Court (2006) 38 Cal.4th 1177, 1186 [exercises of discretion reviewed for an abuse of discretion].)

The trial court did not err in denying defendant relief under the Reform Act. Because the parties conceded that defendant was eligible for relief, the sole question was whether defendant "would pose an unreasonable risk of danger to public safety." The court did not abuse its discretion in concluding that he would. To begin, the court painstakingly examined the categories of evidence specified by the Reform Act, reviewing defendant's criminal history, his disciplinary record while incarcerated, his efforts at rehabilitation, his post-release planning, and his age. The court properly noted that defendant's efforts at rehabilitation, his age, and his post-release plans counseled slightly in favor of release, but concluded that these factors were outweighed by the evidence indicating that defendant still posed a risk to public safety—namely, his predilection for criminal activity, as demonstrated by his pre-incarceration criminal history and his continuation of that pattern of behavior while incarcerated, up to and including the years immediately before and while his petition for relief under the Reform Act was pending.

Defendant raises two categories of objections to the trial court's ruling.

First, he takes issue with the standard the court used as a yardstick for measuring whether defendant would pose an unreasonable risk of danger to public safety. To begin, he asserts that public safety is solely concerned with whether a defendant is likely to commit *violent* crimes. However, the law is to the contrary. (See, e.g., *People v. Nasalga* (1996) 12 Cal.4th 784, 790 [noting that ""it is in the best interest for public safety to

enhance the penalties for the crimes of vehicle theft and receiving stolen vehicles"""].)

Further, defendant contends that the trial court erred in citing *Kaulick*, which analogized the suitability inquiry under the Reform Act to the suitability inquiry undertaking for parole hearings. But *Kaulick* drew the analogy in the context of deciding which standard of review to apply on appeal. (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1306, fn. 29.) We are not applying *Kaulick's* "some evidence" standard here, so *Kaulick* itself is irrelevant on this point. What is more, the trial court in this case drew the analogy because "the statutes and regulations identifying suitability and unsuitability factors for parole" might "help inform" its "decision" on suitability under the Reform Act. But the court looked to parole law only three times—as authority for the propositions that (1) "serious rule violations in prison" can be "probative of recidivist tendencies and danger to public safety"; (2) advancing age decreases one's danger to public safety; and (3) the existence of post-release plans tends to show suitability for parole. Given that the last two factors cut in defendant's favor and the first relies on common sense alone, the trial court's analogies to parole could not have harmed defendant in this case, even if we assumed for the sake of argument that it was error to draw those analogies.

Second, defendant argues that the trial court did not properly apply the standard for suitability to the evidence defendant presented. Specifically, he argues that the trial court (1) gave too much weight to his criminal history, which did not involve his personal use of a gun or injury to any of his victims and which was, in any event, old because he committed his last crime in 1995; (2) gave insufficient weight to the fact that he

committed the 2012 battery causing serious bodily injury on his cellmate because the cellmate was a sexual predator; (3) gave insufficient weight to his acceptance into the transitional living facility; (4) gave insufficient weight to the letters from prison officials; (5) gave too much weight to the timing of his rehabilitative efforts; and (6) wrongly found that defendant had no family support.

Defendant's first five arguments concede that the trial court *considered* the evidence at issue; defendant simply asks us to reweigh it and reach a different conclusion. This is something we are not allowed to do. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

We would not be inclined to do so, even if we could. Defendant's first assertion—that his criminal history did not involve his personal use of a gun or injury to any of his victims—is technically accurate, but ignores that his 1991 robbery conviction rested on defendant pushing the robbery victim to the floor and handcuffing him while one of his compatriots wielded a gun and another repeatedly shouted, "Kill him, kill him"; ignores that his 1991 attempted robbery conviction involved defendant telling a woman to hand over money or else he would shoot her son; and ignores that his 1994 felon-in-possession conviction rested on defendant having a loaded gun in arm's reach. Defendant's second assertion—that he savagely assaulted his cellmate because his cellmate was a sexual predator about to attack him—is belied by defendant's contemporaneous explanation of his actions: "I got off the bunk and saw him with his dick in his hand jerking off, I just punched him." Defendant's fifth assertion—that his post-Reform Act rehabilitative efforts should not have been discounted—asks us to discredit logic that

is not unreasonable: A defendant's lack of motivation to pursue re-entry efforts once back in the community is a relevant consideration, and a defendant whose sole motivation for rehabilitation is to obtain release may lack that motivation once the release occurs.

Defendant is correct that the trial court's finding that there was "no evidence . . . of any family support" is not supported by the record. Defendant submitted letters from his stepfather, his uncle, and his cousin voicing their support for defendant's release. Defense counsel also commented during the evidentiary hearing that members of defendant's family were in the audience, but this is not evidence. (See *People v. Garcia* (1984) 160 Cal.App.3d 82, 88-89 [what courtroom audience does is not evidence].) But the trial court made clear that the negative aspects of defendant's record—namely, his "history of recidivism, lengthy disciplinary record, and meager rehabilitative record"—would eclipse the marginal post-release plans defendant had made. We have no doubt that that court would have reached the same result, even if it had acknowledged the letters from three of defendant's relatives. This error was accordingly harmless and provides no basis for disturbing the court's ruling. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 968 [applying harmless error review under *People v. Watson* (1956) 46 Cal.2d 818 to errors under the Reform Act].)

DISPOSITION

The order is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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