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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH RAY JACKSON,

Defendant and  
Appellant.

B275529

(Los Angeles County  
Super. Ct. No. NA075143)

APPEAL from an order of the Superior Court of  
Los Angeles County, Rand S. Rubin, Judge. Affirmed.

Nancy L. Tetreault, 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, Steven D. Matthews, and Noah P. Hill, Deputy  
Attorneys General for Plaintiff and Respondent.

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Following a suitability hearing under the Three Strikes Reform Act of 2012, enacted by the voters as Proposition 36 (Pen. Code, § 1170.126),<sup>1</sup> the trial court found Kenneth Ray Jackson posed an unreasonable risk of danger to public safety and denied his petition for recall of his prison sentence and request for resentencing. On appeal Jackson contends the court abused its discretion in concluding he posed an unreasonable risk to public safety. We affirm.<sup>2</sup>

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. *The Commitment Offense*

On October 24, 2007 a jury found Jackson guilty of driving a motor vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)). In a bifurcated hearing following Jackson's waiver of his right to a jury trial on multiple specially alleged prior conviction allegations, the trial court found true special allegations that Jackson had suffered 15 prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and sentenced him

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<sup>1</sup> Statutory references are to this code unless otherwise stated.

<sup>2</sup> In his appellate briefs Jackson also argued the trial court had erred by failing to apply the narrow definition of “unreasonable risk of danger to public safety” found in the more recently enacted Proposition 47 (§ 1170.18). While his appeal was pending, the Supreme Court decided *People v. Valencia* (2017) 3 Cal.5th 347, holding the limited definition of unreasonable risk of danger to public safety in Proposition 47 did not apply to Proposition 36. (*Valencia*, at pp. 356-357.) In supplemental letter briefs to this court, Jackson conceded *Valencia* governs his appeal and withdrew that argument.

as a third strike offender to an indeterminate state prison term of 25 years to life.

## 2. *Jackson's Petition for Recall of Prison Sentence*

On February 15, 2013 Jackson petitioned for recall of his sentence and resentencing under Proposition 36, which amended the three strikes sentencing scheme to provide, in general, that a recidivist is not subject to an indeterminate life term for a third strike felony that is neither serious nor violent unless the offense satisfies other criteria identified in the statute.<sup>3</sup> The amendments also allow inmates previously sentenced to indeterminate terms under the former three strikes law to petition for recall of their sentences and resentencing to the term that would have been imposed for their crime had they been sentenced under the new sentencing provisions. (§ 1170.126, subd. (a).) Jackson argued in his petition that his nonviolent third strike conviction for driving a vehicle without the owner's

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<sup>3</sup> Prior to Proposition 36, the three strikes law provided that a defendant convicted of two prior serious or violent felonies would be subject to an indeterminate life sentence of at least 25 years to life upon conviction of a third felony, whether or not that felony was serious or violent. (See *People v. Conley* (2016) 63 Cal.4th 646, 652; *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1285-1286.) Under the amended law a defendant with two prior qualifying strike convictions is not subject to an indeterminate life sentence as a third strike offender when the current offense is neither serious nor violent (§ 1170.126, subd. (e)(1)) and does not meet one of the criteria in section 667, subdivision (e)(2)(C)(i)-(iii) (§ 1170.126, subd. (e)(2)), and none of the defendant's prior strike convictions was for one of the offenses listed in section 667, subdivision (e)(2)(C)(iv) (§ 1170.126, subd. (e)(3)).

consent made him eligible for recall of sentence and resentencing under Proposition 36.

The People conceded Jackson was eligible for recall of sentence and resentencing under Proposition 36 but argued his resentencing would pose an unreasonable risk of danger to public safety. (See § 1170.126, subd. (f) [inmate eligible under Proposition 36 shall be resentenced under new law “unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety”].) In their opposition to his petition the People described Jackson’s extensive criminal background, consisting of multiple qualifying strike convictions for burglary and robbery in 1984 (case no. A027082) and an additional qualifying strike conviction for robbery while on parole in 1992 (case no. NA075143), for which he was sentenced as a second strike offender. Most of Jackson’s victims were elderly and vulnerable.

Moreover, the People argued, when Jackson began serving his prison sentence for his latest offense in 2007 in a Level IV high security facility, his California Department of Corrections and Rehabilitation (CDCR) classification score was 67.<sup>4</sup> At the time the petition was filed, his score had risen to 83 after prison

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<sup>4</sup> The CDCR uses an inmate classification system to ensure inmates are properly housed and supervised. (Cal. Code Regs, tit. 15, § 3375 et seq; see *In re Jenkins* (2010) 50 Cal.4th 1167, 1173 [recognizing Legislature’s delegation of authority to CDCR in Penal Code section 5068 to make rules and regulations governing prisoner classification and discipline].) An inmate’s classification score determines the security level of the penal institution or facility in which he or she will be placed. (Cal. Code Regs., tit. 15, § 3375, subd. (d).) A higher classification score indicates a higher security risk.

administrators found he had committed serious rules violations: In October 2009 he was found guilty of possessing a weapon; in January 2012 he participated in a riot; and on separate occasions in 2015 he, along with a fellow prisoner, committed a battery on another inmate requiring use of force by prison guards and engaged in a fist fight with his cellmate. (The minimum classification score for an inmate serving a life sentence is 19.) The People also cited Jackson's self-identification as a member or associate of the Long Beach Insane Crips, an organization it identified as a criminal street gang, although no evidence was presented in this hearing or in any prior hearing involving Jackson that his crimes or rules violations were gang-related.

In reply in support of his petition, Jackson argued that few of his offenses, although classified as serious or violent felonies, involved incidents of "significant" violence. He hit his elderly victims, but did not use a weapon or inflict great bodily injury. He also claimed his criminal history was the result of a severe and debilitating drug and alcohol addiction that he had cured himself in prison without rehabilitative intervention. He noted he had not had a single drug or alcohol write-up while incarcerated. He passed his General Educational Development (GED) tests in 1989 while in prison and received a credential equivalent to a high school diploma. He received training as a pipefitter, provided evidence he would have the assistance and support of his brother in obtaining a job after his release from prison and presented a letter from a drug and alcohol rehabilitation center indicating his acceptance into its program upon his release. Finally, Jackson argued his rules violations while in prison were not very serious. He did not actually use the weapon he was found to have possessed and fist fights were

common in a high security prison, an opinion shared by Jackson's expert witness, a 30-year correctional officer veteran and former prison warden. Finally, at 53 years old, Jackson argued, he was simply too old to present a danger to public safety.

Following a suitability hearing conducted over the course of two days, the court found Jackson posed an unreasonable risk to public safety and denied his petition for recall of sentence and resentencing. In an 11-page memorandum of decision, the court explained the People had met their burden of proof to demonstrate Jackson's unsuitability for resentencing. The court cited Jackson's criminal history, which "dates back to when he was just 13 years old and has been almost uninterrupted since 1976"; his failure to remain free from prison while on parole; his multiple and recent serious rules violations while in prison; and his failures to obtain any rehabilitative intervention through a drug and alcohol program and to renounce his membership in the criminal street gang to which he had claimed an allegiance. Jackson filed a timely notice of appeal from the court's order denying his petition on suitability grounds.

## **DISCUSSION**

### *1. Governing Law and Standard of Review*

Proposition 36 was intended to "[r]estore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime" and to permit "repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession [to] receive twice the normal sentence instead of a life sentence." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1.) As part of its goal of limiting indeterminate life sentences to serious or violent felony offenders,

Proposition 36 added section 1170.126, which permits inmates previously sentenced to life terms under an earlier version of the three strikes law to petition to recall their sentences and, if eligible for relief, to be resentenced to the term that would have been imposed for their crime under the new sentencing provisions. (§ 1170.126, subd. (a).)

However, even if the petitioner is otherwise entitled to be resentenced under the new three strikes law, the petition may be denied if “the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f).) In exercising its discretion under section 1170.126, subdivision (f), “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)(1)-(3); see *People v. Conley* (2016) 63 Cal.4th 646, 653.)

We review the court’s denial of relief under section 1170.126 based on a finding the petitioner presents an unreasonable risk to public safety for abuse of discretion. (*People v. Conley, supra*, 63 Cal.4th at p. 653 [recognizing trial court’s discretion to evaluate factors under section 1170.126, subdivision (f)]; see generally *People v. Sapp* (2003) 31 Cal.4th 240, 257-258 [applying abuse-of-discretion standard when statute authorizes court to act in its discretion].) We may not disturb the

trial court's order made in exercise of its discretion except on a showing that it exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Hall* (2016) 247 Cal.App.4th 1255, 1264.)

2. *The Trial Court Did Not Abuse Its Discretion in Denying Jackson's Petition on the Ground He Posed an Unreasonable Risk to Public Safety*

Jackson contends the trial court abused its discretion in denying his petition because he presented no danger to public safety. First, he argues the court unfairly characterized him as a danger based on his gang membership even though there was no evidence any of his crimes or rules violations were gang-related. Second, he contends the court improperly emphasized his lack of formal drug rehabilitation programming and disregarded evidence from his expert that drug rehabilitation programs were often not available in high security prisons and, when they were available, enrollment caps and long waitlists often impeded an inmate's participation efforts. Finally, he suggests the court could have protected the public by imposing conditions on his parole such as rehabilitative programming and a requirement that he not associate with gang members.

The trial court based its decision, as required under section 1170.126, subdivision (f), on a number of factors. In addition to Jackson's gang membership, the court cited Jackson's extensive criminal background spanning more than 30 years, including 15 qualifying strike convictions; four serious and very recent rules violations while in prison, including battery of an inmate resulting in a need for the guards to use force (pepper spray) and mutual combat with a cellmate; and a lack of rehabilitative programming for his drug and alcohol addiction.



Although Jackson offers a variety of arguments to counter that reasoning, such as the difficulty in obtaining rehabilitative programming in a high security prison (although there was no evidence he made any attempt to do so), explanations for his rules violations (he battered the inmate in an effort to help him take his medication, not to hurt him) and suggestions for protecting the public (imposing conditions on his parole), he has not shown the court's rejection of those arguments and explanations under section 1170.126, subdivision (f), was arbitrary or irrational. (See *People v. Carmony* (2004) 33 Cal.4th 367, 376-377 [in the absence of showing that ruling was irrational or arbitrary, "trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination . . . will not be set aside on review"].)

#### **DISPOSITION**

The order denying Jackson's petition on suitability grounds is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

MENETREZ, J.\*

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