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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALAN EUGENE HODGE, Defendant and Appellant.	B271176 (Los Angeles County Super. Ct. No. NA022315)

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

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTON

Defendant, Alan Eugene Hodge, was convicted in 1996 of cocaine possession. (Health & Saf. Code, § 11350, subd. (a).) Because he had sustained three prior convictions within the meaning of sections 667, subdivision (d) and 1170.12, subdivision (b), he was sentenced to 25 years to life in state prison. He is currently 60 years old and has been incarcerated for 20 years. He appeals from an order denying his Penal Code section 1170.126, subdivision (b) resentencing petition.[1] The parties agree defendant was eligible for resentencing. (§ 1170.126, subd. (e).) However, the trial court found he posed an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) We find no abuse of discretion and affirm the order denying the resentencing petition.

Previously, defendant appealed from an order denying his section 1170.18, subdivision (a) resentencing petition (Prop. 47). In that appeal, as here, he challenged the trial court's finding he posed an unreasonable risk of danger to public safety. He also challenged the trial court's denial of his reconsideration motion. We affirmed the denial orders. (*People v. Hodge* (Dec. 21, 2016, B266852) [nonpub. opn.].) Our Supreme Court denied review. (*People v. Hodge* (March 15,2015, S239817) [nonpub. order].) The issues raised in the present appeal are similar in certain respects to those asserted in the prior appeal, but they are not identical. Notwithstanding our prior affirmance of the trial court's dangerousness finding, we address the specific arguments raised in the present appeal.

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[1] Further statutory references are to the Penal Code unless otherwise noted.

In case No. B266852, defendant argued the trial court erred in finding defendant posed an unreasonable risk of danger to public safety because: the trial court based its conclusion on a "generalized risk of recidivism" rather than on a risk he would commit one of the "super strike" offenses enumerated in section 667, subdivision (e)(2)(C)(iv); the trial court failed to establish the requisite nexus between defendant's past criminal conduct and his current risk in that it placed too great an emphasis on the presence of gang material in his cell; and it was error to deny his reconsideration motion.

In the present case, defendant argues: the trial court should have applied the section 1170.18, subdivision (b) standard of dangerousness; the trial court "distorted" his criminal record in observing he had "a slew of arrests and convictions" for firearm possession; it was error to rely on defendant's limited rehabilitative programming in support of a dangerousness finding; the trial court improperly discounted his age and low classification score and his reentry plans.

II. DISCUSSION

A. The Definition of Dangerousness

Defendant contends the trial court applied an incorrect standard of dangerousness. Defendant asserts the dangerousness definition in section 1170.18, subdivision (b) applies to section 1170.126, subdivision (f). For the reasons stated in *People v. Buford* (2016) 4 Cal.App.5th 886, 903-913, review granted January 11, 2017, we disagree. This issue has been pending before our Supreme Court for some time. (See

People v. Valencia (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825; *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted February 18, 2015, S223676.)

B. The Trial Court's Dangerousness Finding

1. Applicable law and trial court's conclusions

As noted above, the parties agree defendant was eligible for resentencing. Section 1170.126, subdivision (f) requires a trial court to resentence an eligible defendant unless it determines, the defendant would pose an unreasonable risk of danger to public safety. The focus is on whether the defendant *currently* poses an unreasonable risk of danger to public safety. (*People v. Esparza* (2015) 242 Cal.App.4th 726, 746; cf. *In re Shaputis* (2008) 44 Cal.4th 1241, 1254.) Section 1170.126, subdivision (g) identifies the factors to be considered in exercising that discretion: "(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) 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." In exercising its discretion, the trial court may rely on any factor established by a preponderance of the evidence. (Evid. Code, § 115; *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1305.)

Our review is for an abuse of discretion. (*People v. Franco* (2014) 232 Cal.App.4th 831, 832; *People v. Losa* (2014) 232 Cal.App.4th 789, 791.) As our Supreme Court has repeatedly held, discretion is abused when it is exercised in an arbitrary, capricious or patently absurd manner. (E.g., *People v. Peoples* (2016) 62 Cal.4th 718, 745; *People v. Thomas* (2012) 53 Cal.4th 771, 806.) Here, the trial court issued an extensive memorandum of decision explaining its conclusion that defendant posed an unreasonable risk. Substantial evidence supports the trial court's conclusion.

2. Defendant's criminal history

a. defendant's distortion argument has no merit

Defendant contends the trial court "distorted" his criminal history when it observed he had "a slew of arrests and convictions" for firearm possession. Defendant notes that: he had no firearm possession convictions; a sustained juvenile petition is not a conviction; and after 1991, the term "firearm" no longer includes a pellet gun. While arguably the trial court's language may have been imprecise, the essence of its observation is correct. On several occasions defendant, a gang member, engaged in criminal activity involving a firearm or a simulated firearm. On December 26, 1973, defendant, then 16 years old, and a companion robbed a restaurant by simulating a weapon. Several days later, on January 8, 1974, while awaiting disposition in the robbery matter, defendant was arrested for firearm possession. As a gang war was developing, a school police officer found defendant in possession of a .22-caliber pellet

gun and ammunition. On February 2, 1980, defendant was arrested and subsequently charged with murder. On July 17, 1980, defendant pled guilty to voluntary manslaughter. Defendant denied possessing a gun on that occasion. But a witness saw defendant hand a weapon to a companion who then shot and killed the victim. The probation report is consistent. It states a fellow gang member borrowed defendant's gun. The fellow gang member then shot the victim in defendant's presence. We will further discuss defendant's actions in providing a loaded handgun to a fellow gang member for purposes of killing an unarmed victim later in this opinion. Further, while subsequently on parole in that matter, defendant was discovered with a weapon in his car. The trial court did not distort defendant's criminal record.

Moreover, as described below, defendant's criminal history as a whole and his repeated denials of culpability supported the trial court's dangerousness finding. Defendant failed to remain crime-free during the brief periods between incarcerations. He repeatedly performed poorly on probation and parole.

b. juvenile history

Defendant joined a street gang and began using marijuana at age 12. When he was 16 or 17, he began using cocaine. Defendant's contacts with law enforcement began in 1972, when he was just 15 years old. Juvenile petitions were requested after defendant: was twice caught sniffing glue; was found with marijuana cigarettes on his person; engaged in a fistfight; stole a tape deck from a vehicle; was accused of robbery; broke into a house and stole personal property; snatched a person's purse; and

twice trespassed. On December 26, 1973, defendant and a companion robbed a restaurant by simulating a weapon. On January 8, 1974, shortly after committing the robbery, and while awaiting disposition in that matter, defendant was arrested for firearm possession. After a "gang war" erupted, a school police officer found defendant in possession of a .22-caliber CO-2 pellet gun and ammunition. This matter was dismissed after the robbery petition was sustained. On February 26, 1974, defendant was committed to the Fenner Canyon juvenile probation camp. On December 28, 1974, defendant was released.

c. adult history

i. robbery: case No. A016067

On September 3, 1975, eight months after defendant was released from juvenile camp, he was charged with first degree robbery. On September 30, 1975, defendant pled guilty to that offense. The trial court found true or defendant admitted a great bodily injury allegation. Defendant and two accomplices robbed two elderly, intoxicated victims. Defendant used a table leg to beat one of the victims. The victim suffered a brain concussion and required 25 stitches. However, pursuant to the plea bargain, the trial court struck the great bodily injury allegation. Defendant was committed to the California Youth Authority. Defendant was paroled on April 18, 1977. He was discharged from California Youth Authority parole on June 22, 1978, after he was sentenced to state prison for a subsequent offense. With respect to this offense, defendant commented: "They said I was involved in a robbery. They said these two dudes beat up a guy.

I split. I was on the run." Defendant denied having committed the offense. A parole officer spoke to defendant about difficulties while detained in a youth authority camp setting. While in the youth authority camp, defendant was accused of pressuring another youth. Defendant denied wrongly pressuring the other youth.

ii. auto theft: case No. A018517

On January 24, 1978, while on California Youth Authority parole, defendant was charged with robbery and auto theft. On June 1, 1978, he was convicted of auto theft and sentenced to 16 months in state prison. Defendant was paroled on January 28, 1979. Two months later, on March 20, 1979, defendant was arrested for robbery, kidnapping and rape. On June 26, 1979, he was found in violation of his parole and was returned to custody. On September 20, 1979, defendant was paroled for a second time. He was discharged from parole on July 28, 1980. Defendant admitted he was found in a stolen car that had been used to commit a robbery. Defendant denied to a probation officer any knowledge of the car theft or the robbery. He said, "I rode the beef on it." A probation officer also quoted defendant as saying: "It wasn't no deal. I was in a friend of mine's car. They said I stole it. I borrowed it from a man." A probation officer described defendant as a dangerous, hard-core, tough guy type who had always been a problem and always would be. This was because defendant saw criminality as a way of life.

With respect to the robbery, kidnapping and rape arrest, an August 1, 1980 probation officer's report states: "[Defendant] indicated that he had been out 'partying' with three of his 'home boys' and when they pulled in to a gas station a 'girl and a guy got in the car. The dude asked for some wine and I fired on him. The girl said the guy was crazy.' He then went on to state that they apparently threw this individual out of the vehicle and proceeded to drive on with the girl. Apparently the individual called the police and said that defendant, along with the other individuals[,] had kidnapped the girl. When he was stopped they found the girl with no clothes on in the back seat of the vehicle. Defendant admitted that he, along with the other three individuals, all had sex with the girl but 'I beat it. The broad was lying. She came to court testifying with a smile. They dropped the robbery and broke it down to the rape. I beat it in Judge Kelly's court. I still had to do the violation.' He was referring to the fact that the parole board found sufficient evidence to find him in violation and return him to the institution."

iii. voluntary manslaughter: case No. A021042

On February 2, 1980, defendant was arrested and subsequently charged with murder. On July 17, 1980, defendant pled guilty to voluntary manslaughter. On August 14, 1980, he was sentenced to four years in state prison. He was paroled on October 9, 1982. On February 14, 1983, defendant was found in violation of his parole and was returned to custody. On November 29, 1983, defendant was again paroled. On June 12, 1984, defendant was found in violation of parole and was sentenced to one year in state prison.

Defendant admitted being with someone else who committed a murder. Defendant said he, personally, did not have a gun. However, a witness related a different version. The witness said that following an argument, defendant handed a small weapon to a companion who then shot the victim four times. According to defendant, his parole was violated after he was stopped for a traffic violation and, unbeknownst to him, there was a weapon in the car. Defendant blamed his arrests on alcohol abuse.

The probation officer's August 1, 1980 report relates that the offense occurred on December 30, 1979, at 3:35 a.m. Edward Lopez, a rival gang member, made disparaging racial slurs about defendant. The probation report details the testimony of a witness, Robert Enriquez, "[H]e indicated that he heard Robles ask the defendant if he could borrow his gun then he heard Robles say he was going to look for Lopez to kill him." Mr. Enriquez saw defendant hand a gun to Mr. Robles. Mr. Robles replied, "'It's got all the bullets.'" Defendant and Mr. Robles encountered Mr. Lopez in a parked car. Defendant challenged Mr. Lopez stating, "I heard that you were calling me a nigger." Mr. Lopez began to drive away. Mr. Robles fired multiple shots at Mr. Lopez. Mr. Lopez was shot four times in the chest and died.

Defendant denied any culpability. The probation officer's report relates: "Defendant was interviewed . . . on July 29, 1980. Interestingly, the defendant admitted that the only reason he pled guilty to the charge was because of the 'deal' offered him by the court of no more than four years in state prison and not because of guilt. 'This case ain't mine. I ain't [n]ever killed no one. I'd be a fool to knock off some one right there . . . knowing

someone will give it up.' [Defendant] expressed little remorse over the demise of the victim uttering only negative and profane adjectives about his character. Additionally, the defendant stated that he was not even with Ronald Robles that evening, however, he had known him all of his life. 'We grew up from diapers. That day we met at the party he was doing his thing and I was doing mine.' [Defendant] indicated that he had been picked up on this case at least four times and released feeling that there is a conspiracy going on. 'Robles didn't do that. Neither did I. We are here on the conspiracy.' The only reason [defendant] pled guilty was because of the bargain. 'I didn't want to stay in here all that time and get found guilty of 2nd degree murder.'"

A detective who investigated the case described defendant as a gang leader who should be locked up for good. The detective urged imposition of the maximum sentence. Defendant's parole agent, Tom Reddick, was interviewed by a probation officer. Agent Reddick described defendant as "very sophisticated and very criminally oriented" and violent. Mr. Reddick said defendant was a gang member who also associated with black guerrilla groups. The probation officer related, "[Mr. Reddick] felt that the defendant has exhibited sufficient negative patterns of behavior to almost predict he will never change."

The probation officer, Will Manson, recommended the maximum sentence. Mr. Manson's evaluation states: "Awaiting disposition of a voluntary manslaughter offense if this violen[ce]-prone, 23-year-old gang-oriented parolee who has been plodding through the criminal justice system for years [wreaking] havoc upon victims almost at will. He has been exposed to literally everything in the way of programs with obvious negative results.

He could easily be viewed as a classic criminal-type whose anti-social actions will continue wherever he is either in the community or in an institution. Whatever the case, because of the violent nature of the offense, state prison for the maximum term is being recommended."

iv. attempted robbery: case No. A028796

On May 8, 1984, while on parole, defendant was arrested for robbery. Defendant and an accomplice approached two individuals who were sitting in a vehicle. They demanded money and beer. After the victims refused, a fight ensued. Defendant's accomplice stabbed both victims. Defendant fled the scene. On June 29, 1984, defendant entered a plea to two counts of attempted robbery. On July 27, 1984, he was sentenced to three years in state prison.

A probation officer's report filed on July 21, 1984 states: "Defendant relates that he was doing 'okay' after his last release on parole in December of 1983. However, in May of 1984, he and his fiancée got into an argument and she returned to Mexico. He got into 'heavy drinking' and was drinking steadily for one week straight prior to his involvement in the present offense. [¶] Defendant states that he and his companion were riding around, 'drinking and bullshitting,' when they observed the victims in the car. Defendant asked one of the victims for some beer, explaining that the liquor stores and bars were closed due to the lateness of the hour. However, the victims stated that they did not have any, and defendant and his companion started to leave when, 'One of them said something.' They returned and he and his companion got out of the car. Defendant was merely talking to

the driver of the vehicle when his companion and the victim who was in the passenger side got out and engaged in an altercation. The companion then 'cut them up.' Defendant states that he just wanted some beer, and further states he did not recall if he asked them for any money. He does indicate, however, that he had no intention of robbing either of the victims." Also in July 1984, defendant admitted he had been affiliated with a gang. Defendant said the association ended in 1979 when he went to jail.

On November 26, 1986, and again on March 29, 1989, defendant was found in violation of his parole and was returned to custody. The later parole violation occurred after defendant got into a fight with a brother-in-law. Defendant was discharged from parole on April 25, 1990.

v. cocaine base possession for sale: case No. NA005698

On January 5, 1991, defendant was charged with controlled substance possession for sale. Patrol officers saw defendant drop a tissue to the ground. The tissue contained cocaine base in the form of cocaine rocks. Defendant was interviewed by a probation officer. Defendant admitted he had been using cocaine for about a year. He denied that the cocaine was his. He said he was in the area to buy some cocaine when police officers approached him. They subsequently claimed they saw him drop some cocaine rocks on the ground. On March 15, 1991, defendant entered a plea to the charged offense. On April 2, 1991, defendant was sentenced to five years in state prison.

vi. Defendant's disciplinary history while incarcerated

While incarcerated, defendant was disciplined for: property destruction (2002); possession of an inmate manufactured hypodermic syringe (2003); possession of an inmate-manufactured handcuff key (2004); and participating in a hunger strike (2011). Defendant was interviewed in connection with the present petition by Richard Subia. Mr. Subia was a former director of corrections with 26 years' experience and expertise in corrections and prison gangs. According to Mr. Subia's written report, "[Defendant] . . . had contact with controlled substances at an early age. . . . This use of controlled substances continued during [defendant's] early years of his incarceration and into his current commitment." After defendant was found in possession of a hypodermic syringe, he was placed on mandatory drug testing for a year. Defendant incurred no further discipline for drug possession or use. With respect to the hunger strike, defendant told Mr. Subia he had no choice but to participate in. Not participating would have caused problems for him with his fellow inmates.

3. Defendant's continued gang affiliation

Defendant challenges the trial court's finding of continued gang affiliation. The trial court found that for at least 16 years defendant had been housed in a segregated unit. His placement in a segregated housing resulted from of his affiliation with the Mexican Mafia prison gang and the danger that posed to the general prison population. Mr. Subia described the segregated housing unit: "[Segregated housing] placement represents the

most restrictive and isolated housing in the [California Department of Corrections and Rehabilitation]. [Segregated housing] placement is not punishment, but is a placement decision based on a need for greater security for an inmate. [Segregated housing] placement allows institution staff to better control an inmate's behavior when that behavior threatens the safety of staff or inmates, or when that behavior threatens the security of the institution. Inmates are confined to their cell for 23 hours a day with one hour of time allowed in a concrete exercise area. . . . All meals are served within the cell and unless serious medical conditions arise, all medical checks are conducted at the cell doors. Inmates in [segregated housing] are not allowed phone calls, contact visits, or contact with other inmates. There are no religious activities, program opportunities, or access to the outside environment." Although there is no evidence defendant engaged in violent gang-related conduct, he was willing to continue his association even in the face of continued segregation.

In February 2013 defendant began a "step down program" designed to return him to the general prison population, Mr. Subia described the step down program: "[T]he [Step Down Program] is an avenue for release from [the Security Housing Unit], designed to replace the six year inactive review process for validated [Security Threat Group] affiliates. . . . The [Step Down Program] is an individual behavior based program that provides graduated housing, enhanced programs, and interpersonal interactions. The [Step Down Program] provides for offenders to demonstrate their commitment and willingness to refrain from [Security Threat Group] behavior, and inmate participation is tracked which provides the [Unit Classification] Committee with the means for a proper evaluation of [defendant's] sincerity to

refrain from [Security Threat Group] behavior and assessment of [defendant's] ability to program on a General Population yard." Defendant completed the Step Down program in September 2015.

However, defendant declined to disassociate from the gang. When asked if he wished to renounce his gang membership, defendant said "No." Defendant had a Mexican Mafia tattoo on his forearm. And as recently as March 2015, defendant was in possession of gang-related papers that contained: Mexican Mafia prison gang symbols; the name of his street gang; and his gang moniker. Defendant claimed a prison psychiatrist had provided the papers, which contained puzzle games such as a word search, crossword or Sudoku.

Defendant emphasizes that prison officials did not discipline him for his possession of the gang-related papers. Defendant notes that he completed the step down program and was placed in the general prison population. But these facts did not preclude the trial court from considering defendant's possession of the papers in determining whether he continued to identify with the street and prison gangs. The trial court reasonably concluded, "It is incredible to claim that [defendant's] possession of papers containing his own [gang] moniker, the name of his street gang, and the name of his prison gang was merely coincidental, and is no indication of his gang affinity."

Defendant argues the presence of a Mexican Mafia tattoo on his arm was no indication of current dangerousness. He asserts he had the tattoo for many years. The trial court could reasonably conclude, however, that the tattoo was some indication of defendant's continued affinity for the prison gang.

Defendant further asserts debriefing—renouncing gang membership—is no longer required in order for an inmate to participate in the step down program. Moreover, defendant argues there could have been any number of reasons why he would decline to debrief. Again, however, the trial court could reasonably conclude defendant's refusal to disassociate from the gang was some indication of his continued affiliation.

In the course of its discussion of defendant's continued gang affiliation, the trial court noted briefly, "[Defendant] participated in the 2011 hunger strike." There was evidence the strike was gang-related insofar as members of seven prison gangs who lived in segregated housing participated in the strike. The trial court could, therefore, reasonably conclude it was some evidence of continued affiliation. It does not appear, however, that the trial court placed great weight on this isolated fact in reaching its conclusions.

4. Rehabilitative programming

Defendant challenges the trial court's reliance on his limited rehabilitative programming to support its dangerousness finding. Defendant notes he was in segregated housing for much of his incarceration and had no access to programming except self-funded correspondence courses. Defendant reasons there was no evidence whether he or his family could pay for correspondence courses. Therefore, defendant reasons the trial court had no basis for asserting he failed to seek out such options. The trial court acknowledged defendant's options while in segregated housing were limited, but commented, "[T]he relevant issue is not *why* [defendant] has not programmed, but rather

whether he has programmed." In this case, the fact of, rather than the reasons for the absence of rehabilitative programming could properly serve as a factor in the trial court's dangerousness decision.

The trial court acknowledged that after February 2013, when defendant was placed in the step-down program, he had participated in anger management classes, journaling and Alcoholics or Narcotics Anonymous counseling as part of that program. Defendant admitted his prior criminal conduct had been fueled by drug and alcohol abuse. The trial court expressed continued concern given the lack of evidence defendant had learned to avoid a resumption of such use. The trial court could reasonably conclude that having failed to substantially address his past alcohol and drug use, defendant was at risk of resuming his old ways.

5. Other factors

Defendant asserts the trial court improperly discounted his age and low classification score in reaching its dangerousness conclusion. We disagree. It is evident the trial court weighed both factors in reaching its decision. The trial court observed: "[Defendant] is currently 59 years old. His classification score as of the suitability hearing was 19, the lowest an inmate serving a life term can receive. [Citation.] When [defendant] entered the [California Department of Corrections and Rehabilitation], his classification score was 62. [Citation.]" Neither defendant's age nor his low classification score considered in light of other factors compelled a conclusion defendant did not pose a current danger. Defendant's low classification score was the result at least in part

of having been in segregated housing for 20 years; his physical access to staff and other inmates had been limited.

6. Reentry plan

The trial court acknowledged defendant had plans to enter transitional housing upon release and had the support of an aunt. The trial court expressed concern, however, that defendant had no concrete family support, job opportunities, and plans for permanent housing. Moreover, defendant, who had limited education—no high school diploma or the equivalent—had not acquired any vocational skills while incarcerated. The trial court could reasonably conclude defendant's transitional housing plan was insufficient to ensure he would not return to a life of gang membership and crime if released.

7. Conclusion

The trial court considered defendant's criminal history, his prison disciplinary record, rehabilitation efforts and post-release plans. The trial court premised its dangerousness finding on defendant's: multiple prior convictions for violent crimes; failure to perform successfully on probation or parole; misconduct in prison, albeit "minor," which he minimized; continued gang allegiance; lack of rehabilitative programming; lack of significant substance abuse programming; failure to develop professional or vocational skills; and minimal reentry plan. Substantial evidence supported these conclusions. There was no abuse of discretion.

III. DISPOSITION

The order denying defendant's Penal Code section 1170.126, subdivision (b) resentencing petition is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J.

BAKER, J.