Filed 1/9/17 P. v. Campbell CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND CAMPBELL, Defendant and Appellant.	B264913 (Los Angeles County Super. Ct. No. BA183776)

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

Barbara A. Smith, 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 Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

In 1999, a jury convicted defendant and appellant Raymond Campbell of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and misdemeanor battery (Pen. Code, § 242[1]). It found true the allegations that defendant had two prior convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)) and two prior convictions for which he served prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to 25 years to life in state prison.

Following the passage of Proposition 36, the Three Strikes Reform Act of 2012, defendant filed a petition requesting recall of his sentence pursuant to section 1170.126. The trial court denied the petition, finding defendant eligible for relief but unsuitable for release as he posed an unreasonable risk of danger to public safety. Defendant contends the trial court erred in failing to use the definition of "unreasonable risk of danger to public safety" from Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (§ 1170.18), and abused its discretion in finding he posed a risk. We affirm the order denying defendant's petition for resentencing.

The issue of whether the later-enacted Proposition 47 definition of "unreasonable risk of danger to public safety" applies with respect Proposition 36 petitions is pending before our Supreme Court in *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted February 18, 2015, S223676, and *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825. For purposes of this appeal, we agree with the People's argument that the Proposition 47 definition does not apply in Proposition 36 cases. Because the Supreme Court's

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

resolution of this issue will govern this case, we do not address it further. We also hold that the trial court did not abuse its discretion in determining that defendant posed an unreasonable risk of danger to public safety.

BACKGROUND

On December 12, 2012, defendant filed a petition for recall of sentence pursuant to section 1170.126. The People opposed the petition, arguing defendant was unsuitable for resentencing because he presented an unreasonable risk of danger to public safety based on: his extensive criminal history; prior commission of crimes involving violence or threats of violence; his current crime that was related to an act of violence; and his conduct in prison. In response, defendant argued he was suitable for resentencing in light of: his record of rehabilitation; viable reentry plan; family support; remoteness of his criminal history; and relatively few acts of violence prior to and during his current incarceration.

On March 5, 2015, the trial court held a suitability hearing. The People did not present any witnesses. Their 42 exhibits were admitted into evidence. Richard Subia, an expert witness in adult corrections and rehabilitation, and Dr. Rahn Minagawa, a clinical and forensic psychologist, testified for defendant. Defendant did not testify. His 10 exhibits were admitted into evidence.

The Trial Court's Factual Findings

The trial court made the following factual findings:

In 1980, at age 17, defendant committed a burglary (§ 459) for which a petition was sustained against him in juvenile court.

In 1982, defendant was convicted of grand theft person (§ 487.2) after he stole $110 from a liquor store. The trial court found defendant appeared actually to have committed a robbery and an assault as the record showed he pushed a female employee from the counter in order to take the money and punched the employee on the side of her face when she grabbed his shirt trying to stop him. In February 1983, the trial court granted defendant three years of probation on his grand theft person conviction. In November 1984, defendant violated his probation and the trial court sentenced him to 90 days in jail.

In February1985, three months after being released on his probation violation, defendant was convicted of transporting/selling a controlled substance and placed on probation. (Health & Saf. Code, § 11352.) His first "strike" conviction occurred eight months later, in December 1985, when he was convicted of first degree residential burglary. (§ 459.) The trial court sentenced defendant to four years in state prison. Defendant was released on parole in 1988, and returned to prison twice in 1988 on parole violations. In 1989, defendant was convicted of misdemeanor burglary. (§ 459.) In 1990, he was convicted of transporting/selling a controlled substance. (Health & Saf. Code, § 11352.) In 1993, defendant was again convicted of misdemeanor burglary. (§ 459.)

In 1994, defendant was convicted of "felony"—i.e., first degree—burglary. (§ 459). The trial court sentenced him to two years in state prison. In 1995, defendant was convicted of misdemeanor trespass. (§ 602.) In 1996, defendant was convicted of transportation/sale of a controlled substance (Health & Saf. Code, § 11352), misdemeanor assault with force likely to inflict great bodily injury (§ 245, subd. (a)(1)), and resisting,

delaying, or obstructing an officer (§ 148, subd. (a)). In 1998, defendant was convicted of misdemeanor trespass. (§ 602.)

In 1999, defendant committed his commitment offense—unlawful possession of a controlled substance. (Health & Saf. Code, § 11350, subd. (a).) In that case, defendant forced entry into a hotel room, struggled with the victim and his roommate, and chased the victim and struck him several times as the victim ran to a pay telephone to call the police. The police discovered a bag containing a small amount of cocaine in defendant's pocket during a pre-booking search at the police station. While defendant's commitment offense was pending, defendant was convicted of indecent exposure. (§ 314.1.)

During the course of his current prison commitment, defendant incurred 11 Rules Violation Reports (RVR's) and 18 "counseling chronos." Of the 11 RVR's, three were classified as administrative and eight as serious. Defendant's three administrative RVR's were for failing "to appear for a ducat to the law library" (2000), disobeying orders (2004), and disrespecting staff (2008). His eight serious RVR's were for mutual combat (2000), masturbation (2000), indecent exposure (2002), possessing inmate manufactured alcohol (2004), refusing to provide a urine specimen (2004), disrespect for staff (2004), failing to perform work duties (2008), and possessing a controlled substance—a marijuana cigarette (2010). Of defendant's 18 counseling chronos, only three were incurred in the 10 years before the hearing. Those three were for delaying lockup (2004), having window and light covers in his cell (2009), and failing to report for a work assignment (2009).

Defendant received certificates for participating in Alcoholics and/or Narcotics Anonymous from 2000 through 2004

and July 2013 through February 14, 2014. In 2002, defendant received a "laudatory chrono" for his active participation in Narcotics Anonymous. At the time of the hearing, defendant was housed in a progressive programming yard that required inmates to remain free of discipline and participate in "active programming."

Defendant's access to educational programming was limited during his incarceration. In 2007, after reaching the highest level of an adult education program, he was "unassigned" from the program. Since 2012, defendant participated in voluntary educational activities. While incarcerated, defendant worked as a porter and in the kitchen. In 2014, he received a "laudatory chrono" from his supervisor for going to work every day, performing his duties, working well with others, and remaining free of discipline.

In 1999, when defendant entered prison for his commitment offense, his classification score was 104.[2] Thereafter, defendant's score increased—reaching a high of 124 in 2004—and remained above 104 until 2012 when it decreased to 100. At the time of the hearing, defendant's classification score was 84.

Richard Subia was appointed as an expert in corrections and rehabilitation. He worked for the CDCR for 26 years,

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[2] A classification score is used to determine an inmate's placement within the California Department of Corrections and Rehabilitation (CDCR), including the security level of the facility in which the inmate is housed. "'A lower placement score indicates lesser security control needs and a higher placement score indicates greater security control needs.' [Citation.]" (*In re Jenkins* (2010) 50 Cal.4th 1167, 1173-1174.) The lowest score a life inmate can receive is 19.

including as a prison warden and Director of the Division of Adult Institutions. None of defendant's RVR's indicated to Subia that defendant hurt anyone in prison, and none involved threats of violence or weapons.

With respect to defendant's substance abuse, defendant told Subia he had "'significant problems' with substance abuse on the streets and talked about how his addiction led to some of his criminal offenses." Subia stated there was no evidence defendant tested positive for drugs or alcohol during his incarceration and opined defendant had made a successful effort to refrain from drugs and alcohol in prison. Subia believed defendant would not pose an unreasonable risk of danger to public safety if he were resentenced or released.

Dr. Rahn Minagawa was appointed as an expert in clinical and forensic psychology. He examined defendant and defendant's criminal history, disciplinary record, age, and record of rehabilitation while incarcerated. He found many of defendant's crimes were related to defendant's addiction to crack cocaine. Defendant had gained insight into his history of substance abuse and addiction and the relationship between his criminal conduct and substance abuse. According to Minagawa, defendant did not have a "significant history of violence" and had not engaged in a pattern of violent conduct. Defendant told Minagawa he possessed the marijuana cigarette to barter with and not for personal use. Because defendant subsequently was required to drug test and did not test positive, Minagawa believed him.

Minagawa determined that defendant's risk of committing a sexual offense was not higher than the general population. On the "HCR-20" test, defendant scored in the lowest categories for potential to cause serious or life-threatening physical harm and

for risk of committing an act of violence in the near future. The test also showed defendant required the lowest level of intervention to prevent future violence. Minagawa opined that if defendant participated in a program that provided housing, vocational assistance, financial support, and substance abuse counseling, defendant would not pose an unreasonable risk to public safety.

The Amity Foundation (Amity) provided comprehensive reentry services to released inmates. It was prepared to help defendant transition into the community.

The Trial Court's Decision

In a written decision, the trial court denied the petition. The trial court stated that defendant had a lengthy history of committing multiple crimes when free from custody, even when on parole. Defendant had 20 arrests, 15 convictions, and five parole violations. He had not been free from custody or parole supervision since 1982.

The trial court rejected defendant's contention that his criminal history did not indicate he posed a risk to public safety because his convictions were remote and none involved serious violence, serious injuries to the victims, or the use of weapons. Relying on *People v. Guzman* (2015) 235 Cal.App.4th 847, 860 review subsequently granted on June 17, 2015, S226410), the trial court ruled that the concept of public safety did not contemplate merely the absence of violent acts, it also included the absence of property crimes. Six of defendant's 15 convictions were for property crimes. Moreover, three convictions were for transporting and/or selling drugs which compromised public

safety. The trial court described defendant as the classic drug addict who committed property crimes to support his habit.

Assessing defendant's conduct while incarcerated, the trial court stated, "Because of the undeniable link between [defendant]'s history of substance abuse and criminal behavior, the Court is most concerned about [defendant]'s two RVR's in 2004 for possessing inmate manufactured alcohol and failing to provide a urine sample, and the 2010 RVR for possession for marijuana." It observed that defendant had participated in alcohol and drug programs since his incarceration began, yet was caught with alcohol in his cell in April 2004, and admitted to Minagawa that he drank alcohol at that time. Five months after being caught, defendant failed to provide a urine sample even though he had three and one-half hours' notice. Defendant's conduct demonstrated to the trial court that defendant "was unable to abstain from alcohol despite consistent substance abuse programming."

With respect to defendant's claim that he possessed the marijuana cigarette for barter, the trial court stated that such possession was "behavior substantially similar to his prior convictions for transporting and/or selling controlled substances. He thus exhibited behavior as recently as 2010 that reflects the same criminal mindset he possessed when he committed his crimes in the community. . . . [P]ossessing marijuana for 'barter' bodes poorly for his ability to refrain from selling or using drugs again if released into the community."

The trial court questioned defendant's motivation and sincerity in resuming of substance abuse programming in 2013. It noted defendant had been precluded from participating in a significant amount of programming while housed at Calipatria

State Prison, but ostensibly had more programming available to him following his transfer to Salinas Valley State Prison in 2010. Yet defendant did not resume substance abuse programming until 2013—eight months after Proposition 36 passed, and seven months after defendant filed his petition for resentencing in this case.

The trial court found defendant's reentry plans deficient. All that was before it was the letter from Amity. In the letter, Amity stated it had received information about defendant's potential release. Amity stated, "[W]e work to get the individual to Amity immediately upon release and then transport to the Probation Department" within 72 hours. It was able to "facilitate connection with one of its community partners" for mental health services if ordered by the trial court and worked closely with CDCR and an Amity subcontractor for housing and employment services. Defendant's counsel stated at the suitability hearing she had confirmed Amity had drug counseling. The trial court observed, however, there was no guarantee defendant would receive housing and employment services or drug counseling.

The trial court discounted Subia's opinion that defendant did not pose an unreasonable risk to public safety because Subia did not consider reentry plans as a factor in his opinion. It shared Minagawa's "'reservation that upon [defendant's] release he will still need support in terms of getting a job, transitional housing, continuing to work with an AA/NA group" given defendant's tenuous reentry plans. It concluded defendant's risk of reoffending in the community was increased without a solid and reliable reentry plan that was guaranteed upon his release.

The trial court ruled, "[T]he preponderance of the evidence demonstrates that [defendant] does pose an unreasonable risk of

danger to public safety at this time due to his criminal history, record of serious rules violations, insufficient rehabilitative programming, and inadequate [reentry] plans."

DISCUSSION

The Trial Court Acted Within Its Discretion in Denying Defendant's Petition for Recall of His Sentence

A. Standard of Review

The parties agree we review a trial court's ruling on a Proposition 36 petition for recall of sentence under the abuse of discretion standard of review. (§ 1170.126, subd. (f).) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

B. Application of Relevant Principles

When a petitioner satisfies the eligibility criteria for resentencing under section 1170.126, subdivision (e), "the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless 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 other words, after Proposition 36, a qualified prisoner who is serving a third-strike sentence for a felony that is neither serious nor violent 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. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.)

"In exercising its discretion in 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).)

The trial court found defendant posed an unreasonable risk of danger to public safety based on "his criminal history, record of serious rules violations, insufficient rehabilitative programming, and inadequate re-entry plans." A preponderance of the evidence[3] supports each of the bases of the trial court's finding, and the trial court acted within its discretion in denying defendant's petition.

Defendant's criminal career—at least as established by a sustained juvenile petition—began at age 17 with a burglary. Over the following 19 years, defendant engaged in an unbroken pattern of criminality leading to an additional 14 misdemeanor or felony offenses, a probation violation for which he was sentenced to 90 days in jail, and two parole violations for which he was

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[3] A trial court's determination that a petitioner would pose an unreasonable risk of danger to public safety is released is subject to the preponderance of the evidence standard. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1305; *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075-1076.)

returned to prison. Defendant's felony convictions included three convictions for transporting or selling a controlled substance.

While incarcerated on his current conviction, defendant incurred eight serious RVR's including possessing inmate manufactured alcohol, refusing to provide a urine specimen, and possessing marijuana. Based on its finding of a link between defendant's substance abuse and his criminal conduct, the trial court rightly was concerned that these three rule violations involved alcohol or marijuana. As the trial court explained, defendant's claim that he possessed the marijuana for barter did not ameliorate his conduct because he possessed the substance just before petitioning for recall of sentence and possessing marijuana for barter "bode[d] poorly for his ability to refrain from selling or using drugs again if released into the community."

Although defendant participated in alcohol and drug rehabilitation programs from 2000 to 2004 and July 2013 to February 2014 while incarcerated, his rule violation for possessing inmate manufactured alcohol occurred in 2004—i.e., after four years of alcohol rehabilitation. As for defendant's second period of drug and alcohol rehabilitation beginning in July 2013, the trial court was justifiably skeptical of defendant's motivation and sincerity as defendant recommenced his participation eight months after Proposition 36 passed and seven months after he filed his Proposition 36 petition.

Finally, as for defendant's reentry plans, the Amity letter simply set forth broadly the services Amity provided. The trial court correctly observed that Amity had not guaranteed defendant would receive housing, employment, or drug counseling.

In light of defendant's criminal history, record of serious rules violations, insufficient rehabilitative programming, and inadequate reentry plans, we cannot say the trial court abused its discretion in denying defendant's petition for recall of his sentence based on its determination that defendant posed an unreasonable risk of danger to public safety.

DISPOSITION

The order is affirmed.

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KUMAR, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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