

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MILTON TUCKER, JR.,

Defendant and Appellant.

B271616

(Los Angeles County
Super. Ct. No. NA027035)

APPEAL from an order of the Superior Court of
Los Angeles County. David V. Herriford, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of
Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A.
Engler, Chief Assistant Attorney General, Lance E. Winters,
Assistant Attorney General, Susan Sullivan Pithey, Noah P. Hill
and Michael J. Wise, Deputy Attorneys General, for Plaintiff and
Respondent.

In 1996, defendant and appellant Milton Tucker, Jr., pled no contest to taking a vehicle without the consent of the owner (Veh. Code, § 10851, subd. (a)). In return for his plea, the trial court dismissed additional charges of possessing cocaine (Health & Saf. Code, § 11350, subd. (a)) and willfully evading a police officer (Veh. Code, § 2800.2). Based on the additional finding that he had two qualifying “strike” prior convictions for robbery (Pen. Code, §§ 211, 667, 1170.12; Veh. Code, § 10851), he was sentenced pursuant to the plea agreement and the “Three Strikes” Law to an indeterminate term of 25 years to life in state prison.

On November 30, 2012, defendant filed a petition for recall of his third strike sentence. The trial court issued an order to show cause why the petition should not be granted. The prosecution filed an opposition, and later a revised opposition, arguing that defendant was ineligible and unsuitable for resentencing because (1) defendant’s “classification score in prison” was 194 “based upon a number of violent acts during his current term,” and (2) defendant had an extensive prior record of crime involving possession of a firearm, spousal battery, and resisting a peace officer, as well as absconding from parole. Defendant filed a reply and a supplemental reply, arguing that he did not pose any risk of danger to public safety.

Following several years of litigation, the trial court held a hearing and considered evidence, ultimately denying defendant’s petition on the grounds that defendant posed an unreasonable risk to public safety pursuant to *People v. Esparza* (2015) 242 Cal.App.4th 726, 745–746 (*Esparza*), and was thus ineligible for recall and resentencing. (Pen. Code, §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).)

Defendant's timely appeal ensued. He argues that the trial court erred in denying his petition for recall and resentencing (Pen. Code, § 1170.126, Prop. 36) because it declined to consider the definition of the phrase "unreasonable risk of danger to public safety" as set forth in Penal Code section 1170.18 (Prop. 47).

On February 18, 2015, our Supreme Court granted review in *People v. Valencia* (2014) 232 Cal.App.4th 514 (*Valencia*), S223825. The applicability of Proposition 47's danger definition in the Proposition 36 context is pending before that Court in both *Valencia, supra*, S223825, and *People v. Chaney* (2014) 231 Cal.App.4th 1391 (*Chaney*), review granted February 18, 2015, S223676.

In view of the posture of this issue, we shall not belabor the point but simply conclude, as did the court in *Esparza, supra*, 242 Cal.App.4th 726,¹ that the voters in enacting Proposition 47 did not intend for its definition of danger to extend to petitions under Proposition 36, and thus such definition is inapplicable here.

¹ No petition for review was filed or review granted in *Esparza*, which came from the Sixth Appellate District. In a subsequent Sixth Appellate District case, the majority noted that *Esparza* was the only extant decision on this issue and rejected its conclusion. (*People v. Cordova* (2016) 248 Cal.App.4th 543, 552, fn. 8, review granted Aug. 31, 2016, S236179 (*Cordova*).) In granting review in *Cordova*, the Court deferred further action pending resolution of a related issue in *Chaney, supra*, S223676, and *Valencia, supra*, S223825. We decline to consider the *Cordova* majority opinion persuasive on this point. (Cal. Rules of Court, rules 8.1105, 8.1115.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT