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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEONARD M. HOYOS, Defendant and Appellant.	B280186 (Los Angeles County Super. Ct. No. KA027428)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, 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, Assistant Attorney General, Noah P. Hill and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Leonard Hoyos appeals from an order denying his Proposition 36 petition for resentencing (Pen. Code, § 1170.126, subd. (b)[1]). We affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

I. Underlying Conviction and Sentence.

On May 16, 1995, at 2:30 p.m., Pomona police found appellant seated in a sports utility vehicle with numerous household items including two large televisions, a microwave, a pillow case containing property, and a woman's jewelry box. Subsequent investigation revealed that the property had been taken during two separate residential burglaries which occurred earlier that day and the prior day. In March of 1996, a jury convicted appellant of two counts of felony receiving stolen property (§ 496, subd. (a)) and found that appellant had suffered two strikes (§ 667, subds. (b)-(i).) Thereafter, the trial court sentenced him to prison for 25 years to life pursuant to the Three Strikes law.

II. Proposition 36.

In November 2012, the electorate passed the Three Strikes Reform Act of 2012, also known as Proposition 36. (*People v. Valencia* (2017) 3 Cal.5th 347, 354 (*Valencia*).) "Proposition 36 'amended the Three Strikes law with respect to defendants whose current conviction is for a felony that is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current felony, pursuant to the provisions that apply when a defendant has one prior conviction for a serious or violent felony.' " (*Ibid.*)

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[1] Subsequent section references are to the Penal Code.

"Proposition 36's resentencing provision . . . 'provides a procedure by which some prisoners already serving third strike sentences may seek resentencing in accordance with the new sentencing rules. (§ 1170.126.)' [Citation.] An inmate who is serving a third strike sentence that would have yielded a second strike sentence under Proposition 36's new sentencing rules 'shall be resentenced' as [a] second strike offender '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).)" (*Valencia, supra,* 3 Cal.5th at p. 354, italics added.)

III. The Petition for Resentencing.

On November 29, 2012, appellant filed a Proposition 36 petition for resentencing (petition). Significant briefing followed. Respondent filed an opposition disputing appellant's eligibility for relief. Appellant filed a reply. Respondent filed a revised opposition alleging appellant was both ineligible and unsuitable for resentencing. Appellant filed a reply to the revised opposition. On May 17, 2016, the court found appellant eligible for resentencing.

On December 12, 2016, the court held a Proposition 36 suitability hearing with appellant and the parties' counsel present. Appellant called Richard Subia, a former Director of the Division of Adult Institutions of the California Department of Corrections and Rehabilitation (CDCR) to testify as an expert. Respondent did not call any witnesses to testify. The parties' respective exhibits were admitted into evidence without objection. The matter was then taken under submission.

IV. The Court's Memorandum of Decision.

On January 9, 2017, the court filed a detailed, 16-page Memorandum of Decision denying the petition. The court analyzed the factors set forth in section 1170.126, subdivision (g): appellant's criminal history, disciplinary history and rehabilitative programming, and other evidence.

The trial court reviewed appellant's juvenile history and adult criminal conviction history.[2] The court noted that appellant's history of drug abuse played a constant role in his criminality. When appellant was a juvenile, he had three petitions for being under the influence of a controlled substance. In 1987 and 1989, appellant suffered two misdemeanor convictions for driving under the influence. Appellant's drug addiction persisted as his criminal conduct escalated. Over several months in 1990 and 1991, appellant committed numerous residential burglaries while living in a van with his two infant children and their mother. Witnesses to the burglaries reported that children were in a van during the crimes. In fact, law enforcement found appellant's children in the van when they recovered the stolen property and a "hype kit." Appellant was sentenced to six years in state prison after pleading guilty to seven counts of first degree residential burglary, one count of felony possession of stolen property and two counts of felony child endangerment. When appellant was released from prison, he performed poorly. Appellant tested positive for heroin, absconded

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[2] While section 1170.126, subdivision (g)(1) authorizes consideration of conviction history, the court considered appellant's juvenile record under the catch-all "[a]ny other evidence" provision set forth in section 1170.126, subdivision (g)(3).

from parole and committed the offense that led to the conviction in this case.

As to disciplinary history and rehabilitative programming, the court recounted appellant's 16 serious rules violation reports (RVRs). Most significantly, appellant suffered 13 RVRs for possession of a controlled substance evidenced by positive urinalysis test for the presence of morphine or heroin. The most recent two drug offense RVRs occurred subsequent to the filing of this petition. The court was troubled by the fact that during appellant's 20 years of confinement, appellant had failed to participate in any meaningful substance abuse programming. The court rejected appellant's claim that prison officials prevented him from accessing any programming. The court also found the three recent RVRs for violence disturbing. The court was impressed by appellant's educational advancements including obtaining a GED, taking numerous correspondence courses, and participating in vocational training.

As to other evidence, the court observed that appellant was 47 years old and, ordinarily, such an age would indicate that one did not pose an unreasonable risk of danger. The court however, was presented with appellant's history of engaging in prison misconduct well into his forties including committing two batteries on inmates, participating in a prison riot, and abusing controlled substances which negated this inference.

Ultimately, while acknowledging that appellant's felony convictions were remote in time and his post-release plans and strong family support favored release, the court found, "[i]n light of the nexus between Petitioner's criminal history and his continued drug use in prison, Petitioner's criminal history continues to be probative of his current dangerousness and

continues to demonstrate that he is an unreasonable risk of danger to public safety." The court concluded the totality of the evidence demonstrated that appellant would pose an unreasonable risk of danger to public safety and denied the petition.

ISSUES

Appellant raises four claims. The trial court abused its discretion by finding appellant posed an unreasonable risk of danger to public safety; the Three Strikes Reform Act of 2012 created a presumption of suitability for release; Proposition 36 created a due process liberty interest; and, the term "unreasonable risk of danger to public safety" is void for vagueness. We reject the claims.

DISCUSSION

I. THE COURT PROPERLY DENIED APPELLANT'S PROPOSITION 36 PETITION.

In exercising its discretion to deny resentencing in response to a Proposition 36 petition, "the court has broad discretion to consider: (1) the inmate'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) his or her '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, subd. (g)(1)–(3).)" (*Valencia*, *supra*, 3 Cal.5th at p. 354.) "[T]he proper focus is on whether the petitioner *currently* poses an unreasonable risk of danger to public safety." (*People v. Esparza* (2015) 242 Cal.App.4th 726, 746 (*Esparza*).)

The People have the burden to prove to the trial court that a petitioner poses an unreasonable risk of danger to public safety, and the People must prove by a preponderance of the evidence the facts upon which the trial court predicates a finding that the petitioner poses such an unreasonable risk. (*People v. Frierson* (2017) 4 Cal.5th 225, 239; *People v. Buford* (2016) 4 Cal.App.5th 886, 899 (*Buford*).) We review those facts for substantial evidence (*Frierson*, at p. 239; *Buford*, at pp. 893, 901) and the finding for abuse of discretion (*Buford*, at pp. 895, 901).

Appellant asserts that the court abused its discretion in considering his dated criminal history in making its finding. Initially, the court conceded that appellant's strike offenses and commitment offenses were remote in time. However, the court recalled that appellant's drug use was "the catalyst for his criminal behavior." The court noted that appellant's drug abuse continued while in prison. This led to the court's conclusion that appellant's criminal history and prison misconduct were both "directly linked to his drug use." Substantial evidence supported the court's finding. Appellant committed 13 RVRs for drug possession with the latest two occurring subsequent to the filing of this petition as late as 2016. Moreover, the evidence that appellant's misconduct was "fueled by his drug addiction" was undisputed – it was advanced by appellant's expert, Mr. Subia, and by appellant himself who acknowledged that he had been a heroin addict since age 16 and committed crimes to support his addiction. In light of the strong nexus between appellant's past criminality and his prison misconduct that continued unabated until 2016, the court did not abuse its discretion in determining that appellant's past criminal history was probative of his current dangerousness.

Appellant argues the court abused its discretion in relying on appellant's failure to complete drug treatment in support of its finding. Appellant asserts that prison officials are to blame for his lack of drug rehabilitation. Although appellant's access to certain treatment may have been limited because of his sentence,[3] there was no evidence appellant was denied admission to all treatment for the entire period of his incarceration. The court found it significant that although appellant had enrolled in numerous correspondence classes that focused on life skills such as anger management, stress management, marriage and relationships, appellant failed to take a single correspondence course that was centered on substance abuse. More telling, the court noted, these life skills classes were not having the intended impact – appellant continued to engage in prison misconduct. For example, even while attending prison AA classes in 2015, appellant was found guilty of two RVRs for drug abuse. In any event, regardless of the reasons for appellant's lack of formalized drug treatment, the court's principal concern was whether appellant had addressed his drug addiction. In this regard, the evidence overwhelmingly supported the court's finding that appellant had yet to develop "the tools and mechanisms to address his drug addiction" evidenced by appellant's 13 RVRs for drug possession. Thus, the court did not abuse its discretion by considering appellant's substance abuse in finding appellant posed an "unreasonable risk of danger to public safety" within the meaning of section 1170.126, subdivision (f).

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[3] As a "lifer," appellant was ineligible for in-patient treatment for the first seven years of his sentence under CDCR policy.

Lastly, while appellant admits that he sustained three RVRs for violence, he asserts that they are not indicative of dangerousness because prior to 2012, he had not engaged in any violence. While it is commendable that prior to 2012 appellant did not participate in acts of violence, the fact remains that he had recently committed violent acts and he was disciplined for that conduct. Certainly, recent acts of violence that resulted in discipline are the most probative in any "current dangerousness" assessment. Moreover, section 1170.126, subdivision (g), specifically authorizes the court to consider prison discipline. Therefore, the court properly considered these three RVRs in its finding.

In the present case, the trial court made a discretionary determination that appellant posed an "unreasonable risk of danger to public safety" within the meaning of section 1170.126, subdivision (f). The court conducted a thorough examination of the record and engaged in an attentive analysis of the relevant facts including petitioner's criminal history, prison disciplinary history, rehabilitative programming, and other evidence before reaching its finding. In sum, the court properly applied the Proposition 36 factors and there was ample evidence supporting the trial court's dangerousness assessment.

II. THERE IS NO PRESUMPTION OF SUITABILITY

Appellant next argues that the "spirit" of the Three Strikes law has been modified by Proposition 36 such that there is a presumption that an inmate with a third strike that was non-violent and non-serious should be resentenced as a second-strike offender. Appellant acknowledges that numerous appellate courts have rejected his position. (See *Buford*, *supra*, 4 Cal.App.5th at pp. 901–903 and *Esparza*, *supra*,

242 Cal.App4th at p. 738.) *Buford* and *Esparza* were founded on the analysis of *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1371 (*Gutierrez*), where the California Supreme Court found that the meaning of "shall" did not create a mandatory presumption at least as it applies to a sentencing statute. We find the reasoning of *Buford* and *Esparza* persuasive and their adoption of *Gutierrez*'s analysis sound. We, therefore, reject appellant's claim that Proposition 36 created a mandatory presumption in favor of resentencing.

III. THERE IS NO DUE PROCESS VIOLATION

Appellant asserts that Proposition 36 is akin to a parole release statutory scheme that creates a due process liberty interest under the California and United States Constitutions. Appellant acknowledges that due process is satisfied if the petitioner is given notice and an opportunity to be heard, the court states reasons for its ruling, and the procedure is neither arbitrary nor capricious. We need not determine whether Proposition 36 created a liberty interest since even under the position advanced by appellant, by any measure, due process was satisfied.

Petitioner here was given notice, he was afforded a fair opportunity to be heard by extensive briefing and an evidentiary hearing, the court provided a detailed 16-page Memorandum of Decision outlining its reasoning and, as shown above, the procedure was not arbitrary nor capricious. Thus, we reject appellant's due process challenge.

IV. PROPOSITION 36 IS NOT UNCONSTITUTIONALLY VAGUE

Appellant's final contention is that Proposition 36 is void for vagueness. Appellant principally relies on *Johnson v. United States* (2015) 135 S.Ct. 2551 (*Johnson*) in asserting that Proposition 36 is constitutionally infirm because it fails to provide trial courts with a concrete way in which to measure a petitioner's level or quantum of risk. *Johnson* struck down a portion of a federal career criminal statute that did not adequately define the term "violent felony." The Court criticized the statute for impermissibly "tie[ing] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, rather than to real-world facts or statutory elements." (*Id.* at p. 2558.) Section 1170.126 does not implicate these concerns because subdivisions (f) and (g) require trial courts to focus on "real world" factors specific to the prisoner – criminal history, prison disciplinary records, family support and post-release plans – and preclude trial courts from engaging in the abstract speculation that *Johnson* condemned.

Moreover, in *Valencia*, when our Supreme Court clarified the meaning of the phrase "unreasonable risk of danger to public safety," the Court implicitly rejected any future question that the definition was void for vagueness. To be sure, the Court cited, without criticism, numerous appellate decisions that have previously denied such a constitutional challenge. (*Valencia*, *supra*, 3 Cal.5th at pp. 354–355; see, e.g., *People v. Garcia* (2014) 230 Cal.App.4th 763, 769–770; *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075.) We agree with *Garcia* and *Flores* and reject appellant's contention to the contrary. " 'Statutes must be upheld unless their unconstitutionality clearly,

positively and unmistakably appears.' " (*Garcia*, at p. 768.) As *Garcia* noted, section 1170.126's constitutional clarity is demonstrated by the factors the statute directs trial courts to consider in making their assessment of "unreasonable risk." These standards provide sufficient objective guidance to trial courts to avoid constitutional infirmity. Appellant has failed in his burden to establish that the term "unreasonable risk of danger to public safety" cannot be otherwise objectively determined. Accordingly, we reject appellant's void for vagueness challenge.

DISPOSITION

The order denying appellant's Proposition 36 petition for resentencing is affirmed.

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KALRA, J.*

We concur:

EDMON, P. J.

EGERTON, J.

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