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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK EUGENE JONES,

Defendant and Appellant.

B270693

(Los Angeles County
Super. Ct. No. MA009123)

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

Heather L. Beugen, 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, Paul M. Roadarmel, Jr.,

Supervising Deputy Attorney General, and Stephanie A. Miyoshi, Deputy Attorney General, for Plaintiff and Respondent.

Frank Eugene Jones (Jones) appeals the trial court's order finding him ineligible for resentencing under Penal Code section 1170.126.¹ We affirm.

BACKGROUND

In 1995, a jury found Jones guilty of corporal injury to a spouse (§ 273.5, subd. (a)) and assault by means likely to cause great bodily injury. (§ 245, subd. (a)(1).) The trial court sentenced Jones to 25 years to life in prison under the “Three Strikes” law (§ 667, subds. (b)-(i)).

The Three Strikes Reform Act of 2012 (Proposition 36, or the Act), approved by the voters on November 6, 2012, amended sections 667 and 1170.12 and added section 1170.126. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048.) Under section 1170.126, a prisoner serving an indeterminate life term under the Three Strikes law whose crime is not a serious or violent felony, may petition the trial court to have his or her sentence recalled and to be resentenced as a second strike offender, “unless the court determines that resentencing would pose an unreasonable risk of danger to public safety.” (*Ibid.*) Jones (who is also

¹ All further statutory references are to the Penal Code.

known as Perry Talley) filed a petition for recall of his sentence on November 27, 2012.

The superior court issued an order to show cause, and on April 25, 2013, the prosecutor, faced with an “overwhelming number of cases,” filed a request for a 60-day extension of time “to fully and fairly evaluate this petitioner’s current crime,” as according to the appellate opinion, he “ ‘beat and kicked his wife in the middle of the street.’ ‘Each time she tried to stand, he knocked her down,’ while paramedics tried to intervene.” The trial court granted the continuance to June 26, 2013, when the prosecutor filed a second request for more time to September 18, 2013, “to review all the records for this petitioner.” The trial court again granted the request.

The prosecution filed an opposition to petition for resentencing based on eligibility and suitability on September 19, 2013 arguing that Jones had not met his burden to show he was eligible for resentencing, because in the current case the prosecutor’s file, the probation report, and the appellate opinion (describing Jones as a “ ‘very dangerous’ ” man who gave his wife “ ‘a substantial beating administered in public’ ”), “all contain information that indicate petitioner intended to cause great bodily injury to his wife.” Jones was not suitable for resentencing given his violent criminal history, the violence of the current crime, and his disciplinary record in prison.

On October 15, 2013, the public defender requested an extension of time to prepare a reply, and on December 12

filed a preliminary reply addressing eligibility only, requesting more time regarding suitability, and asking the court to bifurcate the proceeding and grant the public defender 90 more days to file a reply regarding suitability “to preserve that issue.” The preliminary reply argued that Jones had made a prima facie showing of eligibility, and the court may review nothing beyond “the entire record of conviction,” which did not include an express or implied finding that Jones actually inflicted great bodily injury on his wife, or intended to do so.

After two more continuances (one requested by the public defender), the trial court held a hearing on July 28, 2014. The prosecutor stated she had consulted her office and would move forward on the eligibility hearing as the public defender had requested, but she wanted to put some things on the record before the court ruled. The court asked, “Is it a case of People unable to proceed on eligibility but you’d like to make a record?” The prosecutor agreed. Her office had made numerous efforts to obtain the trial transcripts. The archives unit of the court of appeal reported that the transcripts were missing from the file, and the Attorney General’s file was also missing the trial transcripts. The court reporter had retired and her notes were destroyed 10 years after the date of Jones’s conviction. “So at this point we are not conceding that the petitioner is eligible but are unable to demonstrate that he is ineligible And as the court knows, those are required transcripts to prove on the record of conviction that the defendant is ineligible.” The

trial court stated, “Well, if the people are unable to proceed, then the court finds the people . . . have not shown that the defendant is ineligible, so the court finds the defendant eligible on this record.” After the ruling, the prosecutor added for the record that if before the suitability hearing “the report’s transcripts or trial transcripts become available, the People at that point will ask the court for a motion for reconsideration on the eligibility issue.” The court responded, “All right. And I express no opinion as to what I’m going to do at that point.”

The public defender filed a reply regarding suitability on September 8, 2014. On October 19, 2015, the prosecution requested an eligibility hearing.² The trial court searched its file and stated that a minute order showed it had found Jones eligible on July 28, 2014. The prosecutor explained that it now had the trial transcripts, which were not available then,³ and “normally what we do is we file an opposition based on eligibility with citation to the transcripts.” The trial court then ordered the transcripts of

² The delay was due to multiple hearings regarding the prosecution’s *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 motion regarding Jones’s proposed expert, and a series of continuances of Jones’s suitability hearing when the defense requested additional time to prepare.

³ The Court of Appeal, which initially had been unable to locate the trial transcripts, provided them promptly on the prosecution’s second request and without explanation for the delay.

the July 28 hearing: “If it turns out this has somehow got mixed up and we haven’t had an eligibility hearing, we can take that date and use it as an eligibility hearing and combine eligibility and suitability.”

At a readiness hearing on November 16, 2015, the prosecutor argued that the July 28, 2014 hearing transcript showed that the prosecution did not concede eligibility because it did not have the trial transcripts, and while the court had ruled that Jones was eligible, it also had stated that the prosecution could file a motion to reconsider should it obtain the transcripts. The court told the prosecutor to file a motion for reconsideration.

The motion for reconsideration, filed December 7, 2015, argued that the court should exercise its inherent power to reconsider its prior ruling, as the prosecutor recently had obtained the trial transcripts and now could fully present its opposition to Jones’s argument that he was eligible for resentencing under Proposition 36. Jones opposed the motion, arguing that the statute and case law called for “a single, dispositive eligibility ruling” and at the July 28, 2014 hearing, the prosecution should have either requested a continuance or introduced the Court of Appeal opinion into evidence.

At the hearing on January 5, 2016, the prosecution argued that the initial eligibility ruling in July 2014 was an interim order. At that time the court was requiring trial transcripts at eligibility hearings and the prosecutor, despite reasonable efforts, had not been able to get them. The

subsequent delay was due to defense continuances, so there was no prejudice to Jones, and a fair hearing on eligibility was now possible.

The court defined the “eligibility issue [as] did he intend to inflict great bodily injury?” The transcript requirement was self-imposed, as the court had not ruled that transcripts were required. After discussion whether the Court of Appeal opinion was sufficient to resolve the issue, the court stated, “I’m inclined to grant the motion for reconsideration. These things should be decided on the merits The whole idea behind Prop 36 is that people who are nonviolent offenders who went to prison for a third strike that wasn’t a serious or violent felony should get relief. . . . I don’t think that Mr. Jones, if he, in fact, intended to inflict great bodily injury, should get out because the People were misle[]d by a clerk in the court of appeal when they said they couldn’t find a transcript.” The court granted the motion and set an eligibility hearing.

The prosecution filed a supplemental opposition to Jones’s petition for resentencing on January 25, 2016, with the trial transcripts attached as exhibit 1. The transcripts included testimony that two paramedics responding to an assault call saw Jones and the victim (his wife) standing in the middle of the street. Jones, who weighed 200 pounds, hit the 105-pound victim until she fell to the ground. For a 10 minute period, as the victim tried to get up, Jones repeatedly hit her with open-handed slapping motions to cause her to fall to the ground again. He repeatedly punched her face

and upper chest with his fists, used his feet to push her back down onto the street, and kicked her like a football, drawing his leg back to kick her when she tried to get up. The victim put her hands up to block the blows, and tried to crawl away. The paramedics shined a spotlight at Jones, then turned on the flashing and revolving lights and the headlights and sirens, but Jones kept attacking the victim. Finally he left the scene. The victim's lower lip was cut, she was bleeding profusely from a cut finger (a glass she was holding had shattered), her nose was swollen and bleeding, and both her eyes were swollen. The prosecution argued that the transcripts showed that Jones intended to cause great bodily injury, as the victim was half his size, the attack lasted 10 minutes, and he slapped, back-handed, punched, and kicked her as she lay on the ground trying to get up or crawl away, while he ignored the paramedics' attempts to stop the beating.

At the hearing on February 18, 2006, the prosecutor repeated the details of the attack and added that when Jones was in the patrol car after his arrest, he continued to yell at the victim, kick his feet, and bang his head on the window. "[B]ut for the paramedics and the police showing up," Jones intended to inflict great bodily injury. Jones's counsel stated his continuing objection, and argued that the resulting injuries to the victim were not significant. The court took the matter under submission.

On March 1, 2016, the trial court found Jones ineligible for resentencing, as he intended to cause great bodily injury

to another person. Great bodily injury meant a “ ‘significant or substantial physical injury,’ ” and did not require permanent damage, disfigurement, or loss of function; some physical damage (lacerations, bruises, or abrasions) sufficed. Citing the trial transcript, the court described Jones’s attack on the victim: he struck the victim with a closed fist and open hand, held her down, and kicked her with his feet. The attack showed Jones’s intent to cause great bodily injury, and the injuries also showed that intent. Jones was not eligible for relief under Proposition 36.

Jones filed this timely appeal.

DISCUSSION

We reject Jones’s argument that the trial court did not have jurisdiction to consider the motion for reconsideration. “The trial court’s consideration of a petition under the [Three Strikes Reform] Act is a two-step process. First, the court determines whether the petitioner is eligible for resentencing. If the petitioner is eligible, the court proceeds to the second step, and resentsences the petitioner under the Act unless it determines that to do so would pose ‘an unreasonable risk of danger to public safety.’ ” (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 987.) The initial eligibility determination “constitutes ‘[a]n order made after judgment’ ” and “affects whether the court will exercise resentencing discretion. . . . [W]here, as here, the trial court determines the inmate is eligible, the burden shifts to the prosecution to establish dangerousness [citation] and, if the prosecution does not carry its burden,

resentencing the inmate as a second strike offender necessarily follows.” (*Ibid.*) “[T]he People have the right to appeal the eligibility finding under section 1238, subdivision (a)(5),” and a writ petition is also proper. (*Id.* at p. 988.)

Here, the public defender expressly requested that the court bifurcate the proceeding and consider eligibility only. The prosecutor represented that lacking the trial transcripts, it was unable to demonstrate that Jones was not eligible. The trial court then found Jones eligible but also, at the prosecutor’s request, stated it would consider a motion for reconsideration if the prosecutor found the transcripts before the suitability hearing. Later, at the court’s direction, the prosecutor filed the motion for reconsideration with the transcripts. After a hearing, the court granted the motion, concluding that the transcripts showed that Jones was not eligible.

The procedure was entirely within the trial court’s inherent powers, which “include authority to rehear or reconsider rulings: ‘T[he power to grant rehearing is inherent,—is an essential ingredient of jurisdiction, and ends only with the loss of jurisdiction.’ ” (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1248.) “A court could not operate successfully under the requirement of infallibility in its interim rulings.” (*Id.* at p. 1249; see *People v. Nesbitt* (2010) 191 Cal.App.4th 227, 239.) The trial court properly considered the prosecution’s motion for reconsideration of the interim finding that Jones was eligible, and its finding

upon reconsideration that Jones was not eligible is properly before us. In *People v. Blakely, supra*, 225 Cal.App.4th 1042, 1051, the prosecution moved for reconsideration of the finding that an inmate was eligible for resentencing, and the trial court thereupon found defendant ineligible; the appellate court concluded the ruling was appealable.

We also reject Jones's argument that the trial court abused its discretion in granting the motion for reconsideration because the court of appeal opinion in the current case was sufficient to prove eligibility, and the resulting delay was unfair to Jones. The trial transcript contained additional details relevant to whether Jones intended to cause great bodily injury. The defense, as well as the prosecutor, sought and obtained continuances.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.