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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ROBERT GONZALEZ SAENZ, Defendant and Appellant.	B267820 (Los Angeles County Super. Ct. No. BA141091)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed.

Rich Pfeiffer, 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, Shawn McGahey Webb and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Robert Gonzalez Saenz appeals the denial of his petition for resentencing under Penal Code section 1170.26. Saenz challenges both the test applied by the trial court, and its exercise of discretion. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Saenz was sentenced to 76 years to life in prison, based on his conviction for burglary, receipt of stolen property, and unlawful taking of a vehicle, crimes committed in 1996.

In November 2012, Proposition 36, the Three Strikes Reform Act of 2012 (the "Act"), was enacted by the voters. As relevant to Saenz, the Act created a procedure for persons sentenced under the Three Strikes law, as was Saenz, to petition for resentencing when their third felony conviction was not serious or violent. (Pen. Code, § 1170.126, subd. (e).)[1]

"For those sentenced under the scheme previously in force, the Act establishes procedures for convicted individuals to seek resentencing in accordance with the new sentencing rules. (§ 1170.126.) The procedures call for two determinations. First, an inmate must be eligible for resentencing. (§ 1170.126, subd. (e)(2).) An inmate is eligible for resentencing if his or her current sentence was not imposed for a violent or serious felony *and* was not imposed for any of the offenses described in clauses (i) to (iv) of section 1170.12, subdivision (c)(2)(C). (§ 1170.126, subd. (e)(2).) Those clauses describe certain kinds of criminal conduct, including the use of a firearm during the commission of the offense. Second, an inmate must be suitable for resentencing.

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[1] All further statutory references are to the Penal Code.

Even if eligible, a defendant is unsuitable for resentencing if 'the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).) If an inmate is found both eligible and suitable, the inmate's third strike sentence is recalled, and the inmate is resentenced to a second-strike sentence. (*Ibid*.; § 1170.12, subd. (c)(1).)" (*People v. Estrada* (2017) Cal.5th 661, 667.)

In January 2013, representing himself, Saenz filed a petition for resentencing under the Act. The trial court appointed counsel to represent him. After the court issued an order to show cause, in March 2013, the People filed opposition to resentencing. Saenz's counsel filed an amended petition and reply in October 2014, and a revised opposition was filed in February 2015.

The trial court received extensive exhibits, comprising more than three volumes of transcripts, and heard argument on July 15, 2015. The court issued a written ruling denying the petition, on August 18, 2015. Saenz appealed, asserting that the trial court had applied an improper standard to its determination of unreasonable risk, and that, even under the standard it had applied, finding that he posed an unreasonable risk was an abuse of discretion.[2]

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[2] Saenz's first argument, that the test for unreasonable dangerousness found in Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (§ 1170.18, subd. (c)), was the proper standard to be applied, was rejected by the California Supreme Court in *People v. Valencia* (2017) 3 Cal.5th 347 ("*Valencia*"). Because that decision was filed after briefing was completed in this Court, we asked the parties to file supplemental briefs. Both parties conceded that, so long as *Valencia* remains binding

DISCUSSION

A. The Issue Before the Court Required the Exercise of Discretion

The Act's resentencing provisions, which Saenz invokes, provide that: "[A]n 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).)

"In exercising its discretion to deny resentencing, 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).) Thus, as the Legislative Analyst explained in the Voter Information Guide, '[i]n determining whether an offender poses [an unreasonable risk of danger to public safety], the court could consider *any evidence* it determines is relevant, such as the offender's criminal history, behavior in prison, and participation in rehabilitation programs.'

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authority, the trial court had applied the proper test to determine unreasonable risk.

(Voter Information Guide, Gen. Elec. (Nov. 6, 2012) analysis of Prop. 36, by Legis. Analyst, p. 50, italics added.)" (*Valencia*, *supra*, 3 Cal.5th 354.)

Saenz asserted at the trial court, the trial court found, and Respondent concedes, that he established eligibility for resentencing, leaving only the question of whether he is properly considered an unreasonable risk of danger to public safety. We review that determination for abuse of discretion. Section 1170.126, subdivision (f), by its terms, confers discretion on trial courts to make the required determination. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."' [Citation.]" (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1264; see also *People v. Gibson* (2016) 2 Cal.App.5th 315, 325.)[3]

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[3] Saenz acknowledges that the standard of proof is abuse of discretion, citing *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1305. While Saenz also urges this court to apply the analysis in *In re Lawrence* (2008) 44 Cal.4th 1181, that case applied the "some evidence" standard in reviewing the decision in parole suitability cases, and cautioned that consideration of criminal history must be supported by other facts showing current dangerousness. While Saenz argues that in applying that standard, we should conclude that the trial court improperly focused on the commitment offenses, we disagree. We need not reach his argument that *Lawrence* is binding in this situation because, as discussed below, the record demonstrates

B. The Trial Court Based Its Determination on an Extensive Record

The trial court conducted a hearing on the issue of dangerousness, and received in evidence People's Exhibits 1-40 and Saenz's exhibits A-X, all concerning Saenz's prior history and his actions during incarceration. Neither party sought to call any witnesses.

The court, in analyzing the facts placed before it, focused its attention on whether Saenz posed a current risk to public safety, acknowledging that his criminal history was an immutable factor whose relevance was related to its impact on the determination of current risk of dangerousness. Saenz argues that the court abused its discretion in making that determination, by relying too heavily on past events, and by not adequately considering the showing he had made relating to his current status.

The trial court reviewed Saenz's criminal history, including juvenile offenses as early as 1974, and his adult criminal history beginning in 1977 and continuing through the commitment offenses in 1996. The court found that the criminal activity was consistent "for approximately 20 years before receiving a life sentence for his recidivism" and had escalated over time. The court concluded "Petitioner's criminal history demonstrates he is not capable of following the law, thereby rendering him unsuitable for relief under the Reform Act. As discussed *post*, however, Petitioner's criminal history does not form the sole basis for a finding of current dangerousness."

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that the trial court considered far more than the commitment offenses and prior criminal record.

The court then proceeded to review, in detail, Saenz's disciplinary history, and his rehabilitative efforts during his current period of incarceration. The court discussed five incidents of serious misconduct, the last of which took place in 2011, and eight incidents of minor misconduct, the last of which occurred in 2012, the year before Saenz filed his petition. The court expressed special concern about a 2007 incident in which Saenz had physically attacked his cellmate. The court also discussed positive factors: Saenz had earned his GED; completed an associate's degree in bible studies; and had agreed to debrief from his prior gang involvement. The court also acknowledged Saenz's positive classification score, age (56), significant health problems and clear release plans.

The court concluded that, taken together, these facts demonstrated that Saenz "will likely be unable to follow society's laws if released from prison" and that his "serious institutional misconduct and limited record of rehabilitation support the conclusion that resentencing him would pose an unreasonable risk of danger to public safety." The court found that the "totality of the record" supported his conclusion.

C. The Trial Court Did Not Abuse Its Discretion

Saenz argues that the trial court did not properly determine a nexus between the events in the record and his current status. He also asserts that the court failed to take into consideration his warning to authorities of a plot to kill a police officer, and the risk to his own life in doing so. What Saenz does not do, however, is dispute the factual accuracy of the court's recitation of his criminal record. Similarly, with respect to his prison misconduct, Saenz argued that the court should have

viewed those circumstances more favorably than the record demonstrated the prison authorities had and should have judged the credibility of the reports differently.[4] He also asserts that the trial court understated the level of effort required for him to obtain his GED and his associate degree.

In essence, Saenz does not argue that the factual record does not support the matters relied on by the court, but rather that the court should have balanced those facts differently, and placed more weight on Saenz's efforts at rehabilitation and other actions while incarcerated, than on the record of his offenses and incarceration on which the court did rely. That the facts could be viewed through a different prism does not establish an abuse of discretion. The court was clear that it was not relying solely on the immutable facts of prior criminal convictions, but as well on behavior, including incidents resulting in prison violations in 2011 and 2012, the two years prior to the petition itself. The court also considered the positive factors relating to age, physical condition, rehabilitative efforts and release plans, but on balance found them outweighed by the other facts in the record.

This record does not demonstrate any abuse of discretion. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 ["Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance"].)

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[4] We defer to the trial court's credibility determinations. (See, e.g., *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 [credibility determination is the "exclusive province" of the trial court].)

DISPOSITION

The order is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.