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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.

MARCOS SANTISTEVAN,

Defendant and Appellant.

B281265

(Los Angeles County
Super. Ct. No. KA072435)

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

Jonathan B. Steiner and Cheryl Lutz, 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, Noah P. Hill and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

The trial court denied Marco Santistevan's petition for recall of his sentence under the Three Strikes Reform Act, finding under the preponderance of the evidence standard that Santistevan was ineligible for relief because he acted with the intent to cause great bodily harm during the commission of the offenses for which he was convicted. Santistevan appeals, and we reverse and remand with instructions.

BACKGROUND

In 2006, a jury convicted Santistevan of resisting an executive officer (Pen. Code, § 69)¹ and misdemeanor battery (§ 243, subd. (e)(1)). The trial court found true allegations that Santistevan had two prior serious or violent felony convictions, and sentenced him to 25 years to life for the count of resisting an officer (with a concurrent term of one year in jail on the misdemeanor battery). We affirmed the judgment in an unpublished opinion. (*People v. Santistevan* (Sept. 27, 2007, B190994) [nonpub. opn.])

In 2013, Santistevan petitioned to recall his sentence under the Three Strikes Reform Act of 2012, commonly known as Proposition 36 (§ 1170.126). The trial court held

¹ All further statutory references are to the Penal Code.

an eligibility hearing. On December 12, 2016, in a written memorandum of decision, the court found by a preponderance of the evidence that Santistevan was ineligible for relief, because while resisting the officer he “ ‘intended to cause great bodily injury to another person.’ ” (§ 1170.12, subd. (c)(2)(C)(iii); 1170.126, subd. (e)(2).)

Santistevan filed this timely appeal.

DISCUSSION

On appeal, Santistevan argues, *inter alia*, that the trial court erred with regard to the standard of proof, that the trial court should have applied the more stringent beyond a reasonable doubt standard, not the preponderance of the evidence standard.

Since Proposition 36 never set the standard of proof for eligibility findings (see *People v. Guilford* (2014) 228 Cal.App.4th 651, 657), a split developed among the Courts of Appeal, some approving the preponderance of evidence standard, others approving the proof beyond reasonable doubt standard. (See, e.g., *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 [preponderance of the evidence]; *People v. Arevalo* (2016) 244 Cal.App.4th 836, 853 [proof beyond a reasonable doubt].) In reaching its decision to apply the preponderance of the evidence standard, the trial court adopted the reasoning of *Osuna* over that of *Arevalo*.

In *People v. Frierson* (2017) 4 Cal.5th 225, our Supreme Court recently held that the People are required to establish beyond a reasonable doubt that a petitioner is ineligible for resentencing. (*Id.* at p. 230.) In reaching its decision, the

Supreme Court expressly disapproved of *People v. Osuna*, *supra*, 225 Cal.App.4th 1020, and similar cases, and expressly approved of *People v. Arevalo*, *supra*, 244 Cal.App.4th 836. (*Frierson*, at pp. 234–238.)

In light of *People v. Frierson*, *supra*, 4 Cal.5th 225, we reverse the trial court’s order denying Santistevan’s petition and direct the trial court to reconsider the petition under the reasonable doubt standard.

DISPOSITION

The order is reversed. The trial court is directed to reconsider the petition under the reasonable doubt standard.

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JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.