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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. FRANKIE LANE DREW, Defendant and Appellant.	B282103 (Los Angeles County Super. Ct. No. SA023798)

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

Elizabeth K. Horowitz, 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 Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Frankie Lane Drew 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 November 12, 1995, a person's luggage containing, inter alia, a cassette recorder, was stolen. The next day, appellant told the luggage's owner at a hotel that appellant would return the luggage for $2,500. Hotel security detained appellant and found the recorder on his person. A jury convicted him of felony receiving stolen property (§ 496, subd. (a)) and found true the allegation that he had suffered two strikes (§ 667, subd. (d)) — a January 1989 robbery conviction and a December 1989 attempted robbery conviction. Thereafter, the trial court sentenced him to prison for 25 years to life pursuant to the Three Strikes law.

II. The Petition for Resentencing.

On January 17, 2013, appellant filed a section 1170.126, subdivision (b) (Proposition 36) petition for resentencing (petition). Significant briefing followed. The People filed an opposition disputing appellant's suitability, but not eligibility, for relief. The opposition urged resentencing appellant would "pose an unreasonable risk of danger to public safety" within the meaning of section 1170.126, subdivision (f). Appellant filed a reply with exhibits. The People countered by filing exhibit Nos. 1 through 15, totaling 490 pages. Lastly, appellant filed a supplemental reply with exhibits.

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

On March 7, 2017, the court held a Proposition 36 suitability hearing with appellant and the parties' counsel present. Neither party called any witnesses and the parties' respective exhibits were admitted into evidence without objection.

III. The Court's Memorandum of Decision.

On April 5, 2017, the court filed a detailed, 13-page Memorandum of Decision denying the petition. The court reviewed the factors set forth in section 1170.126, subdivision (g): appellant's criminal history, disciplinary history and rehabilitative programming, and other evidence.

As to the criminal history factor, the court received evidence that appellant had suffered five misdemeanor convictions and two serious felony convictions from 1988 to 1989. Appellant was on felony probation when he committed his second felony conviction in 1989 and he was on parole when he committed the 1995 offense underlying his conviction in this case. The court acknowledged that while appellant "did not seriously injure any of his victims" appellant's "offenses were committed in rapid succession, and he has a history of violating his probation and parole." The court found, "[a]lthough [appellant's] criminal history is now remote in time, [appellant] has continued to misbehave in prison. Although [appellant's] criminal history is not extensive, when viewed alongside his disciplinary record and rehabilitative record, the court finds that [appellant's] criminal history continues to support the finding that he currently poses an unreasonable risk of danger to public safety."

As to disciplinary history and rehabilitative programming, the court pointed to the sizeable quantity of records pertaining to appellant—nine binders standing over two feet tall. The court noted that appellant had been found guilty in over 75 serious rules violation reports (RVRs) through 2015. Most alarming were the numerous RVRs for sexual misconduct which resulted in appellant becoming a registered sex offender pursuant to section 290. The court was further troubled by the fact that during appellant's 20 years of confinement, he had failed to participate in any rehabilitative programming. The court rejected appellant's claim that his vision disability prevented him from accessing any programming.

Ultimately, the court declared, "[Appellant's] disciplinary record is exceptional in its length. . . . [Appellant] has engaged in egregious conduct in prison over and over again, during the entire duration of his confinement, with no signs of slowing. . . . [Appellant's] failure to address the causative factors which led to his criminality, indicates [appellant] will not voluntarily or successfully complete re-entry programs once he is released into the community. [¶] . . . The Court finds [appellant's] extensive disciplinary record and lack of rehabilitative programming indicate [appellant] currently poses an unreasonable risk of danger to public safety."

As to other evidence, the court observed appellant was 52 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 disciplinary record which undermined this inference. The court noted that appellant's classification score, which was a risk assessment, was an astounding 524 which suggested an extremely high security risk

particularly because the lowest possible score appellant could have achieved was 19 and he entered prison with a score of 30. The court found that appellant's continued misconduct in prison suggested that he would be unable to successfully comply with his parole terms.

In the end, while still acknowledging that appellant's age supported release, the court found, on balance, that appellant's criminal history, disciplinary record, and rehabilitative record outweighed that single factor. The court concluded "the totality of the record, including consideration of all the statutory factors, demonstrates that resentencing [appellant] at this time would pose an unreasonable risk of danger to public safety."

ISSUES

Appellant claims the trial court abused its discretion by finding he posed an unreasonable risk of danger to public safety based on his violent conduct and indecent exposure violations. He also presents the related claim the court abused its discretion by finding appellant posed an unreasonable risk of danger to public safety based on his failure to participate in rehabilitative programs. We reject the claims.

DISCUSSION

THE COURT PROPERLY DENIED APPELLANT'S PROPOSITION 36 PETITION.

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.*)

Moreover, as pertinent here, "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.)

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.)

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.) 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.)

In the present case, the sole basis for the trial court's denial of the petition was the trial court's discretionary determination that appellant posed an "unreasonable risk of danger to public safety" within the meaning of section 1170.126, subdivision (f). The evidence of the factors considered by the trial court, including petitioner's criminal history, prison disciplinary history, and record of rehabilitation, demonstrates a virtual continuum of misconduct supporting the trial court's dangerousness finding. We note many of appellant's acts of misconduct occurred after January 17, 2013, the date he filed his petition.

The court conducted a careful examination of the record and engaged in a thoughtful and conscientious weighing and evaluation of the pertinent facts, properly applying Proposition 36's language in section 1170.126, subdivision (f), and making the court's dangerousness finding. (See *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075 ["[s]urely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would pose an unreasonable risk of harm to the public safety"].) There was ample evidence supporting the trial court's dangerousness

finding, the court did not abuse its discretion by finding appellant posed an "unreasonable risk of danger to public safety" within the meaning of section 1170.126, subdivision (f), and the court properly denied his Proposition 36 petition.

None of appellant's arguments compel a contrary conclusion. Appellant argues there was no substantial evidence he engaged in violent conduct, therefore, the trial court abused its discretion by relying on that factor in making the dangerousness finding. Appellant concedes some of the incidents of alleged violent conduct involved his commission of a battery, but he argues a battery can involve " ' " 'the least touching' " ' " and the force used " ' "need not be violent." ' " (*People v. Myers* (1998) 61 Cal.App.4th 328, 335.) We reject the argument.

The word "violent" means "marked by extreme force or sudden intense activity," "notably furious or vehement," "extreme, intense," "caused by force: not natural," "emotionally agitated to the point of loss of self control," "prone to commit acts of violence <~ prison inmates>."[2] The court never said, e.g., it was relying on the legal definition of "force or violence" for purposes of battery and within the meaning of section 242.[3] According to the ordinary definition of "violent," the court found there were multiple instances of "violent misconduct" in appellant's disciplinary history including "battery on a peace officer, threatening to kill other inmates, threatening a public official, and mutual combat." An August 30, 2013 incident is

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[2] Merriam-Webster's Collegiate Dict. (10th ed. 1995) page 1319, some capitalization omitted.

[3] Section 242 states, "A battery is any willful and unlawful use of force or violence upon the person of another."

illustrative. The RVR reflects appellant telling a corrections officer, " 'As soon as I get you out there on the street I'm going to fuck you up' " and " 'I'm sick of your shit, I'm going to fuck you up on the street.' " Significantly, this violent incident occurred *after* appellant filed the instant petition, suggesting that when appellant spoke of getting "out there on the street," appellant fully expected to be released and in a position to follow through on his threat. Thus, there was substantial evidence, including the evidence of appellant's assaults and physical misconduct, threats to engage in violent conduct, disruptive behavior, and destruction of state property, supporting the court's conclusion that appellant's conduct in prison was violent.

Appellant argues his "indecent exposure" violations constituted behavior that was "annoying or offensive,"[4] but not indicative of dangerousness, therefore, the trial court abused its discretion by relying on that behavior in making its dangerousness finding. We reject the argument.

Indeed, appellant engaged in 41 acts of sexual misconduct, including masturbating, and exposing himself, intending to be seen, and making vulgar, sexually suggestive comments. *Seven* of these acts occurred after he filed his petition. Two of the 41 in-custody violations resulted in criminal convictions such that he is now required to register as a sex offender pursuant to section 290. On numerous occasions, appellant employed a premeditated

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[4] Appellant notes section 314, subdivision 1, provides, "Every person who willfully and lewdly . . . [¶] 1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be *offended or annoyed* thereby" (italics added) is guilty of a misdemeanor.

ruse to get the victim's attention.[5] In sum, the trial court properly relied on appellant's sexual misconduct when making its dangerousness finding.

Appellant argues that the court's finding that appellant had the opportunity to seek out programming lacked substantial evidence because his visual disability[6] and his classification as a level 4 prisoner prevented him from participating. We reject the argument and appellant's related arguments.

Preliminarily, appellant points to no evidence he was "legally blind" during the entirety of his 20-year imprisonment.[7] Even appellant's counsel conceded at the suitability hearing that she thought appellant became blind in prison. Although appellant may have been "legally" blind, there was no substantial evidence that he was totally blind or that all rehabilitation programs were unavailable to him because of his impaired vision.[8] More to the point, the court actually recognized that

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[5] The court identified specific examples of this sexual misconduct, several of which occurred after the filing of this petition: in 2013, appellant thrust his erect penis through the open port of his cell when a nurse was providing him eye medication; in 2015, appellant, while lying on his back and being examined by a medical professional, began masturbating.

[6] Appellant asserts that, while in prison, he became legally blind due to retinal detachment and glaucoma.

[7] There was substantial evidence that in 2008, he was working on legal matters in his cell, wore glasses, read a hearing officer's name tag, and could read large or magnified print.

[8] In appellant's November 16, 2016 reply, he stated, "Although [appellant] *has received accommodations* for his disability, his *limited* sight makes it *difficult* for him to participate in *regular* prison programming." (Italics added.)

appellant "may have been precluded from participating in some programs due to his impaired vision." The court, though, was not persuaded by appellant's suggestion he was *completely* unable to participate in rehabilitation programs due to his impaired vision *throughout* his entire incarceration.

Moreover, even if all of appellant's failures to participate in rehabilitation programs during the entirety of his imprisonment were attributable to his impaired vision (and not to an unwillingness to participate), the trial court reasonably could have been concerned that, absent such participation, ongoing personal, psychological, and behavioral issues underlying appellant's history of misconduct had not been adequately addressed, with the result resentencing him would pose an unreasonable risk of danger to public safety.

The trial court was not obligated to treat appellant the same as an inmate who successfully had completed multiple prison rehabilitation programs during a 20-year period between commencement of imprisonment and a suitability hearing. The trial court reasonably relied on appellant's complete failure to participate in rehabilitation programs during the entirety of his imprisonment as a factor supporting the conclusion resentencing him would currently pose an unreasonable risk of danger to public safety.

DISPOSITION

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

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KALRA, J.*

We concur:

LAVIN, Acting 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.