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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL J. MATESKY,

Defendant and Appellant.

A143579

(San Mateo County
Super. Ct. No. SC044002A)

Michael J. Matesky appeals from an order denying his petition for resentencing pursuant to Proposition 36 (Pen. Code, § 1170.126).¹ He contends the trial court erred because he was eligible for resentencing on his nonserious and nonviolent felony third-strike convictions. Respondent agrees. We will reverse the order and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

In June 1999, a jury convicted Matesky of nine felonies committed in August 1997: commercial burglary (§ 460, subd. (b), count 1); petty theft with a prior (§ 666, count 2); spousal abuse (§ 273.5, subd. (a), count 3); assault with a deadly weapon (§ 245, subd. (a)(1), count 4); criminal threats (§ 422, count 5); commercial burglary (§ 460, subd. (b), count 6); attempted robbery (§§ 212.5, subd. (c), 664, count 8); robbery (§ 212.5, subd. (c), count 9); and operating a vehicle without consent (Veh. Code, § 10851, count 12).

¹ All further statutory references are to the Penal Code unless otherwise indicated.

In a bifurcated proceeding, the trial court sustained allegations of two prior serious felonies (§ 667, subd. (a)), two prior prison terms (§ 667.5, subd. (b)), and two strikes (§ 1170.12, subd. (c)(2)).

In August 2000, pursuant to the Three Strikes law, the court sentenced Matesky to an aggregate term of 135 years to life, consisting of five consecutive terms of 25 years to life for counts 2, 3, 8, 9, and 12, enhanced by five years each for the two section 667, subdivision (a) findings. The court also imposed, but stayed, four terms of 25 years to life for counts 1, 4, 5, and 6. The court did not impose sentence for the two section 667.5, subdivision (b) enhancements.

In November 2012, California voters approved Proposition 36, known as the Three Strikes Reform Act of 2012 (Reform Act).² Pursuant to the Reform Act, a third-strike indeterminate life sentence is generally reserved for felony offenders whose current offense is a “serious” or “violent” felony, as defined in sections 1192.7, subdivision (c) and 667.5, subdivision (c). The term for an offense that is a nonserious, nonviolent felony is only doubled. (§ 1170.12, subd. (c)(2)(C).) Furthermore, an inmate serving an indeterminate life sentence under the Three Strikes law, “whose sentence under [the Reform Act] would not have been an indeterminate life sentence,” may petition the superior court for resentencing. (§ 1170.126, subs. (a) & (b).) The court has discretion to refuse to resentence the inmate if resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).)

In September 2014, Matesky filed a petition for resentencing under the Reform Act with respect to his nonserious and nonviolent felony convictions. The People opposed Matesky’s petition, contending he was statutorily ineligible because he had been convicted of serious or violent felonies.

In November 2014, the superior court heard and denied Matesky’s petition on the ground he was statutorily ineligible for resentencing.

This appeal followed.

² Effective November 7, 2012.

II. DISCUSSION

Matesky argues that the court erred when it found him ineligible for resentencing, in light of our Supreme Court's subsequent opinion in *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*). As relevant here, *Johnson* ruled "that the [Reform] Act requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis," and "an inmate may obtain resentencing with respect to a three-strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third strike sentence of 25 years to life." (*Id.* at p. 688.)

Respondent acknowledges that Matesky's argument is correct under *Johnson*, and the matter should be remanded to the superior court for reconsideration of Matesky's resentencing petition. Specifically, the court must evaluate Matesky's eligibility for resentencing on a count-by-count basis. The court retains discretion to refuse to resentence Matesky if it finds that "resentencing [him] would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) We will order accordingly.

III. DISPOSITION

The order denying Matesky's petition for resentencing is reversed, and the matter is remanded for further consideration of his petition.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.

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