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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

BRUCE ALLEN SWENSON,

Defendant and Appellant.

2d Crim. No. B255252

(Super. Ct. No. 217904)

(Santa Barbara County)

Bruce Allen Swenson appeals an order denying his petition for resentencing under the Three Strikes Reform Act (Reform Act). (Pen. Code, §§ 667, 1170.12, 1170.126.)¹ He was sentenced to 27 years to life following his 1997 conviction of two counts of solicitation of murder. (§ 653f, subd. (b).) We conclude that because he was convicted of solicitation of murder, he was not eligible for resentencing under the Reform Act. We affirm.

FACTS

In 1996, Swenson hired an individual he believed to be a "hit man" to kill his ex-wife and a Deputy District Attorney.

In 1997, Swenson was convicted of two counts of solicitation of murder. (§ 653f, subd. (b).) He fell within the purview of the Three Strikes law. (§ 667, subd.

¹ All statutory references are to the Penal Code.

(e)(2)(A), 1170.12, subd. (c)(2)(4).) He had prior serious felony convictions. His criminal history included convictions for corporal injury to a spouse (§ 273.5, subd. (a)), false imprisonment (§ 236), criminal threats (§ 422), and assault with a deadly weapon (§ 245, subd. (a)(1)). He was sentenced to 27 years to life in state prison.

In 2012, Swenson filed a petition for "recall of sentence" in the superior court. He claimed he was entitled to "re-sentencing" under "Proposition 36, [the] Three Strikes Reform Act"

The trial court denied the petition. It found Swenson was "ineligible to be re-sentenced under [Proposition] 36."

DISCUSSION

The Reform Act

Swenson contends he was eligible to be resentenced under the Reform Act. He claims the trial court erred by denying his petition and ruling that because of his conviction of solicitation of murder he did not qualify for resentencing under the law. We disagree.

Under the "Reform Act . . . , a defendant convicted of two prior serious or violent felonies is subject to the 25-year-to-life sentence only if the current third felony is a *serious or violent* felony." (*People v. White* (2014) 223 Cal.App.4th 512, 517.) "In approving the Reform Act, the voters found and declared that its purpose was to prevent the early release of dangerous criminals and relieve prison overcrowding by allowing low-risk, nonviolent inmates serving life sentences for petty crimes, such as shoplifting and simple drug possession, to receive twice the normal sentence instead of a life sentence." (*Id.* at p. 522.)

"The electorate . . . approved a mandate that the Reform Act be liberally construed to effectuate the protection of the health, safety, and welfare of the People of California." (*People v. White, supra*, 223 Cal.App.4th at p. 522.)

A defendant is not eligible for resentencing under the Reform Act if "[d]uring the commission of the current offense, the defendant . . . intended to cause

great bodily injury to another person." (§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).)

Here the offense in question is solicitation of murder. Express malice in the form of a specific intent to kill is an element of this offense. (*People v. Bottger* (1983) 142 Cal.App.3d 974, 980.) An intent to kill someone is an intent to cause the most extreme form of great bodily injury. It is the intent to inflict bodily injury to the goal of terminating a life. Consequently, solicitation of murder includes an intent to cause great bodily injury within the meaning of the Reform Act's exclusion provision. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1036 ["voters rendered ineligible for resentencing not only narrowly drawn categories of third strike offenders . . . but also broadly inclusive categories of offenders who, during commission of their crimes . . . intended to cause great bodily injury to another person"].)

In reviewing the Reform Act, we also ""select the construction that comports most closely with the apparent intent of the [law], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences."" (*People v. Superior Court (Ferguson)* (2005) 132 Cal.App.4th 1525, 1530.) The "purpose" of the Reform Act was to allow "low-risk, nonviolent inmates serving life sentences for *petty crimes, such as shoplifting and simple drug possession*" to obtain relief. (*People v. White, supra*, 223 Cal.App.4th at p. 522, italics added.) Solicitation of murder is not a "petty" offense.

Swenson suggests inmates convicted of solicitation of murder are not excluded from eligibility for resentencing because this offense is not a serious or violent crime. But provisions of the Reform Act undermine this claim. Inmates serving a life sentence as a result of a petty crime third strike are categorically excluded from resentencing if they have a prior conviction for crimes including "[a]ny homicide" or "[s]olicitation to commit murder as defined in Section 653f." (*People v. Manning* (2014) 226 Cal.App.4th 1133, 1138, italics added; §§ 667, subd. (e)(2)(C)(iv); 1170.12, subd.(c)(2)(C)(iv); 1170.126, subd. (e)(3).) They are excluded as dangerous offenders

because they committed the same crime Swenson committed. The Reform Act cannot be interpreted to exclude inmates whose third strike was a petty offense because they had a prior solicitation of murder conviction, but then grant relief to those who commit that same offense as a third strike.

Moreover, Swenson's position would lead to another absurd result. It would exclude all those who commit a wide variety of lesser crimes with the intent to cause great bodily injury, but then allow those who commit the more serious offense of solicitation of murder to be eligible for resentencing. Swenson has not shown how this result furthers the Reform Act's goals. Nor has he shown how those who commit solicitation of murder as a third strike fall within the category of "low-risk, nonviolent inmates" who are the Reform Act's intended beneficiaries. (*People v. White, supra*, 223 Cal.App.4th at p. 522.)

The People cite *Schinkel v. Superior Court* (2014) 229 Cal.App.4th 935, 941, which held a defendant who committed solicitation of murder was not eligible for resentencing under the Reform Act. But our Supreme Court has recently granted review of that decision.

Swenson contends to be ineligible under the Reform Act the offense of solicitation of murder must be "tethered to another offense." He claims the statutory language "during the commission of the current offense" "only makes sense if there is *another* offense to which the intent to cause injury attaches."

But appellate courts have rejected this tethering argument. (*People v. White, supra*, 223 Cal.App.4th at p. 527.) The statute only requires the requisite intent in the commission of the current offense. Swenson adopts an unreasonable construction of the plain language of the statute. He is seeking to convert the Reform Act's great bodily injury exclusion provision into a double crime requirement. In interpreting the words of the statute, we must also consider the law's purpose. Allowing those who commit solicitation of murder to be eligible for resentencing would contravene the Reform Act's express "mandate" to protect public safety. (*Id.* at p. 522.) Swenson was convicted of

two counts of solicitation of murder. He falls outside of the Reform Act's resentencing provision.

We have reviewed Swenson's remaining contentions and we conclude he has not shown error.

The order denying Swenson's petition is affirmed.

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GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

Suzan E. Hier, under appointment by the Court of Appeal, for Defendant and Appellant.

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