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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

SABAS CISNEROS,

Defendant and Appellant.

C079371

(Super. Ct. No. 07F07014)

Defendant Sabas Cisneros appeals from the denial of his petition for modification of his maximum term of confinement based on the Three Strikes Reform Act of 2012 (Proposition 36). (Pen. Code, § 1170.126.)¹ He challenges: (1) the trial court's finding that he is ineligible for relief because during the commission of the current offense he was armed with a deadly weapon and intended to inflict great bodily injury, and (2) the trial court's determination that his release would pose an unreasonable risk of danger to public safety. Assuming defendant was otherwise eligible for relief under Proposition 36,

¹ Undesignated statutory references are to the Penal Code.

we conclude the trial court did not abuse its discretion by denying his petition on the basis that his release would pose an unreasonable risk of danger to public safety. Accordingly, we affirm on those grounds.

I. BACKGROUND

A. Procedural Background

In 2012, in bifurcated proceedings, a jury found defendant guilty of battery by a prisoner on a non-confined person and not guilty by reason of insanity. The trial court found true two prior strike allegations. Defendant was committed to a state hospital for a period not to exceed 25 years to life.

On September 23, 2014, defendant filed a petition to modify his maximum term of confinement and for a writ of habeas corpus based on Proposition 36. The trial court issued an order requesting the parties brief whether Proposition 36 resentencing is available to a person who has been found not guilty by reason of insanity and committed to a state hospital. In response, the prosecution contended equal protection and fundamental fairness required allowing defendant to petition for modification of his maximum term. The court then issued a second order asking the parties to brief other issues of eligibility and defendant's dangerousness.

On May 1, 2015, the court held a hearing on the petition and issued an oral ruling denying it. The court expressed doubt that Proposition 36 applies to defendant, but assumed in light of the prosecution's concession that equal protection principles required it to reach the other issues raised by defendant's petition. The court stated it would issue a written opinion confirming its oral ruling. On May 7, 2015, defendant filed a notice of appeal. On June 17, 2015, the court issued its written ruling. Specifically, the court found defendant was ineligible for relief because, during the commission of the current offense, he was armed with a deadly weapon and intended to inflict great bodily injury. The court also determined defendant posed an unreasonable risk of danger to public safety if he was released to the community.

B. Statutory Background

In 2012, California voters passed Proposition 36. As relevant here, it added section 1170.126, which allows a person who is serving an indeterminate term of life in prison that was imposed under the Three Strikes law (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)) for a felony that is neither serious nor violent to petition for recall and resentencing. (§ 1170.126, subd. (b).) Various factors render a petitioner ineligible for resentencing. (See *id.*, subd. (e).) For instance, an inmate is ineligible for resentencing if “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii); see § 1170.126, subd. (e)(2).) But if the petitioner satisfies the statutory criteria and is eligible for resentencing, the trial court “shall” resentence the petitioner “unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (*Id.*, subd. (f).) In exercising its discretion in determining whether resentencing would pose such a risk, “the court may consider: [¶] (1) The petitioner’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) The petitioner’s disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any 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.” (*Id.*, subd. (g).)

Almost two years after the passage of Proposition 36, the voters approved Proposition 47, which reduced a number of felony or wobbler offenses to misdemeanors. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Proposition 47 also provides for resentencing. It added section 1170.18, subdivision (a), which states: “A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this

section (“this act”) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing” under the statutory framework as amended by the passage of Proposition 47. If subdivision (a) is satisfied, subdivision (b) requires recall and resentencing unless, as in Proposition 36, “the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b).) Unlike Proposition 36, Proposition 47 also provides: “*As used throughout this Code, ‘unreasonable risk of danger to public safety’ means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.*” (§ 1170.18, subd. (c), italics added.) These violent felonies include murder. (§ 667(e)(2)(C)(iv)(IV).)

II. DISCUSSION

A. *Commitments to State Hospitals*

To understand the nature of defendant’s petition, we begin by reviewing not guilty by reason of insanity commitments and how they differ from prison sentences. Where, as here, a defendant pleads not guilty by reason of insanity, a jury must first determine whether the defendant is guilty of the charged offense. (§ 1026, subd. (a).) If the defendant is found guilty, then the jury determines whether the defendant was insane at the time he committed the offense. (*Ibid.*) “Insanity, under California law, means that at the time the offense was committed, the defendant was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong.” (*People v. Hernandez* (2000) 22 Cal.4th 512, 520; see § 25, subd. (b).) “If the defendant succeeds in proving his insanity at the time of the offense, commitment follows unless the court determines that the defendant has fully recovered his sanity. [Citation.] The maximum term of commitment is equal to the longest term of imprisonment which could have been imposed for the offenses of which the defendant was convicted.” (*People v. Tilbury*

(1991) 54 Cal.3d 56, 63.) However, the total period of confinement may differ from the maximum term because a defendant may be released early on the grounds that his or her sanity has been restored or, in felony cases, committed beyond the maximum term based on his or her danger to others. (§§ 1026.2, 1026.5, subd. (b).)

Section 1170.126 states explicitly that its resentencing provisions “apply *exclusively* to persons presently serving an indeterminate term of *imprisonment*.” (§ 1170.126, subd. (a), italics added.) Accordingly, at least one other court has held that individuals who have been committed to a state hospital because they were found not guilty by reason of insanity cannot be resentenced under section 1170.126. (*People v. Dobson* (2016) 245 Cal.App.4th 310, 317, review den. June 8, 2016, S233228.) Regardless, we will put this issue aside and affirm the trial court’s ruling on grounds it did reach.

B. Unreasonable Risk of Danger to Public Safety

Defendant challenges the trial court’s determination that his release would pose an unreasonable risk of danger to public safety. He posits the trial court applied an erroneous standard because a high level of risk was required and he had only a “moderate” risk of danger to others according to recent progress reports submitted pursuant to section 1026. (See § 1026, subd. (f) [requiring medical director of facility to submit semi-annual reports to the court on defendant’s status and progress].) We disagree. The standard for risk of danger to public safety is neither moderate nor high, but “unreasonable.” (§ 1170.126, subd. (f); see *People v. Garcia* (2014) 230 Cal.App.4th 763, 769 [“The critical inquiry . . . is not whether the risk is quantifiable, but rather, whether the risk would be ‘unreasonable’ ”].) And this was the determination the trial court made. Defendant also asserts that, in deciding whether he posed an unreasonable risk of danger to public safety, the trial court should have applied the definition set forth in Proposition 47 that by its terms applies throughout the Penal Code and requires an unreasonable risk that he would commit a violent felony. (§ 1170.18, subd. (c).) This

question is currently under review by our Supreme Court. (See *People v. Myers* (2016) 245 Cal.App.4th 794, review granted May 25, 2016, S233937; *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825.) But we need not reach it here. In the trial court’s written ruling, it noted that if the Proposition 47 standard applied, “the danger to the community from defendant’s violent conduct includes an unreasonable risk that he may commit murder if he were released.”² This determination is sufficient to support the trial court’s denial of defendant’s petition under either standard.

Moreover, substantial evidence supports this determination. As the trial court found, defendant had “committed significant acts of violence in a short period of time.” In 2005, defendant shot his victim four times and killed him. “While in custody on that case, in 2006 he savagely assaulted an inmate, slamming his head on a desk, punching him with his fists, then stabbing him above his eye with a pencil.” In 2007, defendant committed the current offense, an attack on a correctional officer. Defendant does not challenge these facts. Instead, he argues they preceded his treatment for mental illness. Further, he contends the danger to others assessed in his progress reports was based on his prior offenses. The record does not support this latter claim, or reflect such a clear division between defendant’s behavior pre and post-commitment. One progress report notes defendant’s homicidal thoughts have decreased, but not that they have stopped entirely. Another report states that on two occasions defendant had struck a peer multiple times before being stopped by hospital staff—once only a few days after he filed his present petition. Further, his significant history of violence appears to be related to his

² This finding also dispenses with defendant’s contention that the trial court’s statement at the hearing, that “there is a significant danger that [defendant] would kill somebody either intentionally or maybe unintentionally by driving a vehicle while intoxicated, something like that,” was insufficient because neither would rise to the level of murder.

substance abuse in addition to his mental disorder, and use of alcohol and illicit substances increase his risk for violence. The trial court also specifically found defendant “has not improved to the extent that he no longer poses a significant danger to the community. He continues to lack insight into his condition, does not fully participate in group therapy and has no relapse prevention program. He has a history of refusing medications, has had homicidal ideations as recently as 2012 and had a significant violent event that, although appearing to be in self-defense, exhibited very aggressive behavior.” Under the circumstances, we conclude the trial court did not abuse its discretion in determining that, if released, defendant would pose an unreasonable risk of danger to public safety, and specifically that there is an unreasonable risk he would commit murder.

On reply, defendant attacks this determination by observing that his prior voluntary manslaughter conviction did not constitute murder and “his not guilty by reason of insanity due to mental disease or defect mitigated against malice.” We need not consider these arguments because defendant failed to raise them earlier or show good reason for failing to do so. (See *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29 [“Withholding a point until the reply brief deprives the respondent of an opportunity to answer it. . . . Hence, a point raised for the first time therein is deemed waived and will not be considered, unless good reason is shown for failure to present it before” (fn. omitted)].) Nonetheless, the new arguments are also unavailing. Both Propositions 36 and 47 render a petitioner ineligible for resentencing if he has a past conviction for murder. (§§ 1170.18, subd. (i), 1170.126, subd. (e)(3).) The trial court’s discretionary determination regarding whether “the petitioner would pose an unreasonable risk of danger to public safety” is forward-looking. Both resentencing statutes permit the trial court to consider the petitioner’s conviction history (§§ 1170.18, subd. (b)(1), 1170.126, subd. (g)(1)), but neither imposes the redundant requirement that a petitioner have already committed a particular kind of offense in order to be adjudged an unreasonable risk for the future. Thus, the fact defendant had previously shot an individual four times,

was, as the trial court found, worthy of consideration, but the fact he was convicted of voluntary manslaughter for this act did not foreclose the trial court's determination that there was an unreasonable risk he would commit murder in the future. Likewise, defendant only suggests his one previous not guilty by reason of insanity verdict "mitigate[s] against malice." He does not assert it precludes defendant from committing murder in the future. And "[b]ecause defendant 'does not expand on the issue with either argument or citation to relevant authority,' " we need not address it any further. (*People v. Oates* (2004) 32 Cal.4th 1048, 1068, fn. 10.) In short, defendant's arguments fail to persuade because they do not alter the fact that substantial evidence supports the trial court's determination that there was an unreasonable risk he would commit murder if released.

III. DISPOSITION

The judgment (the trial court's order denying defendant's petition under Penal Code section 1170.126) is affirmed.

/S/

RENNER, J.

We concur:

/S/

BUTZ, Acting P. J.

/S/

DUARTE, J.