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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALVIS J. BAILEY,

Defendant and Appellant.

D064774

(Super. Ct. No. SCD112999)

APPEAL from an order of the Superior Court of San Diego County, David J.

Danielsen, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Deputy Attorney General, Kelley Johnson and Kristen K. Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Alvin J. Bailey appeals an order after judgment denying his petition to recall his life sentence and to resentence him pursuant to Penal Code<sup>1</sup> section 1170.126.<sup>2</sup> After considering the evidence presented by both the People and Bailey, the trial court found resentencing Bailey would pose an unreasonable risk of current danger to public safety.

On appeal, Bailey contends (1) we should review the court's order denying his petition for resentencing de novo and (2) we should conclude Bailey does not currently pose an unreasonable risk of danger to public safety because the People did not meet their burden of proof on this issue. We conclude the decision as to whether a petitioner would pose an unreasonable risk of danger to public safety lies within the sound discretion of the trial court and, in this instance, the court did not abuse its discretion. We affirm the order denying Bailey's petition for resentencing.

## FACTUAL AND PROCEDURAL BACKGROUND

### A

Bailey's juvenile offense history began at age 12 and consisted of petty thefts, shoplifting, car theft and purse snatching. As an adult, beginning in 1964, Bailey had the following convictions and jail sentences: petty theft (Dec. 1964); theft (Feb. 1965); theft (May 1965); and disorderly conduct (June 1965). He committed second degree burglary

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 597 [order denying a petition for recall of sentence under section 1170.126 is appealable].)

in 1966 and served 18 months in prison. In 1970, he was convicted of committing conspiracy to escape prison for trading identities with his brother after a traffic stop and was sentenced to jail for six months.

Bailey received his first strike in 1971 when he pled guilty to first degree robbery for robbing a liquor store at gunpoint. While a codefendant threatened to kill store clerks if they did not open the safe, Bailey forced one of the clerks into a cooler and tied him up. Bailey was sentenced to five years to life.

Bailey received his second strike in 1972 for kidnapping and escape from prison, which we described in *People v. Bailey* (1974) 38 Cal.App.3d 693, 696-697 (*Bailey*):

"On September 14, 1972, Bailey was an inmate of Puerta La Cruz Conservation Camp, a minimum security facility operated by the State Department of Corrections. He and other inmates were working on a firefighting crew at Boucher Lookout on Palomar Mountain. After the noon roll call, the crew broke for lunch and defendant walked away.

"Mr. and Mrs. Dover were camping that day in a campground located one mile from Boucher Lookout. About 12:30 p.m. they caught sight of a man they positively identified as Bailey. At first he walked into the clearing, looked around and returned to the woods. The Dovers promptly decided to leave and while preparing to do so, saw him watching them. As they approached their camper Bailey ran toward them with a razor in his hand, grabbed Mrs. Dover by the front of her blouse, placed the razor blade close to her throat, and demanded transportation. Dover replied, 'All right, I'll do what you want.' The three then got into the cab section of the vehicle, with Mr. Dover taking the driver's seat and Bailey still holding the razor to Mrs. Dover's throat. Bailey then asked what

time it was. Mr. Dover told him it was 10 minutes to 1 and turned his wrist so Bailey could see his watch. Bailey stated he had about 10 minutes to get out of the area and then removed the watch from Dover's wrist.

"Still holding the razor on Mrs. Dover, Bailey then directed Mr. Dover on which roads to take down the mountain. When they neared Escondido he made them stop, took Mr. Dover's wallet and then made Mrs. Dover get into the back of the camper with him. From that point on until they reached San Diego, he continued to give Mr. Dover directions by tapping on the window and pointing. During the entire episode he continued to hold the razor either in his hand or nearby.

"During the trip Bailey made himself at home in the camper. He first removed his shirt, draped it over the window, then asked Mrs. Dover to have sex with him. When she declined, he did not insist. He drank beer from the refrigerator and looked through the closet and other parts of the camper. He put on a shirt and sweater which belonged to Mr. Dover.

"Bailey finally had the Dovers let him out near 421 - 21st Street in San Diego. He took with him Mr. Dover's watch, shirt and sweater, as well as \$80 from his wallet. He left behind him his prison sweatshirt marked with the number which had been assigned to him. The Dovers were left unharmed except for a few scratches which Mrs. Dover suffered when Bailey had first grabbed her."

In *Bailey*, the jury convicted Bailey of kidnapping with intent to commit robbery, armed robbery and escape from prison with force and violence. (*Bailey, supra*, 38 Cal.App.3d at p. 696.) Due to instructional error, we modified the judgment to show

conviction for simple kidnapping and simple escape. (*Id.* at p. 700.) He was sentenced to five years to life.

After his release from prison, Bailey had further criminal convictions resulting in jail time and probation: receiving stolen property (Apr. 1978); possession of PCP for sale (May 1980); receiving stolen property and forging a name on a credit card (Feb. 1981); carrying a concealed weapon (flare gun) on person (Nov. 1983); sale of marijuana (May 1985); possession of marijuana for sale (June 1991); and inflicting corporal injury on spouse (Sept. 1992).

Bailey received his third strike when he was convicted of attempted burglary in May 1995 after attempting to break into a market. Officers who arrived at the scene noticed a hole in the rear wall of the building and a tire iron nearby. Bailey admitted to attempting to break into the store. He was sentenced to 25 years to life as a result of having two robbery strike priors.

## B

Bailey's prison record included citations for: possessing a visitor's pass (2004); indecent exposure for pleasuring himself while watching a female corrections officer (2007); battery (2009); making a recreational therapist uncomfortable by watching her and making familiar comments (May 2010); and over familiarity with a nurse while discussing the effects of a medication on his libido and stating, his libido returns "when I see a pretty lady such as yourself" (June 2010).

Bailey participated in work assignments while in prison and generally received satisfactory remarks. He completed a vocational course in dry cleaning. He also

participated in voluntary programs such as an addiction program, a three-day program regarding living in a Christian community, a one-day chess tournament and beginning in July 2012, a weekly senior discussion group.

## C

In December 2012 after the Three Strikes Reform Act of 2012 (hereafter Proposition 36 or Act) took effect, Bailey petitioned the court to recall his sentence and to resentence him as a second strike offender. The trial court found Bailey presumptively eligible for sentence modification and assigned him counsel.

Appointed counsel filed a petition for sentence recall, a memorandum in support of the petition and an addendum including a psychological evaluation conducted in July 2013. The People opposed the petition and attached Bailey's prison records.

The psychological evaluation submitted by Bailey noted he was highly defensive and reluctant to reveal much about himself in response to attempts to measure psychopathology and personality functioning. The evaluation stated Bailey's "personality is characterized primarily by antisocial and narcissistic traits. Although capable of making a positive initial impression, he is impulsive, restless and moody. He is unlikely to be trustworthy or reliable, and has a tendency to persistently seek out excitement and engage in self-dramatizing behaviors. He does not tend to take responsibility for his personal or family difficulties, and is lacking in his conscience. Interpersonal problems are often rationalized, and he tends to place the blame for any difficulties on other people. He tends to be self-indulgent and insistent on getting his way. Superficially friendly and sociable, he has little use for social conventions or values. His emotional ties are also

weak, and he tends to walk away from those he no longer perceives as being useful to him." Bailey has sought to improve himself in prison through education and occupational programs, but he remains "guarded and defensive on the psychological measures and lies about his juvenile criminal history during interview. He has psychopathic traits of moderate severity." Although the psychologist evaluated a decrease in Bailey's risk to commit violent offenses, "[h]e remains at significant risk to engage in non-violent criminal behaviors." The evaluation concluded Bailey does not pose an " 'unreasonable' risk to public safety if released because of his current 'dangerousness.' "

#### D

On August 8, 2013, the trial court denied Bailey's petition finding he continues to pose an unreasonable risk of danger to public safety. The court considered Bailey's criminal conviction history, including the types of crimes committed and the extent of injury to the victims. It considered Bailey's prison record including his participation in community programs and work assignments. It also considered the psychological evaluation, including the factual bases. The court stated, "In my judgment, given the nature of these crimes and given the way in which this individual has behaved in the institution, and given the risk of re-offense both for simple ordinary criminality and for violence, I do think at this time [Bailey] continues to pose an unreasonable risk of danger to public safety."

Bailey sought reconsideration of the court's order contending the People did not meet their burden to establish he presented a current unreasonable danger to public safety

and the trial court misapplied the guidelines for determining whether an inmate presents an unreasonable danger to public safety as required by the statute.

The court reconsidered the petition for recall of sentence, but denied the petition. In doing so, the court explained it exercised its discretion based upon the evidence presented by both parties. It also explained it considered, as the trier of fact, the material presented by the psychologist in the report and, based on the evidence presented, did not agree with the conclusion in the psychological evaluation. Finally, the court explained it considered all of the evidence presented including his criminal conviction history along with the disciplinary record and rehabilitation record. The court stated, "I did take a look at the whole package, who [Bailey] is, what the psychological examination revealed, in terms of facts, rather than conclusions. [¶] I took a look at the disciplinary record. And I acknowledge he engaged in some rehabilitation efforts, but the conclusion, at [the end] of that hearing, as is the conclusion today, is that, based on the totality of the evidence, resentencing this petitioner would pose, in my judgment, an unreasonable risk of current danger to public safety."

## DISCUSSION

### I

"[Proposition 36] created a postconviction release proceeding for third strike offenders serving indeterminate life sentences for crimes that are not serious or violent felonies. If such an inmate meets the criteria enumerated in [section 1170.126, subdivision (e)], he or she will be resentenced as a second strike offender unless the court

determines such resentencing would pose an unreasonable risk of danger to public safety." (*People v. Payne* (2014) 232 Cal.App.4th 579, 584.)

If an inmate is eligible, subdivision (f) of section 1170.126 provides, "the petitioner shall be resentenced . . . 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), italics added.) The statute further provides, "*In exercising its discretion* in subdivision (f), 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." (§ 1170.126, subd. (g), italics added.)

Despite the statutory language, Bailey contends we should review the court's order denying his resentencing petition de novo because the issue presents a mixed question of law and fact. We are not persuaded.

When an authorizing statute uses the phrase "in its discretion," a reviewing court typically reviews the trial court's decision for abuse of discretion. (See, e.g., *People v. Sapp* (2003) 31 Cal.4th 240, 257-258 [reviewing decision to sever a trial or counts under § 954 for abuse of discretion]; *People v. Daniels* (2009) 176 Cal.App.4th 304, 320 [reviewing exclusion of expert evidence under § 352 for abuse of discretion].) The

authorities Bailey cites do not involve authorizing statutes using the language "in its discretion."

*People v. Adair* (2003) 29 Cal.4th 895 (*Adair*) addressed the standard of review for a trial court's finding of factual innocence under section 851.8, noting the statute did not expressly set forth the applicable standard of review. (*Id.* at p. 904.) The *Adair* court concluded the statutory language required de novo review because "reasonable cause" is a well-established legal standard "' defined as that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.'" (*Ibid.*) The court concluded the statutory scheme established an objective legal standard for determining factual innocence, applicable to both trial and appellate courts, which "[does] not accommodate any exercise of discretion to which the appellate court should defer." (*Id.* at p. 908.)

Other authorities cited by Bailey also involve well-established constitutional rights or legal principles. (See, e.g., *People v. Kennedy* (2005) 36 Cal.4th 595, 607-609 [determination of whether a lineup procedure was unduly suggestive in violation of the 14th Amend. is reviewed de novo]; *People v. Butler* (2003) 31 Cal.4th 1119, 1127 [de novo review of court-ordered HIV testing in sexual assault cases under § 1202.1, where there is probable cause to believe the defendant transferred bodily fluid to a victim]; *People v. Cromer* (2001) 24 Cal.4th 889, 892-893, 899-903 [de novo review of determination of district attorney's due diligence in seeking out witness, in the context of admitting prior testimony, based on 6th Amend. right to confrontation].)

In contrast, the question of whether a petitioner poses an "unreasonable risk of danger to public safety" under section 1170.126, is not a well-established legal or constitutional standard. The statute expressly endows the trial court with discretion, not only to make the determination, but also to decide what evidence to consider in making the determination. (§ 1170.126, subs. (f), (g).)

Therefore, we conclude "[t]he plain language of subdivisions (f) and (g) of section 1170.126 calls for an exercise of the sentencing court's discretion. 'Discretion is the power to make the decision, one way or the other.' [Citation.] [Citation.] 'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*People v. Payne, supra*, 232 Cal.App.4th at p. 591.)

Addressing the burden of proof and the court's determination under section 1170.126, the Fifth District recently concluded, "the People have the burden of establishing, by a preponderance of the evidence, facts from which a determination resentencing the petitioner would pose an unreasonable risk of danger to public safety can reasonably be made. The reasons a trial court finds resentencing would pose an unreasonable risk of danger, or its weighing of evidence showing dangerousness versus evidence showing rehabilitation, lie within the court's discretion. The ultimate determination that resentencing would pose an unreasonable risk of danger is a discretionary one. While the determination must be supported by facts established by a preponderance, the trial court need not itself find an unreasonable risk of danger by a

preponderance of the evidence. (*People v. Payne, supra*, 232 Cal.App.4th at pp. 595-596.) "[I]ts finding will be upheld if it does not constitute an abuse of discretion, i.e., if it falls within 'the bounds of reason, all of the circumstances being considered. [Citations.]' [Citation.] The facts or evidence upon which the court's finding of unreasonable risk is based must be proven by the People by a preponderance of the evidence, however, and are themselves subject to our review for substantial evidence." (*Id.*, at p. 597.) We agree with this analysis.<sup>3</sup>

## II

Based on evidence presented by both Bailey and the People, we conclude the trial court did not abuse its discretion in denying Bailey's petition for resentencing under section 1170.126 and its decision is supported by substantial evidence.

The evidence showed Bailey has a significant and consistent criminal history beginning from an early age. His first two strike crimes involved (1) robbery of a store at gunpoint, in which he tied up a store clerk, and (2) an escape from prison camp, in which he kidnapped a couple, held a razor blade to the woman's neck and forced the couple to drive him away from the camp near Escondido to San Diego where he took items

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<sup>3</sup> We do not agree with the People's contention the court's decision not to resentence a prisoner must only be supported by the deferential "some evidence" standard. *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1306, footnote 29, merely analogizes the court's resentencing decision to a decision denying an inmate parole. It notes a denial in both instances based on a finding of dangerousness is similar because it "simply means that the inmate remains subject to his initial sentence unless certain findings are made; [and] these findings need not be established beyond a reasonable doubt." The *Kaulick* court concluded a finding of dangerousness based on a preponderance of the evidence does not violate the constitutional right to equal protection of the law. (*Id.* at p. 1306.)

belonging to the victims. Before his third strike for attempted burglary, he was convicted for domestic abuse. The court made clear these past crimes did not form the sole basis for a finding of current dangerousness, but the court viewed them as significant factors considering the seriousness of the crimes committed and the extent of the injuries suffered by the victims.

While in prison, Bailey has had a generally positive work record and undertook some efforts for rehabilitation including a course on addictions, a three-day religious course, a chess tournament and a discussion group. However, he also received a number of citations for inappropriate behavior toward women such as making overfamiliar remarks and indecent exposure. He was also cited for battery.

In addition, the psychological evaluation showed Bailey has received psychiatric treatment in prison, including treatment for depression, and he has been diagnosed with polysubstance dependence and antisocial personality disorder. According to the psychological evaluation, "[a]lthough [Bailey is] capable of making a positive initial impression, he is impulsive, restless and moody. He is unlikely to be trustworthy or reliable, and has a tendency to persistently seek out excitement and engage in self-dramatizing behaviors. He does not tend to take responsibility for his personal or family difficulties, and is lacking in his conscience. . . . Superficially friendly and sociable, he has little use for social conventions or values."

The court looked "at the whole package, who [Bailey] is, what the psychological examination revealed, in terms of facts, rather than conclusions." It concluded, "Based on the totality of the evidence, resentencing this petitioner would pose, in my judgment,

an unreasonable risk of current danger to public safety." Under the circumstances, we cannot conclude the court abused its discretion.

DISPOSITION

The order is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.