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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN FRANCISCO CARRASCO,

Defendant and Appellant.

E060504

(Super.Ct.No. FWV022553)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Marilee Marshall & Associates and Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Eric Swenson, Kristine Gutierrez, and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012 (Reform Act) which is set forth in Penal Code section 1170.126.¹ Under the Reform Act, a defendant convicted of two prior serious or violent felonies is subject to a 25-years-to-life sentence only if his third felony is a serious or violent felony. A defendant who has already been sentenced may petition for recall of his sentence to be sentenced as a second-strike offender. Such petition may be denied if disqualifying exceptions apply. (*People v. White* (2014) 223 Cal.App.4th 512, 517.)

Defendant, who had been sentenced in 2003 to a 50-years-to-life sentence for three nonqualifying felonies, filed a petition for recall of his sentence (petition). The trial court denied the petition on the ground that although defendant was otherwise eligible for resentencing, it found that he posed an unreasonable risk of danger to public safety.

Defendant now claims on appeal as follows: (1) He has been denied adequate appellate review because documents relied upon by the trial court in denying the petition were not preserved; and (2) the trial court erred by finding he posed an unreasonable danger to society.² We affirm the denial of the petition.

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

² The California Supreme Court has recently determined that the denial of a petition to recall sentence is an appealable order. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 602.)

PROCEDURAL AND FACTUAL BACKGROUND

Defendant was found guilty by a San Bernardino County Superior Court jury in case No. FWV022553 of unlawful driving and taking of a vehicle (Veh. Code, § 10851, subd. (a)); receiving a stolen motor vehicle (§ 496d, subd. (a)); receiving stolen property (§ 496, subd. (a)) and possession of a controlled substance, a misdemeanor (Health & Saf. Code, § 11377, subd. (a)).

Defendant had additionally been charged with having suffered four prior serious and/or violent felony convictions within the meaning of sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d) as follows: a violation of section 459, burglary, on January 7, 1992; a violation of section 245, subdivision (a)(1), assault with a deadly weapon, on October 16, 1995; and two violations of section 211, robbery, suffered on October 16, 1995, and February 9, 1996. The trial court found the burglary suffered in 1992 and the robbery in 1996, were true, and the People did not proceed on the convictions suffered in 1995. Defendant was given a 50-years-to-life sentence on March 7, 2003.

On November 28, 2012, defendant filed the petition. Defendant listed his prior convictions as follows: “1992-459,” “1995-245(a)(1),” “1995-211,” and “1995-211.” Defendant was appointed counsel. The trial court found that defendant was eligible for resentencing under the criteria in section 1170.126, subdivision (e). The People alleged that defendant posed an unreasonable risk of danger to public safety and requested a hearing. The trial court ordered that the People obtain defendant’s prison record.

On January 24, 2014, defendant filed a reply to the People's opposition to the petition.³ In the reply, defendant's counsel stated that the facts surrounding defendant's current incarceration involved the victim leaving her car running with her purse inside. When she returned, the car was gone. Defendant was found in possession of the stolen vehicle, the victim's credit card and methamphetamine. Defendant first argued that the petition should be granted because his current crimes did not involve violence. Additionally, his strike priors were remote. His first degree burglary occurred in 1992, when he was 22 years old; the robbery strike occurred in 1996. Defendant claimed that as a "double lifer" there were no jobs or schooling available to him in prison.

Defendant further argued that he had only one isolated incident of violence during his 13 years of incarceration. He set forth his prison record, which included several rule violations. This included asking a prison official to transfer another inmate's property to his property list. Defendant also engaged in several demonstrations that involved covering his cell door and refusing to uncover it, and refusing to relinquish his dinner tray.

Defendant then recounted an incident that occurred on August 10, 2010, which involved an assault by him and another inmate against an inmate named Lopez. He attached the report to the reply. According to the report, on May 11, 2010, a correctional officer observed defendant and another inmate battering the "victim" Lopez. Defendant

³ On April 8, 2014, defendant's counsel filed a motion to augment the record with the People's opposition to the petition because it was not included in the record. On May 28, 2014, the clerk of the San Bernardino County Superior Court stated that the opposition could not be located.

hit Lopez in the head and torso. Despite being ordered to stop and get down on the ground, defendant continued to hit Lopez. A correctional officer shot rubber bullets at defendant and his cohort, but they both continued to batter Lopez. At this point, it was discovered that defendant was holding a weapon. Lopez used his cane against defendant and the other inmate. After being shot with several more rubber bullets and subjected to pepper spray, the three inmates laid down on the ground. A homemade knife was found in defendant's possession. Lopez was found to have puncture wounds. Defendant had several scratches. At the prison hearing on the matter, as to the charges of battery on an inmate with a weapon, defendant stated "No Contest, I don't want to waste anybody's time."

Defendant further provided in the petition that he was currently working as a janitor. He was 43 years old and had family members who would support him if he was released.

The hearing on the petition was conducted on January 24, 2014. The trial court first stated that the People were primarily arguing that defendant posed an unreasonable risk to the community based on the incident in 2010 where defendant committed a battery on an inmate and used a weapon. The trial court stated, "And I've had a chance to read the 'C' file, 115 investigation on that. There's some indication that that may have been a mutual combat situation where at least one other inmate, a Mr. Lopez, was armed with a cane and was using the cane as a weapon. [¶] There was a third inmate, and it appeared all of them were fighting with each other."

The People argued that defendant was almost 44 years old and had spent every single year of his adult life in custody. The People then outlined the crimes that defendant had committed commencing when he was 18 years old. Defendant had two resisting officer convictions. He committed his first robbery in 1994, which also included an assault with a deadly weapon conviction. He was sent to prison. The prosecutor then stated, “And, in 1996 he gets arrested for what ends up being his second conviction for robbery, which the Court didn’t mention also included a firearm. He was armed with a firearm during that robbery in 1996.” He violated his parole several times once he was released. He was arrested in 2001 for the current charges.

The People argued that defendant had been in possession of a weapon in the prior robbery conviction and during the battery on Lopez. The prosecutor stated that defendant was not charged with the battery on Lopez because the district attorney’s office in the area where the prison was located did not think it was necessary given defendant’s 50-years-to-life sentence. The People then referred to defendant’s “nine-page rap sheet” but did not admit it as an exhibit.

Defendant’s counsel argued that during the 2010 incident, defendant was simply defending himself. Defendant’s counsel argued that 50-years-to-life was essentially an LWOP sentence for a car theft. Further, defendant suffered from a drug problem. Defendant’s counsel then stated as to the priors, “He has one prior burglary. There’s an armed robbery. We have no reports. I have no idea if that was a co-part armed, or if he himself was armed. There’s no indication of that. So, it’s pure speculation” The prosecutor objected.

Defendant's counsel reiterated that in the 13 years defendant had been incarcerated, he had only one violent incident. It was pure speculation that the incident was not filed as a criminal case because he had a 50-years-to-life sentence rather than being rejected.

The prosecutor responded he had spoken with someone in the Imperial County District Attorney's Office and had been advised the reason for not filing the case was defendant's sentence. The prosecutor argued, "And, also, it's not pure speculation as to who was armed. [¶] The fact is, as the Court knows, there's only one enhancement that actually allows someone who's not armed with a firearm to actually have an enhancement imposed for being armed with a firearm, and that's if you're a gang member. And there was no indication the defendant was a gang member. [¶] Therefore, the only way you can get a sentencing enhancement for being armed with a firearm is to actually be the person armed with a firearm. [¶] So, that is not speculation." The trial court confirmed the armed robbery referred to the robbery in 1996 for which defendant served nine years in state prison.

The trial court first noted that the usual circumstance for these types of petitions was that the defendant had violent offenses in the 1980s or early 1990s, and then de-escalated to property crimes. Defendant had actually gone in the opposite direction by committing burglary in 1992 and then escalating to robbery and assault with a deadly weapon in 1995. In 1996, he committed a robbery in possession of a firearm. He also had resisting peace officer convictions. The trial court recognized the defendant had only one violent incident while in prison. "But it is a significant incident in which the other

person was stabbed multiple times. [¶] There's some indication that the other person had a cane that was being used as a weapon. But, still, it indicates the defendant was readily resorting to violence with a weapon." The trial court concluded, "So, I look at that pattern and it seems to me there's a continuing pattern of violent activities with weapons. And the PC 69s indicate a violent resistance to law enforcement officers. [¶] And, so at this point, I am satisfied that [defendant] does continue to pose an unreasonable risk of dangerousness to the community." The petition was denied.

II

APPELLATE RECORD

Defendant contends he has been denied the opportunity for meaningful review as the appellate record does not include the documents relied upon by the trial court in denying his petition. Although the trial court and prosecutor referred to a nine-page rap sheet and a "C" file, those documents were apparently not admitted into evidence, they were not made part of the appellate record and could not be located by the superior court.

General speaking, a criminal appellant is entitled to a record adequate to permit review. (*People v. Seaton* (2001) 26 Cal.4th 598, 699.) However, "[i]f the record can be reconstructed with other methods, such as 'settled statement' procedures [citation], the defendant must employ such methods to obtain appellate review. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1170; *People v. Hawthorne* (1992) 4 Cal.4th 43, 66.) "Reconstruction of exhibits is essentially the same as preparing a settled statement for unreported portions of trial proceedings" (*People v. Coley* (1997) 52 Cal.App.4th 964, 969 (*Coley*).

In *Coley, supra*, 52 Cal.App.4th 964, the defendant was convicted of assault with a deadly weapon and other crimes. On appeal, he claimed that the verdicts must be reversed based on insufficiency of the evidence because the exhibits admitted at trial had been lost and could not be reviewed by the appellate court. The clerk of the court certified that the exhibits had been admitted but had been lost. (*Coley, supra*, at pp. 967-969.) Initially, the appellate court noted reversal “for insufficiency of evidence when exhibits are not available for appellate review is not now and never has been the law. The situation gives rise to, at most, a due process of law violation” (*Coley, supra*, at p. 969.)

The *Coley* court also found that “While the defendant is entitled to a record adequate to afford a meaningful appeal, he bears the burden to show the deficiencies in the record are prejudicial. [Citation.]” (*Coley, supra*, at p. 970.) “Consequently, it would be a violation of the constitutional requirement that we not reverse a conviction absent prejudice if we were to reverse a conviction because the exhibits were lost when no attempt has been made to reconstruct them. [Citation.]” (*Ibid.*)

The *Coley* court concluded, “Since an appellant bears the burden of perfecting the appeal and showing error and resulting prejudice, it follows that the appellant must move for an order from the appellate court to the trial court to reconstruct the lost exhibit as a prerequisite to asserting the evidence, including the exhibit, is insufficient to sustain the conviction. This does not imply that the loss of the exhibit is the fault of the defendant here; instead, it comports with the general appellate process in which one who asserts

prejudicial error in a lower court judgment bears the burden of showing the appellate court both error and prejudice.” (*Coley, supra*, 52 Cal.App.4th at p. 972.)

Here, defendant complains about the lack of record in this case because the nine-page rap sheet referred to by the prosecutor during the hearing on the petition, and the “C” file that the trial court stated it had read, were not admitted as exhibits and are not part of the appellate record. However, defendant has not moved for a settled statement as to the records reviewed by the trial court and has failed to show that he could not proceed by settled statement. It is reasonable to conclude that the trial court could recall the records or such records could be reconstructed by the prosecutor. Defendant has made no attempt to perfect the record and cannot now claim he is prejudiced due to the lack of appellate record.

Defendant insists that *Coley* is distinguishable because in that case the exhibits that were lost were marked and admitted. He argues, “[W]here the court uses prior convictions or conduct in prison to conclude that appellant poses an unreasonable risk of danger to the community, the evidence relied upon should be made part of the court’s file to allow for meaningful appellate review as to its accuracy and sufficiency.” We find this no different from the obligation in *Coley* to maintain the exhibits admitted at trial. Certainly, the better practice in this case was for the People to admit as exhibits the nine-page rap sheet and the portions of the “C” file reviewed by the trial court. However, defendant has made no effort to reconstruct the record. Based on the foregoing authorities, the burden lies with him to attempt to provide the missing record in order to show prejudice. This court cannot reverse the judgment based on the missing record.

Nonetheless, as will be shown *post*, based on the record before this court, and the presumption that the trial court regularly performs its duty, the finding by the trial court that defendant posed an unreasonable danger to society was not an abuse of its discretion.

III

DANGEROUSNESS

Defendant contends that the trial court erred by finding under section 1170.126, subdivision (f) that he posed an unreasonable risk of danger to public safety.

“[T]here are two parts to the [Reform] Act: the first part is *prospective* only, reducing the sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony (Pen. Code, §§ 667, 1170.12); the second part is *retrospective*, providing *similar, but not identical*, relief for prisoners already serving third strike sentences in cases where the third strike was not a serious or violent felony (Pen. Code, § 1170.126).” (*People v. Superior Court (Kaulick)* 215 Cal.App.4th 1279, 1292 (*Kaulick*.)

“[U]nder the retrospective part of the Act, if the prisoner’s third strike offense was not serious or violent, and none of the enumerated exceptions applies, the defendant ‘shall be’ sentenced as if the defendant had only a single prior strike, ‘unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (Pen. Code, § 1170.126, subd. (f).)” (*Kaulick, supra*, 215 Cal.App.4th at p. 1293, fn. omitted; see also § 1170.126, subd. (e).) “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).)

“[D]angerousness is not a factor which enhances the sentence imposed when a defendant is resentenced under the Act; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all. If the court finds that resentencing a prisoner would pose an unreasonable risk of danger, the court does not resentence the prisoner, and the petitioner simply finishes out the term to which he or she was originally sentenced.” (*Kaulick, supra*, 215 Cal.App.4th at p. 1303, fn. omitted.) “[A] court’s discretionary decision to decline to modify the sentence in [a prisoner’s] favor can be based on any otherwise appropriate factor (i.e., dangerousness), and such factor need not be established by proof beyond a reasonable doubt to a jury.” (*Ibid.*)

The prosecution bears the burden of proving a prisoner’s dangerousness by a preponderance of the evidence. (*Kaulick, supra*, at p. 1305; *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075-1076.) The denial of a petition for recall of sentence is reviewed for abuse of discretion. (*People v. Aparicio* (2015) 232 Cal.App.4th 1065, 1071, 1076.)

Here, the trial court stated that defendant’s case involved an unusual case in that rather than his commission of crimes de-escalating in seriousness, he committed more violent and serious crimes as he aged. The trial court stated that defendant first started with burglary in 1992. It also noted he had resisting peace officer arrests. These are

clearly reflected on the probation report. The trial court then stated that defendant committed assault with a deadly weapon and robbery. Finally, the trial court noted that defendant committed armed robbery. Defendant's prior criminal history shows an increase in violent offenses.

Further, as noted by the prosecutor, defendant had spent almost his entire life in prison, committing a new crime each time he was released from prison. It is reasonably inferred that defendant, who was only 43 years old, would continue his pattern of committing crimes should he be released.

As for the violent incident in prison, the trial court properly determined that defendant was "readily resorting to violence with a weapon." Based on the report in the record, defendant stabbed Lopez multiple times and walked away with scratches. Defendant was in possession of a homemade knife and did not stop the assault even though he was struck with rubber bullets. Defendant presented no defense to the charge that he committed a battery with a weapon on an inmate. Even if the event could be considered a mutual combat situation, defendant had prepared by making and using the homemade knife. Defendant's readiness to use weapons and commit robberies supported that he posed a danger to society and was not properly resentenced as a second-strike offender.

Defendant contends that the record does not support that he had convictions of robbery and assault with a deadly weapon in 1995 because they do not appear on the probation report. As set forth, *ante*, defendant never sought to settle the record to establish what was listed on the rap sheet that was clearly relied upon by the People in

proving dangerousness and reviewed by the trial court. Further, when defendant filed his petition, he listed his prior convictions as including the 1995 robbery and assault with a deadly weapon. The trial court recounted defendant's record in open court and stated that there were prior robbery and assault with a deadly weapon convictions. It additionally stated that defendant had a prior conviction of armed robbery. We presume official duties have been regularly performed (Evid. Code, § 664), and this presumption applies to the actions of trial judges. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1461-1462, fn. 5; *Olivia v. Suglio* (1956) 139 Cal.App.2d 7, 9 [“If the invalidity does not appear on the face of the record, it will be presumed that what ought to have been done was not only done but rightly done.”].) We must presume that the trial court adequately set forth defendant's prior criminal record.

Defendant also contends for the first time on appeal that the prosecutor's statement as to the armed robbery that it could only be considered an armed robbery if defendant was personally armed was erroneous because section 12022, subdivision (a)(1) allows for a one-year enhancement for a principal armed enhancement. Initially, as set forth *ante*, the record is not complete due to defendant's failure to move to settle the record. Moreover, defendant never objected to the prosecutor's statement or the trial court's finding that he was armed with a firearm on the same grounds in the trial court. (See *People v. Lucas* (2014) 60 Cal.4th 153, 262-263, fn. 41.) As such, he has waived such argument on appeal. Finally, the trial court did not exclusively rely on the fact that defendant was armed during the 1996 robbery. It also relied on the resisting a peace

officer convictions, the 1995 robbery and assault with a deadly weapon, and the violent incident in prison in finding he posed a continuing danger to society.

Based on defendant's criminal record and the incident occurring while he was incarcerated, the trial court did not abuse its discretion by denying defendant's petition to recall his sentence.

IV

DISPOSITION

The trial court's order denying defendant's petition to recall his sentence is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.