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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RANDALL WARREN ROY, Defendant and Appellant.	H039757 (Santa Clara County Super. Ct. No. 208171)

Defendant Randall Warren Roy is currently serving a "Three Strikes" sentence of 25 years to life for a 1998 driving under the influence (Veh. Code, §§ 23152, subd. (a), 23550.5, subd. (a)(1)) offense. In 2013, he filed a petition under Penal Code section 1170.126[1] seeking resentencing to a determinate term. Although defendant was "eligible" for resentencing, the superior court exercised its discretion under section 1170.126 to refuse to resentence him because "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

On appeal, defendant claims that (1) he was entitled to resentencing because section 1170.126 establishes a presumption that he is entitled to resentencing and this presumption was not rebutted by a preponderance of the evidence, and (2) a remand is

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[1] Subsequent statutory references are to the Penal Code unless otherwise specified.

required because Proposition 47, which enacted section 1170.18 in November 2014, changed the definition of "unreasonable risk of danger to public safety" as that phrase is used in section 1170.126. We conclude that the superior court did not abuse its discretion in denying resentencing and that Proposition 47 did not change the definition of "unreasonable risk of danger to public safety" as that phrase is used in section 1170.126.

I. Background

Defendant's criminal history extends back to the 1970's. He was convicted of reckless driving (Veh. Code, § 23103) and resisting an officer (§ 148) in 1978. Later that year, he suffered two convictions for driving under the influence (former Veh. Code, § 23102) and two convictions for driving with a suspended license (Veh. Code, § 14601). In 1979, he suffered multiple convictions for driving with a suspended license, another reckless driving conviction, and his first strike conviction, a conviction for robbery (§ 211).

In 1980, he was convicted of vandalism (§ 594) and driving with a suspended license. In 1982, he was twice convicted of driving under the influence and also convicted of driving with a suspended license and perjury (§ 118). He was convicted of theft (§ 484) in 1983. In 1984, defendant was convicted of assault with a deadly weapon on a peace officer (§ 245, subd. (c)), his second strike conviction, and escape by force (§ 4532, subd. (b)). In 1986, he suffered another conviction for driving under the influence and another for driving with a suspended license. The same was true in 1989 and again in 1993 and again in 1995. By 1998, defendant had served three prison terms, two of them for driving under the influence. He was discharged from parole in the summer of 1998.

Shortly after his discharge from parole, defendant was driving with a blood alcohol level of .21 when he crashed his car and injured himself. His driver's license was suspended at the time. He fled the scene of the accident and denied that he had been

driving the car.[2] Defendant was convicted of driving under the influence, the strike allegations were found true, and he was sentenced to 25 years to life. He has been in prison since 2000. While in prison, defendant has been disciplined for possessing alcohol, manufacturing alcohol, and being under the influence of alcohol. His sole attempt to obtain substance abuse treatment was in 2012.

In January 2013, 53-year-old defendant filed a petition under section 1170.126. The court found that he appeared to qualify under section 1170.126 and appointed counsel to represent him.[3] The prosecutor conceded that defendant was eligible, but she opposed defendant's petition on the ground that, if resentenced, defendant would pose an unreasonable risk of danger to public safety. The prosecutor's opposition assumed that she bore the burden of proving that defendant posed such a risk and that the standard of proof was preponderance. She relied on evidence of defendant's criminal history and prison disciplinary record, noting in particular that defendant had a startling number of driving under the influence convictions.

The court found defendant "to be a menace to the community, to be a public safety risk to the point where the court believes that he would pose an unreasonable risk of danger to public safety" if released. The court denied the petition, and defendant appealed.

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[2] Defendant's identical twin brother later claimed that he had been driving the car but had not taken responsibility at the time because there was an arrest warrant out for him. In 1993, defendant had crashed his car while driving under the influence and had falsely claimed on that occasion too that his brother was the driver.

[3] In March 2013, defendant substituted retained counsel for his appointed counsel.

II. Discussion

A. No Abuse of Discretion

Defendant contends that section 1170.126 establishes a presumption that all eligible petitioners will be resentenced. He maintains that this presumption was not overcome in this case.

In *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, the Second District Court of Appeal held that section 1170.126 does not establish a presumption that eligible petitioners will be resentenced but instead erects "dangerousness" as a "hurdle which must be crossed" before a petitioner is entitled to resentencing. (*Kaulick*, at p. 1303.) We agree with Second District on this point.

Section 1170.126, subdivision (e)[4] establishes the requirements that a petitioner must meet in order to be "eligible for resentencing." Because it uses the word "eligible" rather than "entitled to," subdivision (e) does not establish a presumption. Subdivision (f) confirms the absence of a presumption. Subdivision (f) provides that an eligible petitioner will *not* be resentenced if "the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Taken together, these two subdivisions clearly provide that resentencing will occur only if the petitioner would not pose an unreasonable risk of danger to public safety if resentenced.

Defendant claims that the superior court's "unreasonable risk of danger" finding is not supported by the evidence. Defendant's criminal history amply demonstrates that he will ignore any restrictions that attempt to limit his access to alcohol and vehicles. He has driven with a suspended license on innumerable occasions over a period of 20 years, and, even in prison, he has managed to manufacture, possess, and use alcohol. The

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[4] Subsequent subdivision references are to section 1170.126 unless otherwise specified.

potentially tragic consequences of his access to alcohol and vehicles is amply demonstrated by his lengthy history of reckless driving and drunken crashes. His disrespect for the law is so great that he has not only resisted an officer but has escaped by force and has tried to run down an officer with his car. An individual with this level of disrespect for the law cannot be expected to abstain from drinking and driving if allowed to return to freedom in our community. His very recent attempt to obtain substance abuse treatment is so limited that it provides no reassurance that he will be able to attain sobriety outside of prison. The superior court's finding that defendant poses an "unreasonable risk of danger to public safety" is well supported by the evidence and was not an abuse of discretion.

B. Proposition 47's Definition of "Unreasonable Risk of Danger to Public Safety"

Section 1170.126 was enacted by the voters in November 2012 as part of the Three Strikes Reform Act (the Reform Act). (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) As noted above, subdivision (f) of section 1170.126 erects a hurdle that precludes resentencing if "the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Section 1170.126 does not define "an unreasonable risk of danger to public safety," but it does provide a list of nonexclusive criteria for the court to consider in making this determination. (§ 1170.126, subd. (g).)

Proposition 47, the Safe Neighborhoods and Schools Act (the SNS Act), was enacted by the voters in November 2014. The Legislative Analyst described Proposition 47 as having three aspects: "This measure reduces penalties for certain offenders convicted of *nonserious and nonviolent property and drug crimes*. The measure also allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences. In addition, the measure requires any state savings that result from the measure be spent to support [certain services]." (Voter Information

Guide, Gen. Elect. (Nov. 4, 2014) analysis by the Legislative Analyst, p. 35, italics added.) Nowhere in Proposition 47 or the ballot materials provided to the voters regarding it was there any reference to section 1170.126 or the Reform Act. (Voter Information Guide, Gen. Elect. (Nov. 4, 2014) pp. 34-39, 70-74.)

Proposition 47 established procedures for applications for reduced sentences for specified nonserious and nonviolent property and drug crimes by adding section 1170.18 to the Penal Code. Subdivision (a) of section 1170.18 permits persons convicted of the specified nonserious, nonviolent property and drug felonies to file petitions "request[ing] resentencing . . . ." (§ 1170.18, subd. (a).) Subdivision (b) of section 1170.18 provides that a court that receives such a petition 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." Like section 1170.126, subdivision (g), section 1170.18, subdivision (b) provides that, "[i]n exercising its discretion, the court may consider" the petitioner's criminal history, disciplinary record while incarcerated, and "[a]ny 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." (§ 1170.18, subd. (b).)

Defendant relies on subdivision (c) of section 1170.18. It 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.) The very limited list of "violent felony" offenses set forth in section 667, subdivision (e)(2)(C)(iv) reads: "(I) A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code. [¶] (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined

by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289. [¶] (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive. [¶] (V) Solicitation to commit murder as defined in Section 653f. [¶] (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245. [¶] (VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418. [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

Defendant contends that the very restrictive definition of " 'unreasonable risk of danger to public safety' " set forth in subdivision (c) of section 1170.18 now controls the meaning of that phrase as it is used in section 1170.126.[5] We disagree.

"We recognize the basic principle of statutory and constitutional construction which mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 348, 158 Cal.Rptr. 350, 599 P.2d 656.) That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body." (*People v. Skinner* (1985) 39 Cal.3d 765, 775 (*Skinner*).) "Whether the use of [a particular word] is, in fact, a drafting error can only be determined by reference to the purpose of the section and the intent of the electorate in adopting it." (*Skinner*, at p. 776.)

We believe that the word "Code" was "erroneously used" in section 1170.18, subdivision (c) rather than the word "Act," to refer to the SNS Act, and therefore this

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[5] This issue is currently pending in the California Supreme Court in *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825.

error is properly subjected to "judicial correction." The "purpose" of section 1170.18 and "the intent of the electorate" in enacting it unambiguously demonstrate that the voters did not intend to alter the Reform Act or section 1170.126 in any way or to require the resentencing of any person serving a sentence for a crime *other* than one of the specified nonserious, nonviolent property or drug crimes.

First, because Proposition 47's ballot materials and proposed statutory language contained nothing whatsoever to suggest that Proposition 47 would have any impact on the resentencing of anyone who was serving a sentence for a crime *other* than one of the specified nonserious, nonviolent property or drug crimes, it is inconceivable that voters intended for subdivision (c) of section 1170.18 to severely restrict the ability of a court to reject a resentencing petition under the Reform Act by a person convicted of crimes *other* than one of the specified property or drug crimes and whom the court considered dangerous. The Proposition 47 ballot materials contained no mention of such a possible consequence and the only hint was the use of the word "Code" rather than "Act" in an obscure subdivision of the lengthy proposed act. The ballot materials repeatedly emphasized that the resentencing provisions of Proposition 47, which were contained in section 1170.18, were *limited* to *only* those persons serving sentences for the specified nonserious, nonviolent property and drug crimes.

Second, the timing of Proposition 47 makes an intent to alter the Reform Act illogical. The Reform Act required petitions to be brought within two years unless a court concluded that there was good cause for a late-filed petition. (§ 1170.126, subd. (b).) By the time Proposition 47 took effect, only two days remained in the two-year period for filing a Reform Act petition. No rational voter could have intended to change the rules for Reform Act petitions at the last moment, when nearly all petitions would already have been filed and most of them adjudicated.

Third, the structure and content of section 1170.18 is inconsistent with an intent to apply section 1170.18, subdivision (c)'s definition throughout the entire Penal Code.

Subdivision (n) of section 1170.18 provides: "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling *within the purview of this act*." (§ 1170.18, subd. (n), italics added.) Applying section 1170.18, subdivision (c)'s definition throughout the Penal Code would necessarily "diminish or abrogate the finality of judgments" in cases, like those subject to the Reform Act, that do not fall "within the purview of" Proposition 47. Defendant's petition under the Reform Act, like most such petitions, seeks to abrogate the finality of a Three Strikes judgment in a case that does not involve one of the specified nonserious, nonviolent property or drug crimes. Thus, under section 1170.18, subdivision (n), "[n]othing" in section 1170.18 was intended to apply to his petition. In addition, the wording of section 1170.18, subdivision (c) is itself inconsistent with an intent to apply it "throughout" the entire Penal Code. It refers to "petitioners" and defines a phrase that appears in only two sections of the Penal Code, section 1170.18 and section 1170.126. If the voters had intended to apply this definition to Reform Act petitions, this phrasing would have been the most roundabout means of doing so. Since the ballot materials made no mention of the Reform Act, we will not ascribe such unreasonable conduct to the voters.

In sum, section 1170.18, subdivision (c) contains a drafting error that must be judicially corrected. The word "Code" must be read as "Act." Under this corrected reading of the statute, there is no foundation for defendant's contention.

III. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Elia, J.