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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES DWAYNE AIRY,

Defendant and Appellant.

H042552

(Santa Clara County

Super. Ct. No. CC329760)

Appellant Charles Dwayne Airy is a 64-year old prisoner, currently serving a three-strike term of 28 years to life after pleading guilty to possessing cocaine base and admitting three prior strike convictions and three prior prison terms. In 2013, appellant filed a petition for recall of sentence pursuant to Penal Code section 1170.126,¹ which is part of the Three Strikes Reform Act of 2012. The trial court denied the petition, finding that appellant “poses an unreasonable risk of danger to public safety” if resentenced. (§ 1170.126, subd. (f).) Appellant appealed that order, arguing that reversal was required because there was insufficient evidence to support the trial court’s dangerousness finding and such a finding was an abuse of discretion. He also argued that the trial court erred in denying his request for a jury trial on the petition, and that remand was required because

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

Proposition 47 (section 1170.18), which was enacted in November 2014, changed the definition of “unreasonable risk of danger to public safety” as used in section 1170.126.

While that appeal was pending, but before this Court could render its decision, appellant filed a petition in the trial court for resentencing under section 1170.18 which was enacted as a result of the passage of Proposition 47. The trial court properly found that it had jurisdiction to hear the petition, but denied the petition, finding defendant statutorily ineligible because of his status as a registered sex offender as a result of his 1979 conviction of Texas Penal Code section 21.11, indecency with a minor. Appellant filed a timely notice of appeal from that order.

On appeal appellant argues that under the plain language of section 1170.18, subdivision (i), only individuals who are subject to registration under section 290, subdivision (c), for sex crimes committed in California are barred from petitioning for relief. Thus, individuals like appellant, who are subject to registration based on out-of-state sex crime convictions under section 290.005, are permitted to petition for resentencing.

Respondent concedes that the trial court erred in finding appellant statutorily ineligible for resentencing under Proposition 47. However, respondent correctly asserts that eligibility does not automatically entitle appellant to sentencing relief. Rather, upon remand, the trial court must make a discretionary determination as to whether appellant poses an “unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b).) Therefore, we will reverse the trial court’s order denying the petition and remand the matter for further proceedings on appellant’s Proposition 47 petition. The appellant’s appeal from the order denying his petition for recall of sentence pursuant to section 1170.126, shall be stayed pending the resolution of his Proposition 47 petition.

DISPOSITION

The order denying the defendant’s Proposition 47 petition on the basis of statutory ineligibility is reversed. On remand, the trial court is to conduct further proceedings

consistent with this opinion. The appellant's appeal from the order denying his section 1170.126, shall be stayed pending the resolution of his Proposition 47 petition. Within 15 days of the completion of the proceedings below, counsel for appellant shall file a notice in this court stating appellant's intention to either abandon or to proceed with the appeal from the order denying his section 1170.126.

RUSHING, P.J.

WE CONCUR:

MÁRQUEZ, J.

GROVER, J.