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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE JESUS BEHILL,

Defendant and Appellant.

F067821

(Super. Ct. No. SC081806A)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. Michael G. Bush, Judge.

Eric Weaver, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Chung Mi Choi, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Franson, J. and Smith, J.

INTRODUCTION

The Three Strikes Reform Act of 2012 (Proposition 36) permits third strike offenders serving indeterminate life sentences for crimes that are not serious or violent felonies to petition for resentencing. (Pen. Code, § 1170.126 et seq.)¹ If a petitioning offender satisfies the statute’s eligibility criteria, they are resentenced as a second strike offender “unless the court, in its discretion, determines that resentencing would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f).)

Following the enactment of Proposition 36, defendant filed a petition for resentencing. The trial court found defendant posed an unreasonable risk to public safety, and denied the petition. On appeal, defendant contends (1) the language of Proposition 36 creates a presumption in favor of resentencing; (2) the dangerousness referred to in Proposition 36 must be current dangerousness; (3) the People were required to prove defendant’s current dangerousness beyond a reasonable doubt; (4) the trial court erred by failing to consider the fiscal consequences of denying defendant’s petition for resentencing; (5) the danger referred to in Proposition 36 refers only to the danger of violence; (6) the trial court abused its discretion by denying defendant’s petition for resentencing; and (7) the definition of “unreasonable risk of danger to public safety,” included in section 1170.18, subdivision (c), applies to Proposition 36. We affirm the order denying defendant’s petition for resentencing.

FACTS

On February 9, 2001, defendant pled guilty to possession of heroin for sale (Health & Saf. Code, § 11351). At sentencing, the trial court found defendant had three prior strikes: a 1982 conviction for assault with a firearm (§ 245, subd. (a)(1)), a 1992 conviction for robbery (§ 212.5, subd. (a)), and a 1992 conviction for assault with a

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

deadly weapon (§ 245, subd. (a)(1)). Defendant was sentenced to 25 years to life in prison.²

On December 6, 2012, defendant filed a petition for recall of sentence pursuant to Proposition 36.³ At the hearing on defendant's petition, the People did not dispute defendant's statutory eligibility to be resentenced, but argued his release would pose an unreasonable risk to public safety. The People noted defendant's criminal record contained numerous felony convictions for shootings, assaults, and robberies, and that defendant had committed several rules violations during his incarceration, including two instances of violence against other inmates, a 2004 misdemeanor conviction for possession of heroin in prison (§ 4573.6), and a 2005 rules violation for distributing controlled substances.

Defendant, however, argued he had ceased using drugs and alcohol in 2004, had no rules violations since 2005, and had been consistently praised by his supervisors for his performance at his prison employment. Defendant also stated he had the support of his family and Native American tribe, and would immediately enter an alcoholism program if he were released from prison.

On August 5, 2012, the trial court issued a written ruling denying defendant's petition. The ruling read as follows, in relevant part:

“The petitioner's criminal history is particularly serious in this case. One of his victims has been paralyzed for over 30 years. In another case he and his accomplice tied up the victims while his accomplice was armed with a firearm. In a third case, he pulled the female victim by the hair and punched here [sic] in the eye. While in custody, he has been disciplined for acts of violence and for substance abuse and distribution. The court has also considered the petitioners

² Defendant requests that we take judicial notice of the record on appeal in *People v. Behill* (case No. F043483) pursuant to Evidence Code section 452, subdivision (d).

³ As defendant had already served more time than he could be resentenced for, a grant of defendant's petition would have resulted in defendant being released from prison.

[sic] mental health status. The court is aware of and has considered the fact the petitioner has been involved in some recent rehabilitation efforts and has strong family and tribal support.

“The court believes that based on all the above factors, the People have meet [sic] its [sic] burden of showing that the petitioner still represents an unreasonable risk of danger to public safety.”

This appeal followed.

DISCUSSION

I. Penal Code section 1170.126, subdivision (f) does not create a presumption in favor of resentencing.

Under Proposition 36, if a petitioning inmate meets the statutory eligibility requirements, “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).) On appeal, defendant asserts this “shall ... unless” construction creates a presumption in favor of resentencing that limits the trial court’s discretion to deny resentencing to extraordinary circumstances falling outside of the spirit of Proposition 36. We disagree.

Section 1170.126, subdivision (f) does not say defendant shall be resentenced unless the People prove resentencing would pose an unreasonable risk of danger to public safety. Fairly read, the language mandates the resentencing of a statutorily-eligible petitioner who does not pose an unreasonable risk of danger to public safety, but prohibits the resentencing of petitioners who do.⁴ Section 1170.126, subdivision (f) does not create a presumption in favor of resentencing, but rather establishes different actions for different factual situations.

⁴ While we acknowledge the determination of an inmate’s dangerousness is left to the discretion of the sentencing court, we do not conclude the sentencing court has the discretion to resentence an inmate it has deemed to pose an unreasonable risk of danger to public safety.

Defendant's argument that the denial of resentencing should be reserved for extraordinary cases is misplaced. As we have noted, the text of section 1170.126, subdivision (f) expressly prohibits the resentencing of an inmate if the court deems the inmate to pose an unreasonable risk of danger to public safety. No statutory language limits this prohibition to only those cases where the inmate poses an *extraordinary* risk of danger to public safety. While defendant devotes substantial effort to asserting that the court's discretion to deny resentencing should be circumscribed, defendant fails to acknowledge that the court's discretion to deny resentencing *is* circumscribed; the court can only, and must only, deny resentencing to statutorily-eligible inmates if they pose an unreasonable risk of danger to public safety. Accordingly, defendant's argument must fail.

II. Dangerousness must be current dangerousness.

Next, defendant asserts that, as in a parole eligibility determination, the relevant question is whether a petitioning inmate currently poses an unreasonable risk of danger to public safety. While we reject the notion that parole eligibility reviews are a guide for appellate review of resentencing denial, we agree that the phrase "*poses an unreasonable risk of danger to public safety*" refers to an inmate's current dangerousness, and not the inmate's past dangerousness.⁵ (§ 1170.126, subd. (f), italics added.)

In the instant case, however, there is no indication that the sentencing court's determination was based solely on defendant's past dangerousness and, as discussed below, there was sufficient evidence to conclude defendant posed a current risk of danger to public safety. Therefore, we find no error.

⁵ As parole eligibility matters are reviews of Executive Branch actions, they are subject to the highly deferential "some evidence" standard. (*In re Shaputis* (2011) 53 Cal.4th 192, 198-199.) Review of a denial of resentencing, however, is a review of a discretionary judicial determination, and is subject to review for an abuse of that discretion.

III. Dangerousness need not be proven beyond a reasonable doubt.

Defendant also contends that the People were required to prove his current dangerousness beyond a reasonable doubt. We disagree.

Under section 1170.126, subdivision (f), the determination of a petitioner's dangerousness is left to the discretion of the trial court. "[A] court's discretionary decision to decline to modify the sentence in (a petitioner'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." (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303 (*Kaulick*)). Instead, "once a defendant is eligible for an increased penalty, the trial court, in exercising its discretion to impose that penalty, may rely on factors established by a preponderance of the evidence." (*Id.* at p. 1305.)

We conclude a court's decision to deny a petition for recall of sentence is reviewed only for an abuse of discretion, and need not be supported by proof beyond a reasonable doubt, or even by a preponderance of the evidence. That is not to say, however, that the trial court's decision need not be supported by evidence. The burden of proof falls on the People, and the facts relied on by the sentencing court must be established by a preponderance of the evidence. (*Kaulick, supra*, 215 Cal.App.4th at p. 1305.) Put differently, while the court's decision need not be established by a preponderance of the evidence, the facts relied upon by the sentencing court must be established by a preponderance of the evidence.

Here, defendant does not dispute that the facts underlying the trial court's decision were established by a preponderance of the evidence, he merely asserts the evidence did not establish beyond a reasonable doubt that defendant posed an unreasonable risk of danger to public safety. As defendant's argument mischaracterizes both the burden of proof and the standard of review, it is rejected.

IV. Dangerousness is not limited to the danger of violence.

Next, defendant contends that the dangerousness addressed by section 1170.126, subdivision (f) refers solely to the danger of future violence. We disagree.

When interpreting a ballot initiative, we afford words their ordinary and usual meanings. (*People v. Park* (2013) 56 Cal.4th 782, 796.) “Safety” has been defined as “the condition of being safe: freedom from exposure to danger: exemption from hurt, injury, or loss” (Webster’s 3d New Internat. Dict. (1986) p. 1998) and “[t]he condition of being safe; freedom from danger, risk, or injury” (American Heritage Dict. (2d college ed. 1982) p. 1084).

Upon viewing these definitions, it cannot seriously be asserted that only violent criminals pose a danger to the public safety, as non-violent offenses such as burglary or narcotics distribution create considerable risk of loss or injury to members of the community, as well as significant exposure to danger. This reality is readily reflected in the three strikes law itself, which classifies first degree burglary and furnishing certain drugs to a minor as strikes, and in the language of Proposition 36 itself, which expressly prohibits resentencing for individuals convicted of specified nonviolent narcotics violations. (§§ 667, subd. (d)(1); 1192.7, subd. (c)(18), (24); 1170.126, subd. (e)(2); 667, subd. (e)(2)(C)(i); 1170.12, subd. (c)(2)(C)(i).) We reject defendant’s contention.

V. The trial court was not required to weigh the fiscal consequences of denying resentencing.

Defendant argues the sentencing court erred by failing to consider the fiscal consequences of denying defendant’s petition. We disagree.

While the purpose of Proposition 36 is, in part, to enact a more cost-effective sentencing framework, it does not override the primary purpose of the three strikes law, which is the protection of public safety. (See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1036-1038.) The express language of Proposition 36 prohibits the resentencing of

any petitioner the court finds poses an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) In light of that prohibition, and in light of the complete absence of any language requiring sentencing courts to consider fiscal policy when making resentencing determinations, we reject defendant's argument.

VI. *The trial court did not err by denying defendant's petition for resentencing.*

As noted above, under Proposition 36, statutorily-eligible petitioners "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).) In exercising its discretion, "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." (§ 1170.26, subd. (g).)

We review a trial court's determination that an inmate poses an unreasonable risk of danger to public safety for an abuse of discretion. (*People v. Davis* (2015) 234 Cal.App.4th 1001, 1017.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

In the instant case, the trial court's order denying defendant's petition for resentencing specifically weighed defendant's conviction history and disciplinary record against his rehabilitation record and family support. While the evidence considered by the trial court shows a recent history of rehabilitation, it also shows an extensive history of violent offenses. The record shows defendant had accumulated 13 strike-worthy convictions prior to his incarceration in 2001. Further, after his incarceration in 2001, defendant committed multiple violent and drug-related rules violations. Given this

record, even with defendant's recent good behavior, we cannot state the trial court's decision to deny defendant's petition was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) There was ample evidence to support the trial court's finding that defendant posed an unreasonable risk of danger to public safety and, defendant is not entitled to relief.

VII. *Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to appellant's petition.*

On November 4, 2014, voters enacted the Safe Neighborhoods and Schools Act (Proposition 47). Under Proposition 47, certain offenses previously sentenced as felonies or "wobblers" were reduced to misdemeanors, and individuals serving felony sentences for those offenses could petition for resentencing. (§ 1170.18, subd. (a).) Assuming the petitioning inmate meets the statutory eligibility requirements, the trial court must resentence the inmate in accordance with Proposition 47, "unless 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 specifically defines "unreasonable risk of danger to public safety." That definition reads: "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).)

Section 667, subdivision (e)(2)(C)(iv) enumerates eight felonies or classes of felonies:

"The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies:

"(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.” (§ 667, subd. (e)(2)(c)(iv).)

On appeal, defendant asserts this definition of “unreasonable risk of danger to the public safety” also applies to petitions for resentencing under Proposition 36. We disagree.⁶

““When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.”” (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.) However, “the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the [voters] did not intend.” (*In re Michele D.* (2002) 29 Cal.4th 600, 606.)

⁶ This issue is currently pending review by the Supreme Court. (See *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825; *People v. Payne* (2014) 232 Cal.App.4th 579, review granted Mar. 25, 2015, S223856.)

Here, it appears clear that the phrase “[a]s used throughout this Code,” employed in section 1170.18, subdivision (c), refers to the entire Penal Code, not merely the provisions contained in Proposition 47. (See *People v. Bucchierre* (1943) 57 Cal.App.2d 153, 164-165, 166; see also *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1254-1255; *People v. Vasquez* (1992) 7 Cal.App.4th 763, 766.) We conclude, however, that such an interpretation would lead to consequences the voters did not intend when they enacted Proposition 47.

By its provisions, Proposition 47 reduces the sentences of inmates serving felony sentences for specified offenses that are now classified as misdemeanors. Nowhere in the ballot materials on Proposition 47 were voters informed that the law would also modify the resentencing provisions of Proposition 36, which concerns recidivist inmates serving sentences for felony offenses that remain classified as felonies.

The official title and summary, legal analysis, and arguments for and against Proposition 47 are all silent on what effect, if any, Proposition 47 would have on Proposition 36. As we cannot conclude the voters intended an effect of which they were unaware, we decline to conclude the voters intended for Proposition 47’s definition of “unreasonable risk of danger to public safety” to apply to section 1170.116, subdivision (f), of Proposition 36.

Further, while we are aware “[i]t is an established rule of statutory construction ... that when statutes are in *pari materia* similar phrases appearing in each should be given like meanings,” we are not persuaded that Propositions 36 and 47 are in *pari materia*. (*People v. Caudillo* (1978) 21 Cal.3d 562, 585, overruled on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, 229, 237, fn. 6.) Two “[s]tatutes are considered to be in *pari materia* when they relate to the same person or thing, to the same class of person[s] or things, or have the same purpose or object.” (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4, quoting 2A Sutherland, *Statutory Construction* (Sands, 4th ed. 1984) § 51.03, p. 467.)

Here, Proposition 47 deals with individuals sentenced as felons for crimes that are now misdemeanors, while Proposition 36 deals with inmates with at least two violent or serious felonies who are currently serving indeterminate life sentences for a third felony conviction. These laws deal with different levels of offenses and offenders. In any event, “canons of statutory construction are merely aids to ascertaining probable legislative intent” (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 521, fn. 10); they are “mere guides and will not be applied so as to defeat the underlying legislative intent otherwise determined.” (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391.)

Given our review of Proposition 47, we conclude that voters intended the law to apply to the sentencing and resentencing of the misdemeanor offenses enumerated within that law, and not to the previously enacted provisions of Proposition 36. Defendant is not entitled to remand that would subject his resentencing under Proposition 36 to the definition of “unreasonable risk of danger to public safety” contained in Proposition 47.

DISPOSITION

Defendant’s request for judicial notice is granted. The order denying defendant’s petition for resentencing is affirmed.