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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CORNELL WALKER, Defendant and Appellant.	B288994 (Los Angeles County Super. Ct. No. BA228896)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Jonathan B. Steiner and Richard B. Lennon, California Appellate Project, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

In 2003, a jury convicted appellant Cornell Walker of possession of a firearm by a felon. (Former Pen. Code, § 12021, subd. (a)(1).)[1] He was found to have suffered six prior strike convictions under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and was sentenced to 25 years to life.[2] In March 2018, he filed a petition to recall his sentence pursuant to Proposition 36, the Three Strikes Reform Act of 2012. After issuing an order to show cause and receiving briefing, the trial court denied the petition, finding that defendant was statutorily ineligible for resentencing because he was armed with a firearm during the offense. (§§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(III). Appellant appeals, contending that because the gun he was convicted of possessing was found under the back seat of his car, and the officers who seized it never observed him in the car, it was not readily available for him to use, and therefore he was not armed with it within the meaning of Proposition 36. We disagree and affirm.

BACKGROUND

We take our summary of the evidence from our unpublished opinion in case No. B187368. As here relevant, Los Angeles Police Detective John Skaggs, assisted by FBI agents Gilgore and Rogero,

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[1] All further section references are to the Penal Code.

[2] Appellant twice appealed from the judgment of conviction. In his first appeal, we held that the trial court erred in denying his motion to suppress under section 1538.5, and remanded for a new suppression hearing (B168788). In the second, we affirmed the trial court's denial of the suppression motion and affirmed the court's reinstatement of the prior judgment (B187368).

approached a blue car that might have been involved in the robbery of a drug informant that had just occurred in a drug buy operation. The vehicle was parked in front of a liquor store. As we stated in our opinion: "Agent Gilgore, Agent Rogero, and Detective Skaggs went down the street and investigated the car. Agent Rogero observed that the vehicle was unoccupied and that the engine was running. . . . Agent Rogero, Detective Skaggs, Agent Gilgore and possibly Special Agent Dave Hand were standing around the vehicle when appellant walked from around the corner and asked what the officers were doing standing around the car. . . . Detective Skaggs told appellant they were investigating a robbery, and appellant responded that he did not have anything to do with a robbery. Detective Skaggs asked appellant if they could search his vehicle. When appellant asked why, Detective Skaggs said they were investigating a robbery that potentially involved a vehicle that matched this vehicle's description. Appellant said 'yes' they could search the vehicle. Detective Skaggs asked appellant again if they could search the car. Appellant again said, 'yes.' At that point Detective Skaggs opened the door and began searching the vehicle. While searching the car, Detective Skaggs 'gave [Agent] Rogero a look . . . which [Agent Rogero] perceived to be there being some problem.' From the detective's expression, Agent Rogero knew there was a problem. At that point, appellant 'pushed off from [Agent Rogero] . . . and took off running.' Agent Rogero chased appellant and appellant was subsequently arrested."

As Detective Skaggs explained, before signaling Agent Rogero, he had "found a handgun under the rear seat on the driver's side. He did

not have an easy time finding it. The rear seat would not lift up very high so Detective Skaggs felt under the seat with his hand. He felt what he thought was the butt of a gun, almost as far back as he could reach. 'Because the gun was tucked up so far and there's springs and such, [Detective Skaggs] didn't want to [take] it out right there. [He] left it where it was, stood up and signaled to Agent Rogero with [his] hands to handcuff the defendant.' . . . [D]efendant looked over his shoulder and saw Detective Skaggs' hand gestures and immediately ran towards Crenshaw Boulevard."

Appellant later waived his *Miranda* rights and "Agent Peaco asked appellant why he consented to the search of his car. Appellant admitted possessing the firearm that was recovered and explained he did not think the agents and detectives would find it."

DISCUSSION

Before Proposition 36, the Three Strikes law required a sentence of 25 years to life for any defendant who was convicted of a felony and had two or more prior convictions for serious or violent felonies. (*People v. Perez* (2018) 4 Cal.5th 1055, 1061-1062 (*Perez*).) "Following enactment of Proposition 36, defendants are now subject to a lesser sentence when they have two or more prior strikes and are convicted of a felony that is neither serious nor violent, unless an exception applies." (*People v. Estrada* (2017) 3 Cal.5th 661, 667 (*Estrada*).)

"For those sentenced under the scheme previously in force, [Proposition 36] establishes procedures for convicted individuals to seek resentencing in accordance with the new sentencing rules. (§ 1170.126.)

The procedures call for two determinations. First, an inmate must be eligible for resentencing. (§ 1170.126, subd. (e)(2).) An inmate is eligible for resentencing if his or her current sentence was not imposed for a violent or serious felony *and* was not imposed for any of the offenses described in clauses (i) to (iv) of section 1170.12, subdivision (c)(2)(C). (§ 1170.126, subd. (e)(2).) Those clauses describe certain kinds of criminal conduct, including the use of a firearm during the commission of the offense. Second, an inmate must be suitable for resentencing." (*Estrada, supra*, 3 Cal.5th at p. 667.)

As here relevant, one of the exceptions to eligibility exists if "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) To be armed with a firearm, the defendant must have the firearm "available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997; see *Perez, supra,* 4 Cal.5th at p. 1065.)

"A defendant's 'mere possession' of a firearm or deadly weapon does not establish that the defendant was armed with the firearm or deadly weapon." (*People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458.) The reason is that a defendant's possession may be constructive, with little actual accessibility: "'Obviously, a firearm that is available for use as a weapon creates the very real danger it will be used.' [Citation.] The same cannot necessarily be said about a firearm that is merely under the dominion and control of a person previously convicted of a felony. For instance, a firearm passed down through family members and currently kept in a safe deposit box by a convicted felon would be

under his or her dominion and control, but would present little or no real danger." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1057.)

In the present case, substantial evidence supports the trial court's finding that appellant was armed with a firearm in the commission of the offense of possession of a firearm by a felon. The evidence established not simply mere dominion and control with little accessibility, but actual possession and actual accessibility.

From the fact that the vehicle engine was running, it could be inferred that appellant had occupied the vehicle immediately before the gun was discovered, and had driven it to where the vehicle was stopped at the curb. Further, appellant admitted to Agent Peaco (in substance) that he placed the gun where it was found: he told the Agent that he possessed the firearm and said he had consented to the search because he did not think the officers would find it. He also attempted to flee when Detective Skaggs signaled Agent Rogero, thus further supporting the inference that he placed the gun under the seat.

It is true that Detective Skaggs testified that he "did not have an easy time finding [the gun]," because the rear seat would not lift very high and the gun was tucked under the seat almost as far back as he could reach among the springs. But that Detective Skaggs, who did not know whether a gun was present and did not know precisely where to look, had difficulty discovering the gun does not compel the conclusion that the gun was not available to appellant, who had placed the gun under the seat and knew precisely where it was.

We find the instant case analogous to *People v. Searle* (1989) 213 Cal.App.3d 1091, in which the defendant was arrested outside his car

for selling cocaine. In a search of the car, officers found a loaded firearm "in an unlocked compartment in the back of [the] car." (*Id.* at p. 1095.) The appellate court rejected the defendant's contention that the gun was simply stored in the car. The Court reasoned that "'The underlying intent of the Legislature is to deter persons from creating *a potential for death or injury resulting from the very presence of a firearm at the scene of the crime*.' [Citation.] In this case, not only was the gun located in the car from which appellant sold drugs it was also loaded. Accordingly, we conclude that the gun was available for use." (*Id.* at p. 1099.)

Similarly, in the present case, appellant created the potential for death or great bodily injury during the period of his possession of the firearm by actually possessing it, concealing it in the back seat of his vehicle, knowing precisely where it was, having it available for him to retrieve while occupying the vehicle, and while later parking the vehicle (engine running) on a public street.

Appellant contends that because Detective Skaggs testified he had difficulty retrieving the gun, his case is more analogous to *People v. Peña* (1999) 74 Cal.App.4th 1078 (*Peña*), in which "the firearm was inside a pouch on the passenger side of an unlocked toolbox in the bed of the pickup truck appellant was driving." (*Id.* at p. 1080.) The *Peña* court was considering whether that fact pattern fell within the meaning of former Health and Safety Code section 11550, subdivision (e), which "impose[d] an additional penalty for anyone under the influence of specified controlled substances while in the 'immediate personal

possession' of a loaded, operable firearm." (*Ibid.*) The *Peña* court held "that 'immediate personal possession,' as used in section 11550(e), when applied to a vehicle's occupant, requires that the firearm be within the passenger compartment. Here the rifle in the toolbox in the bed of the truck was not in the passenger compartment of the vehicle. Thus, there was insufficient evidence to support Pe*ñ*a's conviction under section 11550(e), and it must be reversed." (*Id.* at p. 1088.)

Unlike *Peña,* as we have explained, the evidence here showed that defendant actually possessed the firearm and placed it under the back seat of the vehicle (the passenger compartment) where it was found and which he occupied immediately before the gun was seized. Nothing in *Peña* suggests that appellant did not have the gun available for use during the period of his possession established by the evidence.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J. MICON, J.*

*Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.