Filed 9/26/18 P. v. Lopez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOAQUIN JUAREZ LOPEZ, Defendant and Appellant.	B286246 (Los Angeles County Super. Ct. No. VA040296)

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

Richard B. Lennon, 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 David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Joaquin Juarez Lopez (defendant) appeals from the trial court's order denying his petition for resentencing on the ground that he was ineligible for relief under Proposition 36 (Pen. Code, § 1170.126).[1] Defendant contends Proposition 36's exclusion of an inmate who was armed with a firearm during the commission of a felony does not apply when the underlying felony is unlawful possession of a firearm. We reject that argument and affirm the trial court's order.

BACKGROUND

On November 18, 1996, when a deputy sheriff stopped defendant's vehicle, defendant was wearing an empty shoulder holster. He told the deputy that the gun that belonged with the holster was under the front seat of the vehicle. Under the front seat, the deputy found a loaded .357-caliber revolver.

In 1997, defendant was convicted of possession of a firearm by a felon (former § 12021, subd. (a)(1)). The trial court found that defendant had suffered five prior convictions within the meaning of the Three Strikes Law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) and sentenced him to a term of 25 years to life in prison.

In 2013, defendant filed a petition for recall and resentencing pursuant to Proposition 36 (§ 1170.126). The trial court denied the petition on the ground that defendant was ineligible because he was armed during the commission of the offense. Defendant timely appealed.

DISCUSSION

Overview of section 1170.126

In November 2012, voters in California approved Proposition 36, which enacted section 1170.126. That statute established a procedure under which a defendant serving an

---

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

indeterminate life sentence as a third strike offender for a non-serious or non-violent felony that was a strike under the pre-Proposition 36 version of the Three Strikes law, could file a petition for recall of sentence and request resentencing as a second strike offender for that offense. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 596-597 (*Teal*).)

Under section 1170.126, an inmate serving an indeterminate third-strike term for a crime that is not a serious or violent felony may petition for resentencing, unless his third-strike offense comes within one of the statutory exceptions to eligibility. (§ 1170.126, subd. (e).) One such exception applies when "[d]uring the commission of the current offense . . . [the defendant] was armed with a firearm." (§§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2).)

Standard of review and applicable legal principles

Defendant's appeal is premised solely on the trial court's determination that he was "armed with a firearm" and "[d]uring the commission of the current offense" as those terms are used in sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii). He contends those statutory terms must be construed to require that the arming be "tethered" to the underlying felony such that a "facilitative nexus" exists between the availability of the weapon and the commission of the underlying felony. Defendant's statutory construction claim presents a question of law to which we apply the de novo standard of review. (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1181.)

Section 1170.126 was enacted by the electorate when it approved Proposition 36. (*Teal, supra*, 60 Cal.4th at pp. 596-597.) "[O]ur interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. [Citations.]" (*People v. Park* (2013) 56 Cal.4th 782,

796 (*Park*).) When we interpret a statute, "our goal is ""to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law."" [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 54-55.) Because section 1170.126 was enacted by the electorate, it is the voters' intent that controls. (See *Park*, at p. 796.) "'We first examine the words of the statute, "giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent."' [Citation.]" (*Albillar*, at p. 55.) If the language of the statute is ambiguous, we examine other indicators of the voters' intent, particularly the analysis and arguments contained in the official ballot pamphlet. (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) However, """[i]f the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the [electorate's] intent is unnecessary."' [Citation.]" (*Albillar*, at p. 55.) "Once the electorate's intent has been ascertained, the provisions must be construed to conform to that intent. [Citation.]" (*Park*, at p. 796.)

Whether defendant was "armed with a firearm"

An inmate is ineligible for resentencing under section 1170.126 if, "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person" within the meaning of sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii). (§ 1170.126, subd. (e)(2); *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*).)

The phrase "'[A]rmed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. (E.g.,

§ 1203.06, subd. (b)(3); Health & Saf. Code, § 11370.1, subd. (a); *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*) [construing § 12022].) 'The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted' [citation], 'and to have enacted or amended a statute in light thereof ' [citation]. 'This principle applies to legislation enacted by initiative. [Citation.]' [Citation.]" (*Osuna, supra*, 225 Cal.App.4th at p. 1029.)

When "'the language of a statute uses terms that have been judicially construed, "'the presumption is almost irresistible"' that the terms have been used "'in the precise technical sense which had been placed upon them by the courts.'" [Citations.] This principle [likewise] applies to legislation adopted through the initiative process. [Citation.]' [Citation.]" (*Osuna, supra*, 225 Cal.App.4th at p. 1029.) Courts have accordingly concluded that California voters intended "armed with a firearm," as that phrase is used in sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii), and incorporated by reference in section 1170.126, subdivision (e)(2), "to mean having a firearm available for offensive or defensive use." (*Osuna*, at p. 1029.)

Defendant construes "during the commission of the current offense" as that term is used in sections 667(e)(2)(C)(iii) and 1170.12(c)(2)(C)(iii) to mean that being "armed" with a weapon must be in addition to, and not an element of, the current offense. He argues that the arming must be "tethered" to the underlying felony such that a "facilitative nexus" exists between the availability of the weapon and commission of the underlying felony. This necessary tethering cannot occur, defendant argues, when the underlying offense is possession of a firearm.

Numerous appellate courts have rejected the argument that arming must be tethered to an offense other than weapon possession when determining eligibility for resentencing under

section 1170.126. (See, e.g., *People v. Cruz* (2017) 15 Cal.App.5th 1105; *Osuna, supra,* 225 Cal.App.4th 1020; *People v. White* (2014) 223 Cal.App.4th 512; *People v. Blakely* (2014) 225 Cal.App.4th 1042; *People v. Brimmer* (2014) 230 Cal.App.4th 782; *People v. Hicks* (2014) 231 Cal.App.4th 275.) Defendant urges us to reject this uniform line of authority because courts in those cases incorrectly distinguished between arming "in" the commission of a felony (when there must be a facilitative nexus between the arming and the underlying offense), and arming "during" the commission a felony, when a temporal nexus is sufficient. He claims there is no meaningful difference between "during" and "in," that principles of statutory construction, basic grammar, and legislative intent support his argument that the two terms can be used interchangeably, and that a facilitative nexus standard should apply when determining whether an inmate was armed "during" commission of an underlying felony for purposes of resentencing under Proposition 36.

The distinction courts have drawn between being armed with a firearm "in the commission of" a felony and "during commission" of a felony is consistent with the statutory contexts in which those terms are used. Courts have distinguished between imposition of a sentence *enhancement* for anyone armed with a firearm "in the commission of" a felony and disqualification for sentencing *relief* under section 1170.126 if armed "during commission" of the commitment felony. (*Osuna, supra,* 225 Cal.App.4th at pp. 1030-1031.)

In order for a defendant to be armed "in the commission of a felony" for purposes of additional penalties, there must be a facilitative nexus between the arming and the crime. (*Bland, supra*, 10 Cal.4th at p. 999.) No such facilitative nexus exists when the underlying crime is possession of a firearm by a felon, as "[h]aving a gun available does not further or aid in the

commission of the crime of possession of a firearm by a felon." (*Osuna, supra,* 225 Cal.App.4th at p. 1032.) A defendant convicted of being a felon in possession of a firearm accordingly does not risk imposition of additional punishment under section 12022.

Unlike sentence enhancement statutes such as section 12022, which require that a defendant be armed '*in* the commission of' a felony for additional punishment to be imposed, Proposition 36 disqualifies an inmate from eligibility for lesser punishment if he was armed with a firearm "*during* the commission of' of the current offense." In the context of sentence reduction, courts have construed the term "during" as requiring "a temporal nexus between the arming and the underlying felony, not a facilitative one." [Citation.]" (*Osuna, supra*, 225 Cal.App.4th at p. 1032.) As the court in *Osuna* explained: "Since [section 1170.126] uses the phrase '[d]uring the commission of the current offense,' and not in the commission of the current offense [citations], and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, we conclude the literal language of the [statute] disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm." (*Ibid.*)

Support for this interpretation of section 1170.126 may be found in the voter's intent. In enacting section 1170.126 as part of Proposition 36, "voters rendered ineligible for resentencing not only narrowly drawn categories of third strike offenders who committed particular, specified offenses or types of offenses, but also broadly inclusive categories of offenders who, during commission of their crimes -- and regardless of those crimes' basic statutory elements -- used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person" (*Osuna, supra*, 225 Cal.App.4th at p. 1036), and

that the voters' intent to do so is reflected in the ballot materials related to Proposition 36. These materials included statements that the initiative "'[c]ontinues to impose life sentence penalty if the third strike conviction was for certain nonserious, non-violent sex or drug offenses *or involved firearm possession*.' [Citation.]" (*Ibid.*) The court in *Osuna* noted that "[i]n summarizing how the initiative measure would shorten sentences for some third strikers, the Legislative Analyst explained there would be some exceptions to the shorter sentence: 'Specifically, the measure requires that if the offender has committed certain new or prior offenses, including some drug-, sex-, *and gun-related felonies*, he or she would still be subject to a life sentence under the three strikes law.' [Citation.]" (*Ibid.*) The court in *Osuna* conducted an extensive review of ballot materials that distinguished between "petty criminals (such as shoplifters and those convicted of simple drug possession) who posed little or no risk to the public and did not deserve life sentences" and "[a] felon who has been convicted of two or more serious and/or violent felonies in the past, and most recently had a firearm readily available for use," who "simply does not pose little or no risk to the public." (*Id.* at p. 1038.) Based on "the clear evidence of voters' intent," the court in *Osuna* rejected the claim that conviction for possession of a firearm cannot constitute being "armed" with a firearm for purposes of ineligibility for resentencing under section 1170.126. (*Osuna*, at p. 1038.)

The Supreme Court's decision in *People v. Estrada* (2017) 3 Cal.5th 661 (*Estrada*) similarly negates the argument that there must be a facilitative nexus between being armed with a firearm and the underlying offense for a defendant to be ineligible for resentencing under Proposition 36. The court in *Estrada* explained that "section 1170.12, subdivision (c)(2)(C)(iii) provides only one express nexus requirement between [its] general

descriptive terms and the inmate's prior offense: the excluding conduct must occur '[*d*]*uring* the commission' of the offense. [Citation.] The term 'during' suggests temporal overlap: something that occurs throughout the duration of an event or at some point in its course. [Citation.] The term implies, at a minimum, a need for a temporal connection between the excluding conduct and the inmate's offense of conviction. Although the need to establish such a nexus imposes certain limits on the applicability of the firearm-related exception, [Proposition 36] could certainly have imposed an even stricter requirement for triggering the exception. (See [*Bland, supra,*] 10 Cal.4th [at p.] 1002 . . . [interpreting the phrase "'in the commission'" to impose a "'facilitative nexus'" requirement].) Because [Proposition 36] does not do so, we may infer some kind of temporal limitation on the retroactive application of section 1170.12, subdivision (c)(2)(C)(iii)." (*Estrada*, at p. 670, fn. omitted.)

Defendant argues that *Estrada* did not address the issue of whether arming must be tethered to the underlying offense, and that the Supreme Court expressly declined to decide "[w]hether the use, arming and intent described in section 1170.12, subdivision (c)(2)(C)(iii) must have a more-than-coincidental relationship to the current offense." (*Estrada, supra,* 3 Cal.5th at p. 670, fn. 4.) While it is true that *Estrada* did not decide the precise issue presented here, the court's analysis in that case undermines not only defendant's facilitative nexus argument, but also his argument that the "armed with a firearm" exception to eligibility for resentencing under Proposition 36 should be narrowly construed so as not to apply to "defendants who are serving sentences for the mere commission of a gun possession crime."

The Supreme Court in *Estrada* noted, as defendant does in this appeal, that Proposition 36 specifies three categories of offenses that are ineligible for resentencing, and that the third category, which includes being "armed with a firearm," is distinct from the other two. The first two categories of ineligible offenses (§1170.12, subds. (c)(2)(C)(i) and (c)(2)(C)(ii)), the court explained, "reference statutes defining specific criminal offenses or allegations," whereas in section 1170.12, subdivision (c)(2)(C)(iii), "[o]ne finds no reference to any specific statutory provision there, but instead more general terms describing how criminal offenses may be committed." (*Estrada, supra*, 3 Cal.5th at pp. 669-670.) The Supreme Court rejected any facilitative nexus requirement between "these general descriptive terms and the inmate's prior offense," and then concluded: "[S]ection 1170.12, subdivision (c)(2)(C)(iii) is best read as excluding from resentencing 'broadly inclusive categories of offenders who, during commission of their crimes -- and regardless of those crimes' basic statutory elements -- used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.' [Citation.]" (*Estrada*, at p. 670.)

We reject defendant's contention that without a facilitative nexus or tethering test, a felon in possession of a firearm would always be found to be armed simply because he is possession of a firearm and that all weapons offenses would therefore be ineligible for resentencing under Proposition 36. The premise underlying this argument -- that "armed" with a firearm under section 1170.12(c)(2)(C)(iii) is synonymous with simple possession of a firearm under former section 12021 -- is untrue. A defendant may be convicted of violating former section 12021 based on mere constructive possession, i.e., that "'the weapon is . . . not in his actual possession, [but] nonetheless under his dominion and control, either directly or through others. [Citations.]'

[Citation.]" (*Osuna, supra,* 225 Cal.App.4th at p. 1029, quoting *People v. Pena* (1999) 74 Cal.App.4th 1078, 1083-1084.) "For example, suppose a parolee's residence (in which only he lives) is searched and a firearm is found next to his bed. The parolee is in possession of the firearm, because it is under his dominion and control. If he is not home at the time, however, he is not armed with the firearm, because it is not readily available to him for offensive or defensive use." (*Blakely, supra*, 225 Cal.App.4th at p. 1052.) Such a defendant would be eligible for Proposition 36 relief. (*Ibid.*) In such a case, the facilitative nexus test would be unnecessary to conclude he was not "armed" within the meaning of sections 1170.12, subdivision (c)(2)(C)(iii), and 667, subdivision (e)(2)(C)(iii), and thus eligible for relief under section 1170.126, subdivision (e)(2). A firearm cannot be available for use when it is merely in the defendant's constructive possession. Here, in contrast, defendant had actual possession of the firearm and it was accordingly available for his use.

The trial court did not err in ruling that defendant was "armed" during the commission of the crime of felon in possession of a firearm, and was thus ineligible for resentencing under Proposition 36.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT