Filed 6/29/16 P. v. Luckey CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CARL LUCKEY, Defendant and Appellant.	B264685 (Los Angeles County Super. Ct. No. GA022111)

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

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill, and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Carl Luckey challenges the trial court's denial of his petition for recall of his indeterminate life sentence pursuant to Proposition 36. The trial court found that he was ineligible for resentencing because he was armed during the commission of his crimes. (See Pen. Code, §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii).)[1] He contends that his convictions for possession of a sawed-off shotgun and for possession of a firearm by a felon do not bar him from relief under Proposition 36. We disagree and affirm.

FACTS AND PROCEEDINGS BELOW

In 1995, a jury found Luckey guilty of possession of a firearm by a felon, in violation of former section 12021, subdivision (a)(1),[2] and possession of a short-barreled shotgun, in violation of former section 12020.[3] The jury also found that Luckey had two prior strike convictions, as defined in section 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) through (d). Accordingly, the court sentenced him under the "Three Strikes" law to an indeterminate term of 25 years to life.

In 2012, the people of California voted to enact Proposition 36, which provides for relief from indeterminate life sentences under the Three Strikes law for defendants currently serving sentences for nonviolent, nonserious felonies. (§ 1170.126.) On January 6, 2014, Luckey filed a petition for recall of his sentence pursuant to this provision.

The district attorney opposed Luckey's petition on the ground that Luckey was ineligible for relief because he was armed during the commission of his offense (see § 1170.126, subd. (e)(2)), and filed with the trial court transcripts of Luckey's 1995 trial, along with a copy of this court's 1996 unpublished opinion affirming Luckey's

---

[1] Unless otherwise specified, all further statutory references are to the Penal Code.

[2] In 2010, the Legislature repealed section 12021 and replaced it with section 29800.

[3] In 2010, the Legislature repealed section 12020, and replaced it, in relevant part, with section 33215.

conviction. In our opinion, we described the facts of the case as follows: "A friend gave Luckey a sawed-off shotgun, which Luckey stashed by the carport at the side of his apartment building so that 'if [a neighbor and rival gang member] was to mess with my family, that's what I had that shotgun for.' . . . The police found the shotgun after Luckey used it to shoot [the rival gang member], a shooting Luckey admitted at his trial but which was not one of the charges in this case." The transcripts of Luckey's trial confirm this account.

The trial court, after considering the materials both sides submitted, determined that Luckey was ineligible for relief under Proposition 36 because he was armed during the commission of his most recent offense.

DISCUSSION

Under section 1170.126, an inmate serving an indeterminate life sentence under the Three Strikes law "upon conviction . . . of a felony or felonies that are not defined as serious and/or violent felonies . . . may file a petition for a recall of sentence." (*Id.*, subd. (b).) Subdivision (e)(2) of section 1170.126 creates an exception, such that inmates serving a sentence for an offense described in section 667, subdivision (e)(2)(C) are not eligible for resentencing. Among the offenses described in section 667, subdivision (e)(2)(C) are those in which "[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." (*Id.*, subd. (e)(2)(C)(iii) (subdivision (iii)).

Neither of the offenses for which Luckey is currently imprisoned, possession of a firearm by a felon and possession of a short-barreled shotgun, is defined as a serious or violent felony. (See §§ 667.5, subd. (c), 1192.7, subd. (c).) Nevertheless, the trial court found Luckey ineligible for resentencing under section 1170.126 on the ground that he was armed with a firearm during the commission of these offenses.

The record demonstrates that Luckey was not only armed, but in fact fired his weapon.[4] Luckey contends that this does not preclude him from eligibility for resentencing. He argues that the language of the statute "suggests that the factors listed in subdivision (iii) must attach to the current offense as an addition and not just be an element of the current offense." Luckey notes that subdivision (iii) is worded differently from the two preceding subdivisions. In section 667, subdivision (e)(2)(C)(i), the voters barred relief for defendants whose "current offense is a controlled substance charge" involving large quantities of certain drugs. In section 667, subdivision (e)(2)(C)(ii), they barred relief for defendants whose "current offense is a felony sex offense, . . . or any felony offense that results in mandatory registration as a sex offender." According to Luckey, by using the language "[d]uring the commission of the current offense" in subdivision (iii) in place of "[t]he current offense is," as in the two preceding subdivisions, the voters signaled an intent to forbid relief not on the basis of the elements of the current offense, but rather on additional factors separate from the elements of the offense themselves.

Even if we accept for the sake of argument that Luckey's analysis is correct, it does not follow that he was therefore eligible for relief under Proposition 36. " 'Armed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*); accord *Brimmer*, *supra*, 230 Cal.App.4th at p. 793; *People v. White* (2014) 223 Cal.App.4th 512, 524.) At the time Luckey was convicted, section 12021, subdivision (a)(1) provided that "[a]ny person who has been convicted of a felony under the laws of . . . the State of California . . . who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony." Section 12020, subdivision (a), provided that "[a]ny person in this state who . . .

---

[4] In determining whether a defendant was ineligible for Proposition 36 relief because of the circumstances of his offense, a court may consider the record of the case, including the facts as stated in the appellate decision. (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 800-801 (*Brimmer*).)

possesses . . . any short-barreled shotgun . . . is punishable by imprisonment in a county jail not exceeding one year or in the state prison."

Neither section 12020 nor 12021 included as an element a requirement that the defendant be armed. Indeed, a defendant may be guilty of illegal possession of a firearm through constructive possession, or in other words " 'knowingly exercis[ing] a right to control the prohibited item, either directly or through another person.' " (*Brimmer*, *supra*, 230 Cal.App.4th at p. 795.) A parolee might be guilty of illegal possession of a firearm if police find a weapon in his home during a search, but he would not have been armed with the weapon if it was not readily available for him to use. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1030.) Thus, being armed was not an element of the offenses for which Luckey was convicted.

It is consistent with the voters' intent in enacting Proposition 36 to draw a distinction between the illegal constructive possession of a firearm and actual possession in which the defendant has a weapon readily available for use. After reviewing the text of Proposition 36 and the arguments its proposers made on its behalf, the court in *Osuna*, *supra*, 225 Cal.App.4th at p. 1038, concluded, "[i]t is clear the electorate's intent was not to throw open the prison doors to *all* third strike offenders whose current convictions were not for serious or violent felonies, but only to those who were perceived as nondangerous or posing little or no risk to the public. 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, simply does not pose little or no risk to the public. '[T]he threat presented by a firearm increases in direct proportion to its accessibility. Obviously, a firearm that is available for use as a weapon creates the very real danger it will be used.' "

For these reasons, we reach the same conclusion as all published cases that have considered this issue: a defendant is ineligible for resentencing under Proposition 36 if he was armed at the time he committed a felony for illegal possession of a firearm. (See *Brimmer*, *supra*, 230 Cal.App.4th 782; *Osuna*, *supra*, 225 Cal.App.4th 1020; *People v. White*, *supra*, 223 Cal.App.4th 512; *People v. Blakely* (2014) 225 Cal.App.4th 1042;

People v. Elder (2014) 227 Cal.App.4th 1308; *People v. Hicks* (2014) 231 Cal.App.4th 275.) Consequently, the trial court did not err in denying Luckey's petition for recall of his sentence.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.