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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CLINTON ECHOLS, Defendant and Appellant.	B276841 (Los Angeles County Super. Ct. No. KA023419)

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.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Clinton Echols appeals from a post-conviction order denying his petition to recall his sentence and to resentence him under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126), commonly referred to as Proposition 36.[1] We affirm.

FACTUAL AND PROCEDURAL SUMMARY

In 1979 Echols was convicted of robbery. In 1982 he was convicted of felony assault with intent to commit rape in violation of Penal Code section 220,[2] and robbery, and sentenced to four years in prison. In 1984 he was convicted of robbery, and sentenced to seven years in prison.

In 1995 a jury convicted Echols of selling and possessing cocaine, and found true allegations that he had been convicted of robbery in 1979, 1982, and 1984—each a serious and violent felony for purposes of the "Three Strikes" law. (See §§ 667, subd. (d); 667.5, subd. (c)(9); 1170.12, subd. (b); 1192.7, subd. (c)(19).)[3] The court sentenced him to prison for 25 years to life. We affirmed the judgment in an unpublished opinion. (*People v. Echols* (Feb. 26, 1996, B091125) [nonpub. opn.].)

In November 2012 Echols filed a petition under Proposition 36 to recall his sentence and resentence him (the

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

[2] At the time Echols committed the crimes for which he was convicted in 1982, section 220 read: "Every person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 is punishable by imprisonment in the state prison for two, four, or six years."

[3] Our record does not indicate whether the charging pleading in the case that resulted in Echols's 1995 convictions alleged Echols's 1982 conviction of assault with intent to commit rape.

petition). In the petition, Echols set forth his 1995 drug-related convictions and the jury's true findings as to his three prior robbery convictions. The petition did not refer to his conviction of assault with intent to commit rape.

The trial court found that Echols had made a prima facie showing of eligibility for resentencing and issued an order to show cause why the petition should not be granted. The People opposed the petition on the ground, among others, that Echols was ineligible for resentencing because he had been convicted of assault with intent to commit rape in violation of section 220.

At the hearing on the order to show cause, the People introduced, among other evidence, a certified copy of an abstract of judgment evidencing Echols's 1982 conviction for assault with intent to commit rape.[4] Based on that conviction, the court determined that Echols was statutorily ineligible for resentencing and denied the petition. Echols appealed.

DISCUSSION

Echols contends that the court erred by basing the denial of his petition on the fact that he had been convicted of assault with intent to commit rape—a fact that does not appear in the record of his 1995 conviction. We reject the contention.

Prior to Proposition 36, "the Three Strikes law required that a defendant who had two or more prior convictions of violent or serious felonies receive a third strike sentence of a minimum of 25 years to life for any current felony conviction, even if the current offense was neither serious nor violent." (*People v. Johnson* (2015) 61 Cal.4th 674, 680.) Proposition 36 "prospectively changed the

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[4] Echols's counsel objected to the abstract of judgment on the grounds that it was hearsay and lacked foundation. The court overruled the objections. Echols's does not challenge the evidentiary ruling on appeal.

Three Strikes law by reserving indeterminate life sentences for cases where the new offense is also a *serious or violent felony*, unless the prosecution pleads and proves an enumerated disqualifying factor. In all other cases, a recidivist defendant will be sentenced as a second strike offender, rather than a third strike offender." (*People v. Chubbuck* (2014) 231 Cal.App.4th 737, 740-741.)

Proposition 36 also created a post-conviction procedure whereby a prison inmate who is serving a third strike sentence for a crime that was not a serious or violent felony may petition to recall his or her sentence and be resentenced as a second strike offender. (§ 1170.126, subds. (a)-(f); *People v. Johnson*, *supra*, 61 Cal.4th at p. 682.) To obtain relief, the inmate must satisfy certain statutory eligibility requirements. (§ 1170.126, subd. (e).) Two of these requirements relate to the offense for which the court imposed the third strike sentence. (§ 1170.126, subd. (e)(1) & (2).) The current offense, must not, for example, have been either a serious or violent felony (as statutorily defined) or one of the drug or sex offenses specified in the statute. (§§ 1170.126, subd. (e)(1) & (2); 667, subd. (e)(2)(C)(i) & (ii); 1170.12, subd. (c)(2)(C)(i) & (ii).) In addition, the inmate must not have used a firearm, been armed with a firearm or deadly weapon, or have intended to cause great bodily injury "[d]uring the commission of the current offense." (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii); 1170.126, subd. (e)(2).)

The third eligibility requirement—the only eligibility requirement relevant here—is that the "inmate has no prior convictions for any of the offenses appearing in" section 667, subdivision (e)(2)(C)(iv), or section 1170.12, subdivision (c)(2)(C)(iv). (§ 1170.126, subd. (e)(3).) Among the offenses "appearing in" the referenced sections and subdivisions is any " 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare

and Institutions Code." (§§ 667, subd. (e)(2)(C)(iv)(I); 1170.12, subd. (c)(2)(C)(iv)(I).) Section 6600 of the Welfare and Institutions Code defines " '[s]exually violent offense' " to include "a felony violation of Section . . . 220 of the Penal Code, committed with the intent to commit a violation of Section 261." Section 261 defines the crime of rape. Thus, an inmate is not eligible for resentencing under Proposition 36 if he or she has been convicted of violating section 220 with the intent to commit rape.[5]

Here, the People introduced a certified abstract of judgment showing that Echols had been convicted in 1982 of violating section 220 with the intent to commit rape. Echols does not challenge the admissibility of the abstract of judgment on evidentiary grounds, and there was no contrary evidence submitted at the hearing. The abstract of judgment constitutes substantial evidence to support the court's finding that Echols had been convicted of a crime that renders him statutorily ineligible for resentencing. (See *People v. Prieto* (2003) 30 Cal.4th 226, 258; *People v. Semien* (2008) 162 Cal.App.4th 701, 710.)

Echols asserts, however, that the eligibility determination must be made solely on the basis of the record of the convictions for which his third strike sentence had been imposed. Because the third strike sentence was based on his prior *robbery* convictions only, he contends the trial court erred by finding him ineligible based on the prior conviction for assault with intent to commit rape. He relies on decisions holding that in considering an inmate's eligibility for resentencing under Proposition 36, the trial court could look no further than the record of conviction that supported

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[5] Even if an inmate satisfies the eligibility requirements, a court may deny a petition if it determines that resentencing "would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f); see *People v. Johnson*, *supra*, 61 Cal.4th at p. 682.) The court did not address this issue in the instant case.

the third strike sentence. (See, e.g., *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1062-1063; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336-1340 (*Bradford*); *People v. Berry* (2015) 235 Cal.App.4th 1417, 1427.) Echols acknowledges, however, these courts were concerned with "the determination that the *current offense* involved disqualifying conduct." (Italics added.) They did not address the question presented here—whether the court could find an inmate ineligible under the exclusion for disqualifying *prior* convictions based on evidence of a prior conviction not in the record of the case that resulted in the inmate's third strike sentence.

In *Bradford*, for example, the trial court found that the petitioning inmate was ineligible for resentencing based on the "statutory exclusion that applies 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.' [Citation.]" (*Bradford*, *supra*, 227 Cal.App.4th at p. 1327, italics added.) As the Court of Appeal noted, it was thus "concerned with [one of] the enumerated exceptions that apply based on the 'current' conviction." (*Id.* at p. 1328.) In that situation, the court held that the trial court must make the factual determination as to whether the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury "based solely on evidence found in the record of conviction." (*Id.* at p. 1331.) Neither *Bradford* nor the other cases Echols relies upon involved an inmate who, like Echols, was found ineligible for resentencing based upon the third eligibility requirement—the requirement concerning the inmate's "prior convictions." (§ 1170.126, subd. (e)(3).)

People v. Thurston (2016) 244 Cal.App.4th 644 (*Thurston*) was, like the instant case, a prior conviction eligibility case. In *Thurston*, the inmate had been sentenced under the Three Strikes law based on prior convictions that occurred in 1984 and 1990,

none of which rendered him ineligible for resentencing under Proposition 36. (*Id.* at pp. 652-653.) The People asserted, however, that the inmate was ineligible based on his 1975 juvenile adjudication for rape, even though the juvenile adjudication was not part of the record of the conviction for which his third strike sentence was imposed. (*Id.* at p. 653.) After an evidentiary hearing, the trial court agreed. (*Id.* at p. 654.) On appeal, the inmate argued that the juvenile adjudication had not been pled and proved in the proceeding that resulted in his current sentence and could not, therefore, render him ineligible for resentencing. (*Id.* at p. 656.) The Court of Appeal disagreed and held that the conviction that renders the defendant ineligible for resentencing need not be pled or proved in the case that resulted in the third strike sentence, and that the trial court could consider "additional evidence relevant to the eligibility determination." (*Id.* at pp. 657-659.) The additional evidence in *Thurston* included the records of the defendant's 1975 juvenile adjudication for rape. (*Id.* at pp. 674-675.)

Here, as in *Thurston*, the trial court could base its eligibility determination on a conviction other than the convictions that resulted in the defendant's third strike sentence. (§ 1170.126, subd. (e)(3).) Moreover, the court could receive and consider evidence of the disqualifying conviction even though such evidence was not part of the record in the inmate's three strikes case. (*Thurston*, *supra*, 244 Cal.App.4th at p. 659.) Because the court based its finding that Echols was ineligible for resentencing upon substantial evidence that Echols had a prior, disqualifying conviction, there was no error.

DISPOSITION

The order denying Echols's petition to recall sentence is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.