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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. RICHARD MONTANO, Defendant and Appellant.	B279943 (Los Angeles County Super. Ct. No. MA017109)

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

Kevin E. Lerman, 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 Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Montano appeals from an order denying his petition to recall his sentence under the Three Strikes Reform Act of 2012, added by Proposition 36. (Pen. Code, § 1170.126.)[1] He contends the trial court erred in finding he was armed with a deadly weapon during the commission of his current offense and therefore ineligible for resentencing. Based on our review of the record of the current conviction before us, we reject his contention and affirm the order.

BACKGROUND

On October 18, 1999, a jury found Montano guilty of possessing a weapon in prison. (§ 4502, subd. (a).)[2] The trial court found prior conviction allegations to be true and sentenced Montano under the "Three Strikes" law to 25 years to life in prison as a third strike offender. (§§ 667, subds. (b)-(1), 1170.12, subds. (a)-(d).)

This division of the Court of Appeal affirmed Montano's conviction, setting forth the following description of the offense in its opinion: "Defendant was a state prison inmate. During a prison-wide search, two correctional officers searched defendant's cell, which he shared with another inmate. A shelf assigned to defendant held a jewelry box. An officer opened the box, found defendant's identification, and determined the box had a false bottom, from which the officer extracted a stabbing weapon known as a " 'shank.' " Defendant was given his *Miranda* warnings and admitted the weapon was his." (*People v. Montano* (Oct. 27, 2000, B138480) [nonpub. opn.], p. 2.)

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[1] Further statutory references are to the Penal Code.

[2] The first jury deadlocked.

On January 8, 2013, after Proposition 36 was approved by voters in November 2012, Montano filed a petition to recall his sentence under section 1170.126. This statute permits an inmate serving an indeterminate life sentence under the Three Strikes law for a nonviolent, nonserious felony to seek a new, lesser sentence, unless resentencing would pose an unreasonable risk to public safety. (§ 1170.126, subds. (b), (e) & (f).)[3]

The trial court ordered the district attorney to show cause why the court should not recall Montano's sentence. The district attorney filed an opposition and a supplemental opposition arguing Montano was ineligible for resentencing under section 1170.126 because he was armed with a deadly weapon (a shank) during the commission of the current commitment offense (possession of a weapon in prison).[4] The district attorney also argued, even if Montano were eligible for resentencing, he was not suitable under section 1170.126 because resentencing

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[3] As stated in section 1170.126, subdivision (b), violent felonies are those offenses listed in section 667.5, subdivision (c), and serious felonies are those offenses listed in section 1192.7, subdivision (c). Montano's current offense, possession of a weapon in prison under section 4502, subdivision (a), is not enumerated as either a violent or serious felony.

[4] Under section 1170.126, subdivision (e)(2), an inmate is ineligible for resentencing 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 section 1170.12, subdivision (c)(2)(C)(iii). (Italics added.) The prosecution bears the burden of proving a petitioner is ineligible for resentencing under this criterion. (*People v. Frierson* (2017) 4 Cal.5th 225 [226 Cal.Rptr.3d 582, 583, 586, 407 P.3d 423, 424, 427].)

Montano "would pose an unreasonable risk of danger to public safety," based on his criminal convictions and his prison disciplinary record and record of rehabilitation. (§ 1170.126, subds. (f)-(g).)

On January 11, 2016, the date of the hearing on Montano's petition, the trial court received into evidence exhibits the district attorney had submitted the week before, including this division's appellate opinion (discussed above) and excerpts from the reporter's transcript of the trial on the commitment offense.[5] The same day, after considering the parties' papers and exhibits and hearing oral argument, the trial court denied Montano's petition to recall his sentence, stating in its minute order Montano was "statutorily ineligible for recall and resentencing pursuant to Penal Code section 1170.126, because during the commission of the current offense the petitioner was armed with a deadly weapon, a shank."

On February 22, 2016, Montano filed a "petition for rehearing," arguing the trial court applied an incorrect standard of proof in deciding Montano's eligibility for resentencing—an

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[5] We requested and received these exhibits from the superior court. The parties cited these exhibits in their appellate briefing. Exhibit 1 is the abstract of judgment on the current offense. Exhibit 2 is the appellate opinion affirming the current conviction. Exhibit 3 is a chart, providing synopses and page and line numbers for two excerpts from the reporter's transcript from the trial on the current offense. Exhibit 4 consists of portions of the reporter's transcript from the same trial and the sentencing hearing. We need not consider exhibit 3 because we have before us the portions of the reporter's transcript summarized in the chart in exhibit 3.

issue Montano does not raise on appeal.[6] The trial court granted the petition and set the matter for a new hearing. On October 24, 2016, after considering opposition from the district attorney and hearing oral argument, the court again found Montano ineligible for resentencing under section 1170.126 because he was armed with a deadly weapon during commission of the current offense. The trial court stated it found the district attorney's proof sufficient under either the preponderance of the evidence or beyond a reasonable doubt standard.

DISCUSSION

Montano contends the trial court erred in denying his petition to recall his sentence under section 1170.126 based on the court's finding he was armed with a deadly weapon during commission of the current offense (possession of a weapon in prison) within the meaning of section 1170.12, subdivision (c)(2)(C)(iii). Montano argues the record of conviction for the current offense merely establishes he had constructive possession of the shank, and the trial court "engaged impermissibly in judicial fact-finding to resolve factual questions not required by the verdict"—whether he was armed with the shank during commission of the offense.

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[6] At the time Montano filed his petition for rehearing, there was a split in appellate court authority regarding the appropriate standard of proof for a finding of eligibility for resentencing under section 1170.126—preponderandce of the evidence or beyond a reasonable doubt. On December 28, 2017, the California Supreme Court decided that proof beyond a reasonable doubt is required to establish a petitioner is ineligible for resentencing under section 1170.126. (*People v. Frierson*, *supra*, 4 Cal.5th at p. ___ [226 Cal.Rptr.3d 582, 583, 407 P.3d 423, 424].)

In his opening appellate brief, Montano asserted a trial court determining a petitioner's eligibility for resentencing under section 1170.126 is "limited" to "examining what facts the jury found related to the offense." Three days after Montano filed his opening brief in this matter, our Supreme Court issued its opinion in *People v. Estrada* (2017) 3 Cal.5th 661 (*Estrada*), clarifying that a court reviewing a recall petition may consider "conduct beyond that implied by the judgment." (*Id*. at p. 671.) The Court explained "a judgment that predates Proposition 36 may at times fail to imply anything about disqualifying conduct, even if the evidence available to the prosecution could have supported such a finding. For this reason, we think it unlikely that it was part of the Act's design to prevent courts reviewing a recall petition from considering conduct beyond that implied by the judgment. Given the importance of the Act's distinction between violent and nonviolent criminal conduct, it seems implausible that the Act is best understood to condition ineligibility on an indicator of violence that the prosecution had no incentive to incorporate into the judgment. Accordingly, section 1170.12, subdivision (c)(2)(C)(iii) would be substantially underinclusive were we to interpret it to apply only to cases in which the judgment implies disqualifying conduct." (*Id*. at pp. 671-672.)

Thus, the fact the jury in Montano's case only found that he *possessed* the weapon does not mean the trial court reviewing his recall petition could not find that he was *armed* with the weapon during commission of the current offense, based on facts contained in the record of conviction, including the reporter's transcript from the trial and the appellate opinion affirming his conviction. (*Estrada*, *supra*, 3 Cal.5th at pp. 675-676.) As

Estrada made clear, "the excluding conduct [here, the arming] 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." (*Id.* at p. 670.)

Montano correctly states that facts showing constructive possession of a deadly weapon, without more, are not sufficient to establish a defendant was armed with the weapon for purposes of the resentencing exclusion at issue here. "A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051 [" 'Armed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively"].) A deadly weapon "can be under a person's dominion and control without it being available for use. 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. Accordingly, possessing a firearm does not necessarily constitute being armed with a firearm." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030 (*Osuna)*, disapproved on another ground in *People v. Frierson*, *supra*, 4 Cal.5th at p. ___, fn. 8 [226 Cal.Rptr.3d 582, 591, 407 P.3d 423, 431].)

In cases decided since *Osuna*, appellate courts have concluded a petitioner is armed with a weapon within the meaning of section 1170.126, subdivision (e)(2), "even though it is not carried on his person, when he is aware it is hidden in a place readily accessible to him." (*People v. White* (2016) 243 Cal.App.4th 1354, 1358, 1362 [affirming denial of petition to recall sentence on the ground petitioner was armed during commission of the possession offense where police found him in a motel corridor near a trash can containing a firearm, and evidence indicated he knew the weapon was there].)

For example, in *People v. Elder* (2014) 227 Cal.App.4th 1308, a defendant was convicted of possession of a firearm by a felon after officers executed a search warrant at an apartment and recovered a loaded gun from "a shelf of an entertainment center" and another gun "in an unlocked safe in a bedroom." (*Id.* at p. 1317.) When the defendant later filed a petition to recall his sentence under section 1170.126, the trial court found he was armed with a firearm during commission of the possession offense, and therefore ineligible for resentencing, even though the record of the conviction demonstrated he was outside the front door of the apartment (without a firearm) when the officers arrived to execute the search warrant. The Court of Appeal affirmed the denial of the petition, finding "the record of the prior conviction supports the finding of ineligibility" that "defendant either actually possessed the guns or at least had dominion and control over them, under conditions in which the guns were readily available for his use." (*Ibid.*)

Similarly, in *People v. Hicks* (2014) 231 Cal.App.4th 275, the Court of Appeal affirmed the trial court's denial of a petition to recall an indeterminate sentence for possession of a firearm by

a felon where parole agents encountered the defendant outside the front gate of an apartment complex with narcotics and bullets on his person, and then recovered a backpack containing a loaded firearm from inside the apartment he had just visited. (*Id.* at pp. 279-280, 287.) Evidence presented at trial demonstrated the defendant had earlier brought the backpack into the apartment. (*Id.* at pp. 280-281.) The appellate court concluded sufficient evidence supported the trial court's finding "beyond a reasonable doubt that defendant was personally armed with the firearm he was convicted of possessing." (*Id.* at p. 284.)

Here too sufficient evidence supports the trial court's finding beyond a reasonable doubt that Montano was armed with the shank during commission of the current offense of possessing a weapon in prison. " 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' (Webster's 3d New Internat. Dict. (1993) p. 703.)" (*People v. Hicks*, *supra*, 231 Cal.App.4th at p. 284.) The record of the conviction demonstrates Montano had in *his* jewelry box, on *his* assigned shelf, in his cell, a shank that he admitted belonged to him. The shank was readily accessible to him during the time he possessed it, while he was in his cell.[7] As the cases discussed above establish, the record of the conviction need not show the defendant was holding the weapon at the time the weapon was found, or even within reaching distance of the weapon, to support

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[7] In his opening appellate brief, Montano asserts the shank "was hidden in a location that appellant could not easily access." The record of the current conviction does not indicate it would have been difficult for Montano to access the shank from the jewelry box, which, as explained above, "had a false bottom." (*People v. Montano*, *supra*, B138480, p. 2.)

a finding he was armed during the commission of the possession offense.

The trial court did not err in denying Montano's petition to recall his sentence because sufficient evidence in the record of the current conviction demonstrates Montano was armed during commission of the current offense and therefore ineligible for resentencing under section 1170.126.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.