Filed 12/6/17 P. v. McCain CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN EARL McCAIN, Defendant and Appellant.	B281204 (Los Angeles County Super. Ct. No. GA034165)

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

Richard B. Lennon, Staff Attorney, 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, Senior Assistant Attorney General, Noah P. Hill and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

In 1998 Stephen Earl McCain was convicted of possession of a firearm by a felon and sentenced under the three strikes law (Pen. Code, §§ 667, subds. (b)-(j); 1170.12)[1] to an indeterminate state prison term of 25 years to life. At a suitability hearing under the Three Strikes Reform Act of 2012, enacted by the voters as Proposition 36, the trial court found McCain was not eligible to have his sentence reduced and denied the petition for recall of his prison sentence. On appeal McCain contends the court erred in concluding he was armed during the commission of the offense that resulted in his indeterminate life sentence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

1. *McCain's Third Strike Conviction*

On November 7, 1997 neighbors saw McCain open the door and enter Alfredo Flores's Pasadena residence. Ten minutes later, McCain emerged from the home carrying a duffel bag. A police officer stopped him two blocks from the residence and asked if he was armed. McCain told the officer he had a gun in his waistband. The officer handcuffed McCain and took a 9-millimeter handgun from McCain. Inside the duffel bag the

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[1] Statutory references are to this code.

[2] The facts are taken from our opinion in *People v. McCain* (July 20, 1999, B125196) [nonpub. opn.] (*McCain I*) and excerpts of the transcript from McCain's trial. (See *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1110 [in ruling on a petition for resentencing, "'the court may examine relevant, reliable, admissible portions of the record of conviction to determine the existence or nonexistence of disqualifying factors,'" including "'facts underlying previously dismissed counts'"].)

officer found a video cassette recorder (VCR), a black wool cap and a screwdriver. After being advised of his right to remain silent, to the presence of an attorney, and if indigent, to appointed counsel (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]), McCain told the officer he was offered $40 by a drug dealer to retrieve the VCR and handgun from Flores's residence, which the dealer claimed was collateral for a drug deal. McCain said the duffel was his and insisted he had not burglarized the residence. Flores later told the police he did not know McCain or the drug dealer and no one had permission to enter his home. Flores's duffel bag, the VCR, the 9-millimeter firearm and the black wool cap were missing from his residence.

McCain was charged with first degree burglary (§§ 459, 460) (count 1) and possession of a firearm by a felon (§ 12021, subd. (a)(1)) (count 2). The jury was unable to reach a verdict on the burglary charge but convicted McCain of unlawful possession of a firearm. The court found true the allegations McCain had suffered two prior serious or violent felony convictions within the meaning of the three strikes law.

At sentencing the court considered the probation report and McCain's lengthy history of misdemeanor and felony drug, assault and theft convictions (including two, then-recent attempted robbery convictions), as well as the report of a court-appointed psychiatrist who concluded McCain was not an incorrigible career criminal.[3] Defense counsel argued in

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[3] The psychiatrist noted McCain had no mental disorder but suffered from substance abuse. She described McCain as an "unsophisticated, immature, insecure, dependent and undisciplined man, whose episodes of poor judgment and insensitivity to the consequences of his behavior, accompanied by

mitigation McCain's attempted burglaries had not been violent offenses and occurred under the influence of drugs; moreover, the current offense involved no threat of harm to others. The prosecutor argued McCain was an impulsive thief and improvised tall tales rationalizing his misconduct whenever caught. After taking a recess to consider its sentence, the court declined to dismiss either of the prior three strike offenses and imposed an indeterminate sentence of 25 years to life. We affirmed the judgment in *McCain I.*

2. *The Instant Petition*

In February 2015 McCain petitioned for recall of his sentence and resentencing under Proposition 36, which amended the three strikes law to provide, in general, that a recidivist is not subject to an indeterminate life term for a third strike felony that is neither serious nor violent unless the offense satisfies other criteria identified in the statute. The amendments also allow inmates previously sentenced to indeterminate terms under the three strikes law to petition for recall of their sentences and resentencing to the term that would have been imposed for their crime had they been sentenced under the new sentencing provisions. (§ 1170.126, subd. (a); see *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1293.)

In opposing the petition, the People argued McCain was ineligible for Proposition 36 relief because he had been armed with a firearm during the commission of his current offense. The trial court agreed and denied the petition with prejudice.

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former drug abuse, have resulted in a record that significantly overrepresents his criminal tendencies."

DISCUSSION

1. *Governing Law*

Proposition 36 was intended to "[r]estore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime" and to permit "repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession [to] receive twice the normal sentence instead of a life sentence." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1.) As part of its goal of limiting indeterminate life sentences to serious or violent felony offenders, Proposition 36 added section 1170.126, which permits inmates previously sentenced to life terms under an earlier version of the three strikes law to petition to recall their sentences and, if eligible for relief, to be resentenced to the term that would have been imposed for their crime under the new sentencing provisions. (§ 1170.126, subd. (a).)

Eligibility for resentencing depends on several factors. An inmate will be denied resentencing if (1) the current offense was serious or violent; (2) the prosecution establishes one of the four disqualifying exceptions to resentencing under Proposition 36; or (3) the trial court determines, in its discretion, that resentencing the inmate would pose an unreasonable risk of danger to public safety. (§ 1170.126, subds. (e) & (f).) One of the disqualifying exceptions is 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." (§§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

Application of Proposition 36 to the undisputed facts presented here is a pure question of law, which we review de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71; *People v. Rizo* (2000) 233 Cal.4th 681, 685- 686.)

2. *McCain Was Armed with a Firearm Within the Meaning of Proposition 36*

As McCain acknowledges, ""[a]rmed with a firearm" [or weapon] has been statutorily defined and judicially construed to mean having a firearm [or weapon] available for use, either offensively or defensively.'" (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1109-1110; accord, *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*).) "'[I]t is the availability—the ready access—of the weapon that constitutes arming.'" (*People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*); accord, *Cruz,* at p. 1111; *Osuna,* at p. 1029.) Based on this principle, numerous courts have held that Proposition 36 disqualifies an inmate from being sentenced as a second strike offender if he or she was convicted of being a felon in possession of a firearm when the evidence showed the firearm was available for use either offensively or defensively. (*Cruz,* at p. 1112; *Osuna*, at p. 1034; *People v. Hicks* (2014) 231 Cal.App.4th 275, 279-280; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 794-795; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048-1053; *People v. White* (2014) 223 Cal.App.4th 512, 524.) As *Cruz* explained in differentiating firearm enhancements under section 12022, "Proposition 36 turns on whether the defendant was armed '[*d*]*uring the commission* of the current offense' (§ 1170.12, subd. (c)(2)(C)(iii)), which is different than a sentence enhancement for use of a weapon '*in the commission'* of the offense. (§ 12022, subd. (b)(1).) "'During" is variously defined as "throughout the continuance or course of" or "at some point in the course of."

[Citation.] In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one.'" (*Cruz,* at pp. 1111-1112; accord, *Osuna,* at p. 1032; *Hicks*, at p. 284.)

McCain urges us to reject these cases on the ground their reasoning is inconsistent with the structure and wording of section 1170.126. According to McCain, the words "during" and "in" are virtually interchangeable and relying solely on a questionable distinction between them vitiates Proposition 36's goal of limiting indeterminate life sentences to serious or violent felony offenders, especially when its drafters did not include possession of a firearm by a felon in the list of disqualifying offenses. As he points out, in *Bland, supra,* 10 Cal.4th 991, the case relied on by *Osuna* and its progeny, the Supreme Court explained that arming is found if the weapon is available for use at any time "during the commission" of the offense and one is armed "in the commission" of an offense if "at some point during" its commission the weapon is available for use. (*Bland,* at pp. 1001-1003.)

Bland, however, also cites *People v. Fierro* (1991) 1 Cal.4th 173, 225-226 for the proposition "the statutory language 'in the commission of a felony' mean[s] *any time during and in furtherance of the felony*" (*Bland, supra,* 10 Cal.4th at p. 1001), a phrase that appears to distinguish between the temporal aspect of "during" and the facilitative aspect of "in," as it relates to furtherance or commission. As one court explained, "[U]nlike section 12022, which requires that a defendant be armed '*in* the commission of' a felony for additional punishment to be imposed (italics added), [Proposition 36] disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a

firearm '[*d*]*uring* the commission of' the current offense (italics added). 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' [Citation.] Thus, there must be a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same." (*People v. Hicks, supra,* 231 Cal.App.4th at pp. 283-284; see also *People v. White* (2016) 243 Cal.App.4th 1354, 1363 ["'in the commission of a felony'" means "the arming not only must occur *during* the commission of the felony, but must also *facilitate* it"].)

McCain counters that the drafters must have intended to tether the term "armed"—even if it means simply having a firearm available for use—to an underlying offense. Stripped of the other disqualifying circumstances (use of a firearm and intent to cause great bodily injury), sections 667, subd. (e)(2)(C)(iii), and 1170.12, subdivision (c)(2)(C)(iii), provide, "During the commission of the current offense, the defendant . . . was armed with a firearm . . . ." Reading both phrases together, McCain argues, a finding a defendant was armed can only be made when the defendant is engaged in the commission of another offense; possession of the firearm alone is not enough. (See *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037 ["'"Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible.' [Citation.] Interpretations that lead to absurd results or render words surplusage are to be avoided."'"].)

In rejecting this argument, the *Osuna* court observed, "Following this reasoning, defendant was armed with a firearm *during* his possession of the gun, but not 'in the commission' of his crime of possession. There was no facilitative nexus; his having

the firearm available for use did not further his illegal possession of it. There was, however, a temporal nexus. Since [Proposition 36] uses the phrase '[d]uring the commission of the current offense,' and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, . . . the literal language . . . disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm." (*Osuna, supra,* 225 Cal.App.4th at p. 1032.)

The critical issue for our purposes is that every court to have considered this question has, like *Cruz, Osuna, Hicks* and *White*, concluded the temporal/facilitative distinction is material and has adopted *Bland*'s position that the availability of the weapon determines whether the defendant was armed for purposes of eligibility under section 1170.126. While we sympathize with McCain's situation and think it likely he is not the hard-core recidivist targeted by the three strikes law, the trial court did not err in finding he was ineligible for resentencing under Proposition 36 because he was armed at the time he was arrested.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

BENSINGER, J.*

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