Filed 5/3/16 P. v. Mixon CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DAVID MIXON, Defendant and Appellant.	B262798 (Los Angeles County Super. Ct. No. TA056430)

APPEAL from an order 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.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant David Mixon appeals from an order dismissing his petition to recall his sentence and for resentencing under Proposition 36, the Three Strikes Reform Act of 2012. (Pen. Code, § 1170.126.)[1] The order is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of the current offense are taken from our prior unpublished opinion. (*People v. Mixon* (July 10, 2002, B148874).)

"Shortly before 8:00 p.m. on June 8, 2000, Juan Juarez heard noise in front of his house on West Cherry Street in Compton, and went outside to see what was going on. He saw a man, later identified as defendant David Mixon, walking past his house. The man was carrying a large gun which looked like a rifle.

"Police officers arrived at that location in response to a 'man with a gun' call. The arriving officers heard a gunshot from behind the house, and detained a man who came running from the rear yard of the residence. The officers heard additional gunshots from the rear of the property, and saw defendant rattling a security screen on one of the garage windows. Defendant was holding a military assault type rifle.

"Officer Carl Smith identified himself as a police officer and ordered defendant to drop the rifle. Defendant paused, then turned toward Smith and pointed the rifle toward him. Officer Smith fired once at defendant. At the same time, Officer Michael Vasquez fired five to seven rounds. Defendant turned and ran down the driveway toward the street. Three other officers fired toward him. Defendant, who was wounded in the left shoulder, dropped the weapon and stumbled to the ground. An AK-47 assault weapon was found on the ground next to him. He was taken into custody and transported to the hospital. Police officers found three other individuals in the garage.

"Defendant was charged with attempted murder, assault by machine gun or assault weapon, possession of a firearm by a felon, assault with a deadly weapon on a peace officer, discharge of a firearm with gross negligence, and exhibiting a firearm in the

---

[1] All further undesignated statutory references are to the Penal Code.

[presence] of an officer. It was alleged that defendant personally used a firearm, and that he suffered two prior convictions within the meaning of the Three Strikes law.

"Defendant was convicted by jury trial of possession of a firearm by a felon, and acquitted on all other counts. The trial court found two prior convictions to be strikes, denied defendant's motion to dismiss one or more of the strikes, and sentenced him to 25 years to life." Defendant appealed. This court affirmed the conviction in 2002. (*People v. Mixon*, *supra*, B148874.)

In November 2012, the voters adopted Proposition 36, which amended the Three Strikes law by limiting the imposition of an indeterminate life sentence to those defendants whose third felony is defined as serious or violent under sections 667.5 or 1192.7. The initiative allowed those serving a life sentence for a third felony that is not defined by those sections as serious or violent to petition for a recall of sentence and request resentencing. (§ 1170.126, subd. (b).)

Defendant filed a petition to recall his sentence and for resentencing. The trial court found he had made a prima facie showing of eligibility, and issued an order to show cause as to why the petition should not be granted.

The People argued that he was ineligible for resentencing because he was armed with a firearm when he committed the current offense: possession of a firearm by a felon (former § 12021, subd. (a)(1), presently found at § 29800, subd. (a)). In support of this contention, the People submitted our prior opinion and the trial transcript from the B148874 appeal. The trial court denied the petition, finding defendant ineligible because he was armed with a weapon that "was readily available for offensive and defense use," and "was in fact used offensively, although he was not convicted on that count." This timely appeal followed.

DISCUSSION

A defendant is ineligible for resentencing under Proposition 36 if his or her current sentence was "imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to

(iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(2).) This means that an inmate is not eligible for resentencing under the initiative 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." (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).)

The phrase "armed 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].)" (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*).) Defendant contends the disqualifying factor of being armed with a firearm does not apply to gun possession crimes, but, instead, the disqualification applies only "when the arming is an element of the offense." He asserts that for the disqualifying factor to apply, there must be an underlying felony to which the arming is tethered, and because a firearm possession offense has no underlying felony, he was not armed during the commission of the current offense.

Several appellate courts have rejected this argument. In *People v. Hicks* (2014) 231 Cal.App.4th 275, for example, the defendant (Hicks) received a third strike sentence of 25 years to life for possession of a firearm by a felon. (*Id.* at p. 279.) The trial court denied Hicks's petition for resentencing under Proposition 36, based on language in its prior appellate opinion which indicated he was armed with the firearm that he unlawfully possessed. On appeal, Hicks argued that "there must be an underlying felony to which the arming is 'tethered.'" (*Id.* at p. 283.) The appellate court disagreed, concluding that only a "temporal nexus" between the arming and the firearm possession violation is necessary to render him ineligible for resentencing.[2] (*Id.* at p. 284; see also *People v.*

[2] The Supreme Court recently granted review in *People v. Estrada* (2015) 243 Cal.App.4th 336, review granted, April 13, 2016, S232114, which cited *Hicks* for the proposition that an appellate court may rely on a prior appellate opinion in determining

Brimmer (2014) 230 Cal.App.4th 782, 796–797 [“armed with a firearm” means having firearm available for offensive or defensive use]; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1317 [prior appellate opinion showed defendant was armed during unlawful possession of firearm]; *People v. White* (2014) 223 Cal.App.4th 512, 525–526 [same].)

Osuna is similar. (*Osuna*, *supra*, 225 Cal.App.4th 1020.) In that case, the trial court denied the defendant’s petition for resentencing on his present offense, possession of a firearm by a felon in violation of former section 12021, subdivision (a). (*Id.* at p. 1028.) On appeal defendant argued it is possible to violate section 12021 without being armed; “one cannot be armed with a firearm during the commission of possession of the same firearm” (*id.* at p. 1030); and section 12021 is not among the disqualifying offenses listed in section 667, subdivision (e)(2)(C)(i) through (iii) or section 1170.12, subdivision (c)(2)(C)(i) through (iii). (*Id.*, at 1033.)

Finding the terms of Proposition 36 were ambiguous, the *Osuna* court relied upon official ballot pamphlet statements and other election materials to ascertain the intent of the voters. (*Osuna*, *supra*, 225 Cal.App.4th at pp. 1034–1035.) These materials showed the 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.” (*Id.* at p. 1036.)

Although “[h]aving a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon,” the court in *Osuna* found the lack of ‘“facilitative nexus”’ between the arming and the possession of a firearm to be irrelevant to the eligibility determination for resentencing under the Act. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032.) The court held that as long as a “temporal nexus” exists between the arming and the possession, the defendant is disqualified from resentencing

---

that the defendant was armed when he committed the offense, even though the arming enhancement had not been pleaded or proven. (243 Cal.App.4th at p. 342.)

under the Act. (*Ibid.* [lack of facilitative nexus irrelevant because "[a]ct uses the phrase '[d]uring the commission of the current offense,' and not in the commission of the current offense"].)

Thus, "the Act 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 court reasoned that "[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.' [Citation.] [¶] In light of the clear evidence of voters' intent, we reject the claims that disqualification for resentencing under Proposition 36 requires an underlying offense or enhancement to have been pled and proved, and that a conviction for possession of a firearm cannot constitute being 'armed' with a firearm for eligibility purposes. We further conclude disqualifying factors need not be proven to a jury beyond a reasonable doubt where eligibility for resentencing under section 1170.126 is concerned." (*Id.* at p. 1038; but see *People v. Arevalo* (2016) 244 Cal.App.4th 836, 853 [proof beyond a reasonable doubt required for finding of ineligibility based on "arming" factor].)

We agree with *Osuna's* analysis and holding, which is consistent with the Voter Information Guide for Proposition 36. (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) analysis by Legislative Analyst, at p. 48.) The information guide explained in relevant part that the Act "[c]ontinues to impose life sentence penalty if third strike conviction was for certain nonserious, non-violent sex or drug offenses or involved *firearm possession.*" (Italics added.)

The trial court's finding that defendant was armed with the firearm that he possessed in violation of former section 12021, subdivision (a) is based on the trial transcript and our prior opinion in *People v. Mixon, supra,* B148874. (See *People v. Elder, supra,* 227 Cal.App.4th at p. 1317 [prior appellate opinion showed arming ineligibility factor applied]; cf. *People v. Estrada, supra,* 243 Cal.App.4th at 342, review

granted, April 13, 2016, S232114 [appellate court may rely on prior appellate opinion in determining arming ineligibility factor].) We find no error in the court's finding of ineligibility.

DISPOSITION

The order denying the petition for resentencing is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.