Filed 12/29/16 P. v. Robinson 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. RONNIE VON ROBINSON, Defendant and Appellant.	B277125 (Los Angeles County Super. Ct. No. BA175416)

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.

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

Appellant Ronnie Von Robinson challenges the trial court's denial of his petition for recall pursuant to Proposition 36 of his indeterminate life sentence. The trial court found that he was ineligible for resentencing because he was armed during the commission of his current offense. (See Pen. Code, §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii).)[1] Von Robinson contends that his conviction for possession of a firearm by a felon does not bar him from relief under Proposition 36. We disagree and affirm.

FACTS AND PROCEEDINGS BELOW

In 1999, a jury found Von Robinson guilty of possession of a firearm by a felon, in violation of former section 12021, subdivision (a)(1).[2] The trial court found that Von Robinson had three prior strike convictions, as defined in sections 667, subdivisions (b) through (i), and 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 February 15, 2013, Von Robinson filed a petition for recall of his sentence pursuant to this provision.

The district attorney opposed Von Robinson's petition on the grounds that he was ineligible for relief because he was armed during the commission of his offense (see §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii)).

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

[2] In 2010, the Legislature repealed section 12021 and replaced it without relevant changes with section 29800.

The trial transcript establishes that on October 3, 1998, two police officers on patrol were approached by a civilian, who gave the officers a description of an individual with a gun. The officers searched the area and found Von Robinson, who matched the description of the man with the gun. The officers detained Von Robinson, searched him, and retrieved a semi-automatic handgun from Von Robinson's right front pocket. The officers unloaded the gun and determined that it had a live round in the chamber and live rounds in the magazine.

The trial court, after considering the materials submitted by both sides, determined that Von Robinson 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 by subdivision (c) of [s]ection 667.5 or subdivision (c) of [s]ection 1192.7, may file a petition for a recall of sentence." (*Id.*, subd. (b).) Subdivision (e)(2) of section 1170.126 creates an exception, such that an inmate serving a sentence for an offense described in section 667, subdivision (e)(2)(C) is 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)).)

The offense for which Von Robinson is currently imprisoned, possession of a firearm by a felon, is not defined as a serious or violent felony. (See §§ 667.5, subd. (c), 1192.7, subd. (c).) Nevertheless, the trial court found Von Robinson ineligible for resentencing under section 1170.126 on the ground that he was armed with a firearm during the commission of this offense.

A person is "armed with a firearm" if he has "a firearm available for use, either offensively or defensively." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*); accord *People v. Brimmer* (2014) 230 Cal.App.4th 782, 794 (*Brimmer*); *People v. White* (2014) 223 Cal.App.4th 512, 524.) The record demonstrates beyond a reasonable doubt that Von Robinson was armed when he committed this offense.

Von Robinson argues that this does not preclude him from eligibility for resentencing. He contends 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." Von Robinson correctly 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 Von Robinson, 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 Von Robinson's analysis is correct, it does not follow that he was therefore eligible for relief under Proposition 36. At the time Von Robinson 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." This statute did not include 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 felon 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 offense for which Von Robinson 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* 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.' " (*Osuna*, *supra*, 225 Cal.App.4th at p. 1038.)

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 Von Robinson's petition for recall of his sentence.

DISPOSITION

The order of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.