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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LAMARR PLEDGER,

Defendant and Appellant.

B280130

(Los Angeles County
Super. Ct. No. PA032224)

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.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant James L. Pledger appeals from an order denying his petition under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126),¹ for recall of his sentence imposed for conviction of possession of a firearm by a felon. Pledger contends a defendant is ineligible for resentencing under Proposition 36 for being “armed with a firearm” during the commission of an offense only if the arming is tethered to an offense other than possession of a firearm by a felon. He also contends a defendant is disqualified from resentencing only where there is a “facilitative nexus” between his possession of a firearm and the underlying offense. Finally, Pledger contends the superior court erred in requiring the prosecutor to prove Pledger’s ineligibility for resentencing under Proposition 36 by a preponderance of the evidence, instead of beyond a reasonable doubt.

We conclude the exception to Proposition 36 eligibility for a defendant armed during commission of an offense applies to the underlying offense of possession of a firearm by a felon. A defendant is ineligible for resentencing if the firearm was available for offensive or defensive use by the defendant. Further, a facilitative nexus between the defendant’s possession of the firearm and the crime of possession of a firearm by a felon is not required for a defendant to fall within the exception to eligibility. Although we conclude the superior court erred in requiring the prosecutor to prove Pledger’s ineligibility by a preponderance of the evidence, the error was harmless. We affirm.

¹ All further statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Evidence at Trial*

During the early morning hours on December 19, 1998, Pledger and a second man entered a liquor store in San Fernando. Pledger approached the cash register to purchase beer and beef jerky. The owner observed the wooden handle and hammer of a revolver in Pledger's coat pocket. The owner was afraid the men planned to rob him and hit a silent alarm. The two men made a purchase and left the store. (*People v. Pledger* (Dec. 19, 2000, B135661) [nonpub. opn.] (*Pledger I*).)

The police responded and detained Pledger several blocks from the liquor store. Pledger had ammunition in his pants pocket. The police found a loaded revolver in a trash can located 252 feet from the liquor store on Pledger's path between the store and the location where he was detained. The bullets found in Pledger's pocket were of the same caliber and brand as those loaded in the revolver. (*Pledger I, supra*, B135661.)

B. *Jury Verdict and Sentencing*

A jury convicted Pledger of possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)). The jury found true the allegation Pledger suffered three prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12). (*Pledger I, supra*, B135661.) The three prior convictions included two convictions for assault with a firearm (§ 245, subd. (a)(2)) and one conviction for robbery (§ 211). The court sentenced Pledger to 26 years to life, including 25 years to life for possession of a firearm by a felon, calculated as a third strike under the three strikes

law, plus one year for a prior prison term within the meaning of section 667.5, subdivision (b). (*Pledger I, supra*, B135661.)

C. *Pledger's Petition for Recall of Sentence*

On February 13, 2013 Pledger filed a petition for recall of sentence under Proposition 36. He argued that possession of a firearm by a felon is no longer a serious or violent felony within the meaning of the three strikes law (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1)), and that none of his prior serious or violent felony convictions disqualified him from having his sentence recalled (§ 1170.126, subd. (e)(3); see §§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv)). The superior court issued an order to show cause why his sentence should not be recalled.

The People filed an opposition to the petition, asserting Pledger was ineligible for resentencing under section 1170.126, subdivision (e)(2), because “[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or deadly weapon” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) The People also argued that Pledger was unsuitable for resentencing given the nature of his prior offenses. In his reply, Pledger asserted that his possession of a firearm, absent a facilitative nexus to a separate offense, did not render him ineligible for resentencing.

The superior court held a hearing on Pledger’s eligibility for resentencing on January 9, 2017. The superior court relied on this court’s opinion on Pledger’s appeal as containing “adjudicated fact[s],” and denied the petition. The superior court found by a preponderance of the evidence that Pledger was statutorily ineligible for recall and resentencing because he was armed with a firearm during the commission of the offense.

DISCUSSION

A. *The Three Strikes Reform Act of 2012 (Proposition 36)*

Prior to approval of Proposition 36, the three strikes law provided that defendants who committed a felony and had two or more prior convictions for serious or violent felonies were to be sentenced to an indeterminate term of life imprisonment with a minimum term of at least 25 years. (Former § 1170.12, subds. (b), (c)(2)(A); *People v. Perez* (2018) 4 Cal.5th 1055, 1061-1062 (*Perez*); *People v. Estrada* (2017) 3 Cal.5th 661, 666-667 (*Estrada*).)

“Following enactment of Proposition 36, defendants are now subject to a lesser sentence when they have two or more prior strikes and are convicted of a felony that is neither serious nor violent, unless an exception applies.” (*Estrada, supra*, 3 Cal.5th at p. 667.) A defendant falls within one of the exceptions to eligibility 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).)

Proposition 36 applies both prospectively and retroactively to defendants who were previously sentenced under the three strikes law. (*Estrada, supra*, 3 Cal.5th at p. 667.) “For those sentenced under the scheme previously in force, [Proposition 36] establishes procedures for convicted individuals to seek resentencing in accordance with the new sentencing rules. (§ 1170.126.) The procedures call for two determinations. First, an inmate must be eligible for resentencing. (§ 1170.126, subd.

(e)(2).) An inmate is eligible for resentencing if his or her current sentence was not imposed for a violent or serious felony *and* was not imposed for any of the offenses described in clauses (i) to (iv) of section 1170.12, subdivision (c)(2)(C). (§ 1170.126, subd. (e)(2).) Those clauses describe certain kinds of criminal conduct, including the use of a firearm during the commission of the offense. Second, an inmate must be suitable for resentencing.” (*Estrada*, at p. 667.)

Because the Supreme Court has issued three opinions relating to a finding of ineligibility for resentencing under Proposition 36 based on the defendant having been armed with a firearm or deadly weapon during the commission of the current offense, we invited the parties to submit supplemental briefing addressing the Supreme Court’s decisions in *Perez*, *Estrada*, and *People v. Frierson* (2017) 4 Cal.5th 225, 230, 236 (*Frierson*).² We address these decisions below.

B. *The Exception to Eligibility for Resentencing Under Proposition 36 for a Defendant Armed with a Firearm During Commission of an Offense Applies to a Conviction of Possession of a Firearm by a Felon Where the Defendant Has the Firearm Available for Use, Either Offensively or Defensively*

A defendant is ineligible for resentencing if “[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or deadly weapon” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see § 1170.126, subd. (e)(2).) “[A]rmed with a firearm” [or weapon] has been

² Both Pledger and the People have submitted supplemental letter briefs.

statutorily defined and judicially construed to mean having a firearm [or weapon] available for use, either offensively or defensively. [Citations.]’ [Citation.] It is the availability of and ready access to the weapon that constitutes arming.” (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1109-1110 (*Cruz*); accord, *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*) [“A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively.”]; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*) [same], disapproved on another ground in *People v. Frierson*, *supra*, 4 Cal.5th at p. 240, fn. 8.)³

Pledger contends a defendant is not disqualified from resentencing for a conviction of possession of a firearm by a felon under former section 12021, subdivision (a), unless the defendant was armed with a firearm during commission of “*another* offense to which the arming attaches.” We disagree. Every appellate court that has considered resentencing under Proposition 36 for a conviction of possession of a firearm by a felon under former section 12021, subdivision (a), has rejected this argument. (See *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284 [affirming denial of resentencing petition for conviction of former § 12021, subd. (a), rejecting defendant’s argument that “there must be an underlying felony to which the arming is ‘tethered’”]; *Osuna*, *supra*, 225 Cal.App.4th at pp. 1029-1030 [rejecting argument that a defendant is only disqualified from resentencing for a

³ As we discuss below, the Supreme Court in *Frierson* concluded that the People must plead and prove the defendant is ineligible for resentencing under Proposition 36 beyond a reasonable doubt, disapproving the holding in *Osuna* that a preponderance of the evidence standard applies.

conviction of former § 12021, subd. (a), if there is “an underlying felony to which the firearm possession is ‘tethered’”]; see also *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458 [a defendant is disqualified from resentencing under Prop. 36 for conviction of former § 12021, subd. (a), “if he or she had the firearm available for offensive or defensive use”]; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797 [defendant was ineligible for resentencing for conviction of former § 12021, subd. (a), where “the record . . . demonstrates that defendant was in actual physical possession of the shotgun, and therefore armed with a firearm during the commission of his possessory offenses”]; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1054 [“the phrase ‘[d]uring the commission of the current offense, the defendant . . . was armed with a firearm . . . ,’ . . . extends to situations in which the defendant was convicted of violating [former] section 12021 *if* the defendant had the firearm he or she was convicted of possessing available for use, either offensively or defensively”]; *People v. White* (2014) 223 Cal.App.4th 512, 524 [affirming denial of resentencing petition for conviction of former § 12021, subd. (a), where “the record of conviction establishes that [defendant’s] life sentence was imposed because he was in physical possession of a firearm when the police officers approached him”].)

Pledger argues that if the electorate intended to make defendants convicted of possession of a firearm by a felon ineligible for resentencing under Proposition 36, it would have listed former section 12021, subdivision (a), as an excluded offense under section 1170.126, subdivision (e)(2), but did not do so. But a defendant can be convicted of possession of a firearm based on constructive possession of the firearm where the firearm is under the person’s dominion and control, even though it is not

available for use. (*People v. Blakely, supra*, 225 Cal.App.4th at p. 1052; *Osuna, supra*, 225 Cal.App.4th at p. 1030.)

As the court in *Osuna* observed, “A firearm 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.” (*Osuna, supra*, 225 Cal.App.4th at p. 1030.) In *Osuna*, there was evidence that the defendant was holding a handgun when apprehended by the police. “Thus, factually he was ‘armed with a firearm’ within the meaning of [Proposition 36.]” (*Osuna*, at p. 1030.)

As our colleagues in *Osuna* concluded, “In light of the clear evidence of voters’ intent, we reject the claim[] that disqualification for resentencing under Proposition 36 requires . . . that a conviction for possession of a firearm cannot constitute being ‘armed’ with a firearm for eligibility purposes.” (*Osuna, supra*, 225 Cal.App.4th at p. 1038.)

Pledger alternatively contends that a defendant is disqualified from resentencing under Proposition 36 only if there is a facilitative nexus between the arming and commission of the underlying offense. He cites the Supreme Court’s holding in *Bland* that for the purpose of imposition of the firearm sentence enhancement under former section 12022, subdivision (a), there must be a “facilitative nexus” between the arming with a firearm

and “some purpose or effect with respect to the drug trafficking crime” (*Bland, supra*, 10 Cal.4th at p. 1002.)

However, the Supreme Court in *Estrada* rejected the argument that this facilitative nexus requirement applies to resentencing under Proposition 36, explaining, “What is more, section 1170.12, subdivision (c)(2)(C)(iii) provides only one express nexus requirement between these general descriptive terms and the inmate’s prior offense: the excluding conduct 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. Although the need to establish such a nexus imposes certain limits on the applicability of the firearm-related exception, [Proposition 36] could certainly have imposed an even stricter requirement for triggering the exception. (See [*Bland, supra*,] 10 Cal.4th [at p.] 1002 [interpreting the phrase “in the commission” to impose a “facilitative nexus” requirement].) Because [Proposition 36] does not do so, we may infer some kind of temporal limitation on the retroactive application of section 1170.12, subdivision (c)(2)(C)(iii).” (*Estrada, supra*, 3 Cal.5th at p. 670; accord, *Cruz, supra*, 15 Cal.App.5th at pp. 1111-1112 [Proposition 36 ineligibility “requires a temporal nexus between the arming and the underlying felony, not a facilitative one”]; *Osuna, supra*, 225 Cal.App.4th at p. 1032 [same].)

C. *The Trial Court Erred in Using a Preponderance of the Evidence Standard, But the Error Was Harmless*

The trial court used a preponderance of the evidence standard in finding that Pledger was ineligible for resentencing under Proposition 36. The Supreme Court has since clarified “that Proposition 36 permits a trial court to find a defendant was armed with a deadly weapon and is therefore ineligible for resentencing only if the prosecutor proves this basis for ineligibility beyond a reasonable doubt.” (*Perez, supra*, 4 Cal.5th at p. 1059; accord, *Frierson, supra*, 4 Cal.5th at pp. 230, 236.)

The People concede that the superior court improperly applied a preponderance of the evidence standard, but contend the error was harmless because the evidence at trial established beyond a reasonable doubt that Pledger was armed with a firearm during the commission of his current offense. We agree. The superior court’s error in requiring the prosecutor to prove ineligibility by a preponderance of the evidence standard only requires reversal where there is no reasonable probability of a more favorable result had the superior court applied the correct standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Johnson* (2016) 1 Cal.App.5th 953, 968 [applying *Watson* harmless error standard to trial court’s error in determining eligibility for resentencing under Prop. 47]; cf. *Frierson, supra*, 4 Cal.5th at p. 240 [reversing the judgment and remanding to the superior court for consideration of the defendant’s petition for recall of sentence under the correct standard of proof].)

Pledger does not dispute that he had a loaded handgun in his pocket when he was in the liquor store. Thus, Pledger was armed with a firearm during the commission of the crime because he had “the specified weapon available for use, either offensively

or defensively.” (*Bland, supra*, 10 Cal.4th at p. 997; accord, *Cruz, supra*, 15 Cal.App.5th at pp. 1109-1110.) We conclude on these undisputed facts there is no reasonable probability of a different result had the trial court applied the stricter beyond a reasonable doubt standard of proof. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

DISPOSITION

The order is affirmed.

FEUER, J.

We concur:

ZELON, Acting P. J.

SEGAL, J.