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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR CONTRERAS,

Defendant and Appellant.

B265428

(Los Angeles County Super. Ct.
No. KA042578)

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

California Appellate Project, Jonathan B. Steiner, Executive Director, Richard B. Lennon, Staff Attorney, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Noah P. Hill, Deputy Attorney General, for Plaintiff and Respondent.

Edgar Contreras was sentenced to state prison in 1999 for a term of 27 years to life pursuant to the three strikes law (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i))¹ based on his commitment offense of felon in possession of a firearm (§ 12021, subd. (a)), and findings that he had suffered three serious felony convictions of first degree burglary (§ 459) and served two prior prison terms (§ 667.5, subd. (b)). In March 2013, Contreras filed a petition for recall of sentence pursuant to The Three Strikes Reform Act of 2012 (Proposition 36) and section 1170.126. The superior court denied the petition on the basis that Contreras was armed with a firearm in the commission of his commitment offense, a circumstance that disqualifies Contreras from relief under the ameliorative provisions of Proposition 36.

Contreras argues that relief may not be denied on the basis that he was armed with a firearm because being armed is an element of his commitment offense of possession of a firearm by a felon. As Contreras interprets Proposition 36, being armed “must attach to the current offense as an addition and not just be an element of the current offense.” As Contreras candidly recognizes, the case law is contrary to his interpretation.

The issue is one of statutory construction. “‘Thus, the first step in statutory construction is to examine the statutory language and give it a plain and commonsense meaning.’ (*People v. Verduzco* (2012) 210 Cal.App.4th 1406, 1414.) In other words, ‘[w]e must give the statutory provisions at issue a reasonable and common sense interpretation, consistent with the apparent purpose and intention of the Legislature. If possible, we will give significance to the plain meaning of every word, phrase, and sentence of a statute in pursuance of the legislative purpose, harmonizing the various parts of an enactment by considering each particular clause or section in the context of the statutory framework as a whole. In this process, we must take into account the context, object, and history of the legislation, as well as public policy and contemporaneous construction in our attempt to arrive at a construction that is practical

¹ All statutory references are to the Penal Code, unless otherwise indicated.

rather than technical in nature. [Citations.]’ (*In re Rochelle B.* (1996) 49 Cal.App.4th 1212, 1216; see *People v. Zambia* (2011) 51 Cal.4th 965, 972.)” (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 790-791 (*Brimmer*).)

“On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012 (Reform Act), which amended Penal Code sections 667 and 1170.12 and added section 1170.126. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167 [].) Under the ‘Three Strikes’ law (§§ 667, subds. (b)-(i), 1170.12) as it existed prior to Proposition 36, a defendant convicted of two prior serious or violent felonies was subject as a third strike offender to a sentence of 25 years to life upon conviction of *any* third felony. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1285 (*Kaulick*).) Now, under the *prospective* provisions of the Reform Act (set forth in §§ 667, 1170.12), a defendant convicted of two prior serious or violent felonies is subject to the 25-year-to-life sentence only if the current third felony is a *serious or violent* felony. (*Kaulick*, [*supra*,] at pp. 1285-1286, 1292-1293.) Thus, if the third felony is not a serious or violent felony and none of four enumerated disqualifying exceptions or exclusions applies, the defendant will be sentenced as a second strike offender. (*Id.* at pp. 1286, 1293.)” (*People v. White* (2014) 223 Cal.App.4th 512, 517 (*White*), fn. omitted.)

“The Act makes ineligible for resentencing those persons who ‘[d]uring the commission of the current offense, the defendant used a firearm, [or] was armed with a firearm’ (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii); see § 1170.126, subd. (e).)” (*Brimmer, supra*, 230 Cal.App.4th at pp. 788-789.) “Where, as here, the record shows that a defendant convicted of possession of a firearm was armed with the firearm during the commission of that offense, the armed with a firearm exclusion applies and the defendant is not entitled to resentencing relief under the Act.” (*Id.* at p. 797; accord *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030 (*Osuna*) [defendant “actually holding a handgun” was “armed with a firearm” and ineligible for relief under Proposition 36 when applied to conviction of felon in possession of a firearm]; *White, supra*, 223 Cal.App.4th at p. 527 [the armed with a firearm exclusion of Proposition 36

applies to a defendant convicted of possession of a firearm by a felon when the defendant was armed with the firearm during the commission of that offense].)

Here, in determining that Contreras was armed with a firearm, the superior court considered portions of the reporter's transcript from Contreras's trial and this court's opinion affirming the conviction on appeal. It is appropriate for the court to consider the trial record and appellate decision in determining if a petitioner for recall of sentence under Proposition 36 is ineligible for relief on the basis the petitioner was armed with a firearm in the commitment offense. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1317; *Osuna, supra*, 225 Cal.App.4th at p. 1030.) The reporter's transcript of the trial testimony of two police officers established that Contreras was arrested for possession of a semiautomatic .380 pistol which was secreted in his waistband. Our opinion on appeal recited the same fact and additionally included a reference to defendant's trial testimony, in which defendant admitted finding the firearm and intending to "turn it in," but he was arrested before he could do so.

It is uncontroverted that Contreras was in possession of a firearm at the time of his commitment offense. The superior court properly denied his petition to recall the three strikes sentence. (*Brimmer, supra*, 230 Cal.App.4th at pp. 788-789; *Osuna, supra*, 225 Cal.App.4th at p. 1030; *White, supra*, 223 Cal.App.4th at p. 527.)

DISPOSITION

The order denying the petition is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.