Filed 12/14/18 P. v. Patton CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. PERRELL C. PATTON, Defendant and Appellant.	B285164 (Los Angeles County Super. Ct. No. YA048679)

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

Cynthia Grimm, 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, Rama R. Maline and Paul Thies, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendant and appellant Perrell C. Patton appeals from two postjudgment orders: the April 18, 2017 denial of his amended petition to recall sentence pursuant to Penal Code section 1170.126, and the July 21, 2017 denial of his second petition to recall sentence pursuant to Penal Code section 1170.18.

We affirm both orders.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2001, defendant was charged by information with four felonies: carjacking (Pen. Code, § 215, subd. (a); count 1), attempted kidnapping for carjacking (Pen. Code, § 209.5, subd. (a), § 664; count 2), evading an officer (Veh. Code, § 2800.2, subd. (a); count 3), and possession of a controlled substance, cocaine base (Health & Saf. Code, § 11350, subd. (a); count 4). It was further alleged as to count 1 that defendant used a dangerous and deadly weapon, a pellet gun, in the commission of the offense (Pen. Code, § 12022, subd. (b)(2)). It was also alleged defendant had suffered two prior prison terms and two prior convictions for serious or violent felonies within the meaning of the "Three Strikes" law.

The jury convicted defendant on all four counts and found true the allegation that defendant used a deadly weapon in the commission of the carjacking count. The jury also found true the allegation that defendant had suffered two prior violent or serious felonies within the meaning of the Three Strikes law (first degree burglary and bank robbery).

The court sentenced defendant, as a third-strike offender, to an aggregate state prison term of 87 years to life, calculated as follows: 25 years to life on count 1 (carjacking), the base term (Pen. Code, § 1170.12, subd. (c)), plus a consecutive two-year term

for the deadly weapon enhancement (§ 12022, subd. (b)), and two consecutive five-year terms for the two prior strikes (§ 667, subd. (a)(1)); a consecutive 25-years-to-life term on count 3 (felony evading); and a consecutive 25-years-to-life term on count 4 (felony possession). The court imposed and stayed, pursuant to section 654, a 25-years-to-life term on count 2 (attempted kidnapping for carjacking).

In July 2003, this division, in an unpublished decision, affirmed defendant's conviction. (*People v. Patton* (July 8, 2003, B158343).)[1] The factual summary stated the following.

"Audra Jackson went to a gas station to buy gas. After filling her tank but before she stepped back into her car, [defendant] approached her. Holding a pellet gun, he opened her car's front passenger door and ordered her to get in. Afraid, Jackson refused and instead backed away from her car and threw her purse and car keys at [defendant]. While [defendant] rummaged through her purse, Jackson sought help from a married couple standing nearby who offered her refuge in the cab of their pickup truck. After a few minutes, [defendant] drove away in Jackson's car. The couple then took Jackson home, from where she called the police. [¶] The police took a description of [defendant] and within the hour spotted him driving Jackson's car. When [defendant] saw the police, he fled at high speed, driving more than 70 mph in a 35 mph zone while swerving in and out of traffic and running red lights. Eventually, he crashed into a telephone pole and police arrested him. While searching

---

[1] Defendant also filed two petitions for habeas corpus challenging his conviction, both of which were denied (B173311, den. Apr. 7, 2004; B249806, den. July 31, 2013).

the car, they found three pieces of rock cocaine under the driver's seat." (*People v. Patton*, *supra*, B158343.)

Further, the officers involved in the pursuit and detention of defendant found the .22-caliber pellet gun during their search of the car, along with the victim's purse, "[r]ight under the driver's side seat towards the rear."

1. The Proposition 36 Petitions

In 2012, California voters passed Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126; hereafter Proposition 36). (*People v. Johnson* (2015) 61 Cal.4th 674, 679 (*Johnson*).) Proposition 36 authorizes defendants serving third strike sentences that involve current offenses that were not serious or violent felonies to petition for recall of sentence and request resentencing. (*Johnson,* at pp. 679-680; accord, *People v. Estrada* (2017) 3 Cal.5th 661, 667 (*Estrada*).)

After passage of Proposition 36, defendant filed a petition for recall of his sentence that sought resentencing on count 3 (felony evasion) and count 4 (felony possession). On August 7, 2014, the trial court denied defendant's petition, concluding that because one of defendant's current offenses (carjacking) was a violent or serious felony, he was statutorily ineligible for relief. Defendant timely appealed the denial.

During the pendency of that prior appeal, the Supreme Court issued its decision in *Johnson*, *supra*, 61 Cal.4th 674 which held that a defendant may seek to establish his eligibility for "resentencing with respect to a current offense that is neither serious nor violent despite the presence of another current offense that is serious or violent." (*Id.* at p. 695.) This court reversed the trial court's denial of defendant's first Proposition 36 petition, and directed the trial court to conduct further

proceedings on defendant's petition in accordance with *Johnson*. (*People v. Patton* (Aug. 20, 2015, B258914) [nonpub. opn.].)

After issuance of the remittitur, defendant filed an amended Proposition 36 petition seeking recall of his sentence only on count 3 (felony evasion). The trial court ordered briefing and held an eligibility hearing in April 2017. At the time of the hearing, there was a split of authority as to the appropriate standard of proof to apply to the eligibility determination. During argument, defendant urged the court to apply the beyond a reasonable doubt standard. The court took the matter under submission.

On April 18, 2017, the trial court denied defendant's amended petition. Following the cases that had applied a preponderance standard to the eligibility determination, the trial court concluded defendant was ineligible for relief under Proposition 36 because he had been armed with the pellet gun at the time he was apprehended by the police. "[Defendant] could have easily reached back and retrieved the gun to threaten or harm police officers. Therefore, [defendant] was armed with the pellet gun, a deadly weapon, in the commission of the offense, evading a police officer."

Defendant appealed the April 18, 2017 denial of his amended Proposition 36 petition.[2]

2. The Proposition 47 Petitions

Two years after the passage of Proposition 36, California voters approved Proposition 47, the Safe Neighborhoods and Schools Act, which became effective November 5, 2014 (Pen.

---

[2] We granted defendant's motion for relief from default for failing to timely appeal the April 18, 2017 order.

Code, § 1170.18; hereafter Proposition 47). "Proposition 47 reduced certain drug-related and theft-related offenses that previously were felonies or 'wobblers' to misdemeanors." (*People v. Valencia* (2017) 3 Cal.5th 347, 351 (*Valencia*).) Like Proposition 36, Proposition 47 enacted a procedure "permitting inmates who are serving felony sentences for offenses that Proposition 47 reduced to misdemeanors to petition to have their felony convictions reclassified as misdemeanors and to be resentenced based on the reclassification." (*Valencia,* at p. 351.)

In February 2015, before we had decided his first appeal from the denial of the Proposition 36 petition (B258914), defendant filed a petition pursuant to Proposition 47 to recall his sentence on count 4 (felony possession). In March 2015, the trial court found defendant "eligible and suitable" for relief and granted defendant's petition. The court, on stipulation of counsel, ordered the information amended to allege count 4 as a misdemeanor, recalled defendant's sentence, imposed a sentence of 365 days and credited defendant with time served.

A year later, after the remittitur had issued in defendant's first appeal from the denial of the Proposition 36 petition (B258914), the prosecutor moved to vacate the trial court's order granting defendant's Proposition 47 petition on the grounds the trial court had been without jurisdiction to rule on the Proposition 47 petition while the appeal of the Proposition 36 ruling was pending. Defendant's counsel stipulated that the trial court had been without jurisdiction to grant relief.

On March 24, 2016, the trial court vacated its March 6, 2015 order in its entirety and reinstated defendant's original sentence.

On April 20, 2016, defendant filed his second Proposition 47 petition, again seeking an order recalling his sentence on count 4 (felony possession). The court issued an order finding that defendant had made a prima facie showing of eligibility. The court ordered briefing and set a suitability hearing for June 29, 2017. After argument, the court took the matter under submission.

On July 21, 2017, the trial court denied defendant's second Proposition 47 petition, finding that defendant was not suitable for relief. The court explained that defendant's "age and classification score are supportive of resentencing. The court, however, finds these factors are outweighed by [defendant's] criminal history and recent misconduct in prison. In sum, the totality of the record, including consideration of all the statutory factors, demonstrates that resentencing [defendant] at this time would pose an unreasonable risk of danger to public safety."

Defendant appealed.

DISCUSSION

1. The Denial of Defendant's Amended Proposition 36 Petition

During the pendency of this appeal, our Supreme Court issued its decision in *People v. Frierson* (2017) 4 Cal.5th 225 (*Frierson*) resolving the conflict in the lower courts of the appropriate standard of proof regarding a defendant's eligibility for relief under Proposition 36. *Frierson* concluded that after a defendant makes a prima facie showing of eligibility, the prosecution bears the burden of proof to demonstrate ineligibility for resentencing beyond a reasonable doubt. (*Frierson,* at p. 240.)

Defendant contends *Frierson* mandates a reversal and remand to the trial court to reconsider his amended petition

according to the correct standard of proof. Respondent concedes the beyond a reasonable doubt standard applies, but argues there is no structural error mandating reversal and that the error by the trial court was harmless.

We reject defendant's contention the court's application of the preponderance standard during the postjudgment hearing amounted to structural error. (See *People v. Anzalone* (2013) 56 Cal.4th 545, 554 [" 'structural errors not susceptible to harmless error analysis are those that go to the very construction of the trial mechanism—a biased judge, total absence of counsel, the failure of a jury to reach any verdict on an essential element' "]; *People v. Mil* (2012) 53 Cal.4th 400, 411 [structural error applies only in limited circumstances where the error " ' "infect[s] the entire trial process" ' " and " ' "*necessarily* render[s] a trial fundamentally unfair" ' "].)

We therefore turn to the question of whether the trial court's error was harmless.

The trial court, applying a preponderance standard, concluded that defendant was ineligible for relief under Proposition 36 because he had been armed with a deadly weapon in evading police officers after the carjacking. Respondent argues the court's error was harmless because it would have necessarily reached the same conclusion had it applied a beyond a reasonable doubt standard. We agree.

It is undisputed that a defendant is statutorily ineligible for resentencing if during the commission of the current offense, the defendant "was armed with a firearm or deadly weapon." (§ 1170.12, subd. (c)(2)(C)(iii); see also *People v. Perez* (2018) 4 Cal.5th 1055, 1062.) A finding of ineligibility pursuant to section 1170.12, subdivision (c)(2)(C)(iii) must be based on

conduct that occurred during the offense on which resentencing is sought. (*Estrada*, *supra*, 3 Cal.5th at p. 674.)

The evidence established defendant's pellet gun was a .22-caliber weapon. "California courts have held that a pellet gun is in fact a dangerous weapon." (*People v. Montalvo* (1981) 117 Cal.App.3d 790, 797; see also *People v. Schaefer* (1993) 18 Cal.App.4th 950, 951 [finding pellet gun to be deadly weapon within the meaning of Pen. Code, § 12022].)

" ' "[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. [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*), fourth and fifth brackets added.) "[A]rming under the sentence enhancement statutes does not require that a defendant utilize a firearm or even carry one on the body." (*People v. Bland* (1995) 10 Cal.4th 991, 997.) A defendant may be found to be armed within the meaning of the statute even if a firearm is unloaded or inoperable. (*Id.* at p. 1005; accord, *People v. White* (2016) 243 Cal.App.4th 1354, 1362 [it is "well settled that a defendant is armed with a weapon even though it is not carried on his person, when he is aware it is hidden in a place readily accessible to him"].)

Moreover, being armed with a deadly weapon for purposes of Proposition 36 does not mean the deadly weapon facilitated the commission of the charged offense. "Proposition 36 turns on whether the defendant was armed '[*d*]*uring the commission* of the current offense' (§ 1170.12, subd. (c)(2)(C)(iii) italics added), which is different than a sentence enhancement for use of a

weapon '*in the commission*' of the offense (§ 12022, subd. (b)(1), italics added). ' "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*, *supra*, 15 Cal.App.5th at pp. 1111-1112.)

Here, the jury found true beyond a reasonable doubt the allegation that defendant used a deadly weapon (the pellet gun) in the commission of the carjacking count. The evidence was undisputed that defendant remained in possession of that gun when he evaded police after the carjacking and attempted kidnapping of Ms. Jackson. Defendant crashed the victim's car after a high-speed pursuit, and the arresting officers found the pellet gun partially under and behind the driver's seat along with the victim's purse and the cocaine base. As a matter of law, defendant was armed with the weapon during the commission of the evasion offense. The court's application of the preponderance standard was therefore harmless.

Defendant argues for the first time in his reply brief that the trial court improperly considered evidence outside the record of conviction to conclude the pellet gun was a deadly weapon. Specifically, the court considered an owner's manual setting forth specifications for the same type of pellet gun used by defendant. Defendant forfeited this argument by failing to object to the court's consideration of that evidence at the eligibility hearing and also for failing to raise it in his opening brief.

2. The Rulings on Defendant's Proposition 47 Petitions

Defendant first argues the trial court acted in excess of jurisdiction by vacating the March 2015 order granting his first Proposition 47 petition and reinstating his original sentence.

Defendant did not appeal from that order, but contends the court's action was unauthorized and may be challenged at any time.

Defendant forfeited any challenge to the order by stipulating to the court taking such action. He cannot now be heard to complain it was in error.

In any event, we are not persuaded the court erred or acted in excess of jurisdiction. At the time the court granted defendant's first Proposition 47 petition and reclassified count 4 as a misdemeanor, defendant's first appeal of the denial of his Proposition 36 petition (which sought resentencing on counts 3 and 4) was still pending. " '[T]he filing of a valid notice of appeal vests the jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur.' [Citation.] By the same token, the notice of appeal divests the trial court of subject matter jurisdiction. [Citations.] 'Because an appeal divests the trial court of subject matter jurisdiction, the court lacks jurisdiction to vacate the judgment or make any order affecting it. [Citations.] Thus, action by the trial court while an appeal is pending is null and void.' " (*People v. Nelms* (2008) 165 Cal.App.4th 1465, 1471; accord, *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1472.)

Here, defendant's appeal of the Proposition 36 ruling concerned the sentence on both counts 3 and 4. Therefore, the trial court was without jurisdiction to entertain defendant's first Proposition 47 petition seeking to modify the judgment and recall the sentence on count 4 while his appeal of the Proposition 36 ruling regarding count 4 was still pending. Defendant's reliance on *People v. Flores* (2003) 30 Cal.4th 1059 (*Flores*) is unavailing. Defendant cites to *Flores* for the proposition that jurisdiction in

the trial court survives, notwithstanding a pending appeal, "where provided by statute." (*Id*. at p. 1064.) Nothing in the statutory language of Proposition 47 brings it within the exception discussed in *Flores*. (See, e.g., *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 922 ["Neither the language nor intent of [Penal Code section] 1170.18 or Proposition 47 cause us to conclude the statute creates an exception to the general rule that a trial court may not issue an order affecting a judgment while an appeal is pending."].)[3]

Defendant argues in the alternative that his trial counsel's stipulation to vacate the court's ruling amounted to ineffective assistance of counsel. A defendant's burden to demonstrate ineffective assistance on direct appeal is significant. (*Strickland v. Washington* (1984) 466 U.S. 668, 678-688 [a defendant must demonstrate that counsel's representation failed to meet an objective standard of professionalism, and that such failures caused him prejudice].) Given the state of the law, including *Flores*, we are not persuaded there is any merit to defendant's ineffective assistance argument.

---

[3] In an opinion that was superseded by the Supreme Court's grant of review, one Court of Appeal observed in dicta that a trial court is not divested of jurisdiction over a Proposition 47 petition by the pendency on appeal of a Proposition 36 petition. (*People v. Valencia* (2014) 232 Cal.App.4th 514, 527, fn. 22, superseded by *Valencia*, *supra,* 3 Cal.5th 347.) The Supreme Court opinion affirmed the judgment below in *People v. Valencia* without addressing the appellate court's dicta. We decline to address this dicta further since defendant forfeited the point by stipulating that the trial court was without jurisdiction to grant relief while his appeal of the Proposition 36 appeal was pending.

We further find no merit to defendant's contention the court's action in vacating the order and reinstating the original sentence violates the double jeopardy clause. The double jeopardy clause is in no way implicated here. Defendant was tried and convicted once, and the court later vacated and then reinstated the conviction on the felony evading a police officer count. Defendant was not subjected to a second prosecution or multiple punishment.

Defendant next argues the court's denial of his second Proposition 47 petition violated his constitutional right to equal protection. He contends he is subjected to differential treatment because Proposition 47 gives the court discretion to deny resentencing to defendants like him, who are still serving a felony sentence, based on a finding of unreasonable risk of danger to public safety, but not as to offenders who have completed a felony sentence or offenders who are given misdemeanor sentences. Defendant did not raise an equal protection challenge below and has therefore forfeited the claim on appeal.

In any event, the claim is without merit. "Prisoners are not a suspect class. The status of being incarcerated is neither an immutable characteristic nor an invidious basis of classification." (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 178 (*Yearwood*).) Nor does a defendant have " ' "a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives." ' " (*People v. Acosta* (2015) 242 Cal.App.4th 521, 527; see also *People v. Floyd* (2003) 31 Cal.4th 179, 188 [rejecting claim equal protection violation can arise "from the timing of the effective date of a statute lessening the punishment for a particular offense"].

Defendant has not established that, as a recidivist criminal who has committed two or more violent or serious felonies and who is serving a life sentence, he is similarly situated to the other classes of offenders set forth in Proposition 47. (*Yearwood*, *supra*, 213 Cal.App.4th at p. 179 [rejecting equal protection challenged and concluding the discretionary public safety exception of Proposition 36 was rationally related to a legitimate state interest].)

Finally, defendant argues the court abused its discretion in denying his second Proposition 47 petition. Once again, we disagree.

After the trial court determines a defendant is eligible for resentencing under Proposition 47, the court must exercise its discretion to determine whether "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (Pen. Code, § 1170.18, subd. (b).)

We review the court's dangerousness finding under the deferential abuse of discretion standard. (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1264 (*Hall*).) " 'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citations.] ' " '[T]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary.' " ' " (*Ibid.*)

The trial court applies the preponderance standard in making its dangerousness finding. (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 241 (*Jefferson*).) Proposition 47 defines unreasonable risk of danger more narrowly than Proposition 36.

" '[U]nreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (Pen. Code, § 1170.18, subd. (c).) "In other words, section 1170.18(c) states that a court may find a petitioner to be dangerous to public safety only if it finds that there is an unreasonable risk that the petitioner will commit a super strike offense." (*Valencia*, *supra*, 3 Cal.5th at p. 379.)

In determining an otherwise eligible defendant's suitability for release, "the court may consider all of the following: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes. [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated. [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (Pen. Code, § 1170.18, subd. (b).)

In its written order, the court explained that it found significant defendant's long and uninterrupted history of criminal behavior, both as a juvenile and an adult, and his record of misconduct while incarcerated. Defendant had two prior serious or violent felonies, and his current offenses included two violent or serious felonies, along with a deadly weapon use finding. The court explained that "[w]hile a history of recividism alone is an insufficient basis for a court's finding that a [defendant] poses an unreasonable risk of danger to public safety, the multiplicity of prior convictions and the failure to comply with conditions of intervening periods of probation or parole give rise to a valid

concern about a danger to public safety." The court further noted, "[t]here continues to be a nexus between the [defendant's] previous criminal history and his current risk of danger to public safety because of his continued misconduct in prison."

The court's ruling also demonstrates the court considered defendant's proffered mitigating factors, such as his age, and otherwise addressed the enumerated statutory criteria for determining risk.

Defendant has not demonstrated the court acted arbitrarily or irrationally or that its ruling resulted in a miscarriage of justice. (*Jefferson*, *supra*, 1 Cal.App.5th at p. 245 [court did not exceed bounds of reason in determining the defendant was likely to commit a super strike if resentenced based on 19-year-old robbery and assault convictions, including personal use of a firearm, in combination with multiple rule violations in prison and multiple parole violations]; *Hall*, *supra*, 247 Cal.App.4th at p. 1266 [trial court could reasonably infer from the defendant's history of criminal behavior and "repeated failure to rehabilitate" that he presented "an elevated—and escalating—risk" and was unsuitable for resentencing].)

DISPOSITION

The April 18, 2017 order denying defendant's amended petition for recall of sentence pursuant to Penal Code section 1170.126 is affirmed.

The July 21, 2017 order denying defendant's second petition for recall of sentence pursuant to Penal Code section 1170.18 is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. RUBIN, J.