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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PERRY EUGENE WILSON, Defendant and Appellant.	B262967 (Los Angeles County Superior Ct. No. SA036439)

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, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal requires us to determine what evidence a trial court may consider in finding a defendant ineligible for resentencing under the Three Strikes Reform Act of 2012 (Proposition 36). In 1999, a jury found defendant Perry Eugene Wilson guilty of receiving stolen property in violation of Penal Code section 496.[1] The trial court sentenced him to 25 years to life in prison under the Three Strikes law. On December 19, 2012, Wilson filed a petition for recall of sentence pursuant to section 1170.126. The trial court denied the petition, finding Wilson ineligible for relief because he was armed with a deadly weapon during the commission of the offense. This appeal followed. We affirm.

FACTUAL SUMMARY

By information Wilson was charged with receiving stolen property (count 1) and petty theft with a prior (count 2). Upon the People's motion the trial court dismissed count 2. The information also alleged three prior strike convictions. Wilson elected to go to jury trial.

The facts presented to the jury were simple: police stopped the car Wilson was driving and arrested him after learning he did not have a valid driver's license. Wilson possessed another person's driver's license, credit card, and money. The jury convicted Wilson of receiving stolen property. After the verdict, Wilson waived his right to a jury trial on the alleged prior convictions and admitted two prior strikes.

Before trial, the probation department had prepared a probation report. The report stated additional facts not presented to the jury: "The defendant was arrested for driving without a license. The defendant was searched incidental to the arrest. A screwdriver was found in his pocket. A folding knife was found in one of his pockets. It had been modified to open with the flick of a wrist."

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

At sentencing, Wilson moved the court to strike his prior convictions pursuant to *People v. Romero* (1996) 13 Cal.4th 497 (*Romero*). At the hearing the court engaged both counsel and Wilson himself about the knife described in the probation report. The trial court stated: "When the defendant was apprehended, not only did he have the victim's property, but he had in his pocket a knife which the probation officer described as a switchblade knife. I believe. Let's see if I can find that. [¶] A folding knife was found in one of his pockets. It had been modified to open with the flick of the wrist. Here we are in 1998 or 1999 when this incident occurred. He's got two prior serious felonies. Both of them in which he used a knife. He's still got a knife when he shouldn't have had, one that opens with a flick of the wrist. It show a pattern and a continuation of his conduct." In response, defense counsel urged that the People had never argued to the jury that Wilson ever attempted to use the knife towards the victim or the police who arrested him. The court responded: "[T]he fact is he has this, what I would call a [switchblade] knife, but an unusual knife that one might use for offensive actions, and that is replete of his prior conduct."

At this point Wilson asked to address the court: "I really don't know how to put this. But in the environment that I live in, a pocket knife is just a pocket knife. I mean, you know, I didn't have it to hurt nobody. You got kids running around shooting guns and running up on you, you know, trying to hurt you and they don't have no respect for the older brothers and older sisters in the neighborhood. So I had a knife in my pocket. [¶] I didn't try to hurt nobody. I didn't try to pull it on an officer. I didn't try to pull it on [the victim] or anything, you understand? I just had a knife. [¶] . . . [¶] I know I was wrong for having a knife, Your Honor." The court responded that Wilson was trying to justify his possession of the knife because of the neighborhood in which he lived, but "here's a man that on two prior occasions sometime back has used a knife to effectuate a serious crime." The court declined to strike Wilson's prior convictions and sentenced him to 25 years to life.

Wilson appealed the jury's verdict and the denial of the *Romero* motion. This court affirmed his conviction and sentence in an opinion filed November 2, 2000. The opinion includes the following "pertinent facts": "Police subsequently searched appellant's person and recovered a screwdriver, a folding knife modified to operate like a switchblade knife, and a stolen wallet containing the previously mentioned stolen Visa card and driver's license."

Fast forward 13 years. Wilson filed a petition for recall of sentence. The trial court denied the petition, finding Wilson was armed with a deadly weapon during the commission of the offense. In its written order, the trial court relied on facts from the "*entire record of conviction* and no further." The court stated the record of conviction consists of the preliminary hearing transcripts, trial transcripts, appellate court opinions, felony indictments, accusatory pleadings, and pleas of guilty or nolo contendere to determine the motive of the crime. The court noted that it "merely has examined the evidence at trial, including the trial transcript of the testimony given by the witnesses and officers, in order to determine the eligibility of the Petitioner." Later in its opinion, however, the trial court discusses the probation officer's description of the knife found in Wilson's pocket, and the comments of defense counsel, Wilson, and the trial court at sentencing.

ISSUE

It is undisputed Wilson's third strike, receiving stolen property in violation of section 496, is not a serious or violent felony. The issue that disqualified defendant from resentencing is the trial court's finding he was armed with a deadly weapon during the commission of the offense. Wilson argues the trial court's finding was based on an "expansive reading" of the record of conviction which did not reflect the facts of the offense for which he was actually convicted. We disagree and affirm the trial court.

DISCUSSION

On November 6, 2012, the electorate passed the Three Strikes Reform Act of 2012 (Act), also known as Proposition 36. Proposition 36 has prospective and retrospective components. (*People v. Superior Court (Kaulick*) (2013) 215 Cal.App.4th 1279, 1292.)

The prospective provisions of Proposition 36 changed the requirements for sentencing a third strike offender under the Three Strikes law. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) Under the original version of the law, a defendant who had two or more prior serious or violent felony convictions was subject to a sentence of 25 years to life upon any new felony conviction. (Former §§ 667, subd. (b)-(i), 1170.12.) Proposition 36 amended sections 667 and 1170.12 to require courts to impose life sentences only where the new offense is a serious or violent offense, unless the prosecution pleads and proves certain disqualifying factors. In all other cases, the defendant will be sentenced as a second strike offender. (*People v. Yearwood, at* pp. 161, 167-168.)

The Act also created a retrospective, post conviction release proceeding whereby an inmate serving an indeterminate life sentence for a felony that is not serious or violent and who is not otherwise disqualified, may have the sentence recalled. The inmate can then be resentenced as a second strike offender unless the court determines resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).)

Central to this appeal is the issue of disqualification: even if the third strike is not a serious or violent felony, an inmate is nonetheless ineligible for resentencing if he or she has one of the enumerated disqualifying factors found in section 1170.126. One of those factors disqualifies an inmate 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 factual determination of whether the circumstances of the offense of conviction disqualify defendant from resentencing is analogous to the factual determination of whether a prior conviction is a serious or violent felony under the Three Strikes law. Such factual determinations about prior convictions are made by the court based on the record of conviction. (*People v. Guerrero* (1988) 44 Cal.3d 343, 352 (*Guerrero*); *People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Arevalo* (2016) 244 Cal.App.4th 836, 848.) The record of conviction includes the appellate opinion

(*People v. Woodell* (1998) 17 Cal.4th 448, 456); transcripts of testimony (*People v. Bartow* (1996) 46 Cal.App.4th 1573); admissions (*People v. Goodner* (1990) 226 Cal.App.3d 609, 616); and preliminary hearing transcripts (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1531). It also includes facts established within the record, such as a defendant's personal admissions on *Tahl*[2] waiver forms, even if those facts are not essential to the judgment. (*People v. Smith* (1988) 206 Cal.App.3d 340, 344-345 (*Smith*).

Guerrero is the seminal case which established that the trial court may look at the "record of conviction," not just the judgment of conviction, to determine the factual circumstances of an offense. In that case the trial court reviewed the accusatory pleading and the defendant's plea in order to determine the nature of the conduct underlying the conviction. Our Supreme Court validated that methodology, but warned: "To allow the trier of fact to look to the entire record of the conviction is certainly reasonable: it promotes the efficient administration of justice and, specifically, furthers the evident intent of the people in establishing an enhancement for 'burglary of a residence'--a term that refers to *conduct*, not a specific *crime*. To allow the trier to look to the record of conviction -- *but no further* -- is also fair: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*Guerrero, supra*, 44 Cal.3d at p. 355.)

Smith, which followed *Guerrero*, is instructive. Smith was found guilty of three counts of burglary. He had prior convictions for second degree burglary, which the trial court found to be prior convictions for burglary of a residence, thus using them as a basis to enhance defendant's sentence. The evidence proving the nature of the priors included defendant's guilty pleas to second degree burglary and his signatures on *Tahl* waiver forms where he admitted to entering residences with intent to commit theft. Defendant later argued his admissions to burglarizing residences could not be used to enhance his

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[2] *In re Tahl* (1969) 1 Cal.3d 122.

sentence because entering a residence was not an element of the offense of which he was found guilty, second degree burglary. (*Smith, supra,* 206 Cal.App.3d at p. 343.)

Relying on *Guerrero,* the *Smith* court noted a distinction between enhancements that refer to conduct and enhancements that refer to specific crimes. (*Smith, supra,* 206 Cal.App.3d at p. 344.) Where the enhancement refers to prior conduct, the court may examine reports that establish facts describing the conduct, even though the conduct itself is not essential to the underlying prior offense. (*Ibid*.) With "no difficulty," the *Smith* court concluded that charging documents, *Tahl* forms, and sentencing transcripts are included in "any definition of 'record of conviction.' " (*Id.* at p. 345.)

Next, *People v. Trujillo* (2006) 40 Cal.4th 165 (*Trujillo*) presented the "relitigation" problem that the *Guerrero* court warned about. In that case, defendant agreed to enter a guilty plea in exchange for the prosecution's agreement to drop an allegation of personal use of a dangerous weapon. After the guilty plea, the probation officer reported that defendant had stated, " 'I stuck her with the knife.' " (*Id.* at p. 170.) Years later the prosecutor wanted to use defendant's statement to prove that the prior conviction was for a serious felony.

The *Trujillo* court would not allow it. Although the statement appeared in the probation report, the stabbing was never actually litigated in connection with the original conviction and sentence because the issue had been dropped. No findings were made; no facts were established. Therefore, the defendant's statement in the probation report did not describe the nature of the crime of which he was convicted and could not be used to prove that the prior conviction was for a serious felony. Relitigation of the nature of the offense at a later date implicated Trujillo's double jeopardy concerns. (*Trujillo, supra,* 40 Cal.4th at pp. 179-180.)

Here Wilson argues that the issue of possession of the knife was never presented to the jury and was therefore never litigated. He reasons that because it was not litigated to the jury, the trial court could not find possession of the knife was part of the conduct underlying the conviction. To make such a finding now would be to "relitigate" the circumstances of the offense in violation of *Guerrero* and *Trujillo*.

Wilson puts too fine a point on *Guerrero* and *Trujillo*. Both stand only for the proposition that facts never established in the original record of conviction cannot be "proven" or relitigated in later, unrelated proceedings. Neither case limits the record of conviction to facts required to establish the elements of an offense. If additional facts are established by competent evidence, as the *Smith* case holds, they may be used in later proceedings.

Here, in concluding that Wilson carried a deadly weapon during the commission of the offense, the trial court relied on the sentencing transcript, pre-trial probation report, and the opinion of the Court of Appeal. The sentencing transcript alone establishes the facts that support denial of the petition. In ruling on the *Romero* motion, the trial court raised the issue of the knife, which had been reported by the probation officer. Defense counsel did not deny that Wilson had carried a knife during the commission of the offense. Wilson himself admitted he carried the knife on his person during the commission of the crime to protect himself. The court denied Wilson's *Romero* motion because it concluded Wilson had carried a knife, just as he had in two of his prior convictions. The issue of the knife was fully joined, vetted, and litigated at the time of sentencing. This is not a situation, like *Trujillo*, where the prosecution resurrected unadjudicated facts of a crime committed many years ago.

In denying the petition for recall of sentence, the trial court properly relied on facts established at the time of the original conviction. In light of Wilson's admission in the sentencing transcript that he carried a deadly weapon during the commission of the offense, no factual relitigation occurred. That the trial court also reviewed the appellate opinion and the probation report is of no moment.[3]

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[3] Defendant cites *People v. Crocket* (2015) 234 Cal.App.4th 642, review granted May 13, 2015, S225198, for the proposition that the appellate opinion is not probative of whether he carried a deadly weapon during the commission of the offense. The California Supreme Court has granted review in *Crockett*; it may not be cited as precedent. (Cal. Rules of Court, rules 8.1115, 8.1105(e)(1).)

DISPOSITION

The order denying Wilson's petition for recall of sentence is affirmed.

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STRATTON, J.*

We concur:

ALDRICH, Acting, P. J.

LAVIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.