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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ROBERT DAVID MAKIMOTO, Defendant and Appellant.	B278698 (Los Angeles County Super. Ct. No. MA012837)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed in part, reversed in part, and remanded for further proceedings.

Kevin E. Lerman, 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, Assistant Attorney General, Noah P. Hill and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Robert David Makimoto appeals from an order denying his petition for recall of sentence under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).[1] He contends the superior court erred in making a factual determination that he was armed during the commission of three prior offenses, making him ineligible for recall of his sentence. He also contends the superior court erred in requiring the People to prove Makimoto's ineligibility for resentencing under Proposition 36 by a preponderance of the evidence, instead of beyond a reasonable doubt. We agree the superior court used the incorrect standard of proof. As to Makimoto's convictions for receiving stolen property, a firearm, and possession of a firearm by a felon, we conclude the superior court's use of a preponderance of the evidence standard was harmless error, and affirm. As to his conviction for receiving stolen property, a TV/VCR, we conclude there was insufficient evidence to support the superior court's finding of ineligibility for resentencing. As to this conviction, we reverse and remand for the trial court to consider Makimoto's suitability for release.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Underlying Offenses*

1. *The Evidence at Trial*

On July 26, 1996 the Littlerock Post Office was burglarized. The burglars cut the telephone lines, dented the entry door, and stole a TV/VCR and over $12,000 worth of stamps.

On August 4 or 5 the J&I Surplus store in Hesperia was burglarized. The burglars cut the telephone and alarm wires and

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[1] All further statutory references are to the Penal Code.

cut a hole in the roof to enter. They took handguns, including a Smith & Wesson semiautomatic pistol, and other items from the store.

On August 9 Karl Muir rented a storage unit from a self-storage facility in Palmdale. Makimoto accompanied Muir to rent the unit, and Muir listed Makimoto as the only other person with access to the unit. Both Muir and Makimoto signed a ledger at the facility so their identities could be confirmed when they accessed the storage unit in the future.

On August 16 Makimoto sold the TV/VCR taken in the Littlerock Post Office burglary to a pawn shop in Palmdale.

On September 12 the City Mini-Market in Lancaster was burglarized. The burglars cut the telephone and alarm lines and cut a hole in the roof to enter. They took a Taurus semi-automatic handgun, about $1,400 in cash, $7,000 worth of cigarettes, and other items.

On September 18 the Kentwood Mini-Market in Los Angeles was burglarized. The burglars cut the telephone and alarm wires and cut a hole in the roof to enter. Someone called the police to report a prowler. When the police officers arrived, they observed Karl Huffman walking outside the mini-market with a two-way radio. The police detained Huffman, and heard a voice over the radio, later identified as Makimoto, asking, "Where are you? Did you run to my truck? What did you do with my keys?" Huffman led the police to Makimoto's truck; Huffman had the keys to the truck. The police officers recovered from under one of the truck's seats the Smith & Wesson pistol taken from J&I Surplus store. The police also found a duffel bag on the ground adjacent to the mini-market that contained burglary tools and the matching two-way radio.

Huffman later stated to the police that Makimoto told him he was going to burglarize a liquor store, gave Huffman money, and drove Huffman to the Kentwood Mini-Market. When they arrived, Makimoto placed the tools in the duffel bag, gave Huffman the two-way radio, and told him to keep watch and let him know if the police arrived.

Police arrested Makimoto at his home on October 10. They recovered from in and around his house items taken in the burglaries of the Littlerock Post Office, J&I Surplus store, and Kentwood Mini-Market. They also found a charger that could have been used for the two-way radios, burglary tools, and a key for one of the locks on the Palmdale self-storage unit.

The police also went to the Palmdale self-storage facility, where they learned Makimoto had accessed Muir's storage unit on August 26, August 29, September 5, and September 25. The ledger for the storage facility showed that on September 25 Makimoto signed in at 10:57 a.m. and signed out at 11:04 a.m. According to Glenn Langford, the manager of the storage facility, on September 25 Muir came to the storage facility and paid $21 for rental of the storage unit. However, only Makimoto signed the ledger on that date. Any person seeking to access the storage unit was required to sign the ledger at the time of entry.

When the police officers opened Muir's storage unit, they found eight handguns and other items taken from the J&I Surplus store, as well as the Taurus handgun taken from the City Mini-Market.

2. *The Information, Jury Verdict, and Appeal*

Makimoto was charged in an information with two counts of receiving stolen property (§ 496, subd. (a)). In count 1, Makimoto was charged with receiving the Taurus handgun on or between

September 12 and October 10, 1996; in count 2, he was charged with receiving the TV/VCR on or about August 16, 1996. The information also charged Makimoto with two counts of possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)). In count 3, Makimoto was charged with possession of the Smith & Wesson pistol on or about September 18, 1996; in count 4, he was charged with possession of the Taurus handgun on or between September 12 and October 10, 1996. Makimoto was charged in count 5 with the second degree commercial burglary (§ 459) of the Kentwood Mini-Market on September 18, 1996. The information also alleged six prior convictions for serious or violent felonies under the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and two prior felony convictions for which Makimoto served prison terms within the meaning of section 667.5, subdivision (b).

A jury convicted Makimoto on counts 1 and 2 of receiving stolen property (the Taurus handgun and TV/VCR) and on count 4 of possession of a firearm by a felon (the Taurus handgun). The jury was unable to reach a verdict as to the remaining counts. The superior court declared a mistrial and dismissed those counts. Makimoto admitted the prior convictions, and the court sentenced him to three consecutive terms of 25 years to life.

On appeal, we held that under section 654 Makimoto could not be punished for both receiving stolen property and possession of a firearm by a felon with respect to the Taurus handgun. We explained, "The record here showed that counts 1 and [4] involved only a single criminal act: possession of the Taurus gun, kept by [Makimoto] in the storage unit. [P]ossession of the gun was criminal both because he was a felon . . . and because he knew the gun was stolen . . . ." (*People v. Makimoto* (Oct. 12, 1999, B123018) [nonpub. opn.] [at pp. 6-7].) We held that Makimoto "cannot be punished more than once for possession of the gun, under different

provisions of the law," and modified the judgment to stay the sentence on count 4 for possession of a firearm by a felon. (*Id*. at p. 7.)

B. *Makimoto's Petition for Recall of Sentence*

On December 5, 2012 Makimoto filed a petition for recall of sentence under Proposition 36. He asserted that neither receiving stolen property nor possession of a firearm by a felon is a serious or violent felony within the meaning of the three strikes law (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1)), none of his prior serious or violent felony convictions disqualified him from having his sentence recalled (see § 1170.126, subd. (e)(3); §§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv)), and Makimoto's release would not pose an unreasonable risk of danger to public safety. The trial court issued an order to show cause why his sentence should not be recalled.

On September 3, 2013 the People filed an opposition to the petition, contending Makimoto 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).) In his preliminary reply, Makimoto contended that mere possession of a firearm, without ready access to the firearm, did not render him ineligible for resentencing.

The superior court held a hearing on Makimoto's eligibility on August 15, 2016, at which the court admitted the parties' exhibits and heard oral argument. After taking the matter under submission, on September 29, 2016 the superior court issued a detailed 10-page ruling in which it concluded that Makimoto was not eligible for resentencing under Proposition 36. As a threshold matter, the court stated it was entitled to examine the entire

record, including the appellate court opinion and trial transcripts, to determine whether Makimoto was eligible for resentencing under Proposition 36. The court used a preponderance of the evidence standard of proof.

Turning to the facts of the case, the superior court concluded the People had met their burden to show that Makimoto was armed during the commission of the current offenses because at the time of the offenses the Taurus firearm was readily available for offensive or defensive use, citing to the holding in *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*), disapproved on another ground in *People v. Frierson* (2017) 4 Cal.5th 225, 240, fn. 8 (*Frierson*).[2] The superior court explained that Makimoto or his accomplices stole the Taurus handgun on September 12. When Makimoto was arrested on October 10, the police discovered a key to the storage unit in Makimoto's home. The police then recovered the Taurus handgun from the storage unit.

The superior court noted that according to the storage facility's ledger, Makimoto accessed the storage unit on August 26, August 29, September 5, and September 25, 1996. Further, "[a]ccording to the ledger, [Makimoto] was also the last person to access [the storage unit] on September 25th. There is no evidence that anyone else besides [Makimoto] accessed [the storage unit] following the City Mini-Market burglary. The evidence supports the finding that [Makimoto] received the Taurus handgun at some point after it was stolen on September 12th, and then deposited

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[2] 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.

the stolen handgun in [the storage unit] on September 25th. [Makimoto] was therefore armed with the Taurus handgun during the commission of the current offenses, as the handgun was readily available for offensive or defensive use when he deposited the handgun at the storage facility."

The superior court found by a preponderance of the evidence that Makimoto was not eligible for recall of sentence, and denied his petition. Makimoto timely appealed.

DISCUSSION

A. *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, 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." (*Ibid*.)

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 *Frierson*.

In his letter brief, Makimoto contends the superior court's order denying his petition to recall sentence should be reversed because the Supreme Court in *Perez* and *Frierson* has concluded the People must prove a defendant's ineligibility for resentencing under Proposition 36 beyond a reasonable doubt.[3] The People

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[3] The parties in their supplemental briefs agree that the Supreme Court's holding in *Estrada* does not alter Makimoto's position because he does not contend a facilitative nexus is required to prove a defendant is ineligible for resentencing under Proposition 36. (See *Estrada*, *supra*, 3 Cal.5th at p. 670 ["[S]ection 1170.12, subdivision (c)(2)(C)(iii) provides only one express nexus requirement between these general descriptive terms and the

concede the superior court improperly applied a preponderance of the evidence standard, but contend the error was harmless.

B. *Determination of Makimoto's Ineligibility for Resentencing Under Proposition 36*

1. *A defendant is armed with a firearm during the commission of an offense for purposes of Proposition 36 ineligibility if he or she has a firearm available for use offensively or defensively.*

A defendant is ineligible for resentencing if during the commission of the current offense he or she "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 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 ["A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively."]; *Osuna*, *supra*, 225 Cal.App.4th at p. 1029 [same].)

However, 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

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inmate's prior offense: the excluding conduct must occur '[*d*]*uring* the commission' of the offense. [Citation.] The term 'during' suggests temporal overlap . . . ."].) Makimoto contends the People have not met this requirement of a temporal nexus.

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. (*Ibid*.)

2. *The superior court erred in using a preponderance of the evidence standard to determine Makimoto's ineligibility for resentencing.*

The superior court used a preponderance of the evidence standard in finding Makimoto was ineligible for resentencing under Proposition 36. However, since the superior court's ruling, the Supreme Court has concluded "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 superior court's error in applying a preponderance of the evidence standard requires reversal only where there is a 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 Proposition 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].)

3. *The superior court's error as to counts 1 and 4 with respect to the Taurus handgun was harmless.*

Makimoto contends the superior court's error was not harmless because there was conflicting evidence whether Makimoto was ever in actual possession of the Taurus firearm he was charged with receiving. Specifically, Makimoto points to the evidence that Muir also visited the storage facility on September 25, 1996, on which date he paid the $21 monthly rent for the unit. Thus, Makimoto argues it was mere speculation that he had ready access to the gun, as compared to the right to control it.[4]

In response, the People point out that Langford testified that "[w]hen [customers] came in to visit their unit, they would be required to sign in. . . . It's plain as can be. The time in and then time out. Some of them would sign themselves out; some of them we would sign out." Further, there is no record of Muir signing in on September 25 to access the storage unit. Instead, only

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[4] Makimoto also contends the trial court erred in considering evidence that he or one of his accomplices stole the Taurus handgun because Makimoto was not charged with the September 12, 1996 burglary of the City Mini-Market. However, the relevant question is not whether Makimoto stole the Taurus handgun, but whether he possessed the handgun at the time he committed the crime of receiving stolen property. The superior court properly focused on whether Makimoto possessed the Taurus handgun when he accessed the storage unit on September 25, 1996, which facts in the record were properly considered by the court.

Makimoto signed in, arriving at 10:57 a.m., and signing out at 11:04 a.m.

We review the superior court's factual findings supporting its determination of Proposition 36 eligibility for substantial evidence. (*Perez*, *supra*, 4 Cal.5th at p. 1066 ["the trial court's eligibility determination, to the extent it was 'based on the evidence found in the record of conviction,' is a factual determination reviewed on appeal for substantial evidence]; *People v. Guilford* (2014) 228 Cal.App.4th 651, 661 ["'We review the whole record in a light most favorable to the [order denying the petition for resentencing] to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense'"].)

Here, the record establishes that the Taurus handgun was stolen on September 12 and found in the storage unit on October 10, 2016. Any person seeking to access the storage unit was required to sign the ledger at the time of entry. It is undisputed that Makimoto signed the ledger and had access to the storage unit on September 25. Although Makimoto contends Muir also had access to the storage unit on September 25, the superior court found otherwise. The superior court found: "[T]here is no evidence that anyone else besides [Makimoto] accessed [the storage unit] following the City Mini-Market burglary. The evidence supports the finding that [Makimoto] received the Taurus handgun at some point after it was stolen on September 12th, and then deposited the stolen handgun in [the storage unit] on September 25th. [Makimoto] was therefore armed with the Taurus handgun during the commission of the current offenses . . . ."

Although the superior court could have made a factual finding that because Muir paid his rental fee at the storage facility on September 25, he also had access to the rental unit on the same day without signing the ledger, the court did not find this. As the Supreme Court has held, """"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment."""" (*People v. Casares* (2016) 62 Cal.4th 808, 823-824.)

We conclude there is substantial evidence to support the superior court's factual finding that only Makimoto had access to the storage unit between the September 12, 1996 burglary and the October 10, 1996 recovery of the Taurus handgun from the storage unit. (See *Perez*, *supra*, 4 Cal.5th at p. 1066.)

Given the superior court's factual determination that only Makimoto had access to the storage unit during the relevant period, only Makimoto could have placed the handgun in the storage unit following the theft. Thus, Makimoto was armed during the commission of the offense because the handgun was in his physical possession when he placed it in the storage unit, and was available for his offensive or defensive use. (*Estrada*, *supra*, 3 Cal.5th at p. 670 ["the excluding conduct must occur '[*d*]*uring* the commission' of the offense," requiring only a "temporal overlap"]; *Cruz*, *supra* 15 Cal.App.5th at p. 1110 ["It is the availability of and ready access to the weapon that constitutes arming."].)

Accordingly, there is no reasonable probability of a more favorable result had the superior court applied the correct

standard.[5] (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Johnson*, *supra*, 1 Cal.App.5th at p. 968.)

4. *The superior court erred in finding Makimoto was ineligible for resentencing as to count 2 for receiving the stolen TV/VCR.*

Proposition 36 "requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, an inmate may obtain resentencing with respect to a Three Strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third strike sentence of 25 years to life" as to other counts. (*People v. Johnson* (2015) 61 Cal.4th 674, 688, 695.)

The superior court made no specific finding with respect to count 2 for receiving the stolen TV/VCR. Instead, the superior court concluded generally that Makimoto "was armed with the Taurus handgun during the commission of the current offenses, as the handgun was readily available for offensive or defensive use when he deposited the handgun at the storage facility." However, the TV/VCR was stolen on July 26, 1996, then sold by Makimoto on August 16. The Taurus handgun was not stolen until September 12. Clearly, Makimoto did not possess the Taurus handgun at the time he possessed the TV/VCR.

The People contend that because the superior court described Makimoto's possession of the stolen TV/VCR in its memorandum of decision, it found Makimoto was armed in the

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[5] Because we affirm the superior court's determination that Makimoto was ineligible for resentencing on counts 1 and 4, we need not reach the People's contention that Makimoto forfeited his argument as to count 4 for possession of a firearm by a felon.

commission of that crime. We find no such finding, either explicit or implicit, in the memorandum of decision. The People argue in the alternative that even if the superior court did not make this finding, substantial evidence supported a finding that Makimoto was armed at the time he received the TV/VCR. Specifically, they point to the evidence in the record that eight firearms were taken from the J&I Surplus store on August 4 or 5, 1996. Further, Makimoto had access to the storage unit on August 9 when Muir rented the unit. Thus, the People argue, Makimoto was armed when he sold the TV/VCR on August 16.

We disagree. First, Makimoto was not charged with the burglary of the J&I Surplus store, only the receipt of the stolen Smith & Wesson firearm on September 18, 1996, when it was found in his car. Thus, there is no evidence that Makimoto had possession of the Smith & Wesson firearm at any time before September 18. Further, there is no evidence that Makimoto was armed at the time of his August 16, 1996 sale of the TV/VCR to the pawn shop. Indeed, while the eight firearms stolen from J&I Surplus store were found in the storage unit on October 10, 1996, it is speculation that they were in the storage unit as of August 16, 1996. Finally, even if one or more firearms were in the storage unit on August 16, 1996, they would not have been "available for use, either offensively or defensively" at the time Makimoto sold the TV/VCR to the pawn shop. Thus, there was insufficient evidence to support a finding that Makimoto was armed at the time of commission of the crime. (See *Cruz*, *supra*, 15 Cal.App.5th at p. 1110; see also *People v. Bland*, *supra*, 10 Cal.4th at p. 997.)[6]

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[6] Because we conclude the facts in the record do not support the People's argument that Makimoto was armed at the time of his receipt of the stolen TV/VCR on August 16, 1996, we do not reach

We reverse the superior court's order finding that Makimoto was ineligible for sentencing on count 2 because he was armed during the commission of the offense. We remand to the superior court to consider whether Makimoto's release would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f);[7] *People v. Clark* (2017) 8 Cal.App.5th 863, 870.)

DISPOSITION

The order is affirmed as to counts 1 and 4 and reversed as to count 2. The matter is remanded for further proceedings not inconsistent with this opinion.

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whether the superior court properly considered facts in the record that related only to the charge in count 3 of possession of the Smith & Wesson firearm, which was dismissed after the jury deadlocked. Although the Supreme Court in *Estrada* held that the superior court could consider facts underlying counts that were dismissed as part of a plea bargain, it declined to decide whether the superior court could consider facts underlying a count on which a defendant was acquitted. (*Estrada*, *supra*, 3 Cal.5th at pp. 674, 675, fn. 6.) Here, count 3 was dismissed after the jury deadlocked, not after an acquittal.

[7] Section 1170.126, subdivision (f), provides: "Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."

FEUER, J.

We concur:

PERLUSS, P. J.

ZELON, J.