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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MAX CARRILLO, Defendant and Appellant.	B279413 (Los Angeles County Super. Ct. No. KA047848)

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, Assistant Attorney General, Noah P. Hill and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Max Carrillo 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 finding he was ineligible for resentencing on the basis he was armed with a firearm during the commission of the current offense, because the People did not prove there was a "facilitative nexus" between his possession of a firearm and the underlying offense. Specifically, Carrillo argues the People failed to show he used the firearm to aid in the commission of the offense. Carrillo also contends the superior court erroneously used a standard of a preponderance of the evidence, instead of beyond a reasonable doubt.

We conclude a defendant is ineligible for resentencing under Proposition 36 if there is a temporal nexus between possession of a firearm and the underlying offense, in that the firearm was available for use during the commission of the underlying offense, and that no facilitative nexus is required. Although we conclude the superior court erred in using a preponderance of the evidence standard in evaluating Carrillo's eligibility for resentencing, the error was harmless. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Underlying Offenses*

1. *Evidence at Trial*

On March 12, 2000 Los Angeles County Deputy Sheriffs Daniel Torres and Wai Chiu Li stopped Carrillo after observing

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

two traffic violations. Carrillo was driving on a suspended license, and he appeared to be under the influence of an opiate. During a patdown search, Torres recovered nine small plastic baggies containing methamphetamine and two small plastic baggies with marijuana from Carrillo's right front pants pocket, as well as $127.34 in cash and a pager. Li searched the vehicle, and found a duffle bag containing two loaded revolvers on the floorboard of the rear seat. According to Torres, the duffel bag was within reach of the driver, to "[t]he back of the seat behind the driver's right shoulder on the floor." (*People v. Carrillo* (Sept. 26, 2001, B145538) [nonpub. opn.] at pp. 2-3 (*Carrillo I*).)

The deputies also found a scale, a list of police radio frequencies, 12 larger empty baggies, 128 smaller empty baggies, and nine additional baggies containing small quantities of methamphetamine in the trunk of the car. (*Carrillo I*, *supra*, B145538 at pp. 2-3.)

The parties stipulated that Carrillo was a convicted felon. They also stipulated that the 18 baggies of methamphetamine recovered from Carrillo's pants pocket and the trunk weighed 7.25 net grams. A narcotics officer opined that the methamphetamine was possessed for purposes of sale. (*Carrillo I*, *supra*, B145538 at p. 3.)

2. *Jury Verdict and Sentencing*

A jury convicted Carrillo of possession of a controlled substance for sale (Health & Saf. Code, § 11378; count 1), transportation of a controlled substance (*id.*, § 11379, subd. (a); count 2), and possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1); count 3.) As to counts 1 and 2, the jury also found Carrillo was personally armed with a

firearm in the commission of the offenses within the meaning of section 12022, subdivision (c). (*Carrillo I*, *supra*, B145538 at p. 2.)

Carrillo waived a jury trial on the alleged prior convictions, and the trial court found Carrillo had four prior convictions under the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and three prior convictions for which he served separate prison terms (§ 667.5, subd. (b)). The court imposed consecutive sentences of 25 years to life under the three strikes law on count 1 for possession for sale of a controlled substance and on count 3 for possession of a firearm by a felon, for a total aggregate term of 50 years to life. The court imposed a concurrent sentence on count 2 for transportation of a controlled substance, but in *Carrillo I* we modified the judgment to stay the term imposed on count 2 pursuant to section 654. (*Carrillo I*, *supra*, B145538 at pp. 5-8.) The trial court stayed the enhancements for being personally armed with a firearm in the commission of the offenses and struck the prior prison term enhancements. (*Carrillo I*, *supra*, at p. 2.)

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

On February 8, 2013 Carrillo filed a petition for recall of sentence under Proposition 36. He argued that the underlying offenses were not serious or violent felonies within the meaning of the three strikes law, 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)).[2] On March 8, 2013 the superior court issued an order to show cause why Carrillo's sentence should not be recalled.

The People filed an opposition to the petition in which they asserted Carrillo 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 the defendant was unsuitable for resentencing based on his criminal history and his poor performance on probation and parole.

In his reply, Carrillo argued that "'armed . . . in the commission or attempted commission of a felony'" under *People v. Bland* (1995) 10 Cal.4th 991, 1002 (*Bland*), requires that the """arming""" take place during the underlying crime and that it have a """facilitative nexus""" to the offense. (Italics omitted.) Carrillo also pointed to evidence of his suitability for resentencing under Proposition 36.

On November 14, 2016, after hearing argument of counsel, the superior court denied Carrillo's petition with prejudice, finding he was ineligible for resentencing because he was armed with a firearm during the commission of the underlying offenses. In its oral ruling, the court stated that the "case law does not require a facilitative nexus, only a temporal one." Thus, Carrillo "doesn't have to use [the firearm] to commit the crime. He just

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[2] Carrillo's four prior strike convictions were in case No. KA002865. Three of the strikes were for shooting at an inhabited dwelling or occupied vehicle in violation of section 246; a fourth strike was for an aggravated assault in violation of section 245, subdivision (a).

has to have been armed at the time the crime was committed." The court found "by a preponderance of the evidence [Carrillo] is statutorily ineligible for recall and resentencing pursuant to . . . section 1170.126[, subdivision] (a) because during the commission of the current offense [Carrillo] was armed with a firearm; in fact, two firearms."

Carrillo timely appealed.

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) ___ Cal.5th ___, ___ [2018 WL 2090909 at p. 2] (*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. [Citations.]" (*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 *People v. Frierson* (2017) 4 Cal.5th 225, 230, 236.[3] We address these decisions below.

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[3] Both Carrillo and the People have submitted supplemental letter briefs.

B. *Proposition 36 Ineligibility Does Not Require a Facilitative Nexus Between the Arming with a Firearm and the Underlying Offense*

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. [Citations.]" (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1109-1110 (*Cruz*); accord, *Bland*, *supra*, 10 Cal.4th at p. 997 ["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*), disapproved on another ground in *People v. Frierson*, *supra*, 4 Cal.5th at p. 240, fn. 8. [same].)[4]

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 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

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[4] 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.

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*.)

Carrillo urges us to apply the additional requirement of a "facilitative nexus" applicable to firearm sentence enhancements under the Supreme Court's holding in *Bland* to a determination of a defendant's ineligibility for resentencing under sections 667, subdivision (e)(2)(C)(iii), and 1170.12, subdivision (c)(2)(C)(iii). In *Bland*, the Supreme Court held that for the purpose of imposition of the firearm sentence enhancement under 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 . . . .' [Citation.]" (*Bland*, *supra*, 10 Cal.4th at p. 1002.) The court concluded, "by specifying that the added penalty applies only if the defendant is armed with a firearm 'in the commission' of the felony offense, section 12022 implicitly requires both that the 'arming' take place *during* the underlying crime and that it have some '*facilitative nexus*' to that offense. Evidence that a firearm is kept in close proximity to illegal drugs satisfies this 'facilitative nexus' requirement: a firearm's presence near a drug cache gives rise to the inference that the person in possession of the drugs kept the weapon close at hand for 'ready access' to aid in the drug offense." (*Ibid*.)

In *Bland*, police officers had searched the defendant's house and found rock cocaine in the defendant's closet and a nearby duffel bag with items commonly associated with the sale or manufacture of cocaine, including a scale and plastic baggies.

The officers found an assault weapon and other firearms under the bed in the same room. At the time of the search, the defendant was outside of the house. (*Bland*, *supra*, 10 Cal.4th at p. 995.) The court concluded, "From evidence that the assault weapon was kept in [the] defendant's bedroom near the drugs, the jury could reasonably infer that, at some point during the felonious drug possession, defendant was physically present with both the drugs and the weapon, giving him ready access to the assault rifle to aid his commission of the drug offense." (*Id*. at p. 1000.)

The Supreme Court in *Estrada* rejected the argument made by Carrillo here that there must be a "facilitative nexus" between the arming and the underlying offense for a defendant to be ineligible for 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. (See, e.g., Merriam-Webster's Collegiate Dict. (11th ed. 2003) p. 388 [defining 'during' as 'throughout the duration of' or 'at a point in the course of'].) 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, fn. omitted.)

Carrillo points out that the court in *Estrada* qualified its holding by stating in footnote 4 that "[w]hether the use, arming, and intent described in section 1170.12, subdivision (c)(2)(C)(iii) must have a more-than-coincidental relationship to the current offense is a question we have no occasion to consider here." (*Estrada*, *supra*, 3 Cal.5th at p. 670, fn. 4.) However, although the court expressly did not decide whether more than a "coincidental" relationship between the arming and the offense was required to make a defendant ineligible for resentencing, the court made clear that Proposition 36 could have imposed the stricter "facilitative nexus" requirement in *Bland*, but it "does not do so." (*Estrada*, *supra*, 3 Cal.5th at p. 670.)

In addition, following the Supreme Court's decision in *Estrada*, our colleagues in Division Six of this district concluded the People need not show a "facilitative nexus" between the arming and the underlying offense for a defendant to be ineligible for resentencing under Proposition 36. (*Cruz*, *supra*, 15 Cal.App.5th at pp. 1111-1112.) In *Cruz*, the court affirmed the superior court's finding that the defendant was ineligible for resentencing under Proposition 36 based on his use of a weapon during the commission of the current offense even though the jury found not true the allegation the defendant used a knife in the commission of the offense. (*Id.* at p. 1111.) The court explained, "This enhancement [under section 12022, subdivision (b)(1),] applies only if the knife had a facilitative nexus in the

commission of the offense. [Citations.] Proposition 36 turns on whether the defendant was armed '[*d*]*uring the commission* of the current offense' (§ 1170.12, subd. (c)(2)(C)(iii) . . .), which is different than a sentence enhancement for use of a weapon '*in the commission*' of the offense (§ 12022, subd. (b)(1) . . .). '"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.' [Citations.]" (*Id.* at pp. 1111-1112;[5] accord, *Osuna*, *supra*, 225 Cal.App.4th at p. 1032 [Proposition 36 does not require a facilitative nexus for a defendant to be ineligible for resentencing].)

We conclude, as did our colleagues in Division Six, that a determination of ineligibility under Proposition 36 "requires a temporal nexus between the arming and the underlying felony, not a facilitative one.' [Citations.]" (*Cruz*, *supra*, 15 Cal.App.5th at pp. 1111-1112.)

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

The superior court used a preponderance of the evidence standard in finding that Carrillo was ineligible for resentencing under Proposition 36, concluding that "during the commission of the current offense petitioner was armed with a firearm; in fact, two firearms." However, since the superior court's ruling, the

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[5] The court also concluded on the same ground that the fact the jury acquitted the defendant of assault with a deadly weapon was "not dispositive of whether he was armed during the commission of the false imprisonment." (*Cruz*, *supra*, 15 Cal.App.5th at p. 1111.)

Supreme Court has 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*, __ Cal.5th at p. ___ [2018 WL 2090909 at p. 1]; accord, *People v. 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 Carrillo was "armed with a deadly weapon during the commission of his current offense." Specifically, they point to the undisputed evidence at trial that Carrillo had two loaded firearms in his vehicle. According to Torres, the duffel bag was within reach of the driver, to "[t]he back of the seat behind the driver's right shoulder on the floor." Further, the jury found that Carrillo was a felon in possession of a firearm and that he was personally armed with a firearm in the commission of the offenses within the meaning of section 12022, subdivision (c). (*Carrillo I*, *supra*, B145538at p. 2.) Thus, by its verdict, the jury necessarily found that Carrillo knew the firearms were in his vehicle. (See CALJIC No. 12.44 [to find a defendant guilty of possession of a firearm by a felon, the jury must find the defendant "had knowledge of the presence of the . . . firearm"]; CALJIC No. 17.16.1 [to find the allegation true that the defendant was personally armed in the commission of the offense, the jury must find the defendant was "'armed with a

firearm,'" which "means knowingly to carry a firearm . . . or have it available . . . for offensive or defensive use"].)[6]

Although the superior court applied an incorrect standard of proof, we uphold the superior court's finding of ineligibility because the evidence "does not reasonably support any inference but that [Carrillo] was armed with a deadly weapon during the commission of his current offense." (*Perez*, *supra*, ___ Cal.5th at p. ___ [2018 WL 2090909 at p. 1].) In *Perez*, the defendant was convicted of assault by means likely to produce great bodily injury based on his assault of the victim with a truck. (*Id*. at p. ___ [2018 WL 2090909 at p. 2].) The trial court granted the defendant's petition for recall of his sentence, finding he was eligible for resentencing because he was not charged with assault with a deadly weapon, and the truck was not necessarily used as a deadly weapon. (*Id*. at p. ___ [2018 WL 2090909 at p. 2].)

The Supreme Court reversed, agreeing with the appellate court "that because the jury, by its verdict, necessarily found that [the defendant] used force likely to produce great bodily injury when he assaulted [the victim], and because the vehicle was the sole means by which [the defendant] applied this force, the record of conviction establishes that [the defendant] used the vehicle as a deadly weapon. [Citation.]" (*Perez*, *supra*, ___ Cal.5th at p. ___ [2018 WL 2090909 at p. 2].)

We conclude the record here similarly shows beyond a reasonable doubt that Carrillo was armed with a firearm during the commission of the current offense. Carrillo had two firearms

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[6] Although the parties have not included in the record the instructions given to the jury, we have reviewed the record on appeal in *Carrillo I*. The trial court instructed the jury with CALJIC Nos. 12.44 and 17.16.1.

in the backseat available for use during the commission of the crime of possession of a controlled substance for sale, and he had knowledge that the firearms were available for his use.[7] There is no evidence to the contrary. We conclude the superior court's error in applying a preponderance of the evidence standard was harmless, in that there is no reasonable probability of a more favorable result had the trial 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. *People v. 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].)

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[7] In addition, because the jury found true that Carrillo was personally armed with a firearm in the commission of the drug offenses within the meaning of section 12022, subdivision (c), they necessarily found "both that the 'arming' [took] place *during* the underlying crime and that it [had] some '*facilitative nexus*' to that offense." (*Bland*, *supra*, 10 Cal.4th at p. 1002.)

DISPOSITION

We affirm the superior court's order finding Carrillo ineligible for resentencing under Proposition 36.

FEUER, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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