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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MONROE ROBERT ROSS,

Defendant and Appellant.

B295503

(Los Angeles County  
Super. Ct. No. YA020903)

THE COURT:

Monroe Robert Ross appeals the denial of his Proposition 36 (Three Strikes Reform Act of 2012) petition to recall his third strike indeterminate sentence of 25 years to life in prison. (Pen. Code,<sup>1</sup> § 1170.126.) Applying the beyond a reasonable doubt standard in accordance with *People v. Frierson* (2017) 4 Cal.5th 225 (*Frierson*), the trial court determined defendant was

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

ineligible for recall and resentencing because he was armed with a firearm during the commission of the subject offense. (See §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii).)

Defendant appealed the trial court's ruling. We appointed counsel to represent defendant on appeal. After examination of the record, counsel filed an opening brief raising no issues and asking this court to independently review the record. Defendant filed his own supplemental brief, in propria persona. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On July 6, 1994, police officers responded to a call reporting shots fired at a bar. Defendant and another man emerged from a crowd that had assembled near the scene. Defendant was carrying a gun. An officer ordered defendant to approach and kneel; instead, defendant walked to the front of a nearby car and made a downward motion with his hand. He started to approach the officer but then fled and was apprehended. Police recovered a loaded .38-caliber revolver from the gutter next to the car where defendant was seen lowering his hand.

Defendant was convicted of possession of a firearm by a felon (former § 12021, subd. (a)(1))<sup>2</sup> and the trial court found he had suffered two prior strikes (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). The trial court sentenced him to a term of 25 years to life under the Three Strikes law. We affirmed the judgment of conviction (*People v. Ross* (June 30, 1997, B104360) [nonpub. opn.]), but remanded the matter to enable the trial

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<sup>2</sup> Former section 12021, subdivision (a)(1) was repealed as of January 1, 2012, and reenacted without substantive change as section 29800, subdivision (a)(1). (*People v. Sanders* (2012) 55 Cal.4th 731, 734, fn. 2.)

court to exercise its discretion in light of *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. On remand the trial court declined to strike the prior strike convictions. Defendant appealed again, and we affirmed. (*People v. Ross* (Oct. 6, 1999, B124142) [nonpub. opn.].)

In January 2013, defendant filed a petition for recall and resentencing pursuant to Proposition 36. Following review of the record and argument by counsel, the superior court denied the petition, finding by a preponderance of the evidence that defendant was statutorily ineligible for relief because he was armed with a firearm during the commission of the offense. We affirmed the trial court's ruling. (*People v. Ross* (Mar. 2, 2017, B277187) [nonpub. opn.].)

Thereafter, defendant sought reconsideration of his petition for resentencing in light of the California Supreme Court's decision in *Frierson*, which held that the appropriate standard of proof for Proposition 36 ineligibility is beyond a reasonable doubt rather than preponderance of the evidence. (*Frierson, supra*, 4 Cal.5th at pp. 235–236.) The trial court granted reconsideration and held a new eligibility hearing. Following argument the trial court denied the petition, finding beyond a reasonable doubt that defendant was armed with a firearm when he committed his offense.

## DISCUSSION

Defendant argues in his supplemental brief that the trial court erred in denying his petition for recall of his sentence based on its finding that defendant was ineligible for relief because he was armed with a firearm during the commission of the offense. In support of his challenge to the court's ruling, defendant cites Assembly Bill No. 1308 (Stats. 2017, ch. 675, § 1 (AB 1308),

effective Jan. 1, 2018) to claim that imposition of the third strike sentence in this case violated the Eighth Amendment prohibition against cruel and unusual punishment because, when he committed the prior strike offenses, he qualified as a youth offender under section 3051. Defendant was not a juvenile offender when he committed his third strike offense in this case. Accordingly, he is not entitled to a youth offender parole hearing, and section 3051 is irrelevant to defendant's eligibility for recall and resentencing under section 1170.126.<sup>3</sup>

Defendant further contends that the trial court's finding that he was armed with a firearm during the commission of the offense violated his Sixth Amendment right to have "[a]ny fact other than the fact of a prior conviction that increases the

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<sup>3</sup> Section 3051 requires the Board of Parole Hearings to conduct a "youth offender parole hearing" during the 15th, 20th, or 25th year of a juvenile offender's incarceration. (§ 3051, subd. (b); *People v. Franklin* (2016) 63 Cal.4th 261, 277.) Assembly Bill No. 1308, cited by defendant, amended section 3051 to apply to youth offenders who committed their controlling offense (the offense or enhancement for which the longest term of imprisonment was imposed) when they were 25 years of age or younger. (Stats. 2017, ch. 675, § 1 (AB 1308), effective Jan. 1, 2018.) "The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48, and *Miller v. Alabama* (2012) 183 L.Ed.2d 407." (2013 SB 260, Stats. 2013, ch. 312, § 1.)

statutorily authorized penalty for a crime . . . found by a jury beyond a reasonable doubt.” This claim, too, is without merit. Upon receiving a petition for recall of sentence under section 1170.126, the trial court is charged with determining based on its review of the record, “whether the petitioner satisfies the criteria in subdivision (e).” (§ 1170.126, subd. (f).) In the proceedings below, the trial court carried out its duty, and in accordance with *Frierson*, found *beyond a reasonable doubt* that defendant was ineligible for recall.

Defendant further asserts that the court’s “exercise in judicial fact finding” increased his sentence in violation of *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*) and *Mathis v. United States* (2016) 136 S.Ct. 2243 (*Mathis*). According to defendant, these cases forbid a “sentencing court from reviewing preliminary hearing testimony to determine what conduct likely support[ed] the prior conviction.” Further, the United States Supreme Court has made “clear that when criminal law imposes added punishment based on finding[s] about the facts underlying a defendant[’s] prior conviction, the Sixth Amendment contemplates that a jury not a sentencing court will find such facts, unanimously and beyond a reasonable doubt.” Defendant concludes that “the trial court violated defendant’s Sixth Amendment right to a jury’s determination on the seriousness [of] the priors.”

In denying defendant’s petition for recall of his sentence, the trial court made no findings about what conduct led to the underlying conviction, it did not review preliminary hearing testimony to make any determination about a prior conviction, it made no findings about the seriousness of defendant’s priors, and the trial court most definitely did not increase defendant’s

sentence by refusing to decrease it. Neither *Descamps* nor *Mathis* has any bearing on the trial court's determination of defendant's eligibility for relief in this case, and nothing in the proceedings below or in the trial court's findings infringed defendant's Sixth Amendment rights.

Based on our examination of the entire record, we are satisfied that defendant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

### **DISPOSITION**

The judgment is affirmed.

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LUI, P.J.

ASHMANN-GERST, J.

HOFFSTADT, J.