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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALLAN LASTEVEN McINTOSH,

Defendant and Appellant.

B285422

(Los Angeles County
Super. Ct. No. NA038710)

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

California Appellate Project, Jonathan B. Steiner, Executive Director, 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, Senior Assistant Attorney General, Ilana Herscovitz Reid and Blythe J. Leszkay, Deputies Attorney General, for Plaintiff and Respondent.

INTRODUCTION

In 1999, defendant and appellant Allan Lasteven McIntosh (defendant) pleaded guilty to possession of a firearm by a felon and admitted he had sustained certain prior convictions. The trial court sentenced him to state prison for a term of 25 years to life under the Three Strikes Law. Following the passage of Proposition 36, the Three Strikes Reform Act of 2012, defendant filed a petition requesting recall of his sentence and resentencing pursuant to Penal Code section 1170.126.¹ The trial court denied the petition, finding defendant statutorily ineligible for the requested relief. We affirm.

BACKGROUND

In our prior opinion in this case, *People v. Allan L. McIntosh* (Jan. 14, 2000, B131214) (nonpub. opn.) (prior opinion), we set forth the underlying facts of defendant's case as follows: "On October 29, 1998, two Long Beach bicycle patrol officers stopped defendant . . . because [defendant] was riding a bicycle without a light and had been outside the crosswalk when crossing a street. [Defendant] did not comply with the officers' request that he stop and instead rode his bike into a bike ridden by one of the officers. When the officers tried to grab [defendant], they saw [defendant] reach for his waistband. [Defendant] pointed a gun at one of the officers. The other officer also felt someone pulling upward on his own firearm. [Defendant] had to be wrestled to the ground. The gun [defendant] used had a loaded magazine, but the firing chamber was empty."

¹ All statutory references are to the Penal Code.

In 1999, defendant pleaded guilty to possession of a firearm by a felon (former § 12021, subd. (a)(1)),² and admitted he suffered two prior “strike” convictions for serious or violent felonies (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), a prior conviction of a serious felony (§ 667, subd. (a)(1)), and a prior prison term conviction (§ 667.5, subd. (b)). The trial court ultimately sentenced defendant to state prison for a term of 25 years to life in accordance with the Three Strikes Law. We affirmed defendant’s sentence in our prior opinion.

In December 2012, shortly after the passage of Proposition 36, defendant filed a petition to recall his sentence under section 1170.126. The trial court issued an order to show cause why the petition should not be granted. The District Attorney filed an opposition and supplemental opposition with supporting evidence.

On September 18, 2017, the trial court held a hearing on defendant’s petition.³ At the outset of the hearing, the trial court confirmed its understanding of the facts, stating, “I understand the facts to be as follows: [Defendant] was riding his bicycle after dark. He did not have a headlight on, at least the officers thought. They attempted to stop him. He did not obey all the chances to stop. Eventually Officer Mascorro grabbed him to stop him. They both fell off their bikes. Officer Mascorro and his partner were both on bikes. They got into a struggle, and the

² The crime of possession of a firearm by a felon is now found at section 29800, subdivision (a)(1).

³ The multi-year delay between the filing of defendant’s petition and the hearing are attributable to multiple extensions of time granted by the trial court, predominantly at defendant’s request.

defendant pointed a 9mm semi automatic handgun at Officer Mascro. Those are the facts.” Defense counsel and the prosecutor agreed.

Thereafter, the trial court denied the petition, finding defendant statutorily ineligible for the requested relief beyond a reasonable doubt, explaining: “On the basis of the submission on the argument of counsel, I find him statutorily ineligible for recalling and resentencing pursuant to Penal Code section 1170.126 because during the commission of the offense, he both used a firearm and was armed with a firearm. He intended to cause great bodily injury. I think I can make that finding, if you have a loaded handgun, a 9mm handgun at a police officer’s chest, you are not wishing him happy birthday. Accordingly, the petition for recalling and resentencing is denied with prejudice pursuant to 1170.126(e)(2) and 667(e)(2)(C)(iii).”

Defendant filed a timely notice of appeal.

DISCUSSION

Prior to Proposition 36, “the Three Strikes law required that a defendant who had two or more prior convictions of violent or serious felonies receive a third strike sentence of a minimum of 25 years to life for any current felony conviction, even if the current offense was neither serious nor violent.” (*People v. Johnson* (2015) 61 Cal.4th 674, 680.) When defendant was sentenced in 1999 for his firearm possession conviction in this case, he received a sentence of 25 years to life in accordance with the Three Strikes Law, because he had two prior qualifying convictions.

In November 2012, voters approved Proposition 36, the Three Strike Reform Act of 2012. (*People v. Osuna* (2014) 225

Cal.App.4th 1020, 1026 (*Osuna*), disapproved on other grounds *People v. Frierson* (2017) 4 Cal.5th 225, 235-236, 240, fn.8.) Proposition 36 changed the Three Strikes Law in that the 25 years to life sentence for third-strike defendants applies only when “the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor.” (*Ibid.*) In all other cases, the defendant will be sentenced as a second strike offender. (*Ibid.*) The Act also enacted section 1170.126, a post-conviction mechanism “whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the [T]hree [S]trikes [L]aw for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender.” (*Ibid.*) Relevant to the instant appeal, “an inmate is disqualified from resentencing if, inter alia, ‘[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).)” (*Osuna, supra*, 225 Cal.App.4th at p. 1029.)

Here, based on the undisputed fact that “defendant pointed a 9mm semi automatic handgun” at the officer, the trial court found defendant statutorily disqualified from Proposition 36 resentencing in that defendant used a firearm, was armed with a firearm, and intended to cause great bodily injury. On appeal, defendant does not challenge the trial court’s findings as a factual matter. Rather, defendant contends that, as a matter of law, the disqualifying factor of being “armed with a firearm” does not apply where the crime of conviction is for possession of that same firearm. Acknowledging that doing so would be “contrary to the conclusion of previous appellate decisions,” defendant

nonetheless urges this court to hold that, “with respect to the crimes of possessing or carrying, a gun, the defendant is not also armed with it in the commission of those offenses within the meaning of Proposition 36.”

We have given independent consideration⁴ to the statutory interpretation defendant advances on this appeal and hold, consistent with the numerous published decisions addressing the same issue, that “the phrase ‘[d]uring the commission of the current offense, the defendant . . . was armed with a firearm,’ . . . extends to situations in which the defendant was convicted of violating section 12021 *if* the defendant had the firearm he or she was convicted of possessing available for use, either offensively or defensively.” (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1054; see also *People v. Frutoz* (2017) 8 Cal.App.5th 171, 175-180; *People v. Elder* (2017) 227 Cal.App.4th 1308, 1312-1314; *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1364; *People v. Burnes*, *supra*, 242 Cal.App.4th at p. 1458; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797-799; *Osuna*, *supra*, 225 Cal.App.4th at pp. 1030-1038; *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1012-1018; *People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 989-995; *People v. White* (2014) 223 Cal.App.4th 512, 518-528.)

In so holding, we reject defendant’s contention that, for disqualification under the Act, there must be some underlying

⁴ “The issue presented in this appeal ‘is one of the interpretation of a statute and its applicability to a given situation, a question of law we review independently.’ [Citation].” (*People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458.)

felony other than the conviction for firearms possession to which being “armed with a firearm” must be “tethered” or have some “facilitative nexus.” Much has been said—and often repeated—by the many courts and panels of judges addressing this same contention or mild variations thereof. We agree with—and thus need not repeat—the reasoning and holdings of the many prior cases addressing the applicability of the “armed” exclusion for Proposition 36 relief, and simply reiterate the universally accepted conclusion that “the plain language of the Act disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm.” (*People v. Hicks, supra*, 231 Cal.App.4th at p. 284.)

Accordingly, we hold the trial court properly determined defendant was armed with a firearm during the commission of the offense and was therefore disqualified from seeking resentencing under Proposition 36.⁵

⁵ Defendant does not challenge the trial court’s conclusions that he was disqualified from resentencing on the separate and independent grounds that he: (1) used a firearm; and (2) intended to cause great bodily injury. (See §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) These grounds are supported by the undisputed facts, and we thus uphold the denial of defendant’s petition on those grounds as well.

DISPOSITION

The order is affirmed.

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KIN, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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