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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BENEDICTO ASUNCION,

Defendant and Appellant.

B267366

(Los Angeles County
Super. Ct. No. NA025389)

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

California Appellate Project, Jonathan B. Steiner and Jill Ishida, 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 Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Petitioner Benedicto Asuncion is currently serving a “Three Strikes” sentence of 25 years to life for possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1)).¹ Following the passage of the Three Strikes Reform Act (Proposition 36), he petitioned for resentencing under section 1170.126. The trial court denied the petition on the ground he was not eligible for resentencing because he was armed with a firearm during the commission of his current offense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October 1995, a jury convicted Asuncion of possession of a firearm by a felon. The trial court additionally found Asuncion had suffered prior convictions of robbery and had served prior prison terms in connection with those convictions. The trial court sentenced Asuncion to a term of 25 years to life, and ordered the prior prison term enhancements stricken. We affirmed the judgment of conviction and remanded the matter for resentencing pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.² On remand, the trial court imposed the same sentence. We affirmed the judgment.³

As summarized in our prior opinions, the evidence at trial was sufficient to establish the following. On July 27, 1995, a Los Angeles County probation officer went to 1220 Loma Vista Drive with officers of the Long Beach police department to conduct a

¹ All further statutory references are to the Penal Code unless otherwise stated.

² *People v. Asuncion* (B199191; filed on March 3, 1997 [nonpub. opn.])

³ *People v. Asuncion* (B121704; filed on May 7, 1999 [nonpub. opn.])

probation search of Asuncion's residence. Asuncion and a woman were present when the officers forcibly opened the door to the apartment. The officers recovered a loaded .22-caliber derringer handgun in a pouch on the dresser in the bedroom, and a .22-caliber rifle under the bed.

On November 6, 2012, the electorate passed Proposition 36. (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 788.) As discussed more fully *post*, Proposition 36 enacted section 1170.126, which provides that persons currently serving an indeterminate life term under the Three Strikes law may file a petition in the sentencing court seeking to be resentenced to a determinate term as a second striker. (§ 1170.126, subds. (f), (g); *People v. Brimmer, supra*, 230 Cal.App.4th at p. 788.)

On February 22, 2013, Asuncion filed a petition for resentencing under Proposition 36. He argued that he was eligible and resentencing would not pose an unreasonable risk of danger to public safety. The People opposed the motion, arguing that Asuncion was ineligible because he had been armed with a firearm during the commission of his current offense. On September 28, 2015, following an eligibility hearing, the trial court concluded that Asuncion was statutorily ineligible for resentencing because "during the commission of the current offense . . . [he] was armed with a firearm." The court denied the petition and Asuncion timely appealed.

CONTENTIONS

Asuncion argues (1) the arming exclusion does not apply when the current offense is possession of a firearm because there must be a facilitative nexus between the arming and an underlying felony to which the arming is tethered, and (2) under the test set forth in *People v. Guerrero* (1988) 44 Cal.3d 343

(*Guerrero*), the trial court was not authorized to make a new finding of fact he was armed and, here, “[t]he record of conviction does not indicate that [his] ‘conviction’ was based upon conduct that constituted arming.”

DISCUSSION

1. Proposition 36

“Prior to its amendment by [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. [Citations.] [Proposition 36] amended the Three Strikes law with respect to defendants whose current conviction is for a felony that is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current felony, pursuant to the provisions that apply when a defendant has one prior conviction for a serious or violent felony. [Citations.]” (*People v. Johnson* (2015) 61 Cal.4th 674, 680–681, fn. omitted; *People v. Conley* (2016) 63 Cal.4th 646, 651.)

Proposition 36 also enacted section 1170.126, which created a procedure by which eligible prisoners already serving third strike sentences may seek resentencing in accordance with the new sentencing rules. (*People v. Johnson, supra*, 61 Cal.4th at p. 682; *People v. Conley, supra*, 63 Cal.4th at p. 653.) An inmate is eligible for resentencing if he or she is serving an indeterminate term of life imprisonment imposed pursuant to the Three Strikes law for a conviction of a felony or felonies that are not defined as serious and/or violent. (§ 1170.126, subd. (e)(1); *People v. Johnson, supra*, at p. 682.) An inmate “is disqualified

from resentencing if any of the exceptions set forth in section 667, subdivision (e)(2)(C) and section 1170.12, subdivision (c)(2)(C) are present.” (*People v. Johnson, supra*, at p. 682.) One such disqualifying exception applies when the defendant, “[d]uring the commission of the current offense . . . used a firearm, [or] was armed with a firearm.’” (*People v. Brimmer, supra*, 230 Cal.App.4th at p. 788; §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312.)

To determine whether a defendant meets the statutory eligibility requirements of Proposition 36, a trial court examines the entire record of conviction. (See, e.g., *People v. Arevalo* (2016) 244 Cal.App.4th 836, 848; *People v. Brimmer, supra*, 230 Cal.App.4th at pp. 800–801.) Ineligibility must be proven beyond a reasonable doubt. (*People v. Arevalo, supra*, 244 Cal.App.4th at p. 853.)

2. The Record Supports the Trial Court’s Finding that Asuncion Is Ineligible for Resentencing Because He Was Armed During the Commission of his Current Offense

Asuncion’s ineligibility for resentencing depends on whether, *during* his violation of former section 12021 for *possessing* a firearm, he was also *armed* with a firearm. (See §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

“The statutory elements of a violation of section 12021, subdivision (a)(1), . . . are that a person, who has previously been convicted of a felony, had in his or her *possession* or under his or her custody or control any firearm.’ [Citation.] Although the crime of possession of a firearm by a felon may involve the act of personally carrying or being in actual *physical* possession of a firearm . . . such an act is not an essential element of a violation

of former section 12021, subdivision (a), because a conviction of this offense may also be based on a defendant's constructive possession of a firearm. [Citations.] 'To establish constructive possession, the prosecution must prove a defendant knowingly exercised a right to control the prohibited item, either directly or through another person.' [Citation.] Hence, while the act of being armed with a firearm—that is, having ready access to a firearm [citation]—necessarily requires possession of the firearm, possession of a firearm does not necessarily require that the possessor be armed with it." (*People v. Brimmer, supra*, 230 Cal.App.4th at p. 795.)

"[A]rming under the sentence enhancement statutes does not require that a defendant utilize a firearm or even carry one on the body. A defendant is armed if the defendant has the specified weapon available for use, either offensively or defensively. [Citations.] As a recent Court of Appeal decision observed, 'a firearm that is available for use as a weapon creates the very real danger it will be used.' [Citation.] Therefore, '[i]t is the availability—the ready access—of the weapon that constitutes arming.' [Citation.]" (*People v. Bland* (1995) 10 Cal.4th 991, 997, italics omitted.)

As a result of these principles, "not *every* commitment offense for unlawful possession of a gun *necessarily* involves being armed with the gun, if the gun is not otherwise available for immediate use in connection with its possession, e.g., where it is under a defendant's dominion and control in a location not readily accessible to him at the time of its discovery." (*People v. Elder, supra*, 227 Cal.App.4th at pp. 1313–1314.) "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 to him for offensive or defensive use. Accordingly, possessing a firearm does not necessarily constitute being armed with a firearm.” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030, fn. omitted.)

Numerous cases have concluded that, under Proposition 36, a conviction for being a felon in possession of a firearm disqualifies an inmate from resentencing if the nature of that possession amounted to arming as defined in *Bland*. (See, e.g., *People v. White* (2014) 223 Cal.App.4th 512, 525–526 [defendant who tossed away handgun while running from police found to be armed with a firearm and, thus, not eligible for resentencing]; *People v. Hicks* (2014) 231 Cal.App.4th 275, 284 [where defendant was detained at front gate of apartment complex and a gun was found inside his backpack in the apartment he had been visiting, defendant was held to be armed and, thus, not eligible for resentencing]; *People v. Brimmer, supra*, 230 Cal.App.4th at pp. 796–797 [defendant who threatened his girlfriend with shotgun during argument was found to be armed and not eligible for resentencing]; *People v. Elder, supra*, 227 Cal.App.4th at p. 317 [police found defendant outside his apartment and—inside—found a gun on cabinet shelf and a second gun in bedroom safe; defendant was found to be armed with a firearm and thus ineligible for resentencing].)

Hence, to be ineligible for resentencing, there need not be a *facilitative* nexus⁴ between an inmate’s “current offense” (here, being a felon in possession of a firearm) and the disqualifying factor of “being armed during the commission of that offense.” “[U]nlike section 12022, which requires that a defendant be armed ‘*in the commission of*’ a felony for additional punishment to be imposed (*italics added*), [Proposition 36] disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm ‘*[d]uring the commission of*’ the current offense (*italics added*). ‘During’ is variously defined as

⁴ For enhancement purposes, “a defendant is armed if the gun has a facilitative nexus with the underlying offense (i.e., it serves some purpose in connection with it).” (*People v. Brimmer, supra*, 230 Cal.App.4th at pp. 794–795.) This concept of “facilitative nexus” was explained by *Bland, supra*, 10 Cal.4th at p. 1002: “[F]or a defendant to be subject to additional punishment for being armed with a firearm, California law requires the ‘arming’ to be ‘in the commission or attempted commission’ of the underlying felony. (§ 12022, subd. (a)(1).) With respect to felony drug possession [for instance], a defendant is armed ‘in the commission’ of that crime so long as the defendant had the firearm available for use in furtherance of the drug offense at some point during the defendant’s possession of the drugs. Thus, 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.”

‘throughout the continuance or course of’ or ‘at some point in the course of.’ (Webster’s 3d New Internat. Dict. (1993) p. 703.) *Thus, there must be a temporal nexus between the arming and the underlying felony, not a facilitative one.* The two are not the same. [Citation.]” (*People v. Hicks, supra*, 231 Cal.App.4th at pp. 283–284, italics added; accord *People v. Brimmer, supra*, 230 Cal.App.4th at pp. 798–799; *People v. Osuna, supra*, 225 Cal.App.4th at p. 1032.)

Asuncion contends that the trial court erred in finding that he was armed during the commission of his current offense because “[t]he record of conviction does not indicate that the ‘conviction’ was based upon conduct that constituted arming.” Asuncion further argues that, under *People v. Guerrero* (1988) 44 Cal.3d 343, the trial court was tasked with examining the record of conviction to determine whether the felon-in-possession offense was committed under circumstances that showed he was armed; in other words, whether the firearms were readily available to him for offensive or defensive use. Here, he argues, there was “no evidence presented at trial that [he] was aware of the exact location of the weapons in the apartment” such that he had ready access to them.

We agree with Asuncion that, in order to determine whether the “armed with a firearm” ineligibility factor barred him from resentencing, the appropriate procedure was to examine, under *Guerrero* and its progeny, the record of conviction to ascertain the conduct underlying his current offense. However, Asuncion misinterprets *Guerrero* when he argues that the resentencing court could not make the arming finding because “the ready availability of the gun . . . was not an element of former Penal Code section 12021.” *Guerrero* stands for the

proposition that facts never established in the original record of conviction cannot be relitigated in later, unrelated proceedings; it does not limit the record of conviction to facts required to establish the elements of an offense. If additional facts are established by competent evidence, they may be used in later proceedings. (See *People v. Smith* (1988) 206 Cal.App.3d 340, 344 [holding that, under *Guerrero*, the trier of fact may consider facts established within the record of conviction, even if those facts were not essential to the judgment].)

Here, to convict Asuncion of the section 12021 charge under a constructive possession theory, the jury was required to find that he had knowledge of the presence of the firearms and knowingly exercised a right to control them. (See *People v. Brimmer, supra*, 230 Cal.App.4th at p. 795; *People v. Llamas* (1997) 51 Cal.App.4th 1729, 1743; *People v. Low* (1983) 148 Cal.App.3d 89, 92.) Accordingly, it is clear his felon-in-possession conviction was based on the jury's implicit conclusion that he knew the firearms were present in the apartment and exercised a right to control them.

Furthermore, the evidence showed that Asuncion was inside the apartment when the firearms were discovered on the dresser and under the bed. This established the firearms were in a location "readily accessible to him" such that he was armed. (*People v. Elder, supra*, 227 Cal.App.4th at p. 1314; *People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 985 [affirming the defendant was "armed" when he was in his kitchen at the time police found one shotgun in a bedroom and other firearms in a closet]; *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1011–1012 [affirming the defendant was "armed" when he was standing inside his doorway and police

discovered a loaded gun inside the defendant's wife's purse in an adjacent bedroom]; *People v. Elder, supra*, 227 Cal.App.4th at p. 1317 [affirming the defendant was armed when he was standing outside his front door and the police found one loaded gun on a shelf of an entertainment center and another gun in an unlocked safe in a bedroom.]; *People v. Hicks, supra*, 231 Cal.App.4th at p. 280 [affirming the defendant was armed when he was by the front gate of an apartment complex and the police found a loaded pistol inside the apartment he had visited].)

Lastly, Asuncion contends the trial court improperly used a preponderance of the evidence standard of proof rather than a beyond a reasonable doubt standard in deciding whether he was armed. Under *People v. Arevalo, supra*, 244 Cal.App.4th at p. 852, "the appropriate standard of proof is beyond a reasonable doubt." However, as we would affirm the trial court's arming determination under either standard, we need not, as Asuncion requests, remand the matter for the trial court to make the finding under the proper standard.

DISPOSITION

The order is affirmed.

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EDMON, P. J.

We concur:

ALDRICH, J.

GOSWAMI*

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