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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD MATTHEW LONG, Defendant and Appellant.	B281280 (Los Angeles County Super. Ct. No. KA030371)

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

Joshua Schraer, 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 Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Matthew Long appeals the denial of his petition under Three Strikes Reform Act of 2012 (the "Reform Act") to recall his third strike indeterminate sentence of 25 years to life in prison. (Pen. Code, § 1170.126.)[1] The hearing court found by a preponderance of the evidence that appellant was armed during the commission of the underlying offense (possession of a firearm by a felon in violation of section 12021, subd. (a)(1)),[2] and was therefore ineligible for recall and resentencing under section 1170.126, subdivision (e)(2).[3] We reverse and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

On December 28, 1995, La Verne police officers conducted a traffic stop of an older model Volkswagen Beetle with a misaligned headlight. Appellant, who was seated in the front passenger seat, smelled of alcohol and appeared to be "half asleep." The officers ordered appellant out of the vehicle. One officer patted appellant down and found an empty gun holster on his belt and seven bullets in his pocket. A search of the car turned up a loaded gun under the driver's seat.

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[1] Undesignated statutory references are to the Penal Code.

[2] Section 12021 was moved and renumbered as section 29800 on January 1, 2012. (Stats. 2010, ch. 711, § 4.) All references to section 12021 refer to former section 12021.

[3] Section 1170.126, subdivision (e)(2) provides that an inmate is ineligible for resentencing if, during the commission of the underlying offense, the inmate "was armed with a firearm" as provided in section 1170.12, subdivision (c)(2)(C)(iii).

The gun was registered to a James Smith, who told police he had lent the gun to the driver of the car, Gary Balch, a year earlier. Balch admitted to police that he had borrowed the gun from Smith the previous year, and explained that he had it in his car the night of the traffic stop because he wanted to get rid of it. Balch also told the police that he had just met appellant earlier that evening, and he was giving appellant a ride home.

A jury convicted appellant of being a convicted felon in possession of a firearm. (§ 12021, subd. (a)(1).) The trial court found that appellant had suffered two prior convictions under the "Three Strikes" law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), and sentenced appellant to an indeterminate third-strike term of 25 years to life in prison.[4]

After the passage of the Reform Act, appellant filed a petition for recall of his sentence and for resentencing as a second strike offender. (§ 1170.126.) Following a hearing on appellant's eligibility for relief under section 1170.126, the trial court denied the petition finding proof by a preponderance of the evidence that appellant "was armed with a firearm" during the commission of the current offense. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).)

DISCUSSION

The Reform Act amended the Three Strikes law by reserving the indeterminate life sentence for those third strike offenders whose current offense is a serious or violent felony, or

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[4] On May 29, 1997, this court affirmed appellant's conviction and sentence in a nonpublished opinion, B102577.

where the prosecution has pleaded and proved an enumerated disqualifying factor. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167 *People v. Guilford* (2014) 228 Cal.App.4th 651, 655.) With the addition of section 1170.126, the Reform Act also allows an inmate who is serving a life sentence under the Three Strikes law for an offense that is neither a serious nor violent felony and who is not disqualified to petition the court for resentencing as a second strike offender. (*People v. Yearwood*, *supra*, at p. 168.)

A defendant seeking recall and resentencing under the Reform Act bears the initial burden of establishing eligibility for relief. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 963.) "Once that initial showing is made by the defendant, the prosecution bears the burden of proving that one of the ineligibility criteria applies." (*People v. Frierson* (2017) 4 Cal.5th 225, 234 (*Frierson*).) But because the Reform Act contains no standard for proof of ineligibility for second strike sentencing (*People v. Guilford*, *supra*, 228 Cal.App.4th at p. 657), a split developed among the Courts of Appeal over the applicable evidentiary standard, with some courts approving a preponderance of the evidence standard (see, e.g., *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040), and others endorsing the proof beyond a reasonable doubt standard. (See, e.g., *People v. Arevalo* (2016) 244 Cal.App.4th 836, 853.)

In its recent opinion in *Frierson*, *supra*, 4 Cal.5th 225, our Supreme Court resolved the issue, holding that the People are required to establish beyond a reasonable doubt that a petitioner

is ineligible for resentencing.[5] (*Id*. at p. 230.) Accordingly, under *Frierson*, the hearing court in this case could deny appellant's petition for resentencing only upon finding beyond a reasonable doubt that appellant was armed during his commission of the underlying offense. The court thus plainly erred in applying the less stringent preponderance of the evidence standard to find appellant "statutorily ineligible for resentencing pursuant to Penal Code section 1170.126(e)(2)."

"A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997.) While being armed with a firearm invariably involves possession, the reverse is not always true, and "[a] defendant's 'mere possession' of a firearm or deadly weapon does not establish that the defendant was armed with the firearm or deadly weapon." (*People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458.) Accordingly, "a person convicted of being a felon in possession of a firearm is not automatically disqualified from resentencing by virtue of that conviction"; rather, disqualification occurs only if that person was *armed*. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048.)

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[5] In so holding, the high court endorsed *People v. Arevalo*, *supra*, 244 Cal.App.4th 836, while expressly disapproving *People v. Perez* (2016) 3 Cal.App.5th 812, 833, *People v. Newman* (2016) 2 Cal.App.5th 718, 727–732, and *People v. Osuna*, *supra*, 225 Cal.App.4th 1020, 1038–1040, to the extent these cases call for a preponderance of the evidence standard for proving a petitioner's ineligibility for resentencing under the Reform Act. (*Frierson*, *supra*, 4 Cal.5th at p. 240, fn. 8.)

Respondent asserts the hearing court's error in applying the wrong evidentiary standard must be deemed harmless because overwhelming evidence established that appellant was armed during the commission of the offense. In so arguing, respondent cites *People v. Barasa* (2002) 103 Cal.App.4th 287 for its holding that even where a defendant is "convicted with an incorrectly allocated burden of proof, in cases where there is uncontradicted evidence as to a point, there can be no prejudice." (*Id.* at pp. 296–297; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 617–618.) Unlike *Barasa*, where uncontroverted evidence and the defendant's own admissions established the factor which disqualified him for probation, the evidence before the court in this case pertaining to whether appellant was armed during the commission of the offense was in dispute.

The record before the court on appellant's petition for resentencing established that appellant was seated in the front passenger seat of a vehicle in which a loaded gun was found under the driver's seat.[6] The registered owner of the gun had lent it to the driver of the car a year earlier, and the driver had it in his car the night of the traffic stop because he intended to get

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[6] The People make much of the evidence that appellant was wearing an empty gun holster and bullets were found in appellant's pocket. While these facts were relevant to whether appellant was in *possession* of the gun, they were far from dispositive on the question of whether he was *armed*, that is, whether the gun under the seat was available for his use, either offensively or defensively. Moreover, there was no evidence in the record before the court that the bullets matched the gun.

rid of it. The driver had only met appellant earlier that evening, and was giving appellant a ride home.

On these facts, the determination of whether appellant was armed could well turn out differently under the more stringent beyond a reasonable doubt standard, and we cannot deem the hearing court's error in applying the wrong standard of proof to find appellant ineligible for relief under the Reform Act to be harmless. In accordance with *Frierson, supra*, 4 Cal.5th 225, appellant is entitled to a hearing on his recall petition in which the court applies the correct evidentiary standard.

DISPOSITION

The order is reversed. The trial court is directed to reconsider the petition under the reasonable doubt standard.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.