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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY ANTWAN SHANNON, Defendant and Appellant.	B277124 (Los Angeles County Super. Ct. No. VA038282)

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.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill, Deputy Attorney General, and Paul S. Thies, Deputy Attorney General, for Plaintiff and Respondent.

Jeffrey Antwan Shannon appeals the denial of his petition under the Three Strikes Reform Act of 2012 (Proposition 36 or the Act) to recall his third strike indeterminate sentence of 25 years to life in prison. (Pen. Code,[1] § 1170.126.) Appellant contends the trial court erred in determining that appellant was ineligible for recall and resentencing under section 1170.126 based on the court's factual finding that appellant had a disqualifying juvenile adjudication. We disagree and affirm.

BACKGROUND

In 1997 a jury convicted appellant of petty theft with a prior. (§ 666.) The trial court found true the special allegation that appellant had suffered three prior felony convictions in a 1989 case in which appellant was convicted of one count of robbery (§ 211) and two counts of kidnapping (§ 207, subd. (a)). Each of these offenses constitutes a serious and violent felony for purposes of the "Three Strikes" law, and the court sentenced appellant to a term of imprisonment of 25 years to life. (See §§ 667, subds. (d), (e)(2)(A)(ii), 667.5, subd. (c)(9), (14), 1170.12, subds. (b), (c)(2)(A)(ii), 1192.7, subd. (c)(19), (20).) We affirmed the judgment in an opinion certified for partial publication. (*People v. Shannon* (1998) 66 Cal.App.4th 649 (Sept. 4, 1998, B112321) [partial pub. opn.].)

On April 4, 2013, appellant filed a petition pursuant to section 1170.126 to recall his sentence and resentence him as a second strike offender. In his petition, appellant set forth his three prior convictions for serious or violent felonies that had

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

formed the basis for his third strike sentence. The trial court found that appellant had made a prima facie showing of eligibility for resentencing and issued an order to show cause why the petition should not be granted. The People opposed the petition on the ground that appellant is ineligible for resentencing under section 1170.126 due to three prior convictions for sexually violent offenses under Welfare and Institutions Code section 6600, subdivision (b).

Based on the court file, exhibits,[2] pleadings, and argument of the parties, the trial court found by a preponderance of the evidence that appellant was statutorily ineligible for resentencing based on three prior juvenile adjudications for forcible rape in concert (former § 261, par. 2), sodomy in concert (former § 286, subd. (d)), and oral copulation by force in concert (former § 288a, subd. (d)). The court denied the petition, and appellant appealed.

DISCUSSION

Appellant contends the court erred by denying his petition on the basis of his three prior juvenile adjudications for sexually

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[2] The exhibits included: the partially published opinion in *People v. Shannon* (Sept. 4, 1998, B112321); the juvenile petition in *In re Jeffrey Shannon* (Super. Ct. L.A. County, filed Feb. 1, 1980, No. J405923); the adjudication minute order (Super. Ct. L.A. County, Nov. 23, 1982, No. J405923) in which the court sustained the juvenile petition, and declared the offenses to be felonies; the disposition minute order (Super. Ct. L.A. County, Jan. 7, 1983, No. J405923) in which the court declared the minor a ward of the court and ordered a nine-year maximum term of confinement (Cal. Youth Authority) on count 1 (§ 261, par. 2), with concurrent terms for counts 2, 3, and 4.

violent offenses that do not appear in the record of his 1997 conviction. We reject the contention.

I. *Proposition 36*

On November 6, 2012, California voters passed Proposition 36, which amended the Three Strikes law with respect to defendants whose current conviction (the offense for which the third strike sentence was imposed) is for a felony that is neither serious nor violent. (*People v. Johnson* (2015) 61 Cal.4th 674, 679, 681 (*Johnson*); *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1457–1458; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167–168.) The Act amended sections 667 and 1170.12, and added section 1170.126, subdivision (b), authorizing an inmate serving a third strike indeterminate life sentence to petition the trial court for recall of the sentence and for resentencing as a second strike offender. (*Johnson*, at pp. 679–680.)

Not every third strike offender whose current offense is neither serious nor violent qualifies for resentencing under the Act, however. To obtain relief, the inmate must satisfy three statutory eligibility requirements. (§ 1170.126, subd. (e).) Two of those requirements relate to the current offense—the offense for which the court imposed the third strike sentence.[3] (§ 1170.126, subd. (e)(1) & (2).)

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[3] The current offense must not have been either a serious or violent felony (as statutorily defined) or one of the drug or sex offenses specified in the statute. (§§ 1170.126, subd. (e)(1) & (2), 667, subd. (e)(2)(C)(i) & (ii), 1170.12, subd. (c)(2)(C)(i) & (ii).) In addition, the inmate must not have used a firearm, been armed with a firearm or deadly weapon, or have intended to cause great bodily injury "[d]uring the commission of the current offense."

The third eligibility requirement—and the only one at issue in this case—is that the "inmate has no prior convictions for any of the offenses appearing in" section 667, subdivision (e)(2)(C)(iv) or section 1170.12, subdivision (c)(2)(C)(iv). (§ 1170.126, subd. (e)(3).) Among the offenses "appearing in" the referenced sections and subdivisions is any " 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." (§§ 667, subd. (e)(2)(C)(iv)(I); 1170.12, subd. (c)(2)(C)(iv)(I).) Welfare and Institutions Code section 6600 defines " '[s]exually violent offense' " to include "a felony violation of Section 261, . . . 286, . . . 288a . . . of the Penal Code." Section 261 defines the crime of rape, section 286 sodomy, and section 288a defines forcible oral copulation. Thus, an inmate is not eligible for resentencing under Proposition 36 if he or she has a prior conviction for any of these offenses.[4] Because juvenile adjudications qualify as prior convictions for purposes of eligibility for relief under the Act (*People v. Thurston* (2016) 244 Cal.App.4th 644, 662–664 (*Thurston*)), an inmate who has any prior juvenile adjudications for sexually violent offenses is precluded from Proposition 36 relief. (§ 1170.126, subd. (e)(3).)

Here, the exhibits and court file admitted at the eligibility hearing showed that appellant had suffered prior juvenile

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(§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).)

[4] Even if an inmate satisfies the eligibility requirements, a court may deny a petition if it determines that resentencing "would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f); see *Johnson*, *supra*, 61 Cal.4th at p. 682.) The court did not reach the suitability issue in the instant case.

adjudications for forcible rape in concert (§ 261), sodomy in concert (§ 286), and oral copulation by force in concert (§ 288a). Appellant does not challenge the admissibility of these documents on evidentiary grounds, and there was no contrary evidence submitted at the hearing. In particular, the adjudication and disposition orders from the juvenile proceedings, as well as this court's prior opinion in B112321 noting the prior juvenile adjudications, constitute substantial evidence to support the trial court's finding that appellant had prior convictions that rendered him statutorily ineligible for resentencing. (See *People v. Prieto* (2003) 30 Cal.4th 226, 258; *People v. Semien* (2008) 162 Cal.App.4th 701, 710.)

Appellant asserts, however, that the eligibility determination must be made solely on the basis of the record of the conviction in which the third strike sentence was imposed. Because appellant's third strike sentence was based solely on his prior *robbery* and *kidnapping* convictions, he contends the trial court erred by finding him ineligible based on his prior juvenile adjudications for sexually violent offenses, which were not alleged as a basis for imposing the third strike sentence. In so arguing, he relies on decisions holding that in considering an inmate's eligibility for resentencing under Proposition 36, the trial court may look no further than the record of conviction that supported the third strike sentence. (See, e.g., *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1062–1063; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336–1340 (*Bradford*); *People v. Berry* (2015) 235 Cal.App.4th 1417, 1427.) As appellant acknowledges, however, these courts were concerned with "the determination

that the *current offense* involved disqualifying conduct" under section 1170.126, subdivision (e)(2).[5] (Italics added.) They did not address the question presented here: Whether the trial court could find an inmate ineligible under the exclusion for disqualifying *prior* convictions based on evidence of a prior conviction that is not part of the record of the case that resulted in the third strike sentence.

Proposition 36 changed the Three Strikes law both prospectively and retrospectively, and appellant contends these applications should be treated identically. The plain language of the statute and the voters' intent as expressed in the ballot pamphlet compel us to reject appellant's assertion. (See *Thurston*, *supra*, 244 Cal.App.4th at p. 657.)

The prospective application of the Act reserves "indeterminate life sentences for cases where the new offense is

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[5] For example, *Bradford* concerned whether the petitioning inmate was ineligible for resentencing based on the "statutory exclusion that applies 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.' " (*Bradford*, *supra*, 227 Cal.App.4th at p. 1327.) The eligibility determination thus involved one of "the enumerated exceptions that apply based on the 'current' conviction" referenced in section 1170.126, subdivision (e)(2), and thus required the trial court to make a factual determination "based solely on evidence found in the record of conviction." (*Bradford,* at pp. 1328, 1331.) Neither *Bradford* nor any of the other cases upon which appellant relies involved an inmate who, like appellant, was found ineligible for resentencing based upon the third eligibility requirement concerning the inmate's "prior convictions." (§ 1170.126, subd. (e)(3).)

also a *serious or violent felony*, unless the prosecution pleads and proves an enumerated disqualifying factor. In all other cases, a recidivist defendant will be sentenced as a second strike offender, rather than a third strike offender." (*People v. Chubbuck* (2014) 231 Cal.App.4th 737, 740–741; *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1285–1286.) " 'Fairly read, however, section 1170.126 does not impose the same requirements in connection with the procedure for determining whether an inmate already sentenced as a third strike offender is eligible for resentencing as a second strike offender.' " (*Thurston*, *supra*, 244 Cal.App.4th at pp. 656–657, quoting *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033.) Specifically, the retrospective provisions of section 1170.126 that permit an inmate to petition for recall and resentencing contain no pleading and proof requirement, which is found only in the prospective application of the Act. (*People v. Conley* (2016) 63 Cal.4th 646, 661; *Thurston*, *supra*, 244 Cal.App.4th at p. 657 ["The 'pleading and proof requirement plainly is a part of only the *prospective* part of the Reform Act . . . ; it is *not* a part of section 1170.126, the *retrospective* part of the Reform Act' "].)

As respondent observes, an interpretation of section 1170.126 that imposes a pleading and proof requirement on the retrospective application of the Act would deprive the People of the ability to prove the existence of disqualifying prior convictions, because, before the enactment of Proposition 36, there was no reason to plead and prove all of a defendant's prior convictions that would be disqualifying under the Act. (See *People v. Conley*, *supra*, 63 Cal.4th at pp. 659–660.) Moreover, appellant's interpretation would contravene the voters' clear intent to exclude from eligibility for relief any inmate with any prior conviction for a sexually violent offense. (Voter Information

Guide, Gen. Elec. (Nov. 6, 2012) Argument in Favor of Proposition 36, at p. 52 ["*Any* defendant who has *ever been convicted* of an extremely violent crime—such as rape, murder, or child molestation—will receive a 25 to life sentence, no matter how minor their strike offense"], italics added; see also Voter Information Guide, *supra*, Analysis by the Legislative Analyst, at p. 50 [the "measure limits eligibility for resentencing to third strikers . . . who have not committed specified current *and prior* offenses"], italics added.)

In this regard, appellant's attempt to distinguish *Thurston*, *supra*, 244 Cal.App.4th 644 fails. Like the instant case, *Thurston* involved the prior conviction exception in subdivision (e)(3). There, the inmate had been sentenced under the Three Strikes law based on prior convictions that occurred in 1984 and 1990, none of which rendered him ineligible for resentencing under Proposition 36. (*Id.* at pp. 652–653.) The People asserted, however, that a 1975 juvenile adjudication for rape rendered the inmate ineligible for relief, even though the juvenile adjudication was not part of the record of the conviction for which the third strike sentence had been imposed. (*Id.* at p. 653.) After an evidentiary hearing, the trial court agreed. (*Id.* at p. 654.) On appeal, the inmate argued that the juvenile adjudication had not been pleaded and proved in the proceeding that resulted in his current sentence and therefore did not make him ineligible for resentencing. (*Id.* at p. 656.) The Court of Appeal disagreed, holding that the conviction that renders the defendant ineligible for resentencing need not have been pleaded or proved in the case that resulted in the third strike sentence, and that the trial court could consider "additional evidence relevant to the eligibility determination." (*Id.* at pp. 657–659.) The additional evidence in

Thurston included the records of the defendant's 1975 juvenile adjudication for rape. (*Id.* at pp. 674–675.)

Here, as in *Thurston*, the trial court properly based its eligibility determination on a conviction other than the prior convictions that resulted in appellant's third strike sentence. (§ 1170.126, subd. (e)(3).) Likewise, the court properly received and considered evidence of the disqualifying conviction even though such evidence was not part of the record of the current offense in which the three strikes sentence was imposed. (*Thurston*, *supra*, 244 Cal.App.4th at p. 659.) Accordingly, we find no error in the trial court's conclusion that appellant is statutorily ineligible for resentencing under section 1170.126, subdivision (e)(3) due to his prior juvenile adjudications for sexually violent offenses.

DISPOSITION

The order denying appellant's petition to recall his third strike sentence of 25 years to life is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.