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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. SIMON ALEJANDRO QUIJAS, Defendant and Appellant.	B277234 (Los Angeles County Super. Ct. No. PA026050)

APPEAL from an order of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner, Executive Director, and Joshua Schraer, Staff Attorney, 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 David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

In 1997, defendant and appellant Simon Alejandro Quijas was convicted of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1); count 1)[1] and carrying a concealed weapon within a vehicle (§ 12025, subd. (a)(1); count 2). The trial court found that defendant had suffered two prior strikes (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and sentenced him to prison for 25 years to life on count 1, pursuant to the "Three Strikes" Law. The trial court stayed a 25 years to life sentence on count 2. (§ 654.) On appeal, we reversed the conviction on count 2 for instructional error. (*People v. Quijas* (Jul. 14, 1999, B116624) [nonpub. opn.].) Count 2 was later dismissed. (§ 1385.)

On April 17, 2013, defendant filed a petition for recall and resentencing. (§ 1170.126.) After finding that defendant had made a showing of eligibility, the trial court issued an order to show cause why the requested relief should not be granted.

The prosecution filed an opposition to the petition, and defendant filed a reply with exhibits. Defendant then filed an addendum, and the prosecution filed a supplemental opposition. Following an eligibility hearing, the trial court found defendant ineligible for resentencing because he had been armed with a firearm during the commission of the offenses.

Defendant timely appealed. He argues that the trial court erred in finding that he was ineligible for recall and resentencing based upon an alleged independent factual finding that he was armed; alternatively, assuming that the trial court was permitted to make new factual determinations, the finding here that defendant was armed requires reversal because it was not made

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

under the correct standard of proof; and the phrase "armed with a firearm" within section 667, subdivision (e)(2)(C)(iii), requires that the firearm have been readily accessible during the commission of the crime and that it had a facilitative nexus to the commission of the crime during which defendant was armed.

We affirm.

FACTUAL BACKGROUND

"On February 7, 1997, at about 3 p.m., there was a commotion and 'a lot of yelling' in front of the Tujunga home of James Vadnais [(Vadnais)]. There were two groups engaged in a verbal confrontation. Defendant, who was with three other men, was yelling at someone who lived in the neighborhood. . . .

"At one point, defendant went back to his vehicle, bent over, and returned with a weapon. Defendant stood in front of a line of his group with his weapon behind his right thigh. Vadnais thought it looked like a big automatic pistol, but admitted he was 'not real weapon oriented.' . . . [¶] . . . The groups proceeded to yell at each other. Still holding the gun, . . . defendant said . . . 'Come on down to Pepsi Park. We'll finish it there.' Both groups got into cars and left. Vadnais thought that defendant got into the passenger seat, though he was less certain at the preliminary hearing. There were also discrepancies about the number of people in the car at Vadnais'[s] home, at the later identification, and in the police report. [¶] . . . [¶]

"[A]bout three to three and a half hours later, a sergeant came to Vadnais'[s] home; informed him that they stopped the car; and wanted to know if Vadnais could do a drive-by identification. Vadnais was taken a couple of blocks away, where

the car had been pulled over, and identified defendant.[2] He is certain that defendant was the person; he had learned in Vietnam not to take his eyes off someone with a gun and watched defendant for about ten minutes, observing his physical features, on which he was basing his identification.

"Officers Jodie Leeland McGee and Wilfredo Ortiz responded to the report of a group with a gun; Officer McGee spoke to witness Vadnais, who descried the suspect and the vehicle. The officers then patrolled and about half an hour later observed a car and occupants meeting the witness'[s] description. The officers made a U-turn and started to follow the vehicle, which started to speed away, going up to 55 miles per hour on surface streets. Defendant was the driver. . . . Officer McGee found a .38 caliber revolver loaded with six .38 slugs under the passenger seat and a box of ammunition containing 44 rounds under the driver's seat. Prints on the gun were all smudged and could not be identified.

"Officer Ortiz spoke to the other occupants of the car and arrested only defendant." (*People v. Quijas*, *supra*, B116624, at pp. 2–4, fns. omitted.)

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2 At first, Vadnais picked out another person as the individual who had been holding a gun. However, he corrected himself during that initial lineup, identifying defendant.

DISCUSSION

Section 1170.126 was enacted as part of Proposition 36, which provides a procedure by which some prisoners already serving third strike sentences may seek resentencing in accordance with new sentencing rules. (*People v. Johnson* (2015) 61 Cal.4th 674, 682.) Defendant challenges the trial court's denial of his petition for recall and resentencing, raising three arguments. We address in each in turn.

I. Whether the trial court erred in finding that defendant was ineligible for recall and resentencing based upon an independent factual finding that he was armed

In his opening brief, defendant argues that the trial court erred in finding that he was ineligible for recall and resentencing based upon an independent factual finding that he was armed. In his reply brief, defendant concedes that the Supreme Court appears to have resolved this issue in *People v. Estrada* (2017) 3 Cal.5th 661, 672 ["precluding a court from considering facts not encompassed within the judgment of conviction would be inconsistent with the text, structure, and purpose of sections 1170.12, subdivision (c)(2)(C)(iii) and 1170.126, subdivision (e)(2)—and would, by consequence, impose an unnecessary limitation"].

II. Whether the trial court's factual finding that defendant was armed requires reversal because it was not made under the correct standard of proof

Defendant contends that the trial court applied the incorrect standard of proof in making its factual findings, because the appropriate standard is beyond a reasonable doubt, as enunciated by the court in *People v. Arevalo* (2016) 244

Cal.App.4th 836 (*Arevalo*), not preponderance of the evidence. We disagree.

In *People v. Frierson* (2016) 1 Cal.App.5th 788, the court disagreed with *Arevalo* and concluded that the correct standard of proof is preponderance of the evidence. (*People v. Frierson*, *supra*, at pp. 793, 794, review granted Oct. 19, 2016, S236728.) In *People v. Newman* (2016) 2 Cal.App.5th 718 (*Newman*), review granted November 22, 2016, S237491, this court concurred with that conclusion. We noted "beyond a reasonable doubt, the highest standard of proof, implicates issues regarding guilt or innocence of a charged crime but not sentencing," as a general matter, unless the issue involves a factual finding that might subject a defendant to a potential sentence greater than that authorized by the verdict of the trier of fact itself. (*Id*. at p. 731.) We held that the preponderance of the evidence standard applies, because "Proposition 36 operates to decrease a defendant's punishment, not to increase the 'penalty for a crime beyond the prescribed statutory maximum'" (*id*. at p. 732), the scenario in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490. Defendant offers nothing new or different that would warrant revisiting our conclusions in *Newman*.

III. Whether the phrase "armed with a firearm" must be defined to require both that the firearm be readily accessible during the commission of the crime and that it have a facilitative nexus to the commission of the crime during which defendant was armed

A defendant is excluded from recall and resentencing eligibility if, "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm." (§§ 667, subd. (e)(2)(C)(iii) & 1170.12, subd. (c)(2)(C)(iii).) Defendant argues

that the phrase "armed with a firearm" must be defined to require both that the firearm was readily accessible during the commission of the crime and that it had a facilitative nexus to the commission of the crime during which defendant was armed. As defendant acknowledges, numerous courts have rejected this argument, and we agree with those decisions. We conclude that the phrase "'*during* the commission of' the current offense" "requires a temporal nexus between the arming and the underlying felony, not a facilitative one." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1032 (*Osuna*).) Moreover, the phrase "'[a]rmed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. [Citations.]" (*Osuna*, *supra*, 225 Cal.App.4th at p. 1029.) "'"[I]t is the availability—the ready access—of the weapon that constitutes arming."' [Citations.]" (*People v. White* (2014) 223 Cal.App.4th 512, 524.)

Defendant's reliance on *People v. Pitto* (2008) 43 Cal.4th 228 and *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*) in support of his argument that a "facilitative nexus" is required is misplaced. Neither of those cases examined subdivision (iii) of either section 667, subdivision (e)(2)(C) or 1170.12, subdivision (c)(2)(C). Rather, both cases analyzed the sentence enhancement under section 12022, which imposed an additional prison term for one who was "'armed with a firearm in the commission of'" a felony. (*People v. Pitto*, *supra*, 43 Cal.4th at pp. 239–240; *Bland*, *supra*, 10 Cal.4th at pp. 1001–1002.) As explained in *Bland*, "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." (*Bland*, at p. 1002.) This holding has no relevance here because "section 12021 does not, regardless of the facts of the offense, risk imposition of additional punishment pursuant to section 12022." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032.)

Defendant further argues that the trial court erred because "the factors listed in subdivision (iii) must attach to the current offense as an *addition* and not just be a part of the current offense." He notes that other offenses that render an inmate ineligible for resentencing are referred to with the phrase "[t]he current offense is" while subdivision (iii) begins with the phrase "[d]uring the commission of the current offense." (§ 1170.12, subd. (c)(2)(C)(iii).) Based on this distinction, defendant contends that if the statute were intended to exclude the offense of possession of a firearm by a felon, the offense would have been specifically enumerated. We are not convinced. Rather, as the numerous courts before us have held, "a felon who has been convicted of two or more serious and/or violent felonies in the past, and most recently had a firearm readily available for use, simply does not pose little or no risk to the public." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1038.) It follows that we disagree with defendant's reliance upon section 29800 in support of is contention that his possession of a firearm was "relatively minor."

Because defendant was "armed with a firearm" within the meaning of sections 667, subdivision (e)(2)(C)(iii), and 1170.12, subdivision (c)(2)(C)(iii), the trial court properly determined that defendant was ineligible for recall and resentencing under Proposition 36.

DISPOSITION

The order is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J. *
GOODMAN

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