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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE CASTANEDA LOPEZ,

Defendant and Appellant.

B275235

(Los Angeles County
Super. Ct. No. BA140601)

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

California Appellate Project, Jonathan B. Steiner and Richard B. Lennon for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jorge Castaneda Lopez appeals from an order denying his petition for recall of sentence under Proposition 36, the Three Strikes Reform Act of 2012 (the Act).¹ The trial court concluded Lopez was ineligible for resentencing because he was armed during the commission of his crime. Lopez contends the trial court misconstrued the statute. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 5, 1996, while Lopez was confined in a single inmate cell in the Los Angeles County jail, a sheriff's deputy conducted a search of his cell and found a shank hidden between the light fixture and the ceiling. A jury convicted him of possession of a deadly weapon while confined in jail (Pen. Code,

¹ Proposition 36 amended Penal Code sections 667 and 1170.12 and added section 1170.126. It provides that where the current offense is not a serious or violent felony, the defendant will be sentenced as a second strike offender rather than receiving an indeterminate life sentence as a third strike offender unless certain disqualifying factors are present. It also “created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law 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 unless the court determines that resentencing would pose an unreasonable risk of danger to public safety.” (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 168; accord, *People v. Johnson* (2015) 61 Cal.4th 674, 680-681.)

§ 4574, subd. (a)).² The trial court found true the allegations he had three prior serious felony convictions and served a prior prison term (§ 667.5, subd. (b)), and sentenced him to state prison for 26 years to life under the three strikes law (§§ 667, subds. (b)-(i), 1170.12). (*People v. Lopez* (Mar. 17, 2003, B158522) [nonpub. opn.].)

On March 29, 2013, Lopez filed a petition for recall of sentence under Proposition 36. He argued that possession of a deadly weapon while confined in jail was no longer a serious or violent felony within the meaning of the three strikes law (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1)), and none of his three prior serious or violent felony convictions disqualified him from having his sentence recalled (§ 1170.126, subd. (e)(3); see §§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv)). The trial court issued an order to show cause why his sentence should not be recalled.

The People acknowledged Lopez was eligible for resentencing, but argued he was unsuitable because he posed an unreasonable risk of danger to public safety. The People subsequently argued Lopez was ineligible for resentencing under section 1170.126, subdivision (e)(2), because “[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or deadly weapon” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

Reviewing the facts of the case, the court found beyond a reasonable doubt that Lopez was ineligible for the recall of his sentence because he was armed during the commission of the

² Unless otherwise specified, all further statutory references are to the Penal Code.

offense. When the officers searched Lopez’s cell, they found “a shank which was about five inches long, about a quarter inch thick, freshly sharpened to a point, secreted in the light fixture which is easily reachable from the upper bunk in that cell.”

DISCUSSION

A. Applicable Law and Standard of Review

Proposition 36 was enacted to “[r]estore the Three Strikes law to the public’s original understanding by requiring life sentences only when a defendant’s current conviction is for a violent or serious crime” and to permit “repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession [to] receive twice the normal sentence instead of a life sentence.” (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1.) In order to effectuate this goal, Proposition 36 amended sections 667 and 1170.12 and added section 1170.126, which provides that defendants previously sentenced to life terms under the three strikes law may petition to recall their sentences and, if eligible for relief, to be resentenced to a second strike term that would have been imposed for their crime under the new sentencing provisions. (§ 1170.126, subd. (a).)

A defendant is eligible for resentencing if (1) the current offense is not one defined as a serious or violent felony and is not specified in the three strikes law as a disqualifying conviction, and (2) the defendant has no prior disqualifying convictions. (§ 1170.126, subd. (e).) Disqualifying convictions include those where “[d]uring the commission of the . . . 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); see § 1170.126, subd. (e)(2).)

To determine whether a defendant meets the statutory eligibility requirements of the Act, a trial court examines the entire record of conviction. (*People v. Estrada* (2017) 3 Cal.5th 661, 672; *People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 800; see also *People v. Guerrero* (1988) 44 Cal.3d 343, 355.) Application of Proposition 36 to the facts presented here is a pure question of law that we review de novo. (*People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7 [whether facts in record of conviction establish eligibility for resentencing is a question of law]; see also *Pasadena Police Officers Assn. v. Superior Court* (2015) 240 Cal.App.4th 268, 284 [“trial court’s construction and ‘interpretation of the [law] and its application to undisputed facts present questions of law subject to de novo . . . review”].)

B. *Because Lopez Was Armed During the Commission of the Offense He Is Ineligible for Resentencing*

The “question in this case,” according to Lopez, “is whether [the] exclusion applies when the arming is an element of the offense.” Lopez submits the answer is no. He argues that because the “arming” in his case was not “tethered” to another crime, he is eligible for relief. He contends that to be armed with a deadly weapon while committing the crime of possession of a deadly weapon “would render the ‘during the commission’ language meaningless.” For the same reason, he argues that a “simple violation of . . . section 4574” does not render him ineligible in the absence of a facilitative nexus to another offense.

Case law supports neither Lopez’s answer nor his arguments. To this credit, Lopez acknowledges his arguments “[have] been rejected in other appellate decisions.” Indeed, every court to have considered his arguments has rejected them. (See *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1111-1112, petn. for review pending, petn. filed Nov. 6, 2017; *People v. Hicks, supra*, 231 Cal.App.4th at pp. 283-284; *People v. Brimmer, supra*, 230 Cal.App.4th at pp. 798-799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1032.)

Nonetheless, Lopez submits we should depart from these authorities because, as he contends, they misconstrue the meaning of the statute by failing to adequately consider its plain language and grammar. Lopez’s arguments are not persuasive.

The phrase “[a]rmed with a firearm” [or weapon] has been statutorily defined and judicially construed to mean having a firearm [or weapon] available for use, either offensively or defensively. [Citations.]” (*People v. Cruz, supra*, 15 Cal.App.5th at pp. 1109-1110, quoting *People v. Osuna, supra*, 225 Cal.App.4th at p. 1029.) The essence of arming is the availability of, and ready access to, the firearm or weapon. (*People v. Bland* (1995) 10 Cal.4th 991, 997; *Cruz, supra*, at p. 1110; *Osuna, supra*, at p. 1029.) Applying this principle, numerous courts have held that a defendant is ineligible for resentencing under Proposition 36 if he or she was convicted of being a felon in possession of a firearm, and the evidence shows the firearm was available for use by the defendant either offensively or defensively. (See, e.g., *Cruz, supra*, at p. 1112; *People v. Hicks, supra*, 231 Cal.App.4th at pp. 279-280; *People v. Brimmer, supra*, 230 Cal.App.4th at

pp. 794-795; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048-1053; *Osuna, supra*, at p. 1034.)

As explained in *People v. Osuna, supra*, 225 Cal.App.4th 1020, because we are not concerned with an arming *enhancement*, which requires that a defendant be armed *in* the commission of the offense, Proposition 36 “disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm ‘*during* the commission of’ the current offense ‘During’ is variously defined as ‘throughout the continuance or course of’ or ‘at some point in the course of.’ [Citation.] In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. [Citation.]” (*Id.* at p. 1032; accord, *People v. Cruz, supra*, 15 Cal.App.5th at p. 1111 [“Arming ‘requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same’”]; *People v. White* (2016) 243 Cal.App.4th 1354, 1363 [Prop. 36 exclusion “requires only that the arming occur *during* the commission”]; *People v. Hicks, supra*, 231 Cal.App.4th at pp. 283-284 [“unlike [§] 12022, which requires that a defendant be armed ‘*in* the commission of’ a felony for additional punishment to be imposed . . . , [Prop. 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”]; *People v. Brimmer, supra*, 230 Cal.App.4th at pp. 798-799 [Prop. 36 “‘requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same’”].)

Lopez counters that ineligibility requires a “facilitative nexus” between the arming and the commission of the crime, and “there is no meaningful difference demonstrated by legislative

use of the statutory language ‘during’ and ‘in.’” Lopez argues the terms “during” and “in” have been used interchangeably and points to language in *People v. Bland*, *supra*, 10 Cal.4th at p. 1002, where the California Supreme Court stated that “‘in the commission’ of the felony offense, . . . implicitly requires both that the ‘arming’ take place *during* the underlying crime and that it have some ‘*facilitative nexus*’ to that offense.” Rather than assist Lopez’s argument, *Bland*’s use of the term “*during*” distinguishes the temporal requirement of the arming enhancement from the facilitative requirement of “*in furtherance of the felony*.” (*Id.* at p. 1001.) *Bland* did not suggest “during” and “in” were interchangeable.

As previously noted, every court that has considered this issue has come to this same conclusion: Proposition 36 requires only a temporal nexus, not a facilitative one, and the availability of the weapon determines whether the defendant was armed for purposes of eligibility for resentencing. (*People v. Hicks*, *supra*, 231 Cal.App.4th at p. 284; see also *People v. Elder*, *supra*, 227 Cal.App.4th at p. 1312 [“ineligibility for resentencing for being ‘armed’” does not “require something beyond the substantive offense of possession itself”].) We agree with these cases and similarly conclude that “*during* the commission of the current offense” does not require a facilitative nexus.

Consequently, the trial court properly found Lopez ineligible for resentencing under Proposition 36 because he was armed during the commission of the offense. Lopez had a shank hidden in a light fixture which was easily reachable from the upper bunk in his cell. Because the weapon was available for use at any time “during the commission of the offense,” Lopez was “armed” within the meaning of Proposition 36. (*People v. Bland*,

supra, 10 Cal.4th at pp. 999, 1001-1003; *People v. Cruz, supra*, 15 Cal.App.5th at pp. 1109-1110; *People v. Osuna, supra*, 225 Cal.App.4th at p. 1032.)

DISPOSITION

The order is affirmed.

BENSINGER, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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