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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. ALAIN STEFFLRE, Defendant and Appellant.	B267915 (Los Angeles County Super. Ct. No. LA017901)

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

Cheryl Lutz, 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, Noah P. Hill and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Alain Stefflre was convicted in 1994 of unlawfully driving or taking a vehicle, recklessly evading an officer, and several related crimes. Based on his prior convictions, he was sentenced to multiple terms of 25 years to life in prison as a third strike offender. He now appeals from the postjudgment order denying his petition for resentencing under Penal Code section 1170.126,[1] enacted by Proposition 36, the Three Strikes Reform Act of 2012 (Proposition 36). The trial court found defendant was "armed" during the commission of his underlying crimes and therefore was ineligible for resentencing under Proposition 36. We reject his challenges to that ruling and affirm the order.

FACTUAL AND PROCEDURAL HISTORY

In *People v. Stefflre* (December 27, 1995, B090079 [nonpub. opn.]), we affirmed defendant's current conviction and described the following underlying facts: On May 12, 1994, a 1990 Lincoln was stolen during a residential burglary in Encino. On June 22, 1994, Shirley Finston returned to her Tarzana home to find the Lincoln parked backward in her driveway with the trunk open. A man wearing black gloves ran from in front of the residence, jumped in the Lincoln and drove away. Finston took down the license number. She entered her home and found that various items had been stolen; her husband then called the police. About 45 minutes later, defendant, driving the Lincoln, recklessly fled at high speeds during a Highway Patrol pursuit and flipped the car at an exit ramp. Some of the property taken from the Finston residence was discovered in the Lincoln.

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[1] All further code citations are to the Penal Code unless otherwise indicated.

In addition, our review of the trial transcripts reveals the following pertinent facts: During trial, California Highway Patrol officer David Derczo testified regarding his pursuit of defendant on June 22, 1994. After defendant's vehicle flipped over, Officer Derczo saw defendant exit the vehicle and begin to run on foot. Defendant dropped a knife as he was running. Officer Derczo testified that the knife appeared to be attached to defendant's pants in some fashion; he saw defendant "grab[] at his pants" and then the knife fell from the same "general area." After Officer Derczo caught and detained defendant, he walked defendant back to the crash scene, retrieving the knife from the sidewalk along the way. The knife blade was fixed, approximately seven inches long, and sharpened on both sides. During questioning after his arrest, defendant denied any knowledge of a knife.

On November 7, 1994, a jury convicted defendant of three felonies: unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)), unlawfully evading an officer with reckless disregard for safety (Veh. Code, § 2800.2), and receiving stolen property (§ 496, subd. (a)).[2] In a bifurcated trial, a jury found true that defendant had multiple prior convictions for residential burglary, which qualified as serious or violent felonies under the Three Strikes Law. (See §§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).) Consequently, the trial court sentenced defendant to concurrent prison terms of 25 years to life on the three felony counts for which he was convicted (§ 667, subd. (e)(2)(A)(ii)), and a concurrent term of six months for the misdemeanor.

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[2] Defendant previously pled guilty to a misdemeanor offense of giving false information to an officer (§ 148.9, subd. (a)).

We affirmed defendant's conviction in December 1995. Following habeas proceedings in 1996, the trial court resentenced defendant, striking the third strike enhancements as to two counts, leaving only one term of 25 years to life for his conviction for unlawfully taking or driving a vehicle pursuant to Vehicle Code section 10851.

In November 2012, voters adopted Proposition 36, which prospectively limited the imposition of indeterminate life sentences under the Three Strikes Law by amending sections 667 and 1170.12. Prior to Proposition 36, a defendant with two or more prior convictions for serious or violent felonies (see §§ 667.5, 1192.7) who also was convicted of any new felony was subject to an indeterminate life sentence. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) Pursuant to Proposition 36, life sentences are reserved "for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor." (*Ibid*.) Proposition 36 also established a postconviction relief process "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. (§ 1170.126.)" (*Id*. at p. 168.)

In January 2013, defendant filed a petition requesting recall of his sentence pursuant to section 1170.126. In October 2015, the trial court denied the petition on the ground that defendant was ineligible for resentencing under the disqualifying provisions of Proposition 36 because he was "armed with a deadly weapon, a knife" "during the commission of the [] offense." (§§

667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e).) Specifically, the court found that defendant dropped a knife after he exited the Lincoln and fled on foot from police.

Defendant timely appealed from the order denying his petition for resentencing.

DISCUSSION

Pursuant to section 1170.126, subdivision (e)(2), an inmate is ineligible for resentencing if, "during the commission" of the underlying 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), 1170.126, subd. (e)(2).) Defendant asserts the trial court erred in the following respects: (1) relying on the record of conviction to conclude defendant was "armed," which required the court to make "a new finding of fact" that "went beyond the 'nature or basis' of the conviction"; (2) applying an incorrect standard of proof, namely, preponderance of the evidence, rather than beyond a reasonable doubt; and (3) concluding that defendant was "armed" during the commission of his underlying offense, despite the lack of a "facilitative nexus" between his crimes and his possession of the knife. We follow the majority of decisions by this court and our sister courts in rejecting these arguments.

I. *Nature of Factual Findings for Determination of Ineligibility*

Defendant argues that the trial court erred in making a factual finding that he was armed with a knife in connection with his request for resentencing, because in doing so, the court made a new factual finding never determined by the jury.

He acknowledges that the trial court may "properly rely on the record of conviction," including transcripts of the trial, in

determining eligibility under Proposition 36. (See *People v. Bartow* (1996) 46 Cal.App.4th 1573.) However, citing *People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*) and other cases, defendant argues that the court's inquiry into the record is limited to determining "the nature or basis of the crime of which the defendant was convicted." Here, because the trial court made a factual finding regarding his possession and use of a knife that was neither expressly decided by the jury nor necessary to the underlying conviction, defendant argues the court exceeded the bounds of proper inquiry.

We are not persuaded. As we previously held in *People v. Frierson* (2016) 1 Cal.App.5th 788, 791-792, rev. granted October 19, 2016, S236728 (*Frierson*)), "[i]n determining an inmate's eligibility for recall and resentencing under Proposition 36, the trial court may examine all relevant, reliable and admissible material in the record to determine the existence of a disqualifying factor. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048, 1051.)" Indeed, "Proposition 36, on its face, does not dictate that any of the triad of disqualifying factors must be an element of the current offense or a sentence enhancement or that such disqualifying factors must be pled and proved as such to the trier of fact. Its plain and clear language reflects a contrary intent. Subdivision (f) of section 1170.126 expressly provides: 'Upon receiving a petition for recall of sentence under this section, *the court shall determine* whether the petitioner satisfies the criteria in subdivision (e).' (Italics added.)" (*People v. Newman* (2016) 2 Cal.App.5th 718, 724, rev. granted November 22, 2016, S237491 (*Newman*).)

Further, "these disqualifying factors are not a subject for a jury to determine, because they do not cause an increase in

punishment beyond the statutory punishment for the current offense. Proposition 36 operates to decrease a defendant's punishment and therefore is "'an act of lenity.'" [Citation.] The Sixth Amendment right to jury trial therefore is not implicated." (*Newman*, *supra*, 2 Cal.App.5th at p. 724.) Numerous other courts have similarly concluded that a trial court may independently examine the record of conviction in order to make determinations regarding eligibility facts. (See, e.g., *People v. White* (2014) 223 Cal.App.4th 512, 526-527 (*White*); *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 (*Osuna*); *People v. Manning* (2014) 226 Cal.App.4th 1133, 1139-1144; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1314-1316 (*Elder*); *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1338-1340; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 799-801 (*Brimmer*); *People v. Hicks* (2014) 231 Cal.App.4th 275, 286 (*Hicks*).)

Defendant's reliance on *Guerrero, supra*, 44 Cal.3d 343, for a contrary conclusion is misplaced. *Guerrero*, which was decided prior to the enactment of Proposition 36, restricts the evidence a trial court may consider in determining the truth of a *prior conviction* allegation. The court concluded: "To allow the trier of fact to look to the record of the conviction—but no further—is also fair: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*Guerrero*, at p. 355.) Similarly, *People v. Wilson* (2013) 219 Cal.App.4th 500, 510, also cited by defendant, concerns a trial court's determination as to whether a defendant's prior conviction qualifies as a "serious felony" under the Three Strikes Law. In a Proposition 36 proceeding, the court does not

consider an increase in punishment; the reasoning in these cases is therefore inapplicable.

The trial court properly relied on the record of conviction in determining defendant's ineligibility for resentencing. That record contains substantial evidence supporting the trial court's factual finding that defendant was armed with a knife during the commission of the underlying offenses.

II. *Burden of Proof*

Defendant next contends that the trial court should have made all factual determinations relevant to eligibility using the beyond a reasonable doubt standard of proof. He relies on *People v. Arevalo* (2016) 244 Cal.App.4th 836, 852, in which the court concluded the prosecution must prove ineligibility beyond a reasonable doubt. We have disagreed with *Arevalo* and held that the preponderance of the evidence was the proper standard. (*Frierson, supra*, 1 Cal.App.5th at pp. 793-794; see also *Newman, supra*, 2 Cal.App.5th at pp. 727-730 [citing *Frierson* and adopting preponderance standard].) The majority of appellate courts to consider this issue are in accord. (See, e.g., *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301; *Osuna, supra,* 225 Cal.App.4th at p. 1040.) Defendant has provided no basis to depart from our prior holdings on this issue. We therefore find no error.

III. *Basis for "Armed" Determination*

Finally, defendant asserts that "the definition of arming requires that there be a facilitative nexus between a defendant's crimes and his possession of a weapon," and that no such nexus existed here. He acknowledges that appellate courts consistently have rejected this argument, often in connection with an underlying conviction for being a felon in possession of a firearm.

(See *Osuna, supra,* 225 Cal.App.4th at pp. 1029-1032; *White, supra,* 223 Cal.App.4th at pp. 524-527; *People v. Blakely, supra,* 225 Cal.App.4th at pp. 1051-1057; *Elder, supra,* 227 Cal.App.4th at pp. 1312–1314; *Brimmer, supra,* 230 Cal.App.4th at pp. 793-799; *Hicks, supra,* 231 Cal.App.4th at pp. 283-284; *People v. White* (2016) 243 Cal.App.4th 1354, 1362–1363.) He argues these cases were wrongly decided. We disagree.

"Armed" with a firearm or other deadly weapon "has been statutorily defined and judicially construed to mean having a [weapon] available for use, either offensively or defensively." (*Osuna, supra*, 225 Cal.App.4th at p. 1029, citing § 1203.06, subd. (b)(3); Health & Saf. Code, § 11370.1, subd. (a); *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*) [construing arming enhancement in § 12022].) We presume the electorate intended "armed" with a deadly weapon to have this meaning under Proposition 36. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1029, citing *People v. Weidert* (1985) 39 Cal.3d 836, 844 [""The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted' . . . [and] [t]his principle applies to legislation enacted by initiative."].) Following this construction, courts uniformly have held that the armed-with-a-firearm exclusion applies where there is a "temporal nexus between the arming and the underlying felony, not a facilitative one," in other words, where the record indicates the defendant was in actual physical possession of the weapon. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032 [record showed fleeing defendant was observed holding handgun that was discovered during subsequent search of nearby house from which he emerged]; see also *White, supra*, 223 Cal.App.4th at p. 524 [record showed defendant was observed tossing away pair of rolled-up

sweatpants containing handgun during police pursuit]; *Brimmer, supra*, 230 Cal.App.4th at p. 796 [record showed defendant was personally armed with unloaded shotgun while arguing with his girlfriend].)

Here, the record showed that defendant dropped a knife from his person as he ran from a police officer. Shortly thereafter, the officer retrieved a knife from the location where he had seen defendant drop it. Based on this record, it is clear that defendant had the knife "available for use, either offensively or defensively" and was therefore "armed with a deadly weapon" within the meaning of section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii). (See *Osuna, supra*, 225 Cal.App.4th at pp. 1029-1032.)

Defendant does not dispute that there was substantial evidence from which the trial court could conclude he had a weapon available for use during the commission of the offense. Rather, he maintains something more is required to establish the "armed" exclusion. Relying on *Bland, supra*, 10 Cal.4th at p. 997, he argues the exclusion should be interpreted to disqualify an inmate from resentencing only if the arming is "tethered" to or has some "facilitative nexus" with a current offense. *Bland* involved a sentencing enhancement that applies where a defendant was "armed with a firearm in the commission" of a felony drug possession offense. (§ 12022, subd. (c).) The *Bland* court interpreted the phrase "armed with a firearm in the commission" of felony drug possession as requiring evidence of a "nexus or link between the firearm and the drugs." (*Bland, supra*, 10 Cal.4th at p. 1002.)

The *Osuna* court refused to apply this interpretation to the "armed" requirement under Proposition 36, explaining that the

construction of section 12022 requiring a "facilitative nexus" between the arming and an underlying felony is specific to the "imposition of an arming enhancement—an additional term of imprisonment added to the base term, for which a defendant cannot be punished until and unless convicted of a related substantive offense. [Citations.]" (*Osuna, supra*, 225 Cal.App.4th at p. 1030.) The court also reasoned that "unlike 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 '*during* the commission of' the current offense (italics added). 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' (Webster's 3d New Internat. Dict. (1986) p. 703.) 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.]" (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032; accord *Brimmer, supra*, 230 Cal.App.4th at pp. 798-799; *Hicks, supra*, 231 Cal.App.4th at pp. 283-284; *People v. White, supra*, 243 Cal.App.4th at pp. 1362-1363.)

We agree with the reasoning of the *Osuna* court and therefore reject defendant's suggestion that there is no meaningful distinction between the use of the words "during" and "in" in this context. (See *In re Pritchett* (1994) 26 Cal.App.4th 1754, 1757 [rejecting an enhancement because "[a]lthough [defendant] used the shotgun as a club during his possession of it, he did not use it 'in the commission' of his crime of possession. . . . [U]sing it as a club in no way furthered the crime of possession."].)

DISPOSITION

Affirmed.

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COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.