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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIE FRED STEPHENS, Sr.,

Defendant and Appellant.

B293686

(Los Angeles County  
Super. Ct. No. NA042596)

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

California Appellate Project, Richard B. Lennon, 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, Senior Assistant Attorney General, Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

## **I. INTRODUCTION**

Defendant and appellant Willie Fred Stephens, Sr. appeals from the trial court's denial of his petition for recall of sentence pursuant to Proposition 36. We affirm.

## **II. PROCEDURAL BACKGROUND**

In 2000, a jury convicted defendant of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)<sup>1</sup>) and possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)). The jury also found true the allegation that defendant suffered two prior convictions under the Three Strikes law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)). The trial court sentenced defendant to concurrent terms of 25 years to life in state prison for his convictions. On June 17, 2013, we affirmed the judgment.

On February 8, 2013, defendant filed a Proposition 36 petition for recall of sentence as to both of his convictions. On July 8, 2015, defendant also filed a Proposition 47 petition for recall of sentence for his possession of a controlled substance conviction.

On April 17, 2017, the trial court considered defendant's Proposition 36 petition as to his felon in possession of a firearm conviction. The court denied the petition, finding, by a preponderance of the evidence, that defendant was statutorily ineligible for resentencing because he was armed with a firearm during the commission of that offense.

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<sup>1</sup> All further statutory citations are to the Penal Code unless otherwise noted.

On June 1, 2017, the trial court considered defendant's Proposition 47 petition as to his possession of a controlled substance conviction. The court granted the petition, finding defendant eligible and suitable for relief. Accordingly, the court recalled and set aside defendant's felony conviction and imposed a misdemeanor conviction and sentence. The court dismissed as moot defendant's Proposition 36 petition as to his possession of a controlled substance conviction.

Defendant appealed from the trial court's order denying Proposition 36 relief as to his felon in possession of a firearm conviction. Subsequent to the court's order denying defendant Proposition 36 relief, the California Supreme Court held that the "beyond a reasonable doubt" standard and not the "preponderance of the evidence" standard applies to Proposition 36 eligibility determinations. (*People v. Frierson* (2017) 4 Cal.5th 225, 239-240 (*Frierson*)). Accordingly, we reversed the trial court's order ruling defendant ineligible for resentencing and remanded for a new eligibility hearing under the appropriate legal standard.

On October 22, 2018, the trial court held a hearing on defendant's eligibility for Proposition 36 resentencing. It found, beyond a reasonable doubt, that defendant was armed with a firearm when he committed the felon in possession of a firearm offense and thus was statutorily ineligible for resentencing.

### III. DISCUSSION

#### **Defendant Is Ineligible for Proposition 36 Resentencing**

Defendant contends that insufficient evidence supports the trial court's finding that he was armed with a firearm in the commission of the felon in possession of a firearm offense and thus was ineligible for Proposition 36 resentencing. We disagree.

##### *A. Factual Background*

In our initial opinion affirming defendant's judgment (*People v. Stephens* (July 25, 2005, B174562, fn. 2)), we set forth the facts underlying defendant's offenses as follows:

“At about 8:00 p.m. on June 23, 1999, Long Beach Police Officer James Richardson responded to a radio call concerning a landlord-tenant dispute at an apartment complex in the 5900 block of Orange Avenue. At the complex, Officer Richardson saw appellant on an upstairs walkway leaning on a railing. The apartment manager was downstairs, yelling at appellant. Within a few minutes of Officer Richardson's arrival, Officer Donald Radcliffe arrived.

“Officer Richardson asked appellant to come downstairs. Appellant did. Officer Richardson asked appellant if he had any guns or drugs on his person, and appellant replied that he did not. Appellant agreed that Officer Richardson could conduct a pat-down search for officer safety. During the search, Officer Richardson felt a hard object that could have been a small pistol, reached into appellant's pocket and discovered a cellular telephone and a couple of hand-rolled cigarettes.

“Officer Richardson believed that the cigarettes contained marijuana, opened one of them, discovered that it contained marijuana and a substance which appeared to be rock cocaine, and arrested appellant. Appellant stated that someone needed to lock up his apartment. When Officer Radcliffe went to the apartment door to lock it, he saw a .25 caliber pistol on a table near the door. The pistol had a round in the chamber and five rounds in the magazine.”

In our analysis of defendant’s claim below, we set forth additional facts pertinent to his claim.

B. *Standard of Review*

We review a trial court’s Proposition 36 eligibility determination for substantial evidence. (*People v. Perez* (2018) 4 Cal.5th 1055, 1059, 1066 (*Perez*).) “We review the whole record in a light most favorable to the [order] to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense.’ (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859 . . . ; see *People v. Barnes* (1986) 42 Cal.3d 284, 303-304, . . . .)” (*People v. Guilford* (2014) 228 Cal.App.4th 651, 661.)

C. *Analysis*

Proposition 36 “amended the Three Strikes law so that an indeterminate life sentence may only be imposed where the offender’s third strike is a serious and/or violent felony or where the offender is not eligible for a determinate sentence based on

other disqualifying factors. (Pen. Code, §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) [It] also enacted section 1170.126, establishing a procedure for an offender serving an indeterminate life sentence for a third strike conviction that is not defined as a serious and/or violent felony to file a petition for recall of sentence. (§ 1170.126, subd. (b).)” (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 596-597, fn. omitted.) A defendant is disqualified from resentencing under Proposition 36 if the defendant was armed with a firearm during the commission of the current—or third strike—offense. (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).) A trial court may rely on facts not found by the jury in determining whether a defendant is eligible for Proposition 36 resentencing. (*Perez, supra*, 4 Cal.5th at pp. 1059, 1064.)

Defendant’s felon in possession of a firearm conviction is neither a serious nor a violent felony. (§§ 667.5, subd. (c); 1192.7, subd. (c).) The trial court found, however, that defendant was armed with a firearm during the commission of that offense and thus was ineligible for Proposition 36 resentencing. Defendant contends the evidence does not support the trial court’s finding.

In *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*) (disapproved of on another ground by *Frierson, supra*, 4 Cal.5th at page 240, footnote 8), the Court of Appeal considered the “armed with a firearm” disqualification in the context of a defendant who had been convicted of being a felon in possession of a firearm. It held that “armed with a firearm” means to have a firearm “available for offensive or defensive use.” (*Id.* at p. 1029.)

The court explained that “possessing a firearm does not necessarily constitute being armed with a firearm.” (*Osuna, supra*, 4 Cal.5th at p. 1030, fn. omitted.) “Possession” for the

felon in possession of a firearm offense can be “actual” or “constructive.” (*Id.* at p. 1029.) Possession is “actual” when the firearm is in the defendant’s immediate possession or control and “constructive” when the firearm, “while not in his actual possession, is nonetheless under his dominion and control, either directly or through others. [Citations.]’ [Citation.]” (*Ibid.*) A defendant guilty of being a felon in possession of a firearm through constructive possession may not be “armed with a firearm” under the disqualifying provisions of Proposition 36 resentencing. (*Ibid.*)

According to the testimony at trial, when police officers arrived at defendant’s apartment complex, defendant was standing on the second level walkway “leaning on a railing right in front of his apartment door.” Upon being arrested, defendant said to Officer Richardson, “Somebody needs to lock up my apartment.”

Officer Radcliffe went to defendant’s apartment to lock the door. The door was “fully opened,” and the officer stepped inside the apartment to close the door. As he was closing the door, he saw the loaded handgun defendant was convicted of possessing on a table just inside the doorjamb.

Asked how far inside the door the handgun was, Officer Radcliffe testified it was “in hand’s reach.” The handgun was “within an inch or two of the doorjamb on the left-hand side of the door as you walk in.” A person standing outside the door could reach in and grab it.<sup>2</sup>

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<sup>2</sup> Officer Radcliffe was not sure whether there was a screen door in addition to the front door but even if there was a screen door, the officer “could tell the door was standing wide open, through—whether it was a screen there or not.”

Viewing the record in the light most favorable to the order, we conclude there was sufficient evidence that defendant had the handgun in close proximity and within easy reach for defendant's offensive or defensive use. The trial court thus did not err in finding that defendant was "armed with a firearm" during the commission of the felon in possession of a firearm offense. (*Osuna, supra*, 225 Cal.App.4th at p. 1029.)

#### **IV. DISPOSITION**

The order is affirmed.

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KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.