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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT NEVEREZ LOYA,

Defendant and Appellant.

B281261

(Los Angeles County
Super. Ct. No. BA227243)

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

Edward Mahler, 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, Noah Hill and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant Gilbert Neverez Loya appeals the trial court's order denying his petition for resentencing under the Three Strikes Reform Act of 2012 (hereafter Proposition 36 or the Act; Pen. Code, § 1170.126).¹ Defendant's only contention on appeal is that the trial court used the incorrect standard of proof when it considered his petition, finding him disqualified from resentencing by a preponderance of the evidence instead of beyond a reasonable doubt. Because the trial court found the disqualifying factors beyond a reasonable doubt, we affirm the order below.

FACTUAL AND PROCEDURAL BACKGROUND

A March 2002 information charged defendant with stalking (§ 646.9, subd. (b); count 1), assault with a deadly weapon (an automobile) (§ 245, subd. (a)(1); counts 2 & 3), assault with a firearm (§ 245, subd. (a)(2); counts 4 & 5), possession of a firearm by a felon with three prior convictions (§ 12021, subd. (a)(1); counts 6 & 7), criminal threats (§ 422; count 8), and threatening a witness (§ 140, subd. (a); count 9). Personal use of a firearm was alleged for counts 1, 4, and 5 (§ 12022.5). It was also alleged that defendant had suffered three prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and that he had served a prior prison term (§ 667.5, subd. (b)).

Count 9 was stricken before trial, and defendant was convicted by jury of counts 1 through 3. He was acquitted of the remaining counts, and the firearm allegations were found to be untrue. The trial court found true the three strike allegations, declined to strike any of them, and sentenced defendant on count 3 to 25 years to life in state prison, plus one year for the

¹ All further statutory references are to the Penal Code.

prison prior. The trial court also imposed concurrent terms of 25 years to life on counts 1 and 2. We affirmed defendant's conviction and sentence in an unpublished opinion. (See *People v. Loya* (Mar. 16, 2004, B165715).)

We briefly summarize the evidence from defendant's 2003 trial, drawing from our earlier opinion: In 1999, Lisa Flores and defendant began a romantic relationship. After several months, defendant became physically and verbally abusive. Ms. Flores obtained a restraining order after he hit her in the face and head and kicked her. Notwithstanding the restraining order, defendant refused to leave Ms. Flores alone. On January 11, 2002, defendant followed Ms. Flores and her friend as they were driving, and rammed his car into their car several times. The last time the victims' car was hit, it was hit with such force that it spun out and ended up facing the opposite direction.

In October 2014, defendant petitioned the court for recall of his sentence and resentencing pursuant to section 1170.126. The trial court found the petition stated a prima facie basis for resentencing, and issued an order to show cause. The People opposed resentencing and argued defendant was ineligible because he was armed with a deadly weapon or intended to cause great bodily injury during the commission of count 1 because he had struck the victims' vehicle with his car. In support of their opposition, the People submitted our earlier opinion and transcripts from the trial.

The trial court agreed with the People, finding that during the commission of the stalking offense, defendant "repeatedly and violently rammed [the victims'] car with his car." The trial court's memorandum of decision stated that disqualifying factors for resentencing should be found by a preponderance of the

evidence. The memorandum also acknowledged that there was a split of authority regarding the appropriate standard of proof, and that “regardless of whether the correct standard of proof is beyond a reasonable doubt or by a preponderance of the evidence, the Court finds after an evidentiary hearing that the [defendant] was armed with a deadly weapon, a vehicle, and also intended to cause great bodily injury . . . when he was convicted of the one count of stalking.” The court found defendant ineligible for resentencing under section 1170.126, subdivision (e)(2), and denied defendant’s petition with prejudice. Defendant filed a timely notice of appeal.

DISCUSSION

Section 1170.126, subdivision (e) sets forth eligibility criteria that a defendant must meet in order to be resentenced under Proposition 36. A defendant is only eligible for resentencing if he or she is serving an indeterminate term of life imprisonment imposed pursuant to the Three Strikes law “for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.” (§ 1170.126, subd. (e)(1).) A defendant is not eligible for resentencing if the indeterminate term was imposed for an offense where “[d]uring the commission of the current offense, the defendant . . . 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).)

At the time defendant’s petition was decided, there was a split of authority regarding the appropriate standard of proof to determine whether a defendant is ineligible for resentencing under the Act. (See *People v. Frierson* (2017) 4 Cal.5th 225, 235

[discussing split of authority].) While defendant's appeal was pending, the Supreme Court determined that proof beyond a reasonable doubt is required. (*Id.* at p. 240.)

Defendant contends the trial court applied the wrong standard of proof, because the trial court's memorandum of decision recites the preponderance of the evidence standard. We are not persuaded. After stating that the standard for determining the existence of a disqualifying factor is a preponderance of the evidence, the court acknowledged that there was a split of authority on this issue, and that under either the preponderance of the evidence or beyond a reasonable doubt standard, defendant was disqualified. It is plain that the trial court found the disqualifying factors beyond a reasonable doubt, and defendant does not contend there was insufficient evidence in the record to support a finding that he was disqualified beyond a reasonable doubt.

DISPOSITION

The order is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.