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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR NEVAREZ,

Defendant and Appellant.

2d Crim. No. B252432
(Super. Ct. No. 1176163)
(Santa Barbara County)

Arthur Nevarez appeals the denial of his petition to recall his sentence under the Three Strikes Reform Act of 2012 (Pen. Code, §§ 667, 1170.12, 1170.126; Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012)).¹ Appellant was originally sentenced to three consecutive 25-year-to-life indeterminate terms and claims he is eligible for resentencing on his convictions for unlawful possession of ammunition (§ 12316, subd. (b)(1)) and unlawful possession of a firearm by a felon (§ 12021, subd. (a)(1)) because the offenses are not serious felony offenses (§ 1170.126, subd. (b)). We conclude that appellant is ineligible for recall of his sentence and affirm the judgment. (*People v. White* (2014) 223 Cal.App.4th 512, 525-527.)

¹ All statutory references are to the Penal Code.

Procedural History

In 2005, a jury convicted Arthur Nevarz of assault with a firearm (count 1; Pen. Code, § 245, subd. (a)(2)), corporal injury to a spouse (count 2; § 273.5), dissuading a witness by force or threat (count 3; § 136.1, subd. (c)(1), two counts of unlawful possession of a firearm by a felon (counts 4 & 8; § 12021, subd. (a)(1)), and two counts of unlawful possession of ammunition (counts 5 & 7; § 12316, subd. (b)(1)). In the second phase of trial, the trial court found that appellant had suffered two serious felony convictions within the meaning of section 667, subdivision (a), that the prior convictions were strikes within the meaning of the Three Strikes Law (§§ 667, subd. (e)(2)(A); 1170.12, subd. (c)(2)(A)), and that appellant committed counts 1 through 5 while on bail (§ 12022.1, subd. (b).) Appellant was sentenced to 25 years to life on counts 1-5 plus 12 years on the enhancements. On count 7 (unlawful possession of ammunition) and count 8 (unlawful possession of a firearm by a felon), both of which were committed on different dates, appellant was sentenced to consecutive 25-year-to-life terms.² The total aggregate sentence was 87 years to life state prison. We affirmed the judgment in an unpublished opinion. (B191255.)

Following the November 2012 enactment of the Three Strikes Reform Act of 2012, also known as Proposition 36 (see *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167), appellant filed a petition to recall his sentence on counts 7 and 8 (unlawful possession of ammunition and possession of a firearm by a felon) because they are not violent and/or serious felony offenses. (§ 1170.126, subd. (b).) The superior court denied the petition because count 1 (assault with a deadly weapon; § 245(a)(2) and Count 3 (dissuading a witness with force; § 136.1, subd. (c)(1)) were serious felonies that rendered appellant ineligible for resentencing. The court found "that count 8, 12021(a)(1) [possession of a firearm by a felon]) would be a further preclusion."

² Count 8 for unlawful possession of a firearm was committed in January 2005, count 7 for unlawful possession of ammunition was committed in February 2005, and counts 1-5 were committed in March 2005.

Proposition 36

Effective November 7, 2012, Proposition 36 amended the Three Strikes law to provide that a sentence of 25 years to life shall be imposed only if the current offense is a serious or violent felony or the prosecution pleads and proves an enumerated qualifying exception. (§§ 667, subd. (e)(2)(C); 1170.12, subd. (c)(2)(C); *People v. Yearwood*, *supra*, 213 Cal.App.4th at p. 170; *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1285-1286.) Proposition 36 "also added section 1170.126 which creates a postconviction release proceeding 'intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence.' (§ 1170.126, subd. (a).)" (*People v. Yearwood*, *supra*, 213 Cal.App.4th at p. 170.)

Section 1170.126 provides that a prisoner serving an indeterminate term of life under the pre-Proposition 36 version of the Three Strikes law may be eligible for resentencing where the current felony conviction is not a serious or violent felony. (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1293.) If the resentencing eligibility criteria are satisfied and none of the disqualifying exceptions apply, the trial court determines on resentencing whether imposition of a Two Strikes determinate term would pose an unreasonable risk of danger to public safety. (1170.126, subd. (f); *Kaulick*, *supra*, 215 Cal.App.4th at p. 1293.)

Count 8: Armed With A Firearm Exclusion

The superior court correctly found that appellant was ineligible for resentencing on count 8 (possession of a firearm by a felon) because appellant was "armed" with a firearm during the commission of the offense. Count 8 was committed on January 15, 2005. Appellant crashed a Honda into a neighbor's wall, fumbled around the passenger side of the vehicle, and mumbled something about a handgun. An officer summoned an ambulance for appellant and found a loaded .45 caliber handgun under the front passenger seat. Appellant was armed with a firearm within the meaning of section

667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii) which is an operative part of Proposition 36.

Section 1170.126, subdivision (e)(2) cross-references section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii) which provide that an inmate is statutorily ineligible for resentencing if, "[d]uring the commission of the current offense, the defendant used a firearm, *was armed with a firearm* or deadly weapon, or intended to cause great bodily injury to another person." (Italics added.) In *People v. White, supra*, 223 Cal.App.4th 512, officers saw White throw a loaded handgun into the back of his truck during a police surveillance. White was convicted of possession of a firearm by a felon (§ 12021, subd. (a)) and sentenced as a Three Strikes offender to 25 years to life. After the voters approved Proposition 36, White petitioned the court under section 1170.126 to recall his life sentence and resentence him as a second strike offender. The trial court denied the petition on the ground that White was armed with a firearm when he committed the offense. (*Id.*, at p. 522.)

The Court of Appeal affirmed. "[A] trial court may deny section 1170.126 resentencing relief under the armed-with-a-firearm exclusion even if the accusatory pleading, under which the defendant was charged and convicted of possession of a firearm by a felon, did not allege he or she was armed with a firearm during the commission of that possession offense." (*Id.*, at p. 527.) Citing the Proposition 36 Voter Information Guide, the *White* court concluded that Proposition 36 is intended to provide resentencing relief to low-risk nonviolent inmates serving life sentences for petty crimes such as shoplifting and simple drug possession. (*Id.*, at p. 526.) "White's current offense of being a felon in possession of a firearm - when viewed in light of the fact that he was armed with the firearm during the commission of that offense - cannot be deemed a petty or minor crime for purposes of the Reform Act." (*Ibid.*)

The same analysis applies here. Appellant was in physical possession of a loaded .45 caliber handgun and had ready access to it when he crashed into the wall. The armed-with-a-dangerous-weapon exclusion does not require that the arming be anchored or tethered to an offense which does not include simple possession. (*People v. White*,

supra, 223 Cal.App.4th at p. 527; *People v. Osuna* (2014) 225 Cal.App.4th 1020, ["facilitative nexus" between the arming and the possession of firearm not required].) " 'It is the availability - the ready access - of the weapon that constitutes the arming.' [Citation.]" (*People v. Bland* (1995) 10 Cal.4th 991, 997.)

Count 7: Unlawful Possession of Ammunition

The conviction on count 7 involves a February 1, 2005 domestic violence incident in which appellant put a gun to Monica Nevarez's (appellant's wife) head and threatened to kill her and her children. The gun discharged and shot a hole in the garage. An officer responded to the 911 call and helped Nevarez retrieve her van keys and personal items. A few hours later, Nevarez got an emergency protective order and asked for a police escort back to the house. Nevarez told the officer that appellant pointed a gun at her forehead earlier that day and warned that if she came back, "You better come prepared because I am going to shoot you and anyone with you." Officers accompanied Nevarez back into the house, detained appellant, and found four rounds of .357 ammunition in his pocket. Appellant told the officers, "I didn't know they were there, I had forgotten about that." That evening, appellant told her landlord that appellant pointed a gun to her head and threatened to kill her.

Although unlawful possession of ammunition is not a serious felony, appellant possessed this ammunition in conjunction with being armed with a firearm. He also "intended to cause great bodily injury to another person" during the commission of the offense. (§§ 667, subdivision (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).) As discussed in *People v. White*, *supra*, 223 Cal.App.4th at page 527, a court may deny section 1170.126 resentencing relief under the "armed with a firearm" or "intended to cause great bodily injury" exclusion even if the accusatory pleading (i.e., count 7) does not allege that the defendant was armed or intended to cause great bodily injury during the commission of offense.

In order to effectuate the electorate's intention, section 1170.126, subdivision (e)(2) must be read as disqualifying an inmate whose 25-year-to-life sentence was imposed for an offense during the commission of which - whether through a formal

element of the offense or enhancement, or by mere conduct - the inmate used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person. (§§ 667, subdivision (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).) On February 1, 2005, appellant was a felon in possession of ammunition, pointed a handgun at the victim's head, and threatened to kill the victim. Although appellant was not charged with or convicted of assault with a deadly weapon or unlawful possession of a firearm, he did, by his conduct and words, arm himself with a firearm and intend to cause great bodily injury during the commission of the offense.

The order denying appellant's resentencing petition is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J

We concur:

GILBERT, P.J.

PERREN, J.

Timothy J. Staffelll, Judge
Superior Court County of Santa Barbara

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