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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DANTE JEVON CRAIG, Defendant and Appellant.	B271249 (Los Angeles County Super. Ct. No. BA230144)

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

Joshua Schraer, 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 Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Dante Jevon Craig appeals from the trial court's order denying his postjudgment petition for recall of sentence pursuant to Penal Code section 1170.126, subdivision (b). Defendant, who is presently serving a third-strike sentence, contends the trial court erred in denying his petition on the grounds he was not eligible for resentencing because he was armed during the commission of his commitment offenses. Defendant argues the trial court applied an incorrect definition of "armed," made independent factual findings to support its eligibility determination in violation of applicable law, and applied the incorrect burden of proof in making that determination.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2002, a jury found defendant guilty of one count of possession of marijuana for sale (Health & Saf. Code, § 11359), and one count of possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1); now § 29800, subd. (a)(1).)

We briefly summarize the material facts underlying defendant's convictions as reflected in our 2003 opinion affirming the judgment. Defendant's girlfriend contacted police to tell them defendant was selling drugs from their residence, and was also storing two guns in their linen closet. The investigating detective observed the residence for several days before the search of the location and saw defendant use a key to enter. After obtaining a search warrant, the detective watched the residence again and saw, within a 10-minute period, three men arrive separately, remain inside the home for a few minutes, and then leave. (*People v. Craig* (Dec. 23, 2003, B163591) [nonpub. opn.], pp. 2-3.) "After each departure, [defendant] stepped onto the front porch,

watched the visitor leave, and return[ed] inside until the next person arrived." (*Id*. at p. 3.) After the third man left, defendant came outside and went down the alley alongside the home, returning shortly with a trash can. The officers confronted defendant who ran, but was apprehended quickly and detained. (*Ibid*.) The officers then "secured the location and found a loaded silver revolver in an open linen closet in the hallway. Large amounts of marijuana, baggies and $848 in cash [were] found in the residence." (*Ibid*., fn. omitted.) An item of mail was located on the shelf in the living room that was addressed to defendant at that address. Defendant denied all the material facts.

After the jury convicted him of possessing marijuana for sale and possessing a firearm, defendant admitted having suffered two prior strikes within the meaning of the Three Strikes law (a 1994 robbery conviction and a 1995 manslaughter conviction). At the sentencing hearing, the trial court denied defendant's motion to strike one or both strikes pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court imposed a third strike sentence, sentencing defendant to two consecutive terms of 25 years to life.

Defendant appealed his conviction, arguing only that the trial court erred in denying his *Romero* motion and in failing to award the correct number of custody credits. We affirmed defendant's conviction, modifying the judgment to reflect the proper number of custody credits to which defendant was entitled. (*People v. Craig*, *supra*, B163591, p. 13.)

After the passage of the Three Strikes Reform Act of 2012 (Proposition 36), defendant filed a petition pursuant to Penal Code section 1170.126, subdivision (b) requesting a recall of sentence and a new sentencing hearing. Defendant contended he

was entitled to be resentenced because his 2002 commitment offenses were not serious or violent felonies, and did not involve conduct that is otherwise disqualifying under the statutory scheme.

After extensive briefing by the parties, which included submission of the complete transcript from defendant's trial, a hearing was held on defendant's petition on March 28, 2016. The trial court denied the petition, concluding defendant was ineligible for resentencing because there was proof, by a preponderance of the evidence, he was armed with a firearm during the commission of his commitment offenses.

This appeal followed.

DISCUSSION

Proposition 36 made various amendments to the Three Strikes law, including the enactment of Penal Code section 1170.126. Subdivision (b) of section 1170.126 provides a postjudgment mechanism for a defendant serving an indeterminate term on a "third-strike" sentence to petition the trial court for a recall of sentence. It provides, in relevant part, that "[a]ny person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies . . . may file a petition for a recall of sentence . . . to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section." (§ 1170.126, subd. (b).)

A defendant whose commitment offense was not a serious or violent felony may nonetheless be rendered ineligible for Proposition 36 resentencing if "[d]uring the commission of" the commitment offense(s), he or she was "armed" with a firearm. (Pen. Code, § 667, subd. (e)(2)(C)(iii).)

Defendant contends his 2002 conviction for possession of a firearm by a felon was based on constructive possession only and the jury made no finding that he was "armed." He maintains that the jury was not asked to decide whether the firearm was "readily available" to him, and that the trial court therefore necessarily made a new, independent finding in order to conclude he was "armed" within the meaning of Penal Code section 667, subdivision (e)(2)(C)(iii). We disagree.

Our Supreme Court has explained that a "defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997.) " '[I]t is the availability—the ready access—of the weapon that constitutes arming.' [Citation.]" (*Ibid.*) "It is well settled that a defendant is armed with a weapon even though it is not carried on his person, when he is aware it is hidden in a place readily accessible to him." (*People v. White* (2016) 243 Cal.App.4th 1354, 1362 (*White*).) " ' "[A] firearm that is available for use as a weapon creates the very real danger it will be used." [Citation.]' " (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 799 (*Brimmer*).) A "defendant is considered armed even if the weapon is inoperable [citation] or . . . it is unloaded [citation]." (*Ibid.*)

Defendant appears to suggest that because the evidence at trial demonstrated he was detained outside of the residence in which the firearm was located, the trial court could not find the

firearm was "readily available." Not so. Given the evidence in the record on which the jury convicted defendant, the reasonable inference was that defendant was living in, at least part of the time, and selling drugs from within a residence in which a loaded firearm was in an open linen closet at his ready disposal. The only reasonable inference from this evidence is that the firearm was "readily available" and defendant was therefore "armed" within the meaning of the statute. Other courts have similarly concluded that a firearm constructively possessed may nonetheless be "readily available" to a defendant sufficient to support a finding the defendant was armed within the meaning of Penal Code section 667, subdivision (e)(2)(C)(iii). (See, e.g., *White*, *supra*, 243 Cal.App.4th at pp. 1360-1362 [after being approached by police officers, the defendant headed towards a motel room, where a gun was subsequently found hidden in a trash can]; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1317 [defendant detained outside front door of residence where loaded gun was found inside on entertainment center and another gun in an unlocked safe].)

Defendant further contends that being "armed" with a firearm for purposes of Penal Code section 667, subdivision (e)(2)(C)(iii) must be construed as requiring both a temporal and a facilitative nexus, notwithstanding the numerous cases that have rejected that exact argument. (See, e.g., *White*, *supra*, 243 Cal.App.4th at pp. 1361-1363; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *Brimmer*, *supra*, 230 Cal.App.4th at pp. 798-799; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1032 (*Osuna*).) Defendant acknowledges these decisions, but contends we should not follow them. We see no reason to depart from the numerous decisions rejecting the imposition of a facilitative

nexus requirement for the definition of "armed" in section 667, subdivision (e)(2)(C)(iii) and decline defendant's invitation to do so.

Finally, defendant argues that even if the court was entitled to make a factual finding on whether he was armed within the meaning of the statute, the court nonetheless erred by failing to adhere to the beyond a reasonable doubt standard. We reject the argument.

In a Proposition 36 proceeding, the court is not tasked with considering an increase in punishment, but only with deciding whether the defendant is entitled to a reduction in punishment. The retrospective provisions of Proposition 36, at issue here, are "not constitutionally required, but an act of lenity on the part of the electorate." (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1304 (*Kaulick*).) Accordingly, *Kaulick* concluded findings of fact in a proceeding pursuant to Penal Code section 1170.126 do not implicate the Sixth Amendment. (*Kaulick,* at pp. 1304-1305.) *Kaulick* also concluded the proper standard of proof in such proceedings is preponderance of the evidence. (*Id*. at p. 1305.)

Relying in part on *Kaulick*, *Osuna* held the preponderance standard is the proper standard for a court's finding on the existence of a disqualifying factor. "We recognize that *Kaulick* was concerned with a trial court's discretionary determination whether an inmate who was eligible for resentencing nevertheless should not be resentenced due to his or her dangerousness. Its reasoning applies with equal force to the initial eligibility determination, however. A finding an inmate is not eligible for resentencing under [Penal Code] section 1170.126 does not increase or aggravate that individual's sentence; rather,

it leaves him or her subject to the sentence originally imposed. . . . [¶] Because a determination of eligibility under section 1170.126 does not implicate the Sixth Amendment, a trial court need only find the existence of a disqualifying factor by a preponderance of the evidence." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1040.)

Two other courts have also concluded the relevant standard of proof is preponderance of the evidence: *People v. Newman* (2016) 2 Cal.App.5th 718, review granted November 22, 2016, S237491, and *People v. Frierson* (2016) 1 Cal.App.5th 788, review granted October 19, 2016, S236728.

Defendant relies on one case which has concluded the beyond a reasonable doubt standard should apply: *People v. Arevalo* (2016) 244 Cal.App.4th 836. We decline to follow *Arevalo*.

In any event, as we have said, on these facts, the only reasonable inference that may be drawn under any standard is that defendant was in possession of a loaded firearm that was readily available in the home from which he was selling marijuana.

DISPOSITION

The order denying defendant's petition for resentencing is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. SORTINO, J.*

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