Filed 3/2/18 P. v. Woods CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WAYNE E. WOODS, Defendant and Appellant.	B279415 (Los Angeles County Super. Ct. No. TA033082)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Reversed and Remanded with Directions.

California Appellate Project, Jonathan B. Steiner, Executive Director, and Joshua Schraer, Staff Attorney, 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, Assistant Attorney General, Noah P. Hill and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Wayne E. Woods appeals from the denial of his petition for resentencing under Proposition 36 (the Three Strikes Reform Act of 2012), codified in Penal Code section 1170.126.[1] The trial court concluded that he was ineligible for resentencing because in the commission of the subject crime (stalking), he intended to cause great bodily injury, thus making the crime a serious felony (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and also rendering him ineligible under section 1170.126, subdivision (e)(2). He contends that in making this finding, the court wrongly applied the preponderance-of-the-evidence standard rather than requiring proof beyond a reasonable doubt. In light of the recent decision in *People v. Frierson* (2017) 4 Cal.5th 225 (*Frierson*), which held that proof beyond a reasonable doubt is required to make such a finding, we agree. We therefore reverse and remand the matter for application of the proper standard of proof in determining whether appellant is eligible for resentencing on his stalking conviction, and for any further proceedings on appellant's petition as may be appropriate.[2]

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[1] All further statutory references are to the Penal Code.

[2] In his opening brief, appellant contended that the court was precluded from making an independent factual finding whether a prior crime falls under sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii). However, the California Supreme court resolved that question against him in *People v. Estrada* (2017) 3 Cal.5th 661, and in his reply brief he abandons the contention.

BACKGROUND

Three Strikes Conviction

In 1996, a jury convicted appellant of stalking (§ 646.9, subd. (a); count 1) and criminal threats (§ 422; count 5). The court found that appellant had suffered two prior strikes (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) under the Three Strikes law and sentenced him to prison for 25-years-to-life on both counts, ordering the sentence on count 2 stayed under section 654.

In his appeal from the judgment of conviction, this Court affirmed. In our unpublished opinion, we described the evidence supporting appellant's convictions in relevant part as follows:

> "[Naomi] Adams and appellant first met in October 1991 and began a sometimes stormy but intimate relationship. Each were [*sic*] still married to others. In April 1993, appellant moved in and lived with Adams . . . .
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> "On July 20, 1994, Adams and appellant agreed to begin living apart at the end of the month until their marriages had been resolved. However, while appellant was at work that date, Adams began moving out. Appellant came home early and . . . ordered Adams and her relatives to put everything back in the residence. They refused and he retrieved a rifle and threatened to shoot Adams. He also slapped her in the face. . . . Adams moved to another residence.
>
> "In August . . . Adams and appellant reconciled. . . .
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> "On December 15, 1994, a telephone incident involving another woman caused a confrontation. Appellant came to

Adams' residence, shouted 'Rambo,' kicked down the front door, and then grabbed and slapped Adams. He held her by the collar and accused her of deceiving him . . . . For the next three days Adams refused to speak with appellant. However, she finally relented and they again reconciled . . . .

"[¶] . . . [¶]

"On January 9, 1995, the couple argued and appellant told her that the devil would come and kick her door down and tell her what to do. He also spoke of the number '666' as being the mark of the devil. Adams believed that appellant was referring to himself and looked at him with fear. They continued to argue and appellant slapped her, he grabbed her by the collar, threatened to 'do an O.J.' on her and called her 'Nicole.' He told her that he could kill her without anyone finding out and that it would not bother him because he had done it before. He also threatened to detonate her sister's car and slash her brother's throat . . . . Appellant left to sign up for a domestic violence class and Adams . . . obtained an emergency protective order which she posted on her door.

"On January 12, 1995, Adams drove a friend . . . to appellant's apartment so that [she] could serve the restraining order . . . . Appellant had been warned and was not present. However, as [they] left the parking lot, appellant followed them in his truck. Adams made a quick U-turn to avoid appellant and he then drove head-on towards her car, trying to run her off the road. She turned into a gas station where she became blocked in . . . .

Appellant ran towards her making threats that he would kill her and that he was angry about the restraining order. . . .

"On January 15, 1995, Adams awoke and found a red flare on her front porch. Appellant called and spoke to Adams' sister and asked if Adams had received the 'gift' he left on the porch. He also called Adams . . . and said he was going to kill her. . . .

"On January 17, 1995, as Adams was leaving her home with a friend, appellant was sitting outside in his truck. Adams returned to the house and called the police. Appellant called Adams and said '666.' She hung up. He called again and she let the answering machine take the message which was to the effect that he 'wouldn't let go,' or he 'wanted gold, 666.' . . .

"On January 18, 1995, Adams received a telephone call from appellant and appellant advised her that he would 'endanger everyone.' . . .

"[¶] . . . [¶]

"On January 24, 1995, about 1:30 or 2:00 a.m., when Adams was in bed, she heard the sound of glass breaking. She went to the living room and discovered a window had been shattered. On the floor was a brick to which was attached another flare. Appellant called Adams and told her she should 'be glad it wasn't a cocktail' and that he would be back that night. He called back again but she hung up and called the police. The following day Police Detective Benito Aguirre recovered the brick and the flare from Adams. She appeared frightened and asked Aguirre to prevent appellant from terrorizing her."

Petition to Recall the Sentence

On November 6, 2014, appellant filed a petition for recall and resentencing under Proposition 36. He correctly conceded that he was ineligible for resentencing on his criminal threats conviction (§ 422), because that crime is a serious felony under section 1192.7, subdivision (c)(38), rendering him ineligible under section 1170.126, subdivision (e)(1).[3] However, he contended that he was eligible for resentencing on his stalking conviction (§ 646.9).

After finding that appellant had made a prima facie showing of eligibility on the stalking conviction, the trial court issued an order to show cause why the requested relief should not be granted. The prosecution filed an opposition to the petition contending that petitioner was ineligible for resentencing because the evidence showed that "[d]uring the commission of the current offense, the defendant . . . intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Appellant filed a reply, and both sides filed exhibits.

Following an eligibility hearing, the court issued a written decision finding appellant ineligible for resentencing because "the People have amply met their burden of showing by a preponderance of evidence" that appellant intended to cause great bodily injury (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), rendering him ineligible under section 1170.126, subdivision (e)(2).

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[3] The practical effect of this concession is that, even if appellant ultimately obtains resentencing on his stalking conviction, he will still be subject to a sentence of 25-years-to-life on his criminal threats conviction.

DISCUSSION

Appellant contends that in determining him ineligible for resentencing, the trial court erred in using the preponderance-of-the-evidence standard. We agree.

Under section 1170.126, subdivision (e), a previously-convicted, third-strike defendant is eligible for resentencing if: (1) the defendant is serving an indeterminate term of life imprisonment imposed under the Three Strikes law for a conviction of a felony that is not defined as serious and/or violent (see §§ 667.5, 1192.7, subd. (c)); (2) the defendant's current sentence was not imposed for disqualifying offenses specified in sections 667, subdivision (e)(2)(C), and 1170.12, subdivision (c)(2)(C); and (3) the defendant has no prior convictions for offenses listed in sections 667, subdivision (e)(2)(C)(iv), and 1170.12, subdivision (c)(2)(C)(iv). If a trial court determines that the defendant satisfies these criteria, then it must resentence the defendant as a second strike offender, "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

One of the factors that renders a defendant ineligible for resentencing is if "[d]uring 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*." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), italics added; see also 1170.126, subd. (e)(2).) In *Frierson, supra,* 4 Cal.5th 225, decided after the eligibility hearing in the present case, the California Supreme Court resolved a split of authority among the Courts of Appeal, and held that

a finding of ineligibly requires proof beyond a reasonable doubt. Here, the trial court found that appellant intended to cause great bodily injury in the stalking crime, but expressly used the preponderance-of-the-evidence standard in making that finding. Under *Frierson*, we must remand the case for the trial court to reconsider appellant's eligibility for resentencing on the stalking count using the proper standard of proof. (*Frierson, supra,* 4 Cal.5th at p. 240.)

DISPOSITION

The order is reversed and the matter is remanded to the trial court to reconsider appellant's eligibility for resentencing on his stalking conviction using the proper standard of proof (beyond a reasonable doubt), and to conduct any further proceedings on appellant's petition as appropriate.

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WILLHITE, J.

We concur:

EPSTEIN, P. J. MANELLA, J.