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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RAY E. FARRIS,<br><br>Defendant and Appellant. | B283887<br><br>(Los Angeles County Super. Ct. No. BA173214) |

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

Kevin E. Lerman, 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 Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

In 2000, appellant was sentenced to concurrent terms of 25 years to life as a "three strike" offender after being convicted of possession of a firearm by a felon and of carrying a loaded firearm in a vehicle. In the underlying action, the trial court denied appellant's motion under Penal Code section 1170.126 to be resentenced pursuant to the Three Strikes Reform Act of 2012 (Reform Act, Proposition 36).[1] We reject his challenges to that ruling and affirm.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. *Convictions*[2]

On August 19, 1998, appellant was driving his black Lexus westbound on the Pomona freeway. He encountered bicycles on the freeway, lost control, and crashed. Appellant was the owner and sole occupant of the Lexus when the accident occurred.

When California Highway Patrol (CHP) officers arrived at the accident scene, appellant was being placed into an ambulance. CHP Officer Joe Mercado, with the assistance of a tow-truck operator, conducted an inventory search of appellant's Lexus before it was towed away. In the trunk of the Lexus, the tow-truck operator discovered a .40-caliber handgun underneath a box of compact discs. Officer Mercado recovered another

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

[2] The statement of facts is based on our prior unpublished opinion affirming appellant's convictions. (See *People v. Farris* (Feb. 15, 2011, B139604.)

handgun from the trunk; it was inside a shoe inside a blue gym bag. Both guns were loaded.

Appellant was charged with being a felon in possession of a firearm on or about August 19, 1998 (former § 12021, subd. (a)(1); count 1) and carrying a loaded firearm in a vehicle (former § 12031, subd. (a)(1); count 2).[3] Accompanying the charges were allegations that appellant had suffered two prior convictions constituting strikes under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

A jury found appellant guilty as charged, and found true the prior strike allegations. Appellant was sentenced to 25 years to life on count 1, and a concurrent term of 25 years to life on count 2. In an unpublished opinion, this court affirmed the judgment. (See *People v. Farris* (Feb. 15, 2001, B139604).)

B. *Petition for Recall of Sentence*

In 2012, the electorate enacted the Reform Act by approving Proposition 36. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-170.) The Reform Act amended the Three Strikes law to provide that absent specified exceptions, an offender with two or more prior strikes is to be sentenced as a two-strike offender unless the new offense also is a strike, that is, a serious or violent felony.[4] (See *ibid*.) The Reform Act also

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[3] Those offenses are now codified in section 29800, subdivision (a)(1), and section 25850, subdivision (a).

[4] Generally, an offense is a "strike" if it is either a "violent felony" under section 667.5, subdivision (c), or a "serious felony" under section 1192.7, subdivision (c). (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1525.)

added section 1170.126, which creates a postconviction resentencing proceeding for specified inmates sentenced under the prior version of the Three Strikes law. (*People v. Yearwood*, *supra*, at pp. 167-170.) Under that statute, a defendant sentenced as a three-strike offender may petition for recall of the sentence and for resentencing, subject to certain eligibility criteria. (§ 1170.126, subd. (e).) As our Supreme Court has explained, the ballot history of Proposition 36 reflects that its goals were "making the punishment fit the crime, making room in prison for dangerous felons, and saving taxpayer money." (*People v. Johnson* (2015) 61 Cal.4th 674, 691.)

On January 11, 2013, appellant filed a petition for resentencing pursuant to section 1170.126. On June 28, 2017, the trial court denied the petition with prejudice, concluding that appellant was ineligible for resentencing because under the preponderance of the evidence standard, he was armed with a firearm during his commission of the offenses. This appeal followed.

## DISCUSSION

Appellant contends the trial court erred in finding him ineligible for resentencing under an exclusion that applies if "[d]uring the commission of the current offense, [that is, the offense which the resentencing petition targets] the defendant . . . was armed with a firearm or deadly weapon . . . ." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2); see *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1327 (*Bradford*).) He contends that as a matter of law, he cannot be found to have been "armed" during the commission of the targeted offenses because the loaded handguns were in the trunk

of his vehicle. Alternatively, appellant contends that the matter should be remanded for a new hearing on his resentencing petition because the trial court found he was ineligible for resentencing under a preponderance of the evidence standard, rather than beyond a reasonable doubt, as required by *People v. Frierson* (2017) 4 Cal.5th 225 (*Frierson*).[5]

A. *The Undisputed Facts Underlying Appellant's Convictions Establish that he was "Armed" during the Commission of his Offenses*.

The key issue before us concerns the circumstances under which a defendant may be found "armed with a firearm" and thus ineligible for resentencing under the Reform Act. Generally, courts interpreting the "armed" exclusion have sought guidance from *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*), which examined a sentencing enhancement set forth in section 12022, subdivision (a), applicable to defendants "'armed with a firearm in the commission or attempted commission of a felony.'" (*Bland, supra,* at p. 998.) There, police officers executing a search warrant of the defendant's residence found cocaine in the bedroom closet and a cache of firearms under the bed, including an AR-15 assault rifle. (*Id*. at p. 995.) A jury convicted appellant of possessing the cocaine for sale and found true the allegation

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[5] *Frierson* was decided after the trial court determined appellant was ineligible for resentencing. In *Frierson*, our Supreme Court concluded that the People had the burden of proving beyond a reasonable doubt that the petitioner was ineligible for resentencing under the Reform Act, overruling, among other cases, *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 (*Osuna*). (*Frierson*, 4 Cal.5th at p. 240, fn. 8.)

that he was armed with an assault weapon during the commission of the drug offense. (*Id*. at pp. 995-996.) Our Supreme Court concluded that under the enhancement, the term "'armed'" means that the defendant had the firearm "available for offensive or defensive use." (*Id*. at p. 1001.) It further concluded that substantial evidence supported the jury's true finding on the arming enhancement, based on the rifle's close proximity to the cocaine and its accessibility during the defendant's continuing possession of the cocaine. (*Id*. at pp. 1003-1004.)

The court also discussed with approval other scenarios where a defendant was "armed" during the commission of an offense, although the defendant did not carry the firearm on his person or have it nearby. (See *Bland*, *supra*, 10 Cal.4th at pp. 997-998.) Most relevant to the instant case is *People v. Searle* (1989) 213 Cal.App.3d 1091 (*Searle*). There, "a drug dealer who sold cocaine from his car was deemed to be 'armed' when he kept a loaded 357 Ruger in an unlocked compartment in the back of his car." (*Bland*, *supra*, 10 Cal.4th at p. 998, citing *Searle*, at p.1099.)[6]

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[6] The other cases cited by *Bland* were *People v. Martinez* (1984) 150 Cal.App.3d 579 (*Martinez*) and *People v. Garcia* (1986) 183 Cal.App.3d 335 (*Garcia*). In *Martinez*, "evidence that during the defendant's commission of a rape, a screwdriver left at the foot of the bed by the defendant's crime partner would have been visible to the defendant, was sufficient to show that the defendant was 'armed' with a deadly weapon during the rape." (*Bland*, *supra*, 10 Cal.4th at p. 997.) In *Garcia*, a burglar was found to be "'armed' in the commission of the burglary" where before entering the house through the garage, he left a loaded handgun on a low wall outside the garage. (*Bland*, at p. 998.)

Numerous courts have determined that where, during the commission of a target offense, a defendant was "armed" as specified in *Bland,* he is ineligible for resentencing under the Reform Act. (E.g., *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1012-1018; *Osuna*, *supra*, 225 Cal.App.4th at pp. 1028-1038; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314 & fn. 7 (*Elder*); *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284 (*Hicks*).) Appellant contends, however, that he was not armed because the loaded handguns were in the trunk of his vehicle. We disagree.

"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 [defendant not eligible for resentencing under Reform Act where even under defendant's version of events, he was "armed" because he was aware of handgun hidden in trashcan and walked past it while being chased by police].) *Elder* and *Cervantes* are instructive.

In *Elder*, police officers executing a search warrant for an apartment found the defendant standing outside the apartment. (*Elder*, *supra*, 227 Cal.App.4th at p. 1317.) The defendant admitted that he lived there. (*Ibid*.) Inside the apartment, the officers discovered two guns and a photo of the defendant holding one of them. (*Ibid*.) Following his conviction for being a felon in possession of a firearm, he was sentenced as a three-strike offender. (*Id*. at p. 1311.) The trial court denied the defendant's petition for resentencing under the Reform Act, concluding that the evidence "established beyond a reasonable doubt" that the defendant possessed the firearms "under conditions in which the guns were readily available for his use." (*Id*. at p. 1317.) The

appellate court affirmed, upholding the trial court's determination that the defendant was ineligible for resentencing. (*Ibid*.)

In *Cervantes*, police officers executing a search warrant of the defendant's residence found him standing inside the doorway. Heroin was found in the kitchen. About eight feet away from the drug cache, the defendant's loaded handgun was found in an adjacent bedroom, inside a purse belonging to his wife. (*Cervantes*, *supra*, 225 Cal.App.4th at p. 1011.) He was convicted of possessing heroin for sale and sentenced as a three-strike offender. (*Ibid*.) After the trial court granted the defendant's resentencing petition, the People sought a writ of mandate. The appellate court granted relief, concluding that as a matter of law, the defendant was ineligible for resentencing under the Reform Act because he was "armed" during the commission of the drug-related offense. (*Id*. at pp. 1013-1018.)

Here, the record establishes that appellant was the driver, owner and sole occupant of a vehicle containing loaded firearms in the trunk.[7] At any time the vehicle was stopped, he could open

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[7] The jury's verdict necessarily established that appellant was aware of the guns in the trunk. (See *People v. Snyder* (1982) 32 Cal.3d 590, 592 [knowledge of possession or custody of firearm is an element of the offense of being a felon in possession of a firearm]; CALCRIM No. 2530 [knowledge of presence of weapon is element of offense of carrying a loaded firearm].)

As to other facts not resolved by the jury's verdict, numerous courts have held that the trial court may independently examine the record of conviction in order to make determinations regarding them. (E.g., *Osuna*, *supra*, 225 Cal.App.4th at p. 1040; *Elder*, *supra*, 227 Cal.App.4th at pp.

the trunk with his car keys and access the weapons for offensive or defensive purposes. Thus, on the undisputed facts, as a matter of law, appellant was "armed" during the commission of the target offenses.

Appellant argues that while driving, he was not "armed," as the firearms were not "within [his] reach" or "in a position of especially ready access." Appellant acknowledges that these factors -- "within reach" and "especially ready access" -- are taken from *People v. Balbuena* (1992) 11 Cal.App.4th 1136, 1139 (*Balbuena*), which was later disapproved by *Bland*, *supra*, 10 Cal.4th at page 1001, footnote 4. In *Balbuena*, police executing a search warrant of a house found the defendant and his wife sleeping in the living room. About 10 feet away, in unlocked suitcases, officers recovered narcotics, cash and an unloaded pistol. (*Balbuena*, *supra*, at p. 1138.) The defendant was convicted of two felony counts of drug possession, and the jury found true that he was personally armed during the commission of the drug offenses. (*Ibid*.) The appellate court reversed the finding of personal arming, concluding that the evidence did not show the defendant had "especially ready access" to the pistol immediately before or after the police entered his home. (*Id*. at p. 1139.) Our Supreme Court faulted *Balbuena* for focusing on the accessibility of the firearm at the time the police executed the search warrant, rather than during the commission of the drug offenses. (*Bland*, *supra*, at p. 1001.) The court noted that because "drug possession is a crime that continues throughout the time that the defendant has possession of the unlawful drugs,

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1314-1316; *Bradford*, *supra*, 227 Cal.App.4th at pp. 1338-1340; *Hicks, supra*, 231 Cal.App.4th at p. 275.)

it follows that [the arming] enhancement would apply to a defendant who has been found guilty of felonious drug possession and who, at some point during the illegal drug possession, had [a firearm] available for use in furtherance of the drug offense." (*Ibid*.)

Here, in arguing that he was not "armed," appellant focuses on the time the vehicle was in motion, when appellant contends he could not have had ready access to the firearms in the trunk. However, appellant was convicted of being a felon in possession of a firearm on or about August 19, 1998. That offense is "'committed the instant the felon in any way has a firearm within his control.' [Citation.]" (*Osuna*, *supra*, 225 Cal.App.4th at pp. 1029-1030.) Like felonious drug possession, being a felon in possession of a firearm is a continuing offense. (See *People v. Ford* (1964) 60 Cal.2d 772, 795, overruled on another ground by *People v. Satchell* (1971) 6 Cal.3d 28; accord, *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413 ["defendant's possession of [handgun] was not merely simultaneous with [his commission of two] robberies, but continued before, during and after those crimes"].) There is no dispute that appellant, a convicted felon, at various times on August 19, 1998, had ready access to the weapons in the trunk of his vehicle, including when he approached and entered it. Moreover, whenever the vehicle was parked, appellant needed only to open the trunk to access the weapons.[8]

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[8] Although the parties do not discuss appellant's conviction for carrying a loaded firearm, the same arming analysis applies to that offense.

Appellant's reliance on *Osuna*, *supra*, 225 Cal.App.4th 1020 and *People v. White* (2014) 223 Cal.App.4th 512, is misplaced for similar reasons. Those cases stated that constructive possession of a firearm does not necessarily require that the possessor be armed with it, and then proceeded to illustrate that concept with a hypothetical. (*Osuna*, at p. 1030; *People v. White*, at p. 524.) However, contrary to the admonishment in *Bland*, the hypotheticals focused on the relationship between the defendant and the firearm at a specific point in time, not during the commission of an offense. (See *Osuna*, *supra*, at p. 1030 ["For example, suppose a parolee's residence (in which only he lives) is searched and a firearm is found next to his bed. The parolee is in possession of the firearm, because it is under his dominion and control. If he is not home at the time, however, he is not armed with the firearm, because it is not readily available to him for offensive or defensive use."]; *People v. White*, *supra*, 223 Cal.App.4th at p. 524 ["convicted felon may be found to be a felon in possession of a firearm if he or she knowingly kept a firearm in a locked offsite storage unit even though he or she had no ready access to the firearm and, thus, was not armed with it"].) Here, when appellant's access to the two firearms is viewed over the course of the day on which appellant was charged with being a felon in possession of firearms, it is apparent that he had ready access to the weapons for offensive or defensive use.

Appellant argues that our interpretation would deprive all defendants who have committed the offense of being a felon in possession of a firearm of the benefits of the Reform Act. We conclude that is neither true nor relevant. A felon in constructive possession of a firearm is not necessarily armed with the weapon during the time period in which he is charged with the offense.

For example, if a defendant were charged with being a felon in possession of a firearm found in his home on a specific date, the defendant would not be armed with the firearm during the commission of the offense if he were nowhere near his home on that date. More important, as the *Elder* court observed, "even if the great majority of commitments for unlawful gun possession come within our interpretation of this eligibility criterion, it would not run afoul of the voters' intent" with respect to the Reform Act. (*Elder*, *supra*, 227 Cal.App.4th at pp. 1313-1314.)

Finally, appellant argues that no evidence suggests that during the trip preceding the accident, appellant stopped the vehicle to access the weapons or arm himself. As explained, however, no direct evidence of physical possession is required to show a weapon was readily available for use. Rather, evidence that a defendant could have taken possession of a firearm during the commission of the target offense is sufficient. (See, e.g., *Searle*, *supra*, 213 Cal.App.3d at p.1099 [firearm available for use where it was located in unlocked compartment in back of defendant's vehicle]; *Cervantes*, *supra*, 225 Cal.App.4th at pp. 1011-1018 [firearm available for use during defendant's commission of drug offense where it was located eight feet from the drug cache inside his wife's purse].) Here, the dispositive facts are not in dispute. Appellant, a convicted felon, was found guilty of knowingly possessing and transporting loaded firearms in the trunk of his car. It requires no speculation to conclude that appellant could have accessed the weapons before entering his vehicle or after parking it. In sum, on the undisputed facts,

appellant was "armed" during the commission of the target offenses.[9]

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[9] Appellant's reliance on *People v. Berry* (2015) 235 Cal.App.4th 1417 (*Berry*), overruled on other grounds by *People v. Estrada* (2017) 3 Cal.5th 661 (*Estrada*), and *People v. Pena* (1999) 74 Cal.App.4th 1078, 1084 (*Pena*) is misplaced. In *Berry,* police conducting surveillance observed the defendant open the trunk of his Cadillac and reach inside. He then entered and drove away in a stolen Toyota. After being pulled over, the defendant was found in possession of a forged driver's license and a fraudulent check. Police searched the Cadillac and found a loaded firearm in a briefcase in the trunk of the vehicle. Appellant pleaded guilty to two forgery offenses, and the prosecutor dismissed all firearm-related charges. (*Id*. at pp. 1419-1421.) Subsequently, appellant filed a resentencing petition under the Reform Act, which was denied on the basis that he was "armed" during the commission of the forgery offenses. (*Id*. at pp. 1422-1423.) The appellate court reversed, holding that facts underlying a dismissed count may not be considered in determining whether a defendant was armed. (*Id*. at p. 1427.) That broad holding was subsequently rejected by our Supreme Court, which held that a court may rely on facts underlying a dismissed count if those facts also "underlie a count to which the defendant pleaded guilty." (*Estrada*, *supra*, at p. 674.) Here, the trial court relied on facts underlying appellant's convictions. Additionally, appellant was driving the vehicle containing the loaded firearms.

In *Pena*, the appellate court held that the term "'immediate personal possession of a loaded, operable firearm,'" as used in Health & Safety Code section 11550, subdivision (e), requires that the firearm be within the passenger compartment of the vehicle. (*Pena*, *supra*, 74 Cal.App.4th at p. 1088.) It rejected the Attorney General's construction of "'immediate personal possession'" to mean being "'armed with'" the weapon, or having it "readily available for offensive or defensive use." (*Id*. at p.

B. *The Trial Court's Error in Applying the Preponderance of the Evidence Standard was Harmless, and Remand for a New Hearing on Resentencing Petition is not Warranted.*

As noted, the trial court found appellant was "armed" by a preponderance of the evidence. Subsequently, our Supreme Court held that the ineligibility determination must be found beyond a reasonable doubt. (*Frierson*, *supra*, 4 Cal.5th at pp. 239-240.) Appellant's opening brief argued that the trial court's selection of the lesser standard of proof was subject to review under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*), but his reply brief argued that the error was reversible per se. In support of the latter standard, appellant cites *Sullivan v. Louisiana* (1993) 508 U.S. 275 (*Sullivan*) and *In re Francisco N.* (1986) 186 Cal.App.3d 175, disapproved on another point in *In re Manuel L.* (1994) 7 Cal.4th 229, 239, footnote 5. However, neither *Sullivan* nor *In re Francisco N.* involved errors of proof during postconviction resentencing. (See *Sullivan*, *supra*, at pp. 280-282 [where jury rendered verdict based on unconstitutional reasonable-doubt instruction, error was reversible per se]; *In re Francisco N.*, *supra*, at pp. 179-180 [error in applying lesser standard of proof at "adjudicatory stage of a proceeding wherein a juvenile is charged with an act which

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1087.) However, the Reform Act does not use the term "immediate personal possession." Rather, it uses the term "armed," which has been interpreted to mean having the firearm readily available for offensive or defensive use. (See, e.g., *Cervantes*, *supra*, 225 Cal.App.4th at pp. 1012-1018; *Osuna*, *supra*, 225 Cal.App.4th at pp. 1028-1038; *Elder*, *supra*, 227 Cal.App.4th at pp. 1312-1314.)

would constitute a crime if committed by an adult" is reversible per se].) Here, the trial court's error occurred in a postconviction proceeding, "an act of lenity on the part of the electorate to which he or she is not constitutionally entitled." (*People v. Esparza* (2015) 242 Cal.App.4th 726, 740 (*Esparza*).)[10] A petitioner seeking resentencing under the Reform Act is not entitled to a jury trial on any facts to be found at the hearing on the petition. (*Ibid.*) Accordingly, we conclude that *Watson* harmless error analysis applies. (See also *People v. Johnson* (2016) 1 Cal.App.5th 953, 968 [trial court's error on defendant's resentencing petition pursuant to Proposition 47 subject to *Watson* harmless error analysis].) As explained above, even had the trial court applied the beyond a reasonable doubt standard, appellant would have been found ineligible for resentencing under the Reform Act.

Appellant contends the matter should be remanded for a new hearing, arguing that the trial court might make a different finding in light of the stringent beyond a reasonable doubt standard. However, appellant has not argued that there are any disputed facts relevant to the eligibility determination. As explained above, on the undisputed facts, appellant was "armed" during the commission of the target offenses. Thus, remand would be an idle act. (See *People v. Coelho* (2001) 89 Cal.App.4th 861, 889.)

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[10] *Esparza* was abrogated on another point by *People v. Cordova* (2016) 248 Cal.App.4th 543, 552, footnote 8 (*Cordova*), but our Supreme Court subsequently overruled *Cordova* on the same point (see *People v. Valencia* (2017) 3 Cal.5th 347, 351-352).

## DISPOSITION

The order denying appellant's resentencing petition is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.