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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM CUNNINGHAM, Defendant and Appellant.	B277681 (Los Angeles County Super. Ct. No. SA 049255)

APPEAL from an order of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Affirmed.

Jonathan B. Steiner and Nancy Gaynor, 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 Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant William Cunningham challenges the trial court's denial of his petition for a recall of his sentence under the Three Strikes Reform Act of 2012, commonly known as Proposition 36. The trial court determined that Cunningham was ineligible for relief because his current conviction, for corporal injury on a former cohabitant (Penal Code section 273.5, subd. (a)),[1] was an offense in which he acted with the intent to cause great bodily harm. Cunningham contends that the trial court erred by exceeding its authority to find facts regarding Cunningham's conviction. We disagree and affirm the trial court.

FACTS AND PROCEEDINGS BELOW

An information filed in 2003 charged Cunningham with one count of corporal injury to a cohabitant, in violation of section 273.5, subdivision (a), one count of dissuading a witness from reporting a crime, in violation of section 136.1, subdivision (b)(1), and two counts of criminal threats, in violation of section 422. The jury convicted Cunningham of corporal injury to a cohabitant, and acquitted him of the other charges. Because Cunningham had previously suffered convictions for two strike offenses, the trial court imposed a third-strike sentence of 26 years to life in prison.

In our unpublished 2005 opinion in Cunningham's case, we described the facts as follows:

"Cunningham was romantically involved with the victim, Maxann Taylor, and had lived with her for several months but they were not living together in June 2003 because Cunningham was avoiding his parole officer. After spending the night of June 17 at the Summit Motel, the two fought while still in the

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

motel room. Cunningham yelled at Taylor, then threw an orange juice bottle at her face. He told her, 'I'm going to kill you, bitch,' and pulled her off the bed. Taylor threw an ashtray and a lamp at Cunningham. Cunningham then hit Taylor on the head with the lamp, wrapped the lamp cord around her neck, and pulled. Taylor feigned unconsciousness and Taylor left the room. Taylor ran out and called 911 from a nearby pay phone.

"The police and paramedics found Taylor at the motel with several loose teeth, bruises, a swollen forearm, and pains in her breast and thigh. The motel room was a mess and a lamp was broken. Taylor identified Cunningham as her assailant, and he was arrested and charged.

"At trial, Taylor's testimony was corroborated by testimony from a nurse practitioner who had examined Taylor three days after the attack, by a plastic surgeon who had treated Taylor before and after the attack, and by Taylor's dentist—all of whom said her injuries were consistent with her description of the assault." (*People v. Cunningham* (Nov. 22, 2005, B178167 [nonpub. opn.]) [2005 WL 3112534, at *1, fn. omitted].)

On December 12, 2012, Cunningham filed a petition for recall of his sentence pursuant to Proposition 36. The trial court denied the petition, finding that the record of conviction in Cunningham's case showed that Cunningham had acted with an intent to cause great bodily injury. The court reasoned that, in order to find Cunningham guilty, the jury must have believed Taylor's testimony regarding Cunningham's attack, including her testimony that he told her he was going to kill her. In addition, the court found that the physical evidence of the bruises and other serious injuries Taylor suffered corroborated her testimony.

DISCUSSION

In 2012, the voters of California enacted Proposition 36, which amended sections 667 and 1170.12 and added section 1170.126 to reduce the penalties for defendants with two prior strike offenses who are convicted of a third felony. Prior to the enactment of Proposition 36, the trial court was required to sentence such defendants to 25 years to life in prison regardless of the seriousness of their third felony. (*People v. Johnson* (2015) 61 Cal.4th 674, 681 (*Johnson*).) Under Proposition 36, defendants are subject to third-strike sentencing only if their current conviction is for a serious or violent felony or if certain disqualifying factors apply. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048 (*Blakely*).)

Proposition 36 also applies retroactively to inmates currently serving life sentences who would not have received a third strike if Proposition 36 had been in force at the time of their most recent conviction. (*Blakely*, *supra*, 225 Cal.App.4th at p. 1048.) Under section 1170.126, an inmate serving an indeterminate life sentence under the Three Strikes law "upon conviction . . . of a felony or felonies that are not defined as serious and/or violent felonies . . . may file a petition for a recall of sentence." (§ 1170.126, subd. (b).) When an inmate petitions for relief under section 1170.126, the trial court must determine whether the inmate is eligible for relief under the statute. (§ 1170.126, subd. (f).) If so, the trial court then must resentence the inmate "unless the court, in its discretion, determines that resentencing the [inmate] would pose an unreasonable risk of danger to public safety." (*Ibid.*)

In order to be eligible for relief, an inmate must satisfy certain criteria, in addition to having been convicted of a felony not defined as serious or violent. In particular, the inmate must not be serving a sentence "for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(2).) Clauses (i) to (iii) of section 667, subdivision (e)(2)(C), and section 1170.12, subdivision (c)(2)(C) are identical. In both sections, clauses (i) and (ii) describe certain controlled substance and sex offenses. Clause (iii) of both statutes states as follows: "During 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." (§§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii).)

It is not always obvious whether an inmate meets these eligibility criteria. In most criminal cases that took place before Proposition 36 went into effect, there was no reason to plead and prove that a defendant was armed during an offense, or intended to cause great bodily harm. As a consequence, there is typically no single statement in the judgment of conviction stating whether an inmate meets these criteria. The text of section 1170.126 does not describe how the trial court should determine whether an inmate is eligible for resentencing, nor the standard of proof that applies.

To resolve these issues, courts have established some basic rules to which both sides in this case broadly agree. An inmate seeking relief under section 1170.126 is not entitled to a hearing to present evidence regarding eligibility. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1337 (*Bradford*).) On the other hand, trial courts are not limited to the minimal facts

established by the elements of the offense of which the inmate was convicted. Instead, to determine eligibility, the trial court should examine the full record of conviction. (*Blakely*, *supra*, 225 Cal.App.4th at p. 1063; *People v. Guilford* (2014) 228 Cal.App.4th 651, 660; *Bradford*, *supra*, 227 Cal.App.4th at p. 1339.) The record of conviction includes trial and appellate court documents, including the Court of Appeal's opinion in the case. (*People v. Woodell* (1998) 17 Cal.4th 448, 455.)

The doctrine of examining the entire record of conviction developed in the context of deciding sentencing enhancements for habitual criminals, in which courts must review prior out-of-state convictions to determine whether they met the criteria for serious felonies under California law. (See *People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*).) In these cases, our Supreme Court has developed strict requirements regarding the factual determinations courts may reach. Thus, in *People v. McGee* (2006) 38 Cal.4th 682, our Supreme Court held that the trial court's inquiry should be limited to determining "the nature or basis" of the prior offenses. (*Id.* at p. 706.) When examining the record of conviction, the trial court must sometimes "ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law," but the court should not "make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct." (*Ibid.*) In short, the trial court's "inquiry . . . is quite different from the resolution of the issues submitted to a jury, and is one more typically and appropriately undertaken by a court." (*Ibid.*)

Cunningham contends that this body of law should apply to petitions for resentencing under Proposition 36, and that the trial court erred in this case by deciding disputed issues of fact regarding Cunningham's conviction. We are not persuaded.

Although courts have been guided by *Guerrero* and its progeny in establishing procedures for determining eligibility under Proposition 36 (see, e.g., *Bradford*, *supra*, 227 Cal.App.4th at pp. 1336-1340), it does not follow that the procedures established in those cases are binding on Proposition 36 cases in all respects. As the court pointed out in *People v. Newman* (2016) 2 Cal.App.5th 718, 724, review granted Nov. 22, 2016, S237491,[2] a trial court addressing a resentencing petition under Proposition 36 is in a very different position from a court imposing enhancements at an initial sentencing. At the initial sentencing, the defendant has the constitutional right for a jury to determine "the truth or falsity of a sentence enhancement allegation that increases the penalty for the crime beyond the statutory maximum." (*Ibid.*) Consequently, the scope of the court's fact finding is necessarily limited.[3] No such right exists for resentencing determinations under Proposition 36, because they do not increase the defendant's sentence. (*Ibid.*) Furthermore, the plain text of the relevant statutes suggests a broader scope for judicial fact finding in the retroactive application of Proposition 36. When the prosecution intends to challenge a defendant's eligibility for a reduced sentence in a case involving a new conviction, it must "ple[a]d and prove[]"

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[2] Our Supreme Court has granted review of this case. We cite the Court of Appeal opinion in the case as persuasive authority, pursuant to California Rules of Court, rule 8.1115(e)(1).

[3] Although Cunningham is correct that *Guerrero* and its progeny are based on state law, and do not directly apply federal constitutional law regarding judicial fact finding at sentencing (see, e.g., *Apprendi v. New Jersey* (2000) 530 U.S. 466), the two bodies of law are closely related and address similar concerns. (See *People v. Wilson* (2013) 219 Cal.App.4th 500, 513-516.)

the criterion under which the defendant is ineligible. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) By contrast, in cases of retroactive relief, section 1170.126, subdivision (f), provides that "*the court* shall determine whether the petitioner satisfies the criteria" for resentencing (italics added). It is in keeping with existing case law and the statutory language to allow the trial court a broader scope of fact finding in cases involving retroactive relief under Proposition 36, including the ability to determine contested facts.

In reaching our conclusion, we do not imply that courts addressing a petition for resentencing under Proposition 36 are free to find any facts they wish regarding the inmate's prior conduct. The text of section 1170.126, subdivision (e)(2), limits the trial court's inquiry to whether "[t]he inmate's current sentence was . . . imposed for [an] offense[]" in which the inmate intended to cause great bodily injury or met one of the other criteria. A court determining eligibility must therefore focus only on the conduct constituting the offense for which the inmate is currently serving a sentence, and whether the facts introduced to prove that offense established that the defendant is ineligible for relief under one of the specified criteria.

In addition, we agree with the court in *People v. Arevalo* (2016) 244 Cal.App.4th 836, 852 (*Arevalo*), that a court determining eligibility for Proposition 36 resentencing must apply a standard of proof beyond a reasonable doubt. This is consistent with our Supreme Court's directive in *Johnson*, *supra*, 61 Cal.4th at p. 691, that parallel standards apply in the case of new sentencing and in the case of resentencing. In new sentencing under Proposition 36, the prosecution must plead and prove the defendant's ineligibility beyond a reasonable doubt. The same standard should apply with respect to the trial court's factual determinations in retrospective petitions. Furthermore,

a high standard of proof protects against potential errors: " '[T]he statute does not call on the parties to present evidence concerning relevant facts of a prior conviction that determine whether the petitioner is ineligible for resentencing. It is in this respect that the current matter is not like either an ordinary sentencing proceeding or the discretionary resentencing proceeding under Proposition 36, at which time the trial court considers evidence bearing on the petitioner's dangerousness. The retrospective nature of the determination presents unique pitfalls. A review of the record of the prior conviction is potentially problematic since the parties had no incentive to fully litigate at the time of the original trial court proceedings unpleaded factual allegations that relate to the petitioner's conduct and intent at the time of the crimes. Obviously, the issue of whether a particular petitioner intended to cause great bodily injury under the eligibility criteria could be the subject of substantial dispute between the parties, as it necessarily requires a determination based on circumstantial evidence in virtually all cases.' " (*Arevalo*, *supra*, 244 Cal.App.4th at p. 851.) Because the inmate's interest in avoiding this kind of error is large, and the state has an opportunity to protect against the release of a dangerous defendant at a subsequent hearing, a higher standard of proof must apply. (*Id.* at p. 852.)

Under the standards we have just described, the trial court did not err in determining that Cunningham was ineligible for resentencing. At Cunningham's trial, the victim testified that during the assault Cunningham said he was going to kill her. The jury must have found her testimony regarding the attack credible because it was the main link connecting Cunningham to the crime. Furthermore, there was extensive expert testimony regarding the seriousness of the injuries the victim actually did suffer. The trial court did not err in concluding that the evidence

showed beyond a reasonable doubt that Cunningham intended to inflict great bodily injury, and that Cunningham was therefore ineligible for resentencing.

DISPOSITION

The order of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.