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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

BATTISE COLLINS,

Defendant and Appellant.

B280353

(Los Angeles County
Super. Ct. No. BA230105)

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

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, Senior Assistant Attorney General, Noah Hill and Timothy L. O'Hair, Deputies Attorney General, for Plaintiff and Respondent.

Defendant and appellant Battise Collins was sentenced to an indeterminate life term under the three strikes law (Pen. Code, §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d))¹ after a jury convicted him in 2003 of three counts of inflicting corporal injury to a spouse (§ 273.5, subd. (a)), and one count of false imprisonment (§ 236). After the voters approved Proposition 36 in 2012, Collins petitioned to have his sentence recalled under section 1170.126. Following a hearing, the trial court denied the petition, finding that Collins’s conduct demonstrated an intent to cause great bodily injury. Collins’s sole contention on appeal is that the trial court incorrectly applied a preponderance of the evidence standard of proof to find him ineligible for resentencing.

The correct standard of proof for ineligibility findings under Proposition 36 is an issue upon which decisions of the the Courts of Appeal conflict. (*People v. Arevalo* (2016) 244 Cal.App.4th 836 (*Arevalo*) [applying beyond a reasonable doubt standard]; *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*) [applying preponderance of the evidence standard].) Our Supreme Court has granted review to resolve the issue. (*People v. Frierson*, review granted October 19, 2016, S236728.) We recognize that the Supreme Court will have the final say on the matter. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) However, we must address the issue while it is pending in

¹ All further statutory references are to the Penal Code unless otherwise indicated.

the Supreme Court, and conclude the superior court properly denied the petition.

DISCUSSION

Collins claims that *Arevalo* demonstrates the correct standard of proof for ineligibility findings is beyond a reasonable doubt, rather than the preponderance of the evidence standard espoused in *Osuna*. We disagree.

In *Osuna*, the trial court found the defendant was armed with a firearm during the commission of the offense of possession of a firearm and therefore ineligible for resentencing. (*Osuna, supra*, 225 Cal.App.4th at p. 1030.) *Osuna* held that the preponderance of the evidence standard of proof applies when determining eligibility for resentencing under Proposition 36, although the fact that defendant was armed with a firearm was neither pleaded nor proven. The court explained that “[a] finding an inmate is not eligible for resentencing under section 1170.126 does not increase or aggravate that individual’s sentence; rather, it leaves him or her subject to the sentence originally imposed.” (*Id.* at p. 1040.) The trial court’s finding “did not increase the penalty to which defendant was already subject, but instead disqualified defendant from an act of lenity on the part of the electorate to which defendant was not constitutionally entitled.” (*Ibid.*) *Osuna* concluded that the Sixth Amendment was not implicated, and as a result a disqualifying factor need only be found by a preponderance

of the evidence. (*Ibid.*, citing Evid. Code § 115; *People v. Superior Court* (2013) 215 Cal.App.4th 1279, 1305 (*Kaulick*) [dangerousness determination].) The majority of courts facing this issue have agreed with *Osuna*’s reasoning and applied the preponderance of the evidence standard. (*People v. Frierson* (2016) 1 Cal.App.5th 788, review granted October 19, 2016, S236728; *Kaulick, supra*, 215 Cal.App.4th at p. 1305 [proof of dangerousness under Proposition 36 is judged by the preponderance of the evidence standard]; *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075–1076 [same].)

In *Arevalo*, the trial court acquitted the defendant of possession of a firearm at a bench trial, and found the allegation that the defendant was armed with a firearm not true at sentencing. (*Arevalo, supra*, 244 Cal.App.4th at p. 843.) Despite these trial findings, the resentencing court found the defendant ineligible for recall of sentence under Proposition 36 by finding the defendant had used a firearm during the commission of the offense.² (*Id.* at p. 844.) Reversing, our colleagues in Division Three held, “[u]nder a properly applied ‘beyond a reasonable doubt’ standard, Arevalo’s acquittal on the weapon possession charge, and the not-true finding on the allegation of being armed with a firearm, are preclusive of a determination that he is ineligible for resentencing consideration.” (*Id.* at p. 842.)

² By stipulation, the resentencing court was not the trial court that had rendered the verdicts and findings.

We agree with the trial court in the present case that “*Arevalo* should be limited to the factual circumstances that led to that decision: cases where a court finds a petitioner ineligible for resentencing based on the existence of a specific disqualifying factor for which the petitioner was acquitted at trial.” This case is procedurally distinguishable. Unlike the defendant in *Arevalo*, Collins was not acquitted of assault by means of force likely to produce great bodily injury at trial, nor did the jury find that he did not intend to cause great bodily injury. The jury made no findings inconsistent with the trial court’s view of the evidence. Moreover, the Legislature has determined that, “[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.” (Evid. Code § 115.) We are satisfied the *Osuna* line of cases correctly decided that the preponderance of the evidence standard found in the plain language of Evidence Code section 115 is the applicable burden for determining if a defendant’s commitment offense renders him ineligible for relief under Proposition 36.

DISPOSITION

The order denying defendant's petition for recall of sentence is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

RAPHAEL, J.*

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