

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE LINCOLN COATS,

Defendant and Appellant.

A140503, A143779

(San Mateo County
Super. Ct. No. SC-37136A)

Defendant George Lincoln Coats appeals from orders denying his two petitions for resentencing pursuant to Proposition 36 to reduce his “Three Strikes” sentence. Contrary to the trial court’s ruling, defendant was ineligible for recall and resentencing under Penal Code section 1170.126,¹ so that it is unnecessary to consider the trial court’s finding that resentencing would create an unreasonable risk of danger to public safety. We shall therefore affirm the denial of his petitions but on a basis different from that on which the trial court based the denial.

Factual and Procedural History

In November 1997, defendant was convicted after a jury trial of, among other things, one count of felony possession of methamphetamine (Health & Saf. Code, § 11378) and the related enhancement for being personally armed with a firearm (§ 12022, subd. (c)). The jury also found true all of the prior convictions alleged against

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

defendant, including two prior strike convictions (§ 1170.12, subd. (c)(2)) and a prior narcotics conviction (Health & Saf. Code, § 11370.2, subd. (c)).

After the denial of defendant's *Romero* motion² requesting that the trial court dismiss one or both prior strikes to spare him from a third-strike term, defendant was sentenced to an indeterminate term of 25 years to life for possession of methamphetamine, with a three-year enhancement for his prior drug convictions. The trial court did, however, strike the additional five-year enhancement for personal use of a firearm.³

On November 27, 2012, defendant filed a petition for resentencing pursuant to Proposition 36. After a contested hearing regarding his eligibility for resentencing, the trial court found that defendant was eligible for resentencing pursuant to section 1170.126, subdivision (e). Following a two-day hearing in December 2013, however, the court denied the petition for resentencing, finding that defendant would pose an unreasonable risk of danger to public safety if he were resentenced. Defendant filed a timely notice of appeal challenging the denial.

On November 5, 2014, defendant filed a second petition for resentencing arguing that the definition of the phrase “ ‘unreasonable risk of danger to public safety,’ ” set forth in section 1170.18, subdivision (c), contained in the recently passed Safe Neighborhoods and Schools Act, added by Proposition 47, applied to his petition. Following a contested hearing, the trial court denied the second petition. Defendant

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

³ The trial court explained at the time of sentencing that he was striking the enhancement because he did not “believe the sentence should be a 33-year sentence.” Our prior opinion affirming the sentence states that the arming enhancement was struck “at the request of the district attorney . . . in the interests of justice.” (*People v. Coats* (June 12, 2000, A082700) [nonpub. opn.]) Section 12022, subdivision (f), in effect at the time of defendant's sentence, authorized the court to “strike the additional punishment for the enhancements provided in subdivision (c) or (d) in an unusual case where the interests of justice would best be served.” (Stats. 1995, ch. 377, § 8.) Likewise, under section 1385, subdivision (c)(1), “If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).”

timely filed a notice of appeal of the denial of his second petition. The two appeals have been consolidated in this court.

Discussion

Proposition 36, also known as the Three Strikes Reform Act of 2012, was approved by the voters on November 6, 2012, and went into effect the next day. It amended sections 667 and 1170.12 so that an indeterminate prison term of 25 years to life may be imposed as a “third strike” only if the offense is a serious or violent felony or the prosecution pleads and proves an enumerated triggering factor. (§§ 667, subd. (e)(2)(A), (C), 1170.12, subd. (c)(2)(A), (C).)

Proposition 36 also added section 1170.126, which provides a procedure for resentencing “persons presently serving an indeterminate term of imprisonment” under the Three Strikes law “whose sentence under this act would not have been an indeterminate life sentence.” (§ 1170.126, subd. (a).) Such a person may file a petition to recall his or her sentence and be resentenced as a second strike offender. (§ 1170.126, subd. (b).)

Under section 1170.126, “ [a] prisoner is eligible for resentencing as a second strike offender if all of the following [criteria] are shown: (1) the prisoner is serving an indeterminate life sentence for a crime that is not a serious or violent felony; (2) the life sentence was not imposed for any of the offenses appearing in sections 667[(e)(2)(C)] and 1170.12[(c)(2)(C)]; and (3) the inmate has no prior convictions for any of the offenses appearing in clause (iv) of section 667[(e)(2)(C)] or clause (iv) of section 1170.12(c)(2)(C).” [Citation.] If the trial court determines the prisoner’s petition for resentencing satisfies all three of the foregoing eligibility criteria set forth in section 1170.126(e), the court must resentence the prisoner as a second strike offender “ unless the court, in its discretion, determines that resentencing . . . would pose an unreasonable risk of danger to public safety.” ’ ’ (*People v. White* (2014) 223 Cal.App.4th 512, 522.)

The Attorney General argues that the trial court erred in finding that defendant is eligible for resentencing. The Attorney General contends that defendant does not meet the second eligibility criterion which requires that his “current sentence was not imposed

for any of the offenses appearing in” section 667, subdivision (e)(2)(C) and section 1170.12, subdivision (c)(2)(C). Section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii) “describe[] the circumstance [in which] ‘[d]uring the commission of the current offense, the defendant . . . was armed with a firearm.’ ” (*People v. Quinones* (2014) 228 Cal.App.4th 1040, 1044.) As set forth above, the jury found true the enhancement allegation that defendant was armed with a firearm during the commission of his drug offense but the court struck the enhancement allegation at the time of sentencing.

Initially, defendant argues that “this court lacks jurisdiction to review the trial court’s eligibility determination in the absence of any appeal by the prosecution.” We disagree. Defendant does not dispute that the prosecution strongly contested defendant’s eligibility in the trial court. Although the prosecution arguably could have sought appellate review of the ruling on eligibility by way of a petition for writ of prohibition or mandate (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 985), the failure to do so did not waive the present challenge to the finding of eligibility nor does it deny this court jurisdiction to consider the issue. Establishing eligibility is a prerequisite to resentencing. It is only the first step, in the two-step process anticipated under section 1170.126. It is the defendant’s burden to make a prima facie showing of eligibility. (See *Vance v. Bizek* (2014) 228 Cal.App.4th 1155, 1163, fn. 3 [“[A] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.”].) Only after the court determines a defendant is eligible does the burden shift to the prosecution to prove dangerousness. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301.) Accordingly, the Attorney General does not need to file a cross-appeal to challenge defendant’s failure of proof in this regard.

On the merits, defendant argues that because the sentencing court struck the arming enhancement, his current sentence was not “imposed for” that enhancement as required by the plain language of section 1170.126, subdivision (e)(2). As defendant notes, the trial court agreed, explaining that the controlling predicate under section

1170.126, subdivision (e)(2), referring to “[t]he inmate’s current sentence,” is not whether defendant had been convicted of the firearm charge, but rather, whether he had been sentenced on the enhancement.⁴

Recent authority, decided after the trial court made its eligibility determination in this case, demonstrates the error in the court’s and defendant’s reasoning. First, in *People v. White, supra*, 223 Cal.App.4th at page 527, the court held that “where the record establishes that a defendant convicted under the pre-Proposition 36 version of the Three Strikes law as a third strike offender of possession of a firearm by a felon was armed with the firearm during the commission of that offense, the armed-with-a-firearm exclusion applies and, thus, the defendant is not entitled to resentencing relief under the Reform Act.” The court explained that “in such a case, a trial court may deny section 1170.126 resentencing relief under the armed-with-a-firearm exclusion even if the accusatory pleading, under which the defendant was charged and convicted of possession of a firearm by a felon, did not allege he or she was armed with a firearm during the commission of that possession offense.” (*Ibid.*; see also *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1026-1027 [holding that “(1) disqualifying factors need not be pled and proven to a jury beyond a reasonable doubt; (2) where there are facts in the record of conviction that show an inmate was ‘armed with a firearm’—had the firearm available for immediate offensive or defensive use—during the commission of his or her current offense, the inmate is disqualified from resentencing under the Act even though he or she was convicted of possessing the firearm, and not of being armed with it”]; *People v. Hicks* (2014) 231 Cal.App.4th 275 [same].)

⁴ Defendant’s suggestion that the trial court’s interpretation of the statute and eligibility determination should be reviewed for an abuse of discretion is incorrect. The interpretation of section 1170.126, subdivision (e)(2) presents a question of law this court reviews de novo. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331.) Whether defendant satisfies the eligibility criteria as interpreted “is not a discretionary determination by the trial court.” (*Id.* at p. 1336; *People v. Oehmigen* (2015) 232 Cal.App.4th 1, 7 [“What the trial court decides is a question of law: whether the facts in the record of conviction are the proper subject of consideration, and whether they establish eligibility.”].)

In *People v. Hicks, supra*, 231 Cal.App.4th at pages 284-285, the court concluded that defendant's current sentence was "imposed for arming" despite no enhancement allegation being pled or proved. The court explained, subpart (iii) of the enumerated statutes "does not identify specific offenses but, instead, identifies circumstances of the offense—that is, using a firearm, being armed with a firearm or deadly weapon, or intending to cause great bodily injury." (*Id.* at p. 284.) "The eligibility criteria here refer to something that occurs '[d]uring the commission of the current offense,' that being 'the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.' [Citations.] By referring to those facts attendant upon commission of the actual offense, the express statutory language requires the trial court to make a factual determination that is not limited by a review of the particular statutory offenses and enhancements for which a petitioner's sentence was imposed. Not only do the criteria at issue here not describe any particular offenses or enhancements, but the reference to an intent to cause great bodily injury does not clearly equate to the most common related enhancement, that being the infliction of great bodily injury." (*Id.* at p. 285.)

Similarly, in *People v. Osuna, supra*, 225 Cal.App.4th at page 1034, the court rejected the argument that the "plain language" of section 1170.126, subdivision (e)(2) requires that the current sentence be imposed on a pled and proven arming enhancement. The court observed that "[w]e are aware of no provision criminalizing, or permitting imposition of an additional sentence for, the mere intent to cause great bodily injury to another person. . . . Thus, we believe the electorate intended the disqualifying factors to have a broader reach than defendant's interpretation of the statute would give them." (*Osuna*, p. 1034.) The court concluded, "An examination of the statutory scheme as a whole supports the conclusion the phrase '[d]uring the commission of the current offense, the defendant . . . was armed with a firearm,' as used in sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii), and as [it] disqualifies an inmate from resentencing pursuant to section 1170.126, subdivision (e)(2), extends to situations in which the defendant was convicted of violating section 12021 but also had the firearm

he or she was convicted of possessing available for use, either offensively or defensively. This is so even when we take into account section 1170.126, subdivision (e)(2)'s proviso that an inmate is eligible for resentencing if his or her current sentence was 'not imposed for any of the offenses appearing' in those clauses of sections 667 and 1170.12." (*Osuna*, p. 1035.)

Finally, in *People v. Quinones*, *supra*, 228 Cal.App.4th at page 1042, the court relied in part on *People v. White*, *supra*, 223 Cal.App.4th 512, in concluding that "an arming enhancement—found true by the jury but dismissed for sentencing purposes at [the defendant's] original 1996 sentencing hearing—may be used to disqualify him for resentencing under Proposition 36." In that case, just as in this case, the jury had found the arming enhancement true but the court struck the enhancement based on the interests of justice at the time of sentencing. (*Quinone*, p. 1044.) The court explained that the striking of the enhancement for sentencing purposes "does not change the *fact* that defendant was armed with a firearm during the commission of the current offenses. Nothing in the record on appeal suggests any legal infirmity with the enhancement, such as a lack of evidentiary support, or other legal defect." (*Ibid.*) The court observed, "Here we have an even stronger case than *White*; not only do the *facts* show defendant was armed with a firearm, but the jury also found those facts beyond a reasonable doubt. That the sentencing judge found it 'unnecessary' to add punishment therefore is immaterial." (*Quinone*, p. 1045.)

Under the above authority, defendant, having been convicted of the arming enhancement, is ineligible for resentencing. The petition should have been denied on that basis and no discussion of whether defendant would pose an unreasonable risk of danger is required.

Disposition

The orders denying defendant's petitions are affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.

A140503, A143779