

NOT TO BE PUBLISHED

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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
THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANKIE ROY KINGERY,

Defendant and Appellant.

C076725

(Super. Ct. No. CRF959445)

Defendant Frankie Roy Kingery appeals from the trial court's denial of his petition for resentencing pursuant to Penal Code section 1170.126¹ because he was armed during the commission of his current offense. He contends he was deprived of his rights to a jury trial and proof beyond a reasonable doubt on the issue of whether he

¹ Undesignated statutory references are to the Penal Code.

was armed. Based on the sound reasoning of prior opinions, we reject the contention and affirm the order.

BACKGROUND

The facts of defendant's current offense are summarized in our opinion affirming his conviction (*People v. Kingery* (May 7, 1997, C021718) [nonpub. opn.]):

“As the facts are undisputed, a summary is appropriate. Defendant stole two cartons of cigarettes from Long's Drug Store. When pursued by a store assistant manager, defendant brandished a knife until the assistant manager halted his pursuit.”

Defendant pled guilty to petty theft with prior theft-related convictions (§ 666) and admitted two prior strikes. He was sentenced to serve 25 years to life in state prison. We affirmed his conviction in May 1997.

On March 22, 2013, defendant filed a petition for resentencing in the trial court. On May 20, 2013, the trial court ruled defendant was eligible for resentencing because his being armed with a deadly weapon had not been pled and proven. For the next year, defendant and the prosecution filed documents related to the issue of whether resentencing defendant posed an unreasonable risk of danger to public safety.

The prosecution filed a motion for reconsideration of the trial court's eligibility finding on June 14, 2014. On June 16, 2014, the trial court held a hearing on the motion and reversed the prior order, finding defendant ineligible for resentencing because he was armed during his current offense.

DISCUSSION

Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], defendant contends he is entitled to a jury trial and proof beyond a reasonable doubt on the issue of

whether he was armed during the commission of his current offense. He specifically argues that the trial court erred when it made a factual finding on contested facts that increased the penalty for his felony petty theft offense beyond its statutory maximum. We disagree.

Section 1170.126 allows defendants serving a life term for a third strike to petition for resentencing. (§ 1170.126, subd. (b).) Eligibility for resentencing is initially limited to defendants serving life terms for felonies that are neither serious nor violent. (§ 1170.126, subd. (e)(1).) Other factors can render a defendant ineligible for resentencing. One of the disqualifying factors, as cross-referenced in section 1170.126, subdivision (e)(2), renders an offense ineligible for recall of sentence if “[d]uring 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.” (§ 667, subd. (e)(2)(C)(iii).)

Defendant asserts he is entitled to a jury trial and proof beyond a reasonable doubt because the net effect of finding him ineligible for resentencing is a longer sentence.

We rejected this argument in another case. “Reducing the sentence of an individual like the current petitioner, who is serving a valid sentence imposed more than a decade ago, is not constitutionally compelled; it would be an act of lenity. The trial court takes ‘the original sentence as given’; doing so leads to the inevitable determination that section 1170.126 merely provides a limited mechanism within which the trial court may consider a reduction of the sentence below the original term. Section 1170.126, like the statutory mechanism under federal law for a sentencing reduction, is distinguishable from other sentencing proceedings, and the potential reduction of the

sentence is narrowly circumscribed by the statute. The result of a proceeding under section 1170.126 may well be that the petitioner's originally imposed, lawful sentence remains undisturbed. Under the circumstances, the trial court's determination of facts that affect whether the defendant will be resentenced does not implicate the right to a jury trial as described in the *Apprendi* cases." (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336; see also *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1302-1303 [*Apprendi, supra*, 530 U.S. 466 does not apply to dangerousness finding under section 1170.126 as two strikes sentence is not the presumed sentence].)

Defendant attempts to distinguish these cases by asserting they involved undisputed facts, while his case involved a disputed fact of whether he was armed during his current offense. In support of his position, he cites to the preliminary hearing and probation report for his current conviction, which he contends show that whether he was armed was disputed.

Contrary to defendant's version of the facts, our opinion affirming his conviction stated the facts of defendant's crime were undisputed, and related them as set forth above. More importantly, whether the facts were in dispute at trial is irrelevant to the issue of whether *Apprendi, supra*, 530 U.S. 466 applies to defendant's petition for resentencing. *Apprendi* applies only when a fact is used to subject a defendant to a greater potential sentence. (*People v. Towne* (2008) 44 Cal.4th 63, 77.) Since an armed finding that disqualifies defendant from resentencing does not increase his sentence, *Apprendi* does not apply.

DISPOSITION

The order denying defendant's resentencing petition is affirmed.

HOCH, J.

We concur:

HULL, Acting P. J.

BUTZ, J.