

NOT TO BE PUBLISHED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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RENE CAZARES,

Defendant and Appellant.

C080964

(Super. Ct. No. 99F09653)

Defendant Rene Cazares, while serving an indeterminate term of imprisonment, petitioned the trial court for sentencing relief pursuant to Proposition 36, the Three Strikes Reform Act of 2012 (the Act). The trial court found defendant ineligible for relief and denied the petition. Defendant appeals the denial of his petition, contending (1) the finding of ineligibility for recall of his sentence for violation of Penal Code section 4502¹

¹ Undesignated statutory references are to the Penal Code.

was error, (2) the jury was required to find true beyond a reasonable doubt the “armed with a deadly weapon” finding, and (3) even if we find defendant was ineligible for resentencing on his section 4502 conviction, he was nonetheless eligible for recall of his sentence for violating section 4501.5.

We reverse and remand the matter to the trial court for further proceedings regarding defendant’s eligibility for resentencing on his section 4501.5 conviction in accordance with the procedures set forth in section 1170.126.

FACTUAL AND PROCEDURAL BACKGROUND

We take the facts of defendant’s current crimes from our prior opinion affirming defendant’s conviction (*People v. Cazares* (Dec. 30, 2003, C042461) [nonpub. opn.]; see *People v. Guilford* (2014) 228 Cal.App.4th 651, 660-661 (*Guilford*) [prior appellate opinion admissible to prove ineligibility in section 1170.126 proceeding].)

“On September 19, 1999, Robert Williamson III, a correctional officer at California State Prison, Sacramento, was escorting defendant from his cell in administrative segregation to the exercise yard. While enroute, defendant struck up a conversation with several inmates from the general population, which was against prison rules. Defendant began walking toward an open door that led to a kitchen where general population inmates were preparing food. Williamson twice ordered defendant to continue moving. After defendant twice refused, Williamson took hold of defendant’s arm. Defendant muttered something to Williamson, turned around, and head butted him two times, knocking Williamson into a broom closet. Williamson shouted for help and attempted to subdue defendant. Correctional Officer Wesley Hupe assisted Williamson. Defendant was kicking his legs and moving his body. Hupe grabbed hold of defendant’s legs while other correctional officers held the rest of his body. After defendant was subdued, and while he was being escorted to a holding cell by two correctional officers, defendant spit in the face of Correctional Officer Mark Scott. Defendant’s assault on

Williamson formed the basis of count one, while the spitting incident formed the basis of count two.

“Approximately two months later, on November 25, 1999, defendant was searched following time in the exercise yard. The officer conducting the search, Brad Whitaker, discovered a three and one-half inch piece of hard plastic, sharpened at one end and wrapped in white tissue and cellophane, secreted in defendant’s sock.”

Defendant was convicted by a jury of battery upon a nonconfined person (§ 4501.5—count one), gassing a peace officer (§ 4501.1—count two), and being a prisoner in possession of a weapon (§ 4502, subd. (a)—count three). The jury also found defendant had prior serious felony convictions of robbery (§§ 211, 667, subds. (b)-(i), 1170.12) and attempted robbery (§§ 664/211, 667, subds. (b)-(i), 1170.12). The trial court sentenced defendant to two consecutive 25-year-to-life terms on counts one and three, reduced count two to a misdemeanor (§ 17, subd. (b)), and sentenced defendant to 365 days in county jail to be served concurrently to the state prison sentence.

Defendant appealed and, on December 30, 2003, this court affirmed the judgment.

“On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012, which amended sections 667 and 1170.12 and added section 1170.126 (hereafter the Act). . . . The Act also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)” (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168.)

“To obtain a sentencing reduction pursuant to section 1170.126, the prisoner must file a petition for a recall of sentence in the trial court. ‘Any person serving an indeterminate term of life imprisonment imposed pursuant to’ the three strikes law may

file a petition for a recall of his or her sentence within two years after the Act's effective date 'or at a later date upon a showing of good cause.' (§ 1170.126, subd. (b); hereafter 1170.126(b).) Upon receipt of such a petition, the trial court must determine if it satisfies the criteria contained in subdivision (e) of section 1170.126. (§ 1170.126, subd. (f).) If it does, the prisoner shall be resentenced as a second strike offender 'unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).) In exercising this discretion the trial court may consider the prisoner's criminal history, disciplinary record and record of rehabilitation while incarcerated and any other relevant evidence. (§ 1170.126, subd. (g).)" (*People v. Yearwood, supra*, 213 Cal.App.4th at pp. 170-171.)

On January 8, 2013, defendant filed a petition for recall and resentencing pursuant to section 1170.126.

Following a hearing on December 18, 2015, the trial court denied defendant's petition, finding defendant was armed with a deadly weapon during commission of the crime of possession of a weapon (§ 4502), thus rendering him ineligible for section 1170.126 relief.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Defendant contends the trial court erred in denying his petition because being a prisoner in possession of a weapon (§ 4502) is not a disqualifying offense under section 1170.126.

The People argue the trial court properly found defendant was armed with a deadly weapon during commission of the offense. First, they argue the trial court need only find the existence of a disqualifying factor by a preponderance of the evidence—a determination which is reviewed for substantial evidence—and may consult the record of conviction (which includes this court's decision affirming the conviction) along with the

elements of the current offense in making that determination. Next, they argue factors disqualifying defendant from relief need not be pleaded and proven, as that requirement is not part of the retrospective part of the Act governing a petition for resentencing brought by a defendant serving a third strike sentence, and the Act does not increase the penalty for the crime. The People have the better argument.

Section 1170.126 allows a defendant currently serving a three strike sentence for crimes no longer subject to the third strike penalty to petition for resentencing. (§ 1170.126, subd. (a).)

Certain factors render a defendant ineligible for resentencing. As relevant here, one of the disqualifying factors, cross-referenced in section 1170.126, subdivision (e)(2), provides that a defendant is ineligible if “[d]uring the commission of the current offense, the defendant . . . *was armed with a firearm or deadly weapon.*” (§ 667, subd. (e)(2)(C)(iii), italics added.)

A finding of ineligibility rests on a factual determination made by the trial court that defendant was armed with a deadly weapon during the commission of the offense in question. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331-1332 (*Bradford*).) We review a trial court’s finding that a defendant was armed for purposes of resentencing eligibility for substantial evidence. (See *People v. Hicks* (2014) 231 Cal.App.4th 275, 286.) A trial court need only find the existence of a disqualifying factor by a preponderance of the evidence. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 (*Osuna*).)

No Pleading and Proof Requirement

Defendant contends Proposition 36 requires that disqualifying factors be pleaded and proven. This court has previously rejected the argument (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1311-1312; *Bradford, supra*, 227 Cal.App.4th at pp. 1333-1336), as have other Courts of Appeal (*Osuna, supra*, 225 Cal.App.4th at p. 1033; *People v.*

Blakely (2014) 225 Cal.App.4th 1042, 1058; *People v. White* (2014) 223 Cal.App.4th 512, 526-527.)

Defendant argues his claim to the contrary finds support in *Alleyne v. United States* (2013) 570 U.S. ____ [186 L.Ed.2d 314] (*Alleyne*). We disagree. As we concluded in *Guilford, supra*, 228 Cal.App.4th at pages 662-663: “This contention already has been resolved against defendant. ‘[T]he United States Supreme Court has already concluded that its opinions regarding a defendant’s Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt do not apply to limits on downward sentence modifications due to intervening laws.’ [Citations.] [¶] Contrary to defendant’s view, nothing in [*Alleyne*] assists him. As described by our Supreme Court, in *Alleyne*, ‘the United States Supreme Court held that the federal Constitution’s Sixth Amendment entitles a defendant to a jury trial, with a beyond-a-reasonable-doubt standard of proof, as to “any fact that increases the mandatory minimum” sentence for a crime.’ [Citation.] The denial of a recall petition does not increase the mandatory minimum sentence for a defendant’s crime.” The trial court properly makes factual determinations for purposes of deciding eligibility for resentencing under section 1170.126. (*People v. Hicks, supra*, 231 Cal.App.4th at p. 286.) Defendant has not persuaded us otherwise.

“Armed” with a “Deadly Weapon”

As for whether defendant was “armed” with a “deadly weapon” during commission of the offense, substantial evidence supports the trial court’s finding that he was. As a preliminary matter, both parties agree that the elements of the offense of being a prisoner in possession of a weapon (§ 4502, subd. (a)), alone, do not necessarily constitute being armed with a deadly weapon. However, as the People aptly note, the trial court is not limited to consideration of the elements of the current offense in determining whether defendant was disqualified from resentencing, and may look to the record of conviction which necessarily includes our opinion affirming defendant’s

conviction. (*Osuna, supra*, 225 Cal.App.4th at p. 1030; *Guilford, supra*, 228 Cal.App.4th at pp. 660-661.)

Next, a defendant is considered “ ‘armed with a firearm’ ” if the firearm is “available for offensive or defensive use.” (*Osuna, supra*, 225 Cal.App.4th at p. 1029; accord, *People v. Bland* (1995) 10 Cal.4th 991, 997; *People v. Elder, supra*, 227 Cal.App.4th at pp. 1313-1314.) “The word ‘deadly’ means ‘likely to cause or capable of causing death.’ (Webster’s Ninth New Collegiate Dict. (1984) p. 327, italics added.) . . . As such, ‘deadly,’ as employed in the term ‘deadly weapon,’ is not a technical term, requiring instruction as to its meaning. [Citation.]” (*People v. Pruett* (1997) 57 Cal.App.4th 77, 85.) In the context of the crime of assault with a deadly weapon or by force likely to produce great bodily injury (§ 245, subd. (a)(1)), “a ‘deadly weapon’ is ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ ” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) “Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]” (*Id.* at p. 1029.)

According to our decision in defendant’s prior appeal, “defendant was searched following time in the exercise yard,” and the searching officer “discovered a three and one-half inch piece of hard plastic, sharpened at one end and wrapped in white tissue and cellophane, secreted in defendant’s sock.” The hard plastic piece was sharpened, suggesting that while it may not have started out as a weapon, it certainly was altered to become one. The fact that it was sharp is further evidence that it was indeed a deadly

weapon, as it could have been used to stab or slice another person or otherwise “ ‘used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ ” (*People v. Aguilar, supra*, 16 Cal.4th at pp. 1028-1029.)

Similarly, the record leaves little doubt that defendant was armed with a deadly weapon, as the sharpened plastic weapon was discovered on his person (in the sock he was wearing when he was searched) and was readily available “for offensive or defensive use.” (*Osuna, supra*, 225 Cal.App.4th at p. 1029.) As such, he was armed with the deadly weapon during commission of the offense. (*People v. Bland, supra*, 10 Cal.4th at p. 1000.)

We conclude there is sufficient evidence defendant was armed with a deadly weapon during the commission of the offense of being a prisoner in possession of a weapon (§ 4502, subd. (a)), and he was therefore ineligible for resentencing on that conviction.

II

Again relying on *Alleyne, supra*, 570 U.S. ____ [186 L.Ed.2d 314], defendant contends the Sixth and Fourteenth Amendments to the United States Constitution required the jury to find beyond a reasonable doubt the facts which mandate his three strike sentence. The claim lacks merit. As discussed in part I of this opinion, “ ‘[T]he United States Supreme Court has already concluded that its opinions regarding a defendant’s Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt do not apply to limits on downward sentence modifications due to intervening laws.’ [Citations.] [¶] Contrary to defendant’s view, nothing in [*Alleyne*] assists him. As described by our Supreme Court, in *Alleyne*, ‘the United States Supreme Court held that the federal Constitution’s Sixth Amendment entitles a defendant to a jury trial, with a beyond-a-reasonable-doubt standard of proof, as to “any fact that increases the mandatory minimum” sentence for a crime.’ [Citation.] The denial of a recall

petition does not increase the mandatory minimum sentence for a defendant's crime.” (*Guilford, supra*, 228 Cal.App.4th at pp. 662-663, fn. omitted.)

Defendant's reliance on *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) is also unavailing. “[T]he 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.” (*Bradford, supra*, 227 Cal.App.4th at p. 1336.) *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.

III

Defendant argues in the alternative that, in the event we find he was ineligible for section 1170.126 relief with regard to his conviction for violating section 4502, he was nonetheless eligible for relief for the life sentence imposed for his conviction for battery upon a nonconfined person (§ 4501.5).

The People argue defendant's offense “is considered a ‘serious felony’ under the Three Strikes Law because it is equivalent to ‘assault by a life prisoner on a noninmate’ (§ 1192.7, subd. (c)(1)(12)).” Alternatively, the People argue the matter should be remanded to the trial court for a determination regarding whether resentencing “would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f).)

As defendant notes, the People provide no authority to support their claim that battery on a nonconfined person is “equivalent to” assault by a life prisoner on a noninmate. He counters, and correctly so, that at the time he committed the battery offense, he was not a “life prisoner” but was instead serving a sentence of five years eight months. The life sentence was later imposed *as a result of* the battery conviction.

In any event, as our state's Supreme Court recently held, “the Act requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis,” and as

such, “resentencing is allowed with respect to a count that is neither serious nor violent, despite the presence of another count that is serious or violent.” (*People v. Johnson* (2015) 61 Cal.4th 674, 688, 695.) Thus, in the absence of an applicable disqualifying factor, defendant would be entitled to resentencing on that count “unless the court, in its discretion, determines that resentencing the [defendant] would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f).)

Here, the trial court found defendant was generally disqualified from relief based on its finding that he was armed with a deadly weapon during commission of the offense of being a prisoner in possession of a weapon (§ 4502), without making a finding as to whether defendant was eligible for resentencing on the offense of battery on a nonconfined person (§ 4501.5). According to *People v. Johnson, supra*, 61 Cal.4th at pages 688, 695, this was error. We reverse and remand this matter to the trial court to evaluate defendant’s eligibility for resentencing with respect to his conviction for violating section 4501.5 only, including an evaluation of the risk of danger to public safety resulting from any resentencing.

DISPOSITION

The order denying defendant’s petition for resentencing is reversed. The matter is remanded to the trial court with directions to determine whether defendant is eligible under section 1170.126, subdivision (e) for resentencing on his conviction for battery on a nonconfined person (§ 4501.5) and, if so, to resentence defendant on that conviction

unless the court, in its discretion, determines that resentencing defendant would pose an unreasonable risk of danger to public safety under section 1170.126, subdivision (f).

NICHOLSON, J.

We concur:

RAYE, P. J.

DUARTE, J.