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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY CLEVELAND,

Defendant and Appellant.

D058585

(Super. Ct. No. FSB80340)

APPEAL from a judgment of the Superior Court of San Bernardino County, Cara D. Hutson, Judge. Affirmed.

A jury convicted Tony Cleveland of possession of a firearm by a felon. (Pen. Code,¹ § 12021,² subd. (a)(1).) Subsequently, the jury also found Cleveland had three prior strike convictions within the meaning of sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i). The three prior strike convictions were for

¹ Statutory references are to the Penal Code unless otherwise specified.

² Effective January 1, 2012, former section 12021 was repealed and reenacted as section 29800 et seq. There were no substantive changes to the provisions at issue here. Therefore, all section 12021 references in this opinion are to the former version.

residential burglary in 1998 (§ 459), making terrorist threats in 1999 (§ 422); and assault with a firearm in 1999 (§ 245, subd. (a)(2)). The jury also found true the allegation Cleveland served a prior prison term for his 2004 conviction for possession of a narcotic. (§ 667.5.)

The court sentenced Cleveland to prison for a term of 25 years to life under the Three Strikes law (§ 667, subds. (b)-(i)).

Cleveland appeals, contending his sentence is cruel and unusual punishment and violates the California and United States Constitutions. We affirm.

FACTS

Shortly after midnight on August 15, 2008, Officers Joshua Simpson and Christopher Gray of the San Bernardino Police Department were in a marked police car patrolling an area the officers knew to be California Gardens Crip Gang territory in San Bernardino. The officers noticed a car with its headlights on, about half-way down the block, stopped in front of a residence at 2004 West Magnolia Avenue.

As the officers approached in their police car, they turned on the patrol car's spotlights to illuminate the interior of the car. The officers saw two African-American males inside the car. As soon as the officers turned the spotlight on, the right front passenger, who later was identified as Cleveland, opened the door and ran. Officer Gray stopped the patrol car and pursued Cleveland.

While chasing Cleveland, Officer Gray heard the sound of a metal object hitting the concrete of the driveway. Based on his experience, Officer Gray believed the metal object was a gun. Although the metal object fell in front of Officer Gray, he did not stop

to pick it up, but instead, continued to chase Cleveland. Officer Gray broadcast over his hand-held radio that he believed Cleveland had dropped a gun.

Officer Gray ultimately caught and detained Cleveland. Except for a few seconds when Cleveland jumped over a fence, Officer Gray had him in his line of sight during the entire pursuit.

While Officer Gray pursued Cleveland, Officer Simpson detained the driver of the car. Officer Simpson, who heard Officer Gray's radio broadcast, went to the driveway to look for the gun. In the driveway near the carport area, Officer Simpson found a nine-millimeter Ruger P89 gun. The gun magazine, which was designed to hold 30 bullets, is illegal in California where guns are legally allowed to hold 10 rounds. There was one bullet in the chamber ready to be fired and 23 additional rounds inside the magazine. The majority of the bullets were hollow point rounds.

When Officer Gray returned to the driveway, Officer Simpson directed him to the location where he found the gun, which was the same location where Officer Gray heard the sound of a metallic object hitting concrete. There was nothing on the gun indicating it had been lying on the driveway for some time. There were no dust or water stains on the gun. It looked "fresh." No more than five minutes had elapsed between the time Officer Gray heard the gun strike the concrete until he detained Cleveland. Other than Cleveland, neither officer saw anyone else in the area of the driveway.

The parties stipulated that Cleveland had a prior felony conviction and was a "felon" within the meaning of section 12021, subdivision (a)(1).

DISCUSSION

Cleveland asserts his 25-year-to-life sentence shocks the conscience and therefore violates the provisions against cruel and unusual punishment contained in the Eighth Amendment of the United States Constitution and article I, section 17 of the California Constitution. We reject his arguments and conclude the sentence imposed in this case does not constitute cruel and unusual punishment. As such, we need not decide whether Cleveland forfeited his challenge by failing to raise it with the trial court.

To the extent Cleveland relies on the California Constitution, his challenge must be considered in light of *In re Lynch* (1972) 8 Cal.3d 410 and *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*). Cleveland does not directly challenge the general facial constitutionality of the Three Strikes law, but argues its application to him is unconstitutional. He thus urges us to vacate and remand the case for resentencing.

Cleveland's arguments fail to appreciate that the punishment under scrutiny here is not only the result of his current offense. From our independent review of the record in light of the pertinent law, we conclude Cleveland's sentence in this case is not cruel and/or unusual.

As to California's separate constitutional prohibition against cruel or unusual punishment, we note the power to define crimes and prescribe punishment is a legislative function and we may interfere in this process only if a statute or statutory scheme prescribes a penalty so severe in relation to the crime or crimes to which it applies as to violate that constitutional prohibition. (*In re Lynch, supra*, 8 Cal.3d at pp. 423-424.) Ultimately, however, the test whether a specific punishment is cruel or unusual is

whether it is " 'out of all proportion to the offense . . . ' [citation] so as to shock the conscience and offend fundamental notions of human dignity." (*In re DeBeque* (1989) 212 Cal.App.3d 241, 249, quoting *Robinson v. California* (1962) 370 U.S. 660, 676, and citing *In re Lynch, supra*, 8 Cal.3d at p. 424.)

As we noted in *In re DeBeque*, the analysis developed in *In re Lynch, supra*, 8 Cal.3d 410 and *Dillon, supra*, 34 Cal.3d 441, merely provides guidelines for determining whether a given punishment is cruel or unusual and the importance of each criterion depends on the facts of the specific case. (*In re DeBeque, supra*, 212 Cal.App.3d at p. 249.) Although determinations whether a punishment is cruel or unusual may be made based on the first *Lynch* factor alone, i.e., the nature of the offense and/or offender (see, e.g., *Dillon, supra*, 34 Cal.3d at pp. 479, 482-488; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200; *People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311), the defendant has the burden of establishing his punishment is greater than that imposed for more serious offenses in California and that similar offenses in other states do not carry punishments as severe. (See *In re DeBeque, supra*, 212 Cal.App.3d at pp. 254-255.) Successful challenges to proportionality are an "exquisite rarity." (*Weddle, supra*, 1 Cal.App.4th at p. 1196.)

Here, Cleveland has not met that burden. Cleveland's primary contention is that his sentence is too severe because his offense was little more than dropping a gun while running from a police officer. Cleveland's argument misses the mark. Cleveland's punishment is controlled in the first instance by his committing the current offense while having previously been convicted of three serious felony offenses. That the Legislature

saw it necessary to enact such statutes and sentencing schemes to impose harsher punishment for recidivist offenders like Cleveland does not shock our conscience.

Cleveland also failed to provide any evidence similar offenses in other states do not carry punishments as severe. Instead, he simply asserts his sentence was "significantly disproportionate to the risk [he] pose[s] to society." While this bald assertion has little bearing on our analysis, we disagree. Over the past 10 years, Cleveland has without fail shown himself to be a considerable danger to society. He is a documented gang member. He previously was convicted of three serious felonies and has consistently violated parole over the past 10 years. In short, Cleveland's prior convictions coupled with his present conduct qualified him for punishment under the Three Strikes law. We believe mandatory imposition of the legislatively required term was proper absent a showing Cleveland falls outside the spirit of the Three Strikes law, which he does not.

Even if we review the matter by analyzing the factors under the first prong of *In re Lynch*, *supra*, 8 Cal.3d 410 (nature of the offense and/or offender), as refined in *Dillon*, *supra*, 34 Cal.3d 441, we reach the same conclusion that the total 25-year-to-life term imposed does not constitute cruel or unusual punishment. Unlike the youthful 17-year-old first-time offender in *Dillon*, Cleveland was 29 years old at the time he committed the current offense and had been a consistent criminal since age 19 when he was convicted of possession of a controlled substance through his 20's when he was convicted of residential burglary, assault with a firearm, and making a terrorist threat.

Further, in light of the holdings in *Harmelin v. Michigan* (1991) 501 U.S. 957, 994-996, *Rummel v. Estelle* (1980) 445 U.S. 263, 284-285, and the more recent United States Supreme Court companion cases of *Ewing v. California* (2003) 538 U.S. 11, 24-30 and *Lockyer v. Andrade* (2003) 538 U.S. 63, 66-77, which held lengthy indeterminate life sentences imposed under California's Three Strikes law for recidivist criminals did not violate the Eighth Amendment, any reliance in this case on the federal prohibition of cruel and unusual punishment would likewise be unsuccessful. As already noted, Cleveland suffered three prior serious felony convictions before the offenses in this case. He is a documented gang member, previously served a prison term, and continuously violated parole over the past 10 years.

Given all the relevant considerations, the fact Cleveland will serve a sentence of 25 years to life for his most recent felony conviction simply does not shock the conscience or offend concepts of human dignity. We therefore conclude Cleveland has failed to establish his sentence is so disproportionate to his "crime," which includes his recidivist behavior, and that the indeterminate term imposed for that crime does not violate the constitutional prohibitions against cruel and/or unusual punishment.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.