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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PAUL ROBINSON, Defendant and Appellant.	D068794 (Super. Ct. No. SCD110331)

APPEAL from an order of the Superior Court of San Diego County, Frederic L. Link, Judge. Affirmed.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steven T. Oetting, Theodore M. Cropley and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

In 1995, Paul Robinson was charged with assault with a firearm (Pen. Code,[1] § 245, subd. (a)(2), count 1), burglary (§ 459), count 2), and possession of a firearm by a felon (§ 12021). Allegations of personal use of a firearm were attached to counts 1 and 2 (§ 12022.5, subd. (a)). It was further alleged that Robinson had suffered two strike priors (§ 667, subds. (b)-(i)).

After two trials, juries were unable to reach verdicts as to counts 1 and 2. Robinson was convicted of possession of a firearm. Counts 1 and 2 and their associated firearm use allegations were dismissed.

In 1996, Robinson was sentenced to an indeterminate term of 25 years to life.

In 1997, this court affirmed Robinson's conviction in an unpublished opinion, *People v. Robinson* (July 14, 1997, D025429).

Following the passage of Proposition 36 (§ 1170.126) Robinson filed a petition to recall his sentence. The trial court held a hearing and found Robinson ineligible for resentencing because he was armed with a firearm at the time of his underlying offense.

Robinson appeals contending the trial court erred in denying his petition. Robinson argues the record of conviction does not support a finding he was armed with the firearm that he possessed. He contends the failure of the jury to reach a verdict on counts 1 and 2 and their attendant firearm use allegation undermines the trial court's finding. Robinson further contends the fact that the jury was given an unanimity instruction as to the possession count also undermines the trial court's finding. Even if

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

the record shows he was armed at the time of the offense, Robinson argues he had a Sixth Amendment right to have a jury trial on the question of whether he was armed when he possessed the firearm.

Robinson recognizes case law is against his position. He argues those cases were wrongly decided and in any event the record does not support a finding he was armed under these facts. We will reject Robinson's contentions. We are satisfied the record of conviction clearly supports a finding Robinson was armed with a firearm at the time of his offense and that he is not eligible for resentencing under Proposition 36.

STATEMENT OF FACTS

The parties essentially rely on the factual summary contained in our prior opinion. We will incorporate those facts here:

Robinson lived with his girlfriend, Adrian Bolton. His friend, Tony Hayes, lived in the same apartment complex. Hayes testified he and Robinson spent the evening hours of January 22, 1995, drinking beer together. Hayes testified Robinson later drove himself and Hayes in Bolton's car to visit Ava Loftis. Hayes's and Loftis's sister, Angela Gardner, testified Robinson located Loftis in an upstairs room at Loftis's home with another man; Robinson then became loud and cursed "swabbies."[2]

Hayes testified Robinson then drove back to their apartment complex where Robinson dropped him off, but a few minutes later returned. Hayes got back into the car and they sped back to Loftis's house. Eleven-year-old Thomas Kagler, one of Angela's

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2 Robinson was referring to sailors.

children, stated he saw Robinson take a shotgun from the car and place it under his coat. Angela and Lolita Gardner, another sister, saw Robinson go into the house, run up the stairway, pull the shotgun from under his coat, cock it and point it at Angela, shouting something about shooting a "swabby." Kagler testified Robinson pointed the gun toward the ceiling. Later he said he could not recall at whom, if anyone, Robinson pointed the gun. Loftis testified she thought perhaps Robinson pointed the gun downward. She said she told Robinson she had called the police. Lolita testified Robinson said if the police were called, he would come back and get all of them.

Hayes testified Robinson drove them to Clay Street where he pointed his shotgun at "two Latino guys." Hayes said Robinson put the shotgun away and drove off, then noticed police were behind him and threw it into the back seat. Hayes said Robinson pulled over and stopped the car, got out, and left it with the engine running and the lights on, telling Hayes to grab the shotgun and run. Police detained Hayes, took him to Loftis's house for identification procedures, and then to a detoxification center. A loaded shotgun was in the rear of the car. Robinson was arrested on January 31, 1995, at the office of his probation officer.

Defense

Robinson's defense was alibi. He claimed to be in Los Angeles at the time of the incident. He denied being in possession of a shotgun. Some witnesses corroborated this alibi. Bolton testified she had loaned Hayes her car on January 22, at about 2 p.m. A clerk from a Los Angeles hotel testified a voucher from the hotel had the signature "Paul Robinson" next to several dates, including January 22, 1995. On cross-examination, the

witness testified the fact a signature is next to a date does not necessarily mean the person was in the room on that date.

Rebuttal

At the time of Robinson's arrest the probation officer and police questioned him about whether he had been in possession of a shotgun. The probation officer testified Robinson told them he and Bolton were keeping a shotgun in their apartment for their friend, Nicholas Williams, but Robinson denied taking the shotgun in the car on January 22. The probation officer testified that on February 6, 1995, Robinson called and told him the friend for whom they were holding the shotgun was named Patrick.

DISCUSSION

The basic issue presented in this case is whether the record discloses that Robinson was armed with a firearm during the commission of the offenses for which he is serving a third strike sentence. Robinson contends he is not ineligible for resentencing because the offense for which he was convicted, possession of a firearm by a felon, does not include the element of being armed with or using a firearm. Robinson further argues that the prosecution in 1995 had the duty to plead and prove that he was armed at the time of the offense, and in the absence of a record of such pleading and proof, a retrospective determination he was ineligible for resentencing under the Act would violate the principles of due process established in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296. Finally, Robinson contends that even if we reject his other arguments, the record is not sufficient to sustain the trial court's finding.

A. Proposition 36

In November 2012 the voters enacted a reform of California's Three Strikes Law. "The Act changes the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life imprisonment. Under the original version of the three strikes law a recidivist with two or more prior strikes who is convicted of any new felony is subject to an indeterminate life sentence. The Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. [Citation.] 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.)

The proponents of the Act informed the public in the Voter Information Guide that the amendments to the law would do several things. They would (1) revise the three strikes law to impose life sentences only when a new felony conviction is serious or violent; (2) authorize resentencing for offenders currently serving life sentences if the third strike conviction was not serious or violent and the judge determines the sentence does not pose an unreasonable risk to public safety; (3) continue to impose life sentence penalties if the third strike conviction was for certain nonserious, nonviolent sex or drug

offenses or involved firearm possession; and (4) maintain life sentence penalties for felons with nonserious, nonviolent third strike convictions if the person has prior convictions for rape, murder or child molestation. (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) p. 48.)

Thus, the thrust of the reform was to modify the three strikes law to allow resentencing of or prevent future life sentences for persons whose third strike involves a nonserious or nonviolent felony. The proponents argued the reform would make it easier to deal with serious or violent offenders by removing those whose new offenses are not serious or violent, thus making room in the prisons for the truly dangerous offenders. The proponents, however, assured the public that dangerous felons would continue to receive the harsh third strike sentences where certain criteria are met. The criterion at issue in this case is whether the defendant was armed with a firearm during the commission of his commitment offenses. Persons armed with or using firearms were deemed by the proponents of the Act to be dangerous.

Having these principles in mind we turn to Robinson's individual contentions.

B. Possession of a Firearm by a Felon

Robinson contends that conviction of possession of a firearm by a felon does not disqualify him from resentencing. The parties agree the offense does not qualify as a serious or violent felony. Robinson argues that the offense can be committed without being "armed." We agree that physical possession of a firearm is not required to prove possession. Such offense can be proved by showing constructive possession of the weapon, either directly or through another person. (*People v. Sifuentes* (2011) 195

Cal.App.4th 1410, 1417.) On the other hand, being armed means that the defendant had the weapon physically available for offensive or defensive use. (*People v. Bland* (1995) 10 Cal.4th 991, 1003*; People v. Wandick* (1991) 227 Cal.App.3d 918, 921; *People v. Fierro* (1991) 1 Cal.4th 173, 225.)

Thus we agree that mere proof of conviction for possession does not show the defendant was armed during the commission of the offense. Something more is required.

The controlling section in this case is section 1170.126, subdivision (e)(2). It makes a defendant ineligible for resentencing if "[d]uring the commission of the current offense [he] . . . was armed with a firearm." (§ 667, subd. (e)(2)(C)(iii).) As we will discuss below, the section does not require pleading and proof of arming when a retrospective examination of the sentence occurs, nor does it refer to any requirement to establish elements of any of the statutory arming enhancements.

Rather we must follow the direction of the Act to liberally construe its terms to accomplish the purposes of the legislation. (Voter Information Guide, *supra*, text of Prop. 36, § 7, p. 110.)

C. Pleading and Proof

A central contention in Robinson's challenge to the trial court's decision is that in order to establish he is ineligible for resentencing, the disqualifying criterion must have been pled and proved prior to his 1996 conviction. This is required, he argues, because the ineligibility "increases punishment" and pleading and proof are required after *Apprendi, supra,* 530 U.S. 466. We disagree.

In *Apprendi*, *supra*, 530 U.S. 466, the court held that a defendant could not be sentenced to a term, in excess of the statutory maximum for the elements of the offense without the pleading and proof of the facts which would give rise to the increased term. There the trial court had imposed a term, beyond the statutory maximum for the offense, based on judicial fact finding that the crime was motivated by racial animus. (See also *Blakely v. Washington*, *supra*, 542 U.S. 296.) The difficulty with Robinson's argument is that he was sentenced to a life term, based upon factors properly pled and proved when the prosecution demonstrated Robinson was a third strike offender. Thus, in the retrospective examination of the record of conviction the question is not whether to increase punishment for the current offense, because that was already lawfully done. Rather, the question is whether, based on the manner of the commission of the underlying offense the prisoner is or is not eligible for a potential reduction of his or her sentence.

In the portion of the Act dealing with prospective application of the three strikes law to new cases, the statute requires the prosecution to plead and prove any factor which would qualify the defendant for a life term sentence, including, where appropriate, that the defendant was armed during the commission of the offense. (§ 667, subd. (e)(2)(C).) The differences in approach make sense. Prospectively, the prosecution is seeking, in the case of nonserious or nonviolent third strikes, to impose a life term, which would not be possible without the added factors. On the other hand, in a retrospective analysis of sentences, the increased punishment has already been lawfully imposed. We agree with the court in *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1303, in

finding no requirement of pleading and proof for factors of ineligibility in retrospective examination of third strike sentences.

During the briefing process in this case the Second District Court of Appeal filed an opinion in *People v. Arevalo* (2016) 244 Cal.App.4th 836 (*Arevalo*) dealing with the burden of proof in Proposition 36 resentencing. The court there concluded that in such resentencing proceedings disqualifying factors must be proved beyond a reasonable doubt. (*Arevalo, supra*, at p. 848.) Since the *Arevalo* case was first raised in the appellant's reply brief, we requested and have received supplemental briefing on the correct burden of proof. Having considered the briefing, we are convinced the court's decision in *Arevalo* requiring proof of disqualifying factors beyond a reasonable doubt is not correct and we decline to follow it.

In *Arevalo, supra,* 244 Cal.App.4th 836, the defendant was acquitted at trial of weapon possession and the jury found not true an armed allegation. However, at the resentencing hearing the trial court reviewed the evidence and found, by a preponderance of the evidence, that Arevalo had been armed with a firearm during the commission of the underlying offense. The appellate court found error in the application of the burden of proof.

In reaching its decision the court in *Arevalo, supra,* 244 Cal.App.4th 836 declined to follow *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*) as well as *People v. Superior Court* (*Kaulick*), *supra,* 215 Cal.App.4th 1279, which had concluded the burden of proof of disqualifying facts at a resentencing hearing was by a preponderance of the evidence. Shortly after the *Arevalo* opinion a different division of the Second District

reached a contrary conclusion. In *People v. Frierson* (2016) 1 Cal.App.5th 788, 793 (*Frierson*), review granted October 19, 2016, S236728, the court rejected the reasoning in *Arevalo, supra,* 244 Cal.App.4th 836 and continued to hold that in such proceedings, proof of disqualifying facts is by a preponderance of the evidence. Yet another division of the Second District also rejected the reasoning in *Arevalo* and agreed with the holdings in *Osuna* and *Kaulick.*

In *People v. Newman* (2016) 2 Cal.App.5th 718, 730-733 (*Newman*), the court disagreed with the analysis in *Arevalo, supra,* 244 Cal.App.4th 836. We are persuaded that *Arevalo* was wrongly decided and that the views expressed in *Newman* are correct and we adopt them in this case.

D. The State of the Record

Finally, Robinson contends the record on appeal does not establish he was armed during his offenses. We again disagree.

At the hearing on the petition the trial court relied on our statement of facts in our prior opinion. Robinson acknowledges appellate opinions are part of the record of conviction. (*People v. Woodell* (1998) 17 Cal.4th 448, 457.) The record as set forth in our prior opinion clearly establishes Robinson had actual physical possession of the shotgun at various times during the charged offense. The trial court was entitled to rely on our recitation of the facts from the record as it existed at the time.

Robinson contends that the failure of the jury to make true findings on the two allegations of personal use undermines the finding he was armed. Again we disagree. The section 12022.5 allegations were pled as enhancements for counts 1 and 2. The jury

did not reach a verdict on the underlying counts, so it makes sense the jury would not make a finding on the enhancements. However, those enhancements were not attached to the possession count. As to count 3, the record provides adequate support for the finding Robinson was not merely in constructive possession, but had the firearm available for immediate use.

Robinson also points to the giving of an unanimity jury instruction regarding the possession count, because there was more than one act of possession. He again contends the instruction undermines the trial court's finding since the jury could have found constructive possession. Again we disagree. The facts show Robinson had actual physical possession. While the jury did not have to distinguish between constructive and physical possession, the trial court in reviewing the record was entitled to rely on the facts in the record of conviction. The court's finding that Robinson was armed at the time of the offense is supported by the record.

In *People v. White* (2014) 223 Cal.App.4th 512 (*White*), this 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 a firearm during the commission of that offense, the armed-with-a-firearm exclusion applies and the defendant is not entitled to resentencing relief under the Reform Act." (*White, supra,* at p. 519.)

In *White, supra,* 223 Cal.App.4th 512 the record established that the defendant had actual physical possession of a firearm at the time of the offense. We distinguished the possession offense, which can be committed by constructive possession from those cases

where the defendant has actual physical possession. We observed that while the "act of being armed with a firearm . . . [citation] necessarily requires possession of the firearm, possession of a firearm does not necessarily require that the possessor be armed with it. For example, a convicted felon may be found to be a felon in possession of a firearm if he or she knowingly kept a firearm in a locked offsite storage unit even though he or she had no ready access to the firearm and, thus, was not armed with it." (*Id.* at p. 524.) We further concluded, "In sum, the record shows the prosecution's case was not based on the theory that White was guilty of possession of a firearm by a felon because he had constructive possession of the firearm; it was based on the theory that he was guilty of that offense because he had actual physical possession of the firearm." (*Id*. at p. 525.)

Just as was the case in *White, supra,* 223 Cal.App.4th 512, the record in this case establishes that Robinson had actual physical possession of the firearm when he committed the current offense. Robinson acknowledges the *White* decision and a similar decision in *People v. Superior Court* (*Kaulick*), *supra,* 215 Cal.App.4th 1279. Robinson simply argues both cases were wrongly decided and that we should not follow them. We are familiar with both cases and are satisfied they were correctly decided. Hence, we are satisfied the record establishes that Robinson was armed with a firearm at the time of the offense and is thus ineligible for Proposition 36 resentencing.

DISPOSITION

The order denying Robinson's petition for resentencing is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.