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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK PEREZ SANTIAGO,

Defendant and Appellant.

E058558

(Super.Ct.No. INF057232)

OPINION

APPEAL from the Superior Court of Riverside County. Charles Everett Stafford, Jr., Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Warren Williams, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On May 7, 2008, defendant and appellant Frank Perez Santiago was convicted by a jury of being a felon in possession of a firearm under former Penal Code¹ section 12021, subdivision (a)(1),² and possession of ammunition by a prohibited person under former section 12316, subdivision (b)(1). The jury also found true his two strike priors under sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1). Defendant admitted five alleged prison prior offenses. On September 19, 2008, the trial court sentenced defendant to an indeterminate term of 25 years to life under the three strikes law.

Over four years later, on December 18, 2012, defendant filed a petition for recall of sentence under section 1170.126. The prosecution opposed the petition because defendant's current conviction was a felony offense enumerated in section 667, subdivision (e)(2)(C)(i)-(iii) and/or section 1170.12, subdivision (c)(2)(C)(i)-(iii). At the hearing on the petition on March 22, 2013, the trial court denied defendant's petition.

On April 15, 2013, defendant filed a timely notice of appeal. For the reasons set forth, we shall affirm the trial court's order denying defendant's petition.

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

² Effective January 1, 2012, former section 12021, subdivision (a), was repealed and reenacted without substantive change as section 29800, subdivision (a). (See Cal. Law Revision Com. com. & Historical and Statutory Notes, 51D Pt. 4 West's Ann. Pen. Code (2012 ed.) foll. § 29800, p. 194.) All further references to section 12021, subdivision (a), are to the former version.

II

STATEMENT OF FACTS

A. The Underlying Case

The details of defendant's underlying case are taken from our unpublished opinion (*People v. Santiago* (Nov. 17, 2009, E046735)):

On February 1, 2007, about 11:30 a.m., deputies of the Riverside County Sheriff's Department were dispatched to the Castro Trailer Park in Coachella, in response to suspicious circumstances involving a Hispanic male on a bicycle heading south from the trailer park.

Investigator Alfredo Verduzco saw defendant, who matched the description given by dispatch. Sergeant Hignight, who was also in the area, pulled his patrol car over and approached defendant. Defendant dismounted his bike and ran with his bike to his side. Attached to the bike was a canvas bag. Investigator Verduzco joined the pursuit. Defendant reached into his waistband and dropped his bike when he reached the railroad tracks. Defendant then headed toward some bushes. Investigator Verduzco found defendant hiding in the bushes and arrested him.

From defendant's bag, Sergeant Hignight recovered 46 rounds of .357 hollow point Winchester ammunition, one additional round of a different brand, clothing, and a shoe. Investigator Verduzco found a .357 revolver handgun loaded with five rounds about five feet from where he had detained defendant. The ammunition in the gun matched the ammunition found in defendant's bag.

Deputy McKenzie Berry interviewed defendant at the police station. Defendant denied knowledge of the gun and denied being at the Castro Trailer Park. The match to the shoe in defendant's bag was found at the trailer park, near space No. 35.

The parties stipulated that defendant had previously been convicted of a felony, and that the deputies were investigating a call referencing suspicious activity.

B. The Hearing on the Petition for Recall of Sentence

After defendant filed his petition for recall of sentence under section 1170.126 and the prosecution filed its opposition, the trial court held a hearing on March 22, 2013. At the hearing, the trial court and the parties discussed whether defendant was precluded from resentencing because of his felon in possession conviction.

Defense counsel argued that defendant was not armed within the meaning of section 1170.126 because he was caught with the gun located a few feet away from him. The trial court stated that there was no doubt that defendant was physically in possession of the firearm because the officer observed him attempting to pull something out of his waistband while fleeing, and then discovered him with the revolver in pristine condition only a few feet away. The prosecutor contended that defendant was "armed" within the meaning of the statute because he had the firearm for potential offensive or defensive use. Defense counsel argued that felon in possession of a firearm was a nonviolent and nonserious offense; therefore, it was not within the spirit of the three strikes law and did not warrant an indeterminate sentence of 25 years to life in prison. After hearing argument, the trial court ruled that defendant was armed with a firearm and denied defendant's petition for recall of sentence.

III

ANALYSIS

Defendant contends that “the trial court erred in concluding that [defendant] was ‘armed’” within the meaning of sections 667, subdivision (e)(2)(C)(iii), and 1170.12, subdivision (c)(2)(C)(iii).

The Three Strikes Reform Act of 2012 (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012)) amended the three strikes statutes (§§ 667, 1170.12) to require that before a defendant may be sentenced to an indeterminate life term in prison under the three strikes law, the new felony (the commitment offense) must generally qualify as a serious or violent felony. (§§ 667, subd. (e)(2)(A), (C), 1170.12, subd. (c)(2)(C).) An exception to this general rule exists, among others, where the prosecution has pled and proved the defendant used a firearm in the commission of the current offense, was *armed* with a firearm or deadly weapon, or intended to cause great bodily injury to another. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) If the prosecution pleads and proves this exception exists, the defendant must be sentenced under the three strikes law.

Proposition 36 also added section 1170.126, which applies exclusively to those “persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence.” (§ 1170.126, subd. (a).) Section 1170.126 sets forth a procedure through which certain prisoners can petition the court for resentencing. Such a person may file a petition to recall his or her sentence and be sentenced as a second strike offender.

(§ 1170.126, subd. (b).) An inmate is eligible for such resentencing if none of his or her commitment offenses constitute serious or violent felonies *and* none of enumerated factors disqualifying a defendant for resentencing under Proposition 36 apply.

(§ 1170.126, subd. (e).)

Section 1170.126, subdivision (e)(1), provides that a defendant is eligible for resentencing if he or she is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 “for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.” We agree with defendant that his current commitment felony offenses of possession of a firearm under former section 12021, subdivision (a)(1), and being a felon in possession of ammunition under former section 12316, subdivision (b)(1), are not serious or violent felonies under sections 667.5, subdivision (c), or 1192.7, subdivision (c). However, the inquiry does not end with whether or not the current conviction is a serious or violent felony.

Section 1170.126, subdivision (e)(2), provides, as pertinent here, that a defendant is eligible for resentencing if “[t]he inmate’s current sentence was *not* imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.” (Italics added.) Being armed with a firearm during the commission of a current offense is listed in section 667, subdivision (e)(2)(C)(iii), and section 1170.12, subdivision (c)(2)(C)(iii).

It is undisputed here that defendant was armed with a firearm. As such, under section 1170.126, subdivision (e)(2), defendant was ineligible for resentencing based on the fact that defendant was armed with a firearm.

Defendant, however, argues that “these new provisions in [section] 667 and [section] 1170.12 are intended to apply to situations where there is some underlying offense that could be committed with or without a firearm and with or without inflicting great bodily injury, but which has been enhanced by the presence of additional facts such as having a firearm, using a firearm, or inflicting great bodily injury.” In sum, defendant argues that he was not “armed” within the meaning of sections 667 and 1170.12 because “[f]elon in possession is one of those rare offense where arming is an element of the offense.” Hence, “[i]t is not possible to add an arming enhancement to a felon in possession charge because of the statutory limiting language.”

This issue was argued and rejected recently in *People v. White* (2014) 223 Cal.App.4th 512. We hereby adopt the analysis in *People v. White*, and reject defendant’s argument. (*Id.* at p. 527.)

In this case, a jury found defendant guilty of being a felon in possession of a firearm under former section 12021, subdivision (a)(1). “The statutory elements of a violation of section 12021, subdivision (a)(1) . . . are that a person, who has previously been convicted of a felony, had in his or her possession or under his or her custody or control any firearm.” (*People v. Padilla* (2002) 98 Cal.App.4th 127, 138.)

“Although the crime of possession of a firearm by a felon may involve the act of personally carrying or being in actual *physical* possession of a firearm, as occurred here,

such an act is not an essential element of a violation of section 12021(a) because a conviction of this offense also may be based on a defendant's *constructive* possession of a firearm. (See *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417; *People v. Mejia* (1999) 72 Cal.App.4th 1269, 1272 [defendant need not physically have the weapon on his person; constructive possession of a firearm 'is established by showing a knowing exercise of dominion and control' over it].) 'To establish constructive possession, the prosecution must prove a defendant knowingly exercised a right to control the prohibited item, either directly or through another person.' (*People v. Sifuentes, supra*, 195 Cal.App.4th at p. 1417.)" (*People v. White, supra*, 223 Cal.App.4th at p. 524.) The California Supreme Court has explained that "[i]t is the availability—the ready access—of the weapon that constitutes arming." (*People v. Bland* (1995) 10 Cal.4th 991, 997, quoting *People v. Mendival* (1992) 2 Cal.App.4th 562, 574.)

Here, not only did defendant possess a firearm, but he was also armed with a firearm. Specifically, defendant was carrying a loaded revolver immediately prior to the police discovering him hiding on the ground—with a gun located five feet away and in pristine condition. Immediately before defendant attempted to conceal himself, the detective observed him "trying to pull something out of his waistband" as he was running across the field. It is uncontested that defendant had the loaded firearm available for offensive or defensive use while he illegally possessed the firearm and the ammunition. As the trial court found, defendant "was armed in commission of that offense." Hence, like the defendant in *People v. White, supra*, 223 Cal.App.4th 512, during the commission of felon in possession of a firearm, defendant was armed with a firearm.

Therefore, we agree with the court in *People v. White, supra*, 223 Cal.App.4th 512, 527, and “hold 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.”

In a recent opinion, *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*), the Fifth Appellate District reached the same conclusion as the Fourth Appellate District, Division One, in *People v. White, supra*, 223 Cal.App.4th 512.

In *Osuna, supra*, 225 Cal.App.4th 1020, the defendant, while driving a vehicle, refused to yield to an officer who attempted to pull him over. When the defendant finally stopped, he was holding a black handgun. He ran down the street and climbed over a fence into a residence. The officers established a perimeter around the residence; the defendant eventually stepped outside and was arrested. The defendant denied having a gun. Officers searching the residence found a nine-millimeter handgun in the air-conditioning duct, and found loaded nine-millimeter magazines outside the house and in the car. (*Id.* at p. 1027.) A jury convicted defendant of being a felon in possession of a firearm (former §12021, subd. (a)(1)), and obstructing a peace officer in the performance of his or her duties (§ 148, subd. (a)(1)). (*Osuna*, at p. 1027.)

Three years after his conviction, in March 2013, the defendant petitioned the trial court for resentencing under the Reform Act. The trial court concluded that “jurors necessarily found defendant personally possessed the firearm and had it available for

offensive or defensive use; consequently, defendant was ‘armed with a firearm’ within the meaning of the Act and so was ineligible for resentencing.” (*Osuna, supra*, 225 Cal.App.4th at p. 1028.) The appellate court agreed. It stated: “The facts in defendant’s case . . . support a finding he had a firearm available for offensive or defensive use. . . . [D]efendant was actually holding a handgun when he first got out of the car. Thus, factually he was ‘armed with a firearm’ within the meaning of the Act.” (*Id.* at p. 1030.)

Nevertheless, the defendant argued “that for disqualification under the Act, there must be an underlying felony to which the firearm possession is ‘tethered’ or to which it has some ‘facilitative nexus.’ [The defendant concluded] one cannot be armed with a firearm during the commission of possession of the same firearm.” (*Osuna, supra*, 225 Cal.App.4th at p. 1030.)

In response, the court stated the “[d]efendant would be correct if we were concerned with imposition of an arming *enhancement*—an additional term of imprisonment added to the base term, for which a defendant cannot be punished until and unless convicted of a related substantive offense. (*People v. Dennis* (1998) 17 Cal.4th 468, 500.)” (*Osuna, supra*, 225 Cal.App.4th at p. 1030.) After going into further discussions regarding this issue, the court noted that “[h]aving a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon. Thus, a defendant convicted of violating former section 12021 does not, regardless of the facts of the offense, risk imposition of additional punishment pursuant to section 12022, because there is no ‘facilitative nexus’ between the arming and the possession. However, unlike section 12022, which requires that a defendant be armed ‘*in the commission of*’ a

felony for additional punishment to be imposed (*italics added*), the Act disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm ‘*during* the commission of’ the current offense (*italics added*). ‘During’ is variously defined as ‘throughout the continuance or course of’ or ‘at some point in the course of.’” (*Id.* at p. 1032.) Therefore, “[s]ince the Act uses the phrase ‘[d]uring the commission of the current offense,’ and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, we conclude the literal language of the Act disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm.” (*Ibid.*)

As in *Osuna, supra*, 225 Cal.App.4th at page 1040, “[t]he record in this case amply established defendant was disqualified from resentencing as a second strike offender because he was armed with a firearm during the commission of his current offense.” Accordingly, we find the trial court did not err in finding defendant was ineligible for resentencing under section 1170.126.

IV
DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.