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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Petitioner,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,

Respondent;

SAMUEL PEREZ,

Real Party in Interest.

E059527

(Super.Ct.No. RIF083008)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Becky Dugan, Judge.

Petition granted.

Paul E. Zellerbach, District Attorney, and Emily R. Hanks, Deputy District Attorney, for Petitioner.

No appearance for Respondent.

Steven Harmon, Public Defender, Joshua A. Knight and Joseph J. Martinez,
Deputy Public Defenders, for Real Party in Interest.

The People have filed this writ petition challenging the superior court's order finding real party in interest, Samuel Perez, eligible for resentencing under Penal Code section 1170.126,¹ known as the Three Strikes Reform Act of 2012 (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012)) (the Act). This challenge is predicated on two claims: (1) that resentencing Perez violates the express terms of his plea agreement, where he agreed to serve a stipulated term of 30 years to life in exchange for dismissal of certain counts and allegations; and (2) that he is disqualified from resentencing because he used a firearm during the commission of the commitment offense. We conclude that Perez is clearly not eligible for resentencing relief based on his use of a firearm; therefore, we need not address the People's other claim. We grant the People's petition.

FACTUAL AND PROCEDURAL BACKGROUND

In 1999, Perez was charged with possession of a firearm by a felon, animal cruelty, negligent discharge of a firearm, carrying a loaded firearm in a vehicle, misdemeanor evading, and resisting arrest. It was further alleged that Perez personally used a firearm within the meaning of sections 667 and 1192.7. He was also charged with two prison priors and two prior strikes, for attempted robbery and first degree burglary.

¹ All further statutory references shall be to the Penal Code, unless otherwise indicated.

In a separate case, Perez was charged with receiving stolen goods and vehicle theft.

These cases were consolidated.

The evidence introduced at the preliminary hearing indicated that Perez was pulled over by California Highway Patrol Officer Duran for a traffic infraction. There was an active warrant for his arrest for vehicle theft. Perez gave Duran a false name. Duran became suspicious that Perez had given him a false name. When he confronted him about this, Perez ran to his car and fled. Duran chased him to a dead end where Perez abandoned his car. Perez jumped over a fence into a backyard and fell. A couple and their dog were in the yard. When the dog ran toward Perez, he shot and killed the dog.

Perez agreed to plead guilty to animal cruelty. The People orally amended the information to allege a serious felony prior. Perez admitted two strike priors and one serious felony prior. The parties stipulated that the preliminary hearing transcript would form the factual basis of the plea.² Perez was sentenced to the stipulated term of 30 years to life, and the remaining counts and allegation were dismissed.

² The minute order indicates that counsel stipulated to this, but the hearing transcript shows that the trial court asked whether it could use the preliminary hearing transcript as the factual basis for the plea. The prosecutor expressly stated it could do so, but there was no response from defense counsel.

After the filing of the return, a new deputy public defender was assigned to represent Perez and moved to amend the return to deny that the parties entered into this stipulation. We denied the motion to amend; admissions in a verified pleading cannot simply be omitted in order to better suit a party's argument. (*Hendy v. Losse* (1991) 54 Cal.3d 723.) Moreover, we conclude from the record that Perez tacitly agreed that the preliminary hearing transcript could be used as the factual basis of the plea.

After the passage of Proposition 36, Perez petitioned to recall his sentence under section 1170.126.

The People filed opposition, arguing that Perez was not eligible for resentencing because he had agreed to serve an indeterminate term of 30 years to life pursuant to a negotiated plea agreement, and he had used a firearm during the commission of the offense.

The superior court found Perez eligible for resentencing under section 1170.126, but continued the hearing so that he could take some programming classes in order to show he would not pose an unreasonable risk of danger to public safety.³ With respect to the People's argument that Perez had specifically agreed to the term, the court observed that the statute did not exclude defendants who had entered into plea bargains from resentencing. The superior court found that it was undisputed that Perez had used a firearm, but concluded that the statute requires that the People plead and prove firearm use, which they had failed to do in this case.

DISCUSSION

To be eligible for recall of sentence under section 170.126, the inmate's current offense must not have been imposed for statutorily enumerated crimes or certain conduct specified in sections 667, subdivision (e)(2)(C)(i)-(iii), or section 1170.12,

³ The People have sought writ review of two other cases in which the trial court continued the hearing for this same purpose. We ultimately denied these petitions, finding that the People had failed to object to the continuances in the trial court and, so, forfeited review of this issue. The People do not challenge the continuance in this case.

subdivision (c)(2)(C)(i)-(iii). If the third strike is not a serious or violent felony, the inmate is entitled to be resentenced unless one of four enumerated disqualifying exceptions or exclusions applies. One such exception occurs where the defendant “used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury” in the commission of the offense.⁴ The People contend that Perez is statutorily ineligible for resentencing based on the used-a-firearm exclusion. We agree. As we will discuss more fully *post*, it is undisputed—and the trial court so found—that Perez used a firearm in committing the current offense: he shot and killed a dog with a gun.

Perez contends that the clear language of section 1170.126 requires that the exclusions refer solely to offenses that were pleaded and proved. The trial court agreed and found that the People had not pleaded nor proved the used-a-firearm exclusion. We

⁴ Section 667, subdivision (e)(2)(C)(iii), provides: “If a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the defendant shall be sentenced [as a second strike offender] pursuant to paragraph (1) of subdivision (e) unless the prosecution pleads and proves any of the following: [¶] . . . [¶] (iii) During 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.”

Section 1170.12, subdivision (c)(2)(C)(iii), provides: “(C) If a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a felony described in paragraph (1) of subdivision (b) of this section, the defendant shall be sentenced [as a second strike offender] pursuant to paragraph (1) of subdivision (c) of this section, unless the prosecution pleads and proves any of the following: [¶] . . . [¶] (iii) During 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.”

reject the notion that there is a pleading and proof requirement to determine an inmate's eligibility for resentencing under the Act.

It must be understood that “there are two parts to the Act: the first part is *prospective* only, reducing the sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony (Pen. Code, §§ 667, 1170.12); the second part is *retrospective*, providing similar, but not identical, relief for prisoners already serving third strike sentences in cases where the third strike was not a serious or violent felony (Pen. Code, § 1170.126).” (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1292.) As *Kaulick* further explained, “Under the *prospective* part of the Act, a defendant whose third strike is not a serious or violent felony shall receive a second strike sentence ‘unless the prosecution pleads and proves’ any of the four exceptions. (Pen. Code, §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) In contrast, under the *retrospective* part of the Act, after a defendant petitions for resentencing, ‘the court shall determine’ if any of the exceptions apply. (Pen. Code, § 1170.126, subd. (f).) One of the exceptions is if the defendant ‘used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury’ in the commission of the current offense. (Pen. Code, § 1170.12, subd. (c)(2)(C)(iii).) By its terms, the Act does not require a jury finding establishing this exception when a prisoner is seeking resentencing pursuant to the retrospective part of the Act; the court must simply ‘determine’ whether the exception applies.” (*Kaulick*, at p. 1298, fn. 21.)

People v. White (2014) 223 Cal.App.4th 512, adopts this same analytical framework, noting that “although section 1170.126[, subdivision] (e)(2) expressly cross-references ‘sections clauses (i) to (iii), inclusive’ of [sections] 667[, subdivision] (e)(2)(C) and 1170.12[, subdivision] (c)(2)(C), nothing in the language of section 1170.126[, subdivision] (e)(2) or of any of the other subdivisions of section 1170.126 governing an inmate’s petition for resentencing relief under the Reform Act references the plead-and-prove language.”⁵ (*Id.* at pp. 526-527.)

⁵ The pertinent provisions of section 1170.126 read as follows: “(e) An inmate is eligible for resentencing if:

“(1) The inmate 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.

“(2) The 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.

“(3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.

“(f) Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.”

The appellate court in *White* affirmed the holding that the defendant was not eligible for resentencing because the “armed-with-a-firearm” exclusion applied. In that case, the defendant’s underlying conviction was for possession of a firearm by a felon. The court recognized that actual possession is not an essential element of that offense, because a conviction for violation of former section 12021, subdivision (a), may be based on a defendant’s constructive possession of a firearm. (*People v. White, supra*, 223 Cal.App.4th at p. 524.) Even though the information had not alleged that the defendant was armed with a firearm nor contained a sentence enhancement allegation that he was so armed, the record showed that he had been armed with a firearm during the commission of the current offense. The court determined that the armed-with-a-firearm exclusion applied based on the record, and rejected the defendant’s claim that the pleading and proof requirement applied to the retrospective portion of the Act. (*Id.* at p. 526-527.)

Our colleagues in Division One of the Fourth Appellate District in *White, supra*, 223 Cal.App.4th 512, and more recently our colleagues in the Fifth Appellate District in *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*), (review den. July 9, 2014, S218183) have found the pleading and proof requirement “plainly is a part of only the *prospective* part of the Reform Act, which governs the *sentencing of a defendant* with ‘two or more prior serious and/or violent felony convictions’ who has suffered a third felony conviction; it is *not* a part of section 1170.126, the *retrospective* part of the Reform Act that governs a petition for *resentencing* brought by an *inmate* already serving a life sentence under the Three Strikes law.” (*White*, at p. 527, italics in original; accord,

Osuna, at p. 1033; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1058.) Our analysis has led this court to the same statutory interpretation. (*People v. Brimmer* (2014) 230 Cal.App.4th 782.) We therefore conclude that here, the trial court erred when it decided that it was necessary to plead and prove a disqualifying factor under section 1170.126.

We reject Perez's contention that the matter should be sent back to the trial court to determine eligibility. He asserts the trial court did not assess from the record of conviction the existence of the disqualifying factor. To the contrary, the record clearly established Perez used a firearm during the commission of the current offense, and the trial court found that this fact was undisputed. Perez has admitted in his return that in addition to the animal cruelty charge, the information charges him with being a felon in possession of a firearm, negligent discharge of a firearm, and carrying a loaded firearm in a vehicle. He has not attempted to withdraw this admission. In addition, the preliminary hearing transcript also shows that the prosecution's case was based on shooting a dog. (*People v. Reed* (1996) 13 Cal.4th 217, 230; *People v. Trujillo* (2006) 40 Cal.4th 165, 177-180; *People v. Brimmer, supra*, 230 Cal.App.4th at p. 800.)

White supports our conclusion. There, the court concluded that the record of conviction established the disqualifying fact that White had been armed with a firearm even though the information did not allege he was armed, and it contained no sentence enhancement allegation that he was armed. The record showed, however, that the prosecution's case was based on evidence that he not only possessed the firearm, but also that he was armed with the firearm during the commission of the current offense.

Furthermore, White had conceded at trial and in his opening brief on appeal that he was armed.

In conclusion, the record clearly established that Perez used a firearm during the commission of the current offense of animal cruelty and, thus, he is statutorily ineligible for resentencing under the Act.

Finally, our analysis and conclusion are consistent with the purposes of the Act. When the voters enacted the Act by approving Proposition 36 in November 2012, they were told that resentencing relief applied to low-risk, nonviolent inmates, not to the most dangerous offenders, including those who had used firearms. (*People v. Brimmer, supra*, 230 Cal.App.4th at p. 793; *People v. White, supra*, 223 Cal.App.4th at p. 526.) The voters could not have intended to afford resentencing relief to a person like Perez who resorted to using a firearm in such a wanton manner.

DISPOSITION

Let a writ of mandate issue directing the Superior Court of Riverside County to set aside its order finding Perez eligible for resentencing under Penal code section 1170.126 and to issue a new and different order denying his petition for recall of sentence.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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MILLER
J.

We concur:

RAMIREZ
P. J.

KING
J.